THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER,
ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES,
AND NUMBERED CONSECUTIVELY

BOOK 25

Case No. 14,692 — Case No. 15,243

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U. S. v. BURR—U. S. v. GRACE MEADE

Case No. 14,692—Case No. 15,243

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FEDERAL CASES.

BOOK 25.

A COMPREHENSIVE COLLECTION OF DECISIONS OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER, (1880,) ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES.

N. B. Cases reported in this series are always cited herein by their numbers. The original citations can be found when desired through the table of cases.

Case No. 14,692.

UNITED STATES v. BURR.

[Brunner, Col. Cas. 493;[1] 2 Wheeler, Cr. Cas. 573.]

Circuit Court, D. Kentucky. Nov. 8, 1806.

CRIMINAL LAW—PROCESS, WHEN AWARDED.

Courts will not award criminal process on the mere motion and suggestion of the district attorney, unsupported by oath.

The attorney for the United States, on the 3d day of this term, having made a motion for the caption and examination of the said Burr, etc.[2]

Before INNIS, District Judge.

THE COURT this day delivered the following opinion, which is ordered to be entered of record, to wit:

The motion made by Mr. Attorney on the 3d day of this term is predicated upon the fifth section of the act of congress [1 Stat. 384] entitled an act in addition to the act for the punishment of certain crimes against the United States: "That if any person shall within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years." The evidence in support of the motion is in the following words, viz.:

"J. H. Daviess, attorney for said United States, in and for said district, upon his corporal oath, doth depose and say, that the deponent is informed, and doth verily believe, that a certain Aaron Burr, Esq., late vice-president of the said United States, for several months past, hath been, and is now, engaged in preparing and setting on foot, and in providing and preparing the means for a military expedition and enterprise, within this district, for the purpose of descending the Ohio and Mississippi therewith, and making war upon the subjects of the king of Spain, who are now in a state of peace with the people of the United States, to wit, on the province of Mexico, on the westwardly side of Louisiana, which appertain and belong to the king of Spain, a European prince, with whom the United States are at peace. And said deponent further saith, that he is informed and fully believes, that the above charge can and will be fully substantiated by evidence, provided this honorable court will grant compulsory process to bring in witnesses to testify thereto. And this deponent further saith, that he is informed, and verily believes, that the agents and emissaries of the said Burr have purchased up, and are continuing to purchase, large stores of provisions, as if for an army, while the said Burr seems to conceal in great mystery from the people at large his purposes and projects; and while the minds of the good people of this district seem agitated with the current rumor, that a military expedition against some neighboring power is preparing by the said Aaron

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [For an extended account of the circumstances under which this motion was made, and the incidents attending the proceedings in relation to it, see the "Historical Sketch of Burr's Western Expedition," which is appended, as a note, to Case No. 14,692a.]

Burr. Wherefore, said attorney, on behalf of said United States, prays that due process issue to compel the personal appearance of the said Aaron Burr in this court, and also of such witnesses as may be necessary in behalf of the said United States; and that this honorable court will duly recognize the said Aaron Burr, to answer such charge as may be preferred against him in the premises. And in the meantime, that he desist and refrain from all further preparation and proceeding in the said armament within the said United States, or the territories or dependencies thereof. J. H. Daviess, A. U. S.

"Affirmed to in open court. (Attest.) T. Tunstall, C. K. D. C.

"November 5, 1806."

The question to be considered: Has this court power to award process against the accused, and to compel the attendance of witnesses upon this motion; and if the court has such power, is the evidence adduced sufficient to warrant the measure? Four kinds of proceeding have been known and pursued in order to convict persons of crimes and misdemeanors: 1st. By an application to a justice or judge out of court. 2d. By preferring an indictment to a grand jury. 3d. By a presentment of the grand jury. And the 4th. By information. The present application is not embraced by either of those modes of proceeding. It is a new case resting on the discretion of the court; and, as this decision may be considered a precedent in future, I have thought it my duty to take time and mature the subject; because, the proposed measure being prevention, no injury could arise by a little delay. No instance has occurred (within my recollection, since I have become acquainted with judicial proceedings, when a crime or misdemeanor has been committed) of a motion being made to a court to award process to arrest the offender in the first instance; neither have I knowledge of the existence of a law to authorize it. In any case where a court awards process, it is predicated upon some previous act already done, which gives the court cognizance of the subject, and brings the case in a legal shape before that tribunal; this being performed, the power to adopt every necessary measure to attain the object and end of the law, and to perfect justice, is vested in a court. The magnitude of this cause, not only as it relates to the community, but to the accused, requires that the proceeding be pursued with regularity, caution, and circumspection. If the facts stated in the affidavit be true, the project ought to be prevented, and the offender punished. Yet, in doing this, the regular legal steps pointed out by usage, or by law, ought to be pursued. If, on the other hand, the accused be innocent, the strong arm of power ought to be confined within its proper limits, the known rules of proceeding; and on no occasion but extreme necessity ought a judge to be induced to exercise a power which rests on discretion. The law then becomes unknown, and the best judge may be considered a tyrant, because it then depends upon his whim and his caprice. It will not be uniform, but it is liable to change with the opinion of every judge.

These reflections extend to the general principle arising out of the case. Admit, however, that they are erroneous; to award process would be improper; it would be an act of oppression, because there is not legal evidence before the court to authorize an arrest of the person accused. The evidence is the oath of a person who has been informed by one not upon oath; and the deponent believes the fact to be true. I make no doubt of the truth of the affidavit; that is, that the deponent has been informed that the fact stated is true; yet it is not legal evidence, and, not being legal evidence, the court cannot act upon it. Upon this view of the subject, I am compelled to declare, that as the cause is a new one, as no precedent has been shown to justify such a proceeding, as the law is silent upon the subject, and as there are two other modes of proceeding which are regular and well understood, viz., by applying to the judge out of court, and obtaining a warrant upon legal evidence, or by the court ordering a grand jury to be summoned instanter, and preferring an indictment, this motion is overruled.

The attorney for the United States then prayed the judge to issue his warrant to the marshal, to summon a grand jury, which was done accordingly.

Case No. 14,692a.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 1; 4 Cranch (8 U. S.) 455.]

Circuit Court, D. Virginia. April 1, 1807.

TREASON—WHAT CONSTITUTES—PRELIMINARY EXAMINATION—SUFFICIENCY OF EVIDENCE—PROBABLE CAUSE.

[1. On a preliminary examination probable cause must be shown. Proof furnishing good reason to believe that the crime alleged has been committed by the person charged, though not

[1] [This and the following cases (Cases Nos. 14,692b–14,694a) arising out of the trials of Aaron Burr, have been taken from the report by J. J. Coombs, Esq., published in 1864, rather than from the more voluminous and less readable reports of Carpenter & Robertson, published early in the century. In order to render more accessible the various opinions delivered by the chief justice, separate reports of the proceedings arising out of the commitments and trials have been made, while the proceedings from day to day, out of which the various motions arose, and the running comments of court and counsel, are shown in the main case, No. 14,693. The entire matter is thus comprehended in 10 separate reports, which, beginning with the above case, No. 14,692a, are printed in consecutive order in this volume. The proceedings were commenced March 20, 1807, by bringing the prisoner before Chief Justice Marshall as a committing magistrate, for preliminary examination. On the proofs then adduced, the chief justice refused to hold Burr to answer to the charge of high treason, but committed him on the charge of a

sufficient for a conviction, will suffice for commitment.]

[Cited in Re Van Campen, Case No. 16,835; Re Farez, Id. 4,645.]

[2. An affidavit, used on a preliminary examination of a person charged with setting on foot a military expedition against a nation with which the United States were at peace, set out the translation of a letter originally written in cipher to the affiant, and signed with the name of the accused, describing a military enterprise, from which it appeared that the means had been provided. The affidavit averred that the letter was received from the accused, but did not aver that it was in his handwriting, nor set out a copy of the original and the cypher. *Held* that, taken in connection with previous declarations of the accused, showing a meditated expedition against Spanish dominions, it made out a case of probable cause.]

[Cited in U. S. v. Bloomgart, Case No. 14,612.]

[3. An intention to commit treason against the United States by levying war, not carried out by the actual assembling of troops, is not punishable as treason.]

[4. The act of revolutionizing a territory of the United States, though only as a means for an expedition against a foreign power, is treason.]

[5. The engaging or enlisting of men for levying war against the United States, not followed by a future embodying of such men, is not punishable as treason.]

[6. A person will not be held to trial for treason in levying war against the United States on an affidavit that he is engaging or enlisting men for such purpose, without proof of the actual embodying of men, where ample time is given to get such proof.]

[At law. On examination of Aaron Burr for commitment. Aaron Burr was arrested by Maj. Perkins on the Tombigbee river in what is now Washington county, Ala., February 20, 1807. He was conducted to Ft. Stoddard, detained a prisoner there about two weeks, and then started for Washington City on horseback, attended by a guard of nine men, under the command of Maj. Perkins. At Fredericksburg, Va., Maj. Perkins was met by a dispatch from the president directing him to convey the prisoner to Richmond, Va., which he accordingly did.]

On Monday, March 30, 1807, Colonel Aaron Burr, who had remained under military guard in the city of Richmond since his arrival on the 26th of that month, was delivered over to the civil authorities by virtue of a warrant issued by the chief justice of the United States, founded on charges of a high misdemeanor, in preparing and setting

misdemeanor, in preparing and setting on foot a military expedition against the dominions or territory of a prince (the king of Spain) with whom the United States were at peace. (See above, Case No. 14,692a.) On May 25, 1807, the grand jury being then in session to consider the charges against Burr and his confederates, the attorney for the United States made a motion in open court to commit Mr. Burr on a charge of high treason, stating that additional evidence, not available at the time of the former hearing would be presented. Objection being made to the power of the court to undertake a further investigation, particularly while the grand jury was in session, the matter was argued at length, and on May 26th, the court rendered an opinion sustaining its power in the premises. Case No. 14,692b. Evidence was then heard upon this motion. Among the proofs offered was an affidavit by Jacob Dunbaugh, which was objected to on various grounds. The objections were argued, and on May 28th an opinion was delivered excluding the affidavit for want of proper authentication. Case No. 14,692c. On June 9th Mr. Burr applied to the court for a subpœna duces tecum to be directed to the president of the United States, requiring him to produce a certain letter and certain orders issued to the army and navy in relation to Burr's expedition. This motion having been fully argued, the court, on June 13th, rendered an opinion deciding that the writ might issue. Case No. 14,692d. Afterwards a witness called to prove the authenticity and materiality of a letter in cipher, which the attorney for the United States proposed to send up to the grand jury, refused to testify, on the ground that his answers might criminate himself; and the question of his right to decline answering the questions put to him was determined by the court, in an opinion delivered on the 18th of June. Case No. 14,692e. A motion was subsequently made by the defendant to attach Gen. Wilkinson for a contempt of court, in obstructing the administration of justice and abusing the process of the law, by coercing and intimidating certain witnesses, and procuring their depositions by unlawful means. Upon this motion evidence was received and argument had, and the court, in an opinion delivered on June 27th, refused the attachment. Case No. 14,692f. In selecting the petit jury certain questions arose as to what constitutes such prejudice or partiality as will disqualify a juror; and on August 11th an opinion was delivered, considering the subject at length. Case No. 14,692g. The introduction of evidence was begun August 17th; and an objection was immediately made by the defense to the testimony of the first witness, Gen. Eaton, on the ground that the prosecution must first prove the overt act, as laid, before giving evidence of the intention and purposes of Burr in preparing the expedition. The question thus raised was determined by the court in an opinion delivered on the following day. Case No. 14,692h. The next case, No. 14,693, is the main case, comprising a report of all the proceedings in extenso (except those which have been made the subject of separate reports as herein indicated), together with the running comments of counsel thereon; also, the arguments of counsel and the opinion of the court upon the main question in the case, which was raised by defendant's motion to exclude further testimony on the grounds (1) that the evidence in relation to the overt act did not show a levying of war; and (2) that, it appearing that defendant was not present at the time, no evidence was admissible to connect him with the doings of the persons who had assembled for the purposes of the expedition. This motion was granted, and the case was thereupon committed to the jury, and a verdict of acquittal returned. Burr was immediately afterwards put upon his trial for a misdemeanor in setting on foot a military expedition against the dominions of the king of Spain. This trial also resulted in an acquittal. The proceedings therein are reported at length in Case No. 14,694. As a result of Burr's trials, a nolle prosequi was entered in respect to each of the indictments against his confederates, Harman, Blennerhassett, and Israel Smith. Afterwards a motion was made to commit all three of the prisoners "to that place for trial where the military expedition is said to have been completed." This motion was argued, and the chief justice, after delivering an opinion of some length, committed Burr and Blennerhassett to the district of Ohio, to be there held to answer the charge of setting on foot a military expedition against the dominions of the king of Spain. Case No. 14,694a. The defendants thereupon gave bail in the sum of $3,000 each, but it does not appear that any further steps were ever taken to bring them to trial in Ohio.]

on foot within the territories of the United States, a military expedition against the dominions of the king of Spain; and also of treason against the United States, in assembling an armed force with a design to seize the city of New Orleans, to revolutionize the territory attached thereto, and to separate the Western from the Atlantic states. Colonel Burr was conducted by the marshal of the district of Virginia, from his lodgings in the Eagle Hotel, to a retired room in the same house, before Chief Justice Marshall, for examination. The counsel and a witness for the United States, the counsel for the prisoner, and a few friends invited by the latter, were alone admitted. Before the examination commenced it was agreed between the counsel, with the assent of the Chief Justice, that if a discussion should become necessary an adjournment to the capitol should take place. The evidence introduced on behalf of the United States consisted of a copy of the record in the Cases of Bollman and Swartwout, in the supreme court of the United States, (containing the affidavits of General Eaton, General Wilkinson and others,) and also the verbal testimony of Maj. Perkins, who apprehended Colonel Burr in the Mississippi territory, giving an account of his arrest and conveyance to Richmond.

[The depositions were as follows:]

[2] [Deposition of James Wilkinson:

[I, James Wilkinson, brigadier general and commander in chief of the army of the United States, to warrant the arrest of Doctor Erick Bollman, on a charge of treason, misprision of treason, or such other offense against the government and laws of the United States as the following facts may legally charge him with, on my honor as a soldier; and on the Holy Evangelists of Almighty God, do declare and swear, that on the sixth day of November last, when in command at Natchitoches, I received by the hands of a Frenchman, a stranger to me, a letter from Doctor Erick Bollman, of which the following is a correct copy:

["New Orleans, September 27, 1806.

["Sir: I have the honor to forward to your excellency the enclosed letters, which I was charged to deliver to you by our mutual friend. I shall remain for some time at this place, and should be glad to learn where and when I may have the pleasure of an interview with you. Have the goodness to inform me of it, and please to direct your letter to me, care of or enclose it under cover to them. I have the honor to be, with great respect, sir, your excellency's most obedient servant,

["(Signed) Erick Bollman.

["Gen. Wilkinson."

[Covering a communication in cipher from Col. Aaron Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession:

["I (Aaron Burr) have obtained funds, and have actually commenced the enterprise. Detachments from different points, and under different pretences, will rendezvous on the Ohio, 1st November. Everything internal and external favors views; protection of England is secured. Truxton is gone to Jamaica to arrange with the admiral of that station, and will meet at the Mississippi—England—navy of the United States are ready to join, and final orders are given to my friends and followers. It will be a host of choice spirits. Wilkinson shall be second to Burr only. Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward 1st August, never to return. With him goes his daughter. The husband will follow in October with a corps of worthies. Send forthwith an intelligent and confidential friend, with whom Burr may confer. He shall return immediately with further interesting details. This is essential to concert and harmony of movement. Send a list of all persons known to Wilkinson west of the mountains, who could be useful, with a note delineating their characters. By your messenger send me four or five of the commissions of your officers, which you can borrow under any pretence you please. They shall be returned faithfully. Already are orders to the contractor given to forward six months' provisions to points Wilkinson may name. This shall not be used until the last moment, and then under proper injunctions. The project is brought to the point so long desired. Burr guarantees the result with his life and honor, the lives, the honor and fortunes of hundreds, the best blood of our country. Burr's plan of operations is to move down rapidly from the falls on the fifteenth of November, with the first five hundred or one thousand men, in light boats, now constructing for that purpose; to be at Natchez between the fifth and fifteenth of December; then to meet Wilkinson; then to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge. On receipt of this send Burr an answer. Draw on Burr for all expenses, etc. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The gods invite to glory and fortune. It remains to be seen whether we deserve the boon. The bearer of this goes express to you. He will hand a formal letter of introduction to you from Burr, a copy of which is hereunto subjoined. He is a man of inviolable honor and perfect discretion; formed to execute rather than to project; capable of relating facts with fidelity, and incapable of relating them otherwise. He is thoroughly informed of the

[2] [From 4 Cranch (8 U. S.) 455.]

plans and intentions of ——, and will disclose to you as far as you inquire, and no further. He has imbibed a reverence for your character, and may be embarrassed in your presence. Put him at ease and he will satisfy you. Doctor Bollman, equally confidential, better informed on the subject, and more intelligent, will hand this duplicate. 29th July."

[The day after my arrival at this city, the 26th of November last, I received another letter from the doctor, of which the following is a correct copy:

["New Orleans, November 25th, 1806.

["Sir: Your letter of the 16th inst, has been duly received. Supposing that you will be much engaged this morning, I defer waiting on your excellency till you will be pleased to inform me of the time when it will be convenient for you to see me. I remain with great respect, your excellency's most obedient servant,

["Erick Bollman.

["His Excellency, Gen. Wilkinson, Fauxbourg, Marigny, the house between Madame Trevigne and M. Macarty."

[On the 30th of the same month I waited in person on Doctor E. Bollman, when he informed me that he had not heard from Colonel Burr since his arrival here, that he (the said Doctor E. Bollman) had sent despatches to Colonel Burr by a Lieutenant Spence, of the navy, and that he had been advised of Spence's arrival at Nashville in the state of Tennessee, and observed that Colonel Burr had proceeded too far to retreat; that he (Colonel Burr) had numerous and powerful friends in the United States, who stood pledged to support him with their fortunes, and that he must succeed; that he (the said Doctor E. Bollman) had written to Colonel Burr on the subject of provisions; and that he expected a supply would be sent from New York, and also from Norfolk, where Colonel Burr had strong connections. I did not see or hear from the doctor again until the 5th inst., when I called on him the second time. The mail having arrived the day before, I asked him whether he had received any intelligence from Colonel Burr. He informed me that he had seen a letter from Colonel Burr of the 30th October, in which he (Colonel Burr) gave assurances that he should be at Natchez with 2,000 men on the 20th December, inst., where he should wait until he heard from this place; that he would be followed by 4,000 men more; and that he (Colonel Burr,) if he had chosen, could have raised or got 12,000 as easily as 6,000, but that he did not think that number necessary. Confiding fully in this information, I became indifferent about further disguise. I then told the doctor that I should most certainly oppose Colonel Burr if he came this way. He replied that they must come here for equipments and shipping, and observed that he did not know what had passed between Colonel Burr and myself, obliqued at a sham defence, and waived the subject. From the documents in my possession, and the several communications, verbal as well as written, from the said Doctor Erick Bollman, on this subject, I feel no hesitation in declaring under the solemn obligation of an oath, that he has committed misprision of treason against the government of the United States.

[(Signed) James Wilkinson.

[Signed and sworn to this 14th day of December, 1806, before me one of the justices of the peace of this county.

[(Signed) J. Carrick.

["Philadelphia, July 25, 1806.

["Dear Sir: Mr. Swartwout, the brother of Colonel S., of New York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and highly respectable from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg you to pardon the trouble which this may give you. With entire respect, your friend and obedient servant,

["A. Burr.

["His Excellency, Gen. Wilkinson."

[Second deposition of James Wilkinson:

[I, James Wilkinson, brigadier general and commander in chief of the army of the United States, to warrant the arrest of Samuel Swartwout, James Alexander, Esq., and Peter V. Ogden, on a charge of treason, misprision of treason, or such other offence against the government and laws of the United States, as the following facts may legally charge them with, on the honor of a soldier, and on the Holy Evangelists of Almighty God, do declare and swear, that in the beginning of the month of October last, when in command at Natchitoches, a stranger was introduced to me by Colonel Cushing, by the name of Swartwout, who a few minutes after the colonel retired from the room, slipt into my hand a letter of formal introduction from Colonel Burr, of which the following is a correct copy:] [2]

[Here was set out the letter of July 25, 1806, given above.]

[2] [Together with a packet, which, he informed me, he was charged by the same person to deliver me in private; this packet contained a letter in cipher from Colonel Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession:] [2]

[Here was set out a translation of the cypher letter of July 29, given above.]

[2] [From 4 Cranch (8 U. S.) 455.]

[2][I instantly resolved to avail myself of the reference made to the bearer, and in the course of some days drew from him (the said Swartwout) the following disclosure: "That he had been dispatched by Colonel Burr from Philadelphia, had passed through the states of Ohio and Kentucky, and proceeded from Louisville for St. Louis, where he expected to find me, but discovering at Kaskaskias that I had descended the river, he procured a skiff, hired hands, and followed me down the Mississippi to Fort Adams, and from thence set out for Natchitoches, in company with Captains Sparks and Hooke, under the pretense of a disposition to take part in the campaign against the Spaniards, then depending. That Colonel Burr with the support of a powerful association, extending from New York to New Orleans, was levying an armed body of 7,000 men from the state of New York and the western states and territories, with a view to carry an expedition against the Mexican provinces, and that 500 men under Colonel Swartwout and a Colonel or Major Tyler, were to descend the Alleghany; for whose accommodation light boats had been built, and were ready." I inquired what would be their course. He said: "This territory would be revolutionized, where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans; that they expected to be ready to embark about the first of February, and intended to land at Vera Cruz, and to march from thence to Mexico." I observed that there were several millions of dollars in the bank of this place, to which he replied, "We know it full well." And on remarking that they certainly did not mean to violate private property, he said they "merely meant to borrow. and would return it; that they must equip themselves in New Orleans; that they expected naval protection from Great Britain; that the Capt. ——, and the officer of our navy, were so disgusted with the government that they were ready to join; that similar disgusts prevailed throughout the western country, where the people were zealous in favor of the enterprise, and that pilot boat built schooners were contracted for along our southern coast for their service; that he had been accompanied from the Falls of Ohio to Kaskaskias, and from thence to Fort Adams, by a Mr. Ogden, who had proceeded on to New Orleans with letters from Colonel Burr to his friends there." Swartwout asked me whether I had heard from Doctor Bollman; and on my answering in the negative, he expressed great surprise, and observed, "that the doctor and a Mr. Alexander had left Philadelphia before him, with despatches for me, and that they were to proceed by sea to New Orleans, where he said they must have arrived."

[Though determined to deceive him if possible, I could not refrain from telling Mr. Swartwout it was impossible that I could ever dishonor my commission; and I believe I duped him by my admiration of the plan, and by observing, "that although I could not join in the expedition, the engagements which the Spaniards had prepared for me in my front, might prevent my opposing it," yet I did, the moment I had deciphered the letter, put it into the hands of Colonel Cushing, my adjutant and inspector, making the declaration that I should oppose the lawless enterprise with my utmost force. Mr. Swartwout informed me that he was under engagements to meet Colonel Burr at Nashville the 20th of November, and requested of me to write him, which I declined; and on his leaving Natchitoches, about the 18th of October, I immediately employed Lieutenant T. A. Smith to convey the information, in substance to the president, without the commitment of names; for, from the extraordinary nature of the project, and the more extraordinary appeal to me, I could not but doubt its reality, notwithstanding the testimony before me, and I did not attach solid belief to Mr. Swartwout's report respecting their intentions on this territory and city, until I received confirmatory advice from St. Louis. After my return from the Sabine, I crossed the country to Natchez, and on my descent of the Mississippi from that place, I found Swartwout and Peter V. Ogden at Fort Adams. With the latter I held no communication, but was informed by Swartwout, that he (Ogden) had returned so far from New Orleans, on his route to Tennessee, but had been so much alarmed by certain reports in circulation that he was afraid to proceed. I inquired whether he bore letters with him from New Orleans, and was informed by Swartwout that he did not, but that a Mr. Spence had been sent from New Orleans through the country to Nashville, with letters for Colonel Burr.

[I reached this city the 25th ultimo, and on the next morning James Alexander, Esq., visited me. He inquired of me aside whether I had seen Doctor Bollman, and on my answering in the negative, he asked me whether I would suffer him to conduct Bollman to me, which I refused. He appeared desirous to communicate something, but I felt no inclination to inculpate this young man, and he left me. A few days after he paid me a second visit, and seemed desirous to communicate, which I avoided until he had risen to take leave. I then raised my finger, and observed, "Take care, you are playing a dangerous game." He answered, "It will succeed." I again observed, "Take care." And he replied with a strong affirmation, "Burr will be here by the beginning of next month." In addition to these corroborating circumstances against Alexander, I beg leave to refer to the accompanying documents, A, B. From all which I feel no hesitation in declaring, under the solemn obligation of an oath, that I do believe the said Swartwout, Alexander, and Ogden, have been parties to, and have been concerned in, the insurrection form-

[2] [From 4 Cranch (8 U. S.) 455.]

ed, or forming, in the states and territories on the Ohio and Mississippi rivers, against the laws and constitution of the United States.

[(Signed) James Wilkinson.

[Sworn to, and subscribed before me, this 26th day of December, in the year of our Lord, 1806.

[(Signed) George Pollock,

[Justice of the Peace for the County of Orleans.

[Deposition of William Eaton:

[Early last winter Col. Aaron Burr, late vice president of the United States, signified to me, at this place, that, under the authority of the general government, he was organizing a secret expedition against the Spanish provinces on our south-western borders, which expedition he was to lead, and in which he was authorized to invite me to take the command of a division. I had never before been made personally acquainted with Col. Burr, and, having for many years been employed in foreign service, I knew but little about the estimation this gentleman now held in the opinion of his countrymen and his government; the rank and confidence by which he had so lately been distinguished, left me no right to suspect his patriotism. I knew him a soldier. In case of a war with the Spanish nation, which, from the tenor of the president's message to both houses of congress, seemed probable, I should have thought it my duty to obey so honorable a call of my country; and, under that impression, I did engage to embark in the expedition. I had frequent interviews with Col. Burr in this city, and, for a considerable time, his object seemed to be to instruct me by maps, and other information, the feasibility of penetrating to Mexico; always carrying forward the idea that the measure was authorized by government. At length, some time in February, he began by degrees to unveil himself. He reproached the government with want of character, want of gratitude, and want of justice. He seemed desirous of irritating resentment in my breast by dilating on certain injuries he felt I had suffered from reflections made on the floor of the house of representatives concerning my operations in Barbary, and from the delays of government in adjusting my claims for disbursements on that coast during my consular agency at Tunis; and he said he would point me to an honorable mode of indemnity. I now began to entertain a suspicion that Mr. Burr was projecting an unauthorized military expedition, which, to me, was enveloped in mystery; and, desirous to draw an explanation from him, I suffered him to suppose me resigned to his counsel. He now laid open his project of revolutionizing the western country, separating it from the Union, establishing a monarchy there, of which he was to be the sovereign, and New Orleans to be his capital, organizing a force on the waters of the Mississippi, and extending conquest to Mexico. I suggested a number of impediments to his scheme, such as the republican habits of the citizens of that country, and their affection towards our present administration of government, the want of funds; the resistance he would meet from the regular army of the United States, on those frontiers, and the opposition of Miranda, in case he should succeed to republicanize the Mexicans.

[Mr. Burr found no difficulty in removing these obstacles. He said he had, the preceding season, made a tour through that country, and had secured the attachment of the principal citizens of Kentucky, Tennessee and Louisiana, to his person and his measures; declared he had inexhaustible resources to funds; assured me the regular army would act with him, and would be reinforced by ten or twelve thousand men from the abovementioned states and territory, and from other parts of the Union; said he had powerful agents in the Spanish territory; and, as for Miranda, said Mr. Burr, we must hang Miranda. He now proposed to give me the second command in his army. I asked him who should have the chief command. He said, "General Wilkinson." I observed it was singular that he should count on General Wilkinson. The elevated rank and high trust he now held as commander in chief of our army and governor of a province, he would hardly put at hazard for any precarious prospects of aggrandizement. Mr. Burr said, General Wilkinson, balanced in the confidence of government, was doubtful of retaining much longer the consideration he now enjoyed, and was, consequently, prepared to secure to himself a permanency. I asked Mr. Burr if he knew General Wilkinson. He answered, "Yes," and echoed the question. I said I knew him well. "What do you know of him?" said Mr. Burr. I know, I replied, that General Wilkinson will act as lieutenant to no man in existence. "You are in an error," said Mr. Burr. "Wilkinson will act as lieutenant to me." From the tenor of repeated conversations with Mr. Burr, I was induced to believe the plan of separating the Union, which he had contemplated, had been communicated to, and approved of by, General Wilkinson (though I now suspect it an artful argument of seduction), and he often expressed a full confidence that the general's influence, the offer of double pay and double rations, the prospect of plunder, and the ambition of achievement, would draw the army into his measures. Mr. Burr talked of the establishment of an independent government west of the Alleghany as a matter of inherent constitutional right of the people, a change which would eventually take place, and for the operation of which the present crisis was peculiarly favorable. "There was," said he, "no energy in the government to be dreaded, and the divisions of political opinions throughout the Union was a circumstance of which we should profit." There were very many

enterprising men among us, who aspired to something beyond the dull pursuits of civil life, and who would volunteer in this enterprise, and the vast territory belonging to the United States, which offered to adventurers, and the mines of Mexico, would bring strength to his standard from all quarters. I listened to the exposition of Colonel Burr's views with seeming acquiescence. Every interview convinced me more and more that he had organized a deep-laid plot of treason in the west, in the accomplishment of which he felt fully confident, till, at length, I discovered that his ambition was not bounded by the waters of the Mississippi and Mexico, but that he meditated overthrowing the present government of our country. He said, if he could gain over the marine corps, and secure the naval commanders, Truxton, Preble, Decatur, and others, he would turn congress neck and heels out of doors, assassinate the president, seize on the treasury and the navy, and declare himself the protector of an energetic government. The honorable trust of corrupting the marine corps, and of sounding Commodore Preble and Captain Decatur, Colonel Burr proposed confiding to me. Shocked at this proposition, I dropped the mask, and exclaimed against his views. He talked of the degraded situation of our country, and the necessity of a blow by which its energy and its dignity should be restored; said, if that blow could be struck here at this time, he was confident of the support of the best blood of America. I told Colonel Burr he deceived himself in presuming that he, or any other man, could excite a party in this country who would countenance him in such a plot of desperation, murder and treason. He replied, that he, perhaps, knew better the dispositions of the influential citizens of this country than I did. I told him one solitary word would destroy him. He asked, "What word?" I answered, "Usurper." He smiled at my hesitation, and quoted some great examples in his favor. I observed to him, that I had lately traveled from one extreme of the Union to the other; and though I found a diversity of political opinion among the people, they appeared united at the most distance aspect of national danger. That, for the section of the Union to which I belonged, I would vouch, that should he succeed in the first instance here, he would within six weeks afterwards have his throat cut by Yankee militia.

[Though wild and extravagant Mr. Burr's last project, and though fraught with premeditated slaughter, I felt very easy on the subject, because its defeat he had deposited in my own hands. I did not feel so secure concerning that of disjointing the Union. But the very interesting and embarrassing situation in which his communications placed me, left me, I confess, at a stand to know how to conduct myself with propriety. He had committed no overt act of aggression against law. I could draw nothing from him in writing, nor could I learn that he had exposed his plans to any person near me, by whom my testimony could be supported. He had mentioned to me no persons who were principally and decidedly engaged with him, except General Wilkinson, a Mr. Alston, who I found was his son-in-law, and a Mr. Ephraim Kibby, late a captain of rangers in General Wayne's army. Satisfied that Mr. Burr was resolute in pushing his project of rebellion in the west of the Alleghany, and apprehensive that it was too well and too extensively organized to be easily suppressed, though I dreaded the weight of his character when laid in the balance against my solitary assertion, I brought myself to the resolution to endeavor to defeat it by getting him removed from among us, or to expose myself to all consequences, by a disclosure of his intentions. Accordingly, I waited on the president of the United States, and after some desultory conversation, in which I aimed to draw his view to the westward, I used the freedom to say to the president I thought Mr. Burr should be sent out of this country, and gave for reason that I believed him dangerous in it. The president asked where he should be sent. I mentioned London and Cadiz. The president thought the trust too important, and seemed to entertain a doubt of Mr. Burr's integrity. I intimated that no one, perhaps, had stronger grounds to mistrust Mr. Burr's moral integrity than myself; yet, I believed ambition so much predominated over him, that when placed on an eminence, and put on his honor, respect to himself would insure his fidelity. His talents were unquestionable. I perceived the subject was disagreeable to the president; and to give it the shortest course to the point, declared my concern that if Mr. Burr were not in some way disposed of, we should, within eighteen months, have an insurrection, if not a revolution, on the waters of the Mississippi. The president answered, that he had too much confidence in the information, integrity, and the attachment to the Union, of the citizens of that country, to admit an apprehension of the kind I am happy that events prove this confidence well placed. As no interrogatories followed my expression of alarm, I thought silence on the subject, at that time and place, became me. But I detailed, about the same time, the whole projects of Mr. Burr to certain members of congress. They believed Colonel Burr capable of anything, and agreed that the fellow ought to be hanged; but thought his projects too chimerical, and his circumstances too desperate, to give the subject the merit of serious consideration. The total security of feeling in those to whom I had rung the tocsin, induced me to suspect my own apprehensions unseasonable, or at least too deeply admitted; and, of course, I grew indifferent about the subject.

[Mr. Burr's visits to me became less frequent, and his conversation less familiar.

He appeared to have abandoned the idea of a general revolution, but seemed determined on that of the Mississippi; and, although I could perceive symptoms of distrust in him towards me, he manifested great solicitude to engage me with him in the enterprise. Weary of his importunity, and at once to convince him of my serious attachments, I gave the following toast to the public: The United States. Palsy to the brain that should plot to dismember, and leprosy to the hand that will not draw to defend, our Union! I doubt whether the sentiment was better understood by any of my acquaintance than Colonel Burr. Our intercourse ended here. We met but seldom afterwards. I returned to my farm in Massachusetts and thought no more of Mr. Burr, nor his empire, till some time late in September or beginning of October, when a letter from Maurice Belknap, of Marietta, to Timothy E. Danielson, fell into my hands at Brimfield, which satisfied me that Mr. Burr had actually commenced his preparatory operations on the Ohio. I now spoke publicly of the fact; transmitted a copy of the letter from Belknap to the department of state, and about the same time forwarded, through the hands of the postmaster general, to the president of the United States, a statement in substance of what is here above detailed concerning the Mississippi conspiracy of the said Colonel Aaron Burr, which is said to have been the first formal intelligence received by the executive on the subject of the conspiracy being in motion.

[I know not whether my country will allow me the merit of correctness of conduct in this affair. The novelty of the duty might, perhaps, have embarrassed stronger minds than mine. The uprightness of my intentions, I hope will not be questioned. The interviews between Colonel Burr and myself, from which the foregoing statement has resulted, were chiefly in this city, in the months of February and March, last year.

[William Eaton.

[Washington City, Jan. 26, 1807.

[Sworn to in open court this 26th day of January, 1807.

[William Brent, Clerk.

[Deposition of James L. Donaldson:

[In open court personally appears James Lowry Donaldson, who, being duly sworn, deposeth and saith, that he was in the city of New Orleans, in the Orleans territory, and the environs of said city, from the 15th day of October to the 10th day of December, 1806; that during the latter part of this time he was frequently in the company of General James Wilkinson, and visited the general the day after his arrival at New Orleans. On this occasion, this deponent received in confidence from General Wilkinson information to the following purport; that the general had undoubted and indisputable evidence of a treasonable design formed by Aaron Burr and others to dismember the Union, by a separation of the western states and territories from the Atlantic states; that New Orleans was in immediate danger, and that he had concluded a hasty compromise with the Spaniards, so as to be able to withdraw his troops instantly to this the immediate object of attack and great vulnerable point; that he had received a letter from Burr holding forth great inducements to him to become a party, of which he showed me the original in cypher, and another written paper purporting to be a deciphered copy of the letter. He expressed great indignation of the plot, and surprise that one so well acquainted with him as Burr should dare to make to him so degrading a proposal, and declared his determination of defeating the enterprise, or perishing in the attempt. He observed, in addition, that there were many agents of Mr. Burr then in the town, who had already been assiduous in their visits, and towards whom he was determined to act with cautious ambiguity, so as at the same time to become possessed of the whole extent of the plan, the persons engaged, and the time of its execution, and also to prevent any attempt on his person, of which he declared he had serious apprehensions. Of the number of these agents he was not aware, but mentioned the names of two of whom he was certain. Messrs. Bollman and Alexander. From time to time, as this deponent had interviews with General Wilkinson, he informed this deponent that he had received additional information respecting the movements and designs of Burr by means of these agents, of whom he considered Bollman as the principal. In the course of these transactions, this deponent was employed by General Wilkinson in the copying of certain papers and documents, and preparing certain despatches for the general government, which the general intended to forward by the brig Thetis. While thus employed at the general's lodgings, this deponent has remarked, upon two different occasions, a person knock for admittance at a door with a window in it opposite the table where this deponent was sitting, who, this deponent was informed by General Wilkinson, was Doctor Bollman. Upon these occasions the general has suddenly risen from his seat, and accompanied this person in a number of turns up and down a balcony in the front of the house, apparently engaged in deep conversation. Upon the latter of these occasions the general, on his return into the chamber, said to this deponent: "That is Doctor Bollman. His infatuation is truly extraordinary. He persists in his belief that I am with Burr, and has this moment shown me a letter from the latter, in which he says that he is to be at Natchez on the 20th December with 2,000 men, that 4,000 will follow in the course of a few days, and that he could, with the same ease, have procured double that number." General Wilkinson then observed that he had obtained all the information he wanted, and

that the affair would not be kept much longer a secret from the public. When this deponent left the city of New Orleans, the inhabitants of that city were in a state of great alarm, and apprehended a serious attack from Mr. Burr and his confederates. This deponent understood that mercantile business was much embarrassed, and great fears were entertained of considerable commercial failures in consequence of the embargo which had been imposed, that General Wilkinson was taking strong measures of defense, and that 400 persons were then actually engaged in the fortifications of the city. And further this deponent saith not

[James L. Donaldson.

[Sworn to in open court.

[William Brent, Clerk.

[January 26, 1807.

[Deposition of Lieutenant W. Wilson:

[I left New Orleans on my way to this city on the 15th of December last. At that time and for some time preceding, the strongest apprehensions and belief universally prevailed among the inhabitants of that city, that Aaron Burr and his confederates had prepared an armed force, and were advancing to attack and plunder the city, in consequence of which the greatest alarms prevailed, a general stagnation of business ensued, and the danger was credited there as a matter of public notoriety; that Brigadier General Wilkinson, with the army of the United States, was at New Orleans, occupied in the most active military preparations for the defense of the place, repairing the forts, mounting cannon, collecting ammunition, etc.,—all under the firm persuasion and belief that such an attack was meditated, and about very speedily to take place, by the said Burr. This deponent knows that the general was decidedly of opinion, from the most satisfactory information, that the said Burr and his confederates were advancing with an armed force against this place. And further this deponent saith not.

[(Signed) William Wilson.

[Sworn to in open court this 27th day of January, 1807.

[William Brent, Clerk.

[The deposition of Ensign W. C. Mead is precisely similar to that of Lieut. Wilson, except that the former states that he left New Orleans on the 19th of December.] [2]

Major Perkins testified that on the night of the 18th or 19th of February last, he was at Washington Court House. At about 11 o'clock, as he was standing at the door of the house occupied by the sheriff, he observed two men coming down the road. The moon afforded him light enough to enable him to see objects at some distance. The foremost man, who was thirty or forty yards before his companion, and who turned out to be Colonel Burr, passed near the door without stopping or speaking. Burr's companion stopped and inquired the way to Major Hinson's; the way was pointed out, but Perkins informed him that the major was from home, and that in consequence of a late rise in the waters, he would experience some difficulty in getting there that night; the stranger, however, went on. Perkins, struck with this midnight journey, the silence of the person who had first passed, the unwillingness of the travellers to stop at a public place, where they and their horses might have been accommodated, and their determination to continue their route to Hinson's after information was given that he was from home, communicated to the sheriff his suspicion that these men must be under the influence of some extraordinary motive. Possibly they might be robbers, or perhaps one of them was Burr endeavoring to make his escape. He had been informed that Burr had left Natchez. Impressed by these suspicions, he urged the sheriff, who had gone to bed, to arise and go with him to Hinson's. After some time the sheriff agreed to accompany him, and they went to Hinson's, where they found both the travellers. Burr, who had been in the kitchen to warm himself, soon came into the room where his companion and Perkins were. Perkins eyed him attentively, but never got a full view of his face. He discerned that Burr once glanced his eye at him, apparently with a view to ascertain whether Perkins was observing him, but withdrew it immediately. The latter had heard Mr. Burr's eyes mentioned as being remarkably keen, and this glance from him strengthened his suspicions. He determined immediately to take measures for apprehending him. He accordingly left the place, after mentioning in a careless manner the way he meant to take. The way he indicated was opposite to the course he thought Burr would pursue. After getting beyond the reach of observation he took the road to Fort Stoddart, and obtained the aid of the commandant and four soldiers." The commandant of the fort was Captain Gaines, (afterwards the well-known Major General Gaines.) At sunrise he and Perkins, with four dragoons, started in search of the travellers, and met them two miles from Hinson's house, about nine o'clock in the morning. Captain Gaines rode forward and addressed the suspected personage: "I presume, sir," said he, "that I have the honor of addressing Colonel Burr." "I am a traveller in the country," was the reply, "and do not recognize your right to ask such a question." Whereupon Gaines said, "I arrest you at the instance of the federal government." "By what authority do you arrest a traveller on the highway, on his own private business?" asked Burr. "I am an officer in the army," answered the captain, "and I hold in my hand the proclamation of the president and the governor directing your arrest."

[2] [From 4 Cranch (8 U. S.) 455.]

Major Perkins further testified that while they were on their way to Washington, at Chester Court House, in the back part of South Carolina, Mr. Burr, observing a small collection of people, got off his horse, went into the company, asked for a magistrate, and complained of being under an illegal arrest and military guard. Perkins, however, soon reinstated him on his horse, and directed the guard to proceed. The people manifested no disposition to interfere.

After the evidence was gone through, Mr. Hay, district attorney, submitted a motion in writing for the commitment of the prisoner on the two charges above mentioned. A discussion was then agreed, on both sides, to be necessary; and, in pursuance of the previous arrangement, Mr. Hay moved an adjournment to the capitol, to which the counsel of Colonel Burr assented. Colonel Burr was then admitted to bail in the sum of five thousand dollars, for his appearance on the following day, at ten o'clock, a. m.

Tuesday, March 31, 1807.

At ten o'clock MARSHALL, Chief Justice, took his seat on the bench, in the court room, which was densely filled with citizens. Cæsar Rodney, attorney general of the United States, and George Hay, United States attorney for the district of Virginia, appeared as counsel for the prosecution. Counsel for Colonel Burr, Edmund Randolph, Esq., and John Wickham, Esq. On the suggestion of counsel that it would be impossible to accommodate the spectators in the court room, the chief justice adjourned to the hall of the house of delegates.

Mr. Hay opened the argument on the motion to commit. He stated the first offence to be a violation of the fifth section of an act of congress passed June 5, 1794 [1 Stat. 384], entitled "An act in addition to the act for the punishment of certain crimes against the United States," continued in force for limited periods by several succeeding laws, and continued without limitation by an act passed in 1797 [Id. 497]. Secondly, he insisted that there was probable cause to suspect that the prisoner had committed an act of treason; that he intended to take the city of New Orleans, make it the seat of his dominion and the capital of his empire; and that this charge was proved by the affidavits exhibited in the Cases of Bollman and Swartwout. He relied upon the opinion of the supreme court in that case as supporting the doctrine for which he contended, and went into a minute examination of the evidence to show that it brought the case within the definition of treason as laid down in said opinion. He also commented on the flight of Col. Burr from justice.

Mr. Wickham and Mr. Randolph replied, denying that there was any evidence that an overt act of treason had been committed, or probable cause to believe Col. Burr guilty of such a crime. As to the other charge, the evidence to sustain it was trivial, but if deemed sufficient to put him on his trial, it was a bailable offence; and in view of the fact that Col. Burr had been brought to a place where he had fewer friends than in almost any other part of the United States, it would be improper to require him to give bail in a large sum.

Col. Burr then addressed the court, not, as he said, to remedy any omission of his counsel, who had done great justice to the subject, but to state a few facts, and repel some observations of a personal nature. The present inquiry involved a simple question of treason or misdemeanor. According to the constitution, treason consisted in acts; an arrest could only be justified by the suspicion of acts; whereas, in this case, his honor was invited to issue a warrant upon mere conjecture. Alarms existed without cause. Mr. Wilkinson alarmed the president, and the president alarmed the people of Ohio. He appealed to historical facts. No sooner did he understand that suspicions were entertained in Kentucky of the nature and design of his movements, than he hastened to meet an investigation. The prosecution not being prepared, he was discharged. That he then went to Tennessee. While there he heard that the attorney for the district of Kentucky was preparing another prosecution against him; that he immediately returned to Frankfort, presented himself before the court, and again was honorably discharged; that what happened in the Mississippi territory was equally well known; that there he was not only acquitted by the grand jury, but they went farther, and censured the conduct of the government; and if there had been really any cause of alarm, it must have been felt by the people of that part of the country; that the manner of his descent down the river was a fact which put at defiance all rumors about treason or misdemeanor; that the nature of his equipments clearly evinced that his object was purely peaceable and agricultural; that this fact alone ought to overthrow the testimony against him; that his designs were honorable, and would have been useful to the United States. His flight, as it was termed, had been mentioned as evidence of guilt. He asked, at what time did he fly? In Kentucky he invited inquiry, and that inquiry terminated in a firm conviction of his innocence; that the alarms were at first great in the Mississippi territory, and orders had been issued to seize and destroy the persons and property of himself and party; that he endeavored to undeceive the people, and convince them that he had no designs hostile to the United States, but that twelve hundred men were in arms for a purpose not yet developed; the people could not be deceived; and he was acquitted, and promised the protection of the government; but the promise could not be performed; the arm of military

power could not be resisted; that he knew there were military orders to seize his person and property, and transport him to a distance from that place; that he was assured by the officer of an armed boat, that it was lying in the river ready to receive him on board. Was it his duty to remain there thus situated? That he took the advice of his best friends, pursued the dictates of his own judgment, and abandoned a country where the laws ceased to be the sovereign power; that the charge stated in a hand-bill, that he had forfeited his recognizance, was false; that he had forfeited no recognizance; if he had forfeited any recognizance, he asked why no proceedings had taken place for the breach of it? If he was to be prosecuted for such breach, he wished to know why he was brought to this place? Why not carry him to the place where the breach happened? That more than three months had elapsed since the order of the government had issued to seize and bring him to that place; yet it was pretended that sufficient time had not been allowed to adduce testimony in support of the prosecution. He asked why the guard who conducted him to that place avoided every magistrate on the way, unless from a conviction that they were acting without lawful authority? Why had he been debarred the use of pen, ink, and paper, and not even permitted to write to his daughter? That in the state of South Carolina, where he happened to see three men together, he demanded the interposition of the civil authority; that it was from military despotism, from the tyranny of a military escort, that he wished to be delivered, not from an investigation into his conduct, or from the operation of the laws of his country. He concluded that there were three courses that might be pursued,—an acquittal; or a commitment for treason, or for a misdemeanor; that no proof existed in support of either but what was contained in the affidavits of Eaton and Wilkinson, abounding in crudities and absurdities.

Mr. Rodney, attorney general, then closed the argument on behalf of the United States.

The CHIEF JUSTICE remarked that he would deliver an opinion in writing the next day, and thereupon Col. Burr's recognizance was renewed for his appearance at the capitol on the following day at ten o'clock.

Wednesday, April 1, 1807.

MARSHALL, Chief Justice. I am required on the part of the attorney for the United States to commit the accused on two charges: (1) For setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States. (2) For committing high treason against the United States.

On an application of this kind I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused: but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it. I think this opinion entirely reconcilable with that quoted from Judge Blackstone. When that learned and accurate commentator says, that "if upon an inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him, otherwise he must be committed to prison or give bail," I do not understand him as meaning to say that the hand of malignity may grasp any individual against whom its hate may be directed, or whom it may capriciously seize, charge him with some secret crime, and put him on the proof of his innocence. But I understand that the foundation of the proceeding must be a probable cause to believe there is guilt; which probable cause is only to be done away in the manner stated by Blackstone. The total failure of proof on the part of the accuser would be considered by that writer as being in itself a legal manifestation of the innocence of the accused. In inquiring, therefore, into the charges exhibited against Aaron Burr, I hold myself bound to consider how far those charges are supported by probable cause.

The first charge stands upon the testimony of General Eaton and General Wilkinson. The witness first named proves that among other projects which were more criminal, Colonel Burr meditated an expedition against the Mexican dominions of Spain. This deposition may be considered as introductory to the affidavit of General Wilkinson, and as explanatory of the objects of any military preparations which may have been made. I proceed, then, to that affidavit. To make the testimony of General Wilkinson bear on Colonel Burr, it is necessary to consider as genuine the letter stated by the former to be, as nearly as he can make it, an interpretation of one received in cypher from the latter. Exclude this letter, and nothing remains in the testimony which can in the most remote degree affect Colonel Burr. That there are to the admissibility of this part of the affidavit great and obvious objections need not be stated to those who know with how much caution proceedings in criminal cases ought to be instituted, and who know that the highest tribunal of the United States has been divided on them. When this question came before the supreme court, I felt the full force of these objections, although I did not yield to them. On weighing in my own mind the reasons for and against acting, in this stage of the business, on that part of the affidavit, those in favor of doing so appeared to me to preponderate, and, as

this opinion was not overruled, I hold myself still at liberty to conform to it. That the original letter, or a true copy of it accompanied by the cypher, would have been much more satisfactory, is not to be denied; but I thought, and I still think, that, upon a mere question whether the accused shall be brought to trial or not, upon an inquiry not into guilt but into probable cause, the omission of a circumstance which is indeed important, but which does not disprove the positive allegations of an affidavit, ought not to induce its rejection or its absolute disbelief, when the maker of the affidavit is at too great a distance to repair the fault. I could not in this stage of the prosecution absolutely discredit the affidavit, because the material facts alleged may very well be within the knowledge of the witness, although he has failed to state explicitly all the means by which this knowledge is obtained. Thus, General Wilkinson states that this letter was received from Colonel Burr, but does not say that it was in his hand-writing, nor does he state the evidence which supports this affirmation. But, in addition to the circumstance that the positive assertion of the fact ought not perhaps, in this stage of the inquiry, to be disregarded, the nature of the case furnishes that evidence. The letter was in cypher. General Wilkinson, it is true, does not say that a cypher had been previously settled between Colonel Burr and himself, in which they might correspond on subjects which, though innocent, neither of them might wish to subject to the casualties of a transportation from the Atlantic to the Mississippi; but when we perceive that Colonel Burr has written in cypher, and that General Wilkinson is able to decypher the letter, we must either presume that the bearer of the letter was also the bearer of its key, or that the key was previously in possession of the person to whom the letter was addressed. In stating particularly the circumstances attending the delivery of this letter, General Wilkinson does not say that it was accompanied by the key, or that he felt any surprise at its being in cypher. For this reason, as well as because there is not much more security in sending a letter in cypher, accompanied by its key, than there is in sending a letter not in cypher, I think it more reasonable to suppose that the key was previously in possession of Wilkinson. If this was the fact, the letter being written in a cypher previously settled between himself and Colonel Burr, is, in this stage of the inquiry at least, a circumstance which sufficiently supports the assertion that the letter was written by Colonel Burr. The enterprise described in this letter is obviously a military enterprise, and must have been intended either against the United States, or against the territories of some other power on the continent, with all of whom the United States were at peace. The expressions of this letter must be admitted to furnish at least probable cause for believing that the means for the expedition were provided. In every part of it we find declarations indicating that he was providing the means for the expedition; and as these means might be provided in secret, I do not think that further testimony ought to be required to satisfy me that there is probable cause for committing the prisoner on this charge. Since it will be entirely in the power of the attorney general to prefer an indictment against the prisoner, for any other offence which he shall think himself possessed of testimony to support, it is, in fact, immaterial whether the second charge be expressed in the warrant of commitment or not; but as I hold it to be my duty to insert every charge alleged on the part of the United States, in support of which probable cause is shown, and to insert none in support of which probable cause is not shown, I am bound to proceed in the inquiry.

The second charge exhibited against the prisoner is high treason against the United States in levying war against them. As this is the most atrocious offence which can be committed against the political body, so is it the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power. It is that of which the people of America have been most jealous, and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the definition of this, but have themselves declared in their constitution that "it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort." This high crime consists of overt acts, which must be proved by two witnesses, or by the confession of the party in open court. Under the control of this constitutional regulation, I am to inquire whether the testimony laid before me furnishes probable cause in support of this charge. The charge is, that the fact itself has been committed, and the testimony to support it must furnish probable cause for believing that it has been actually committed, or it is insufficient for the purpose for which it is adduced. Upon this point, too, the testimony of General Eaton is first to be considered. That part of his deposition which bears upon this charge is the plan disclosed by the prisoner for seizing upon New Orleans, and revolutionizing the Western states. That this plan, if consummated by over acts, would amount to treason, no man will controvert. But it is equally clear that an intention to commit treason is an offence entirely distinct from the actual commission of that crime. War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war. If Colonel Burr had

been apprehended on making these communications to General Eaton, could it have been alleged that he had gone further than to meditate the crime? Could it have been said that he had actually collected forces and had actually levied war? Most certainly it could not. The crime really complete was a conspiracy to commit treason, not an actual commission of treason. If these communications were not treason at the instant they were made, no lapse of time can make them so. They are not in themselves acts. They may serve to explain the intention with which acts were committed, but they cannot supply those acts if they be not proved. The next testimony is the deposition of General Wilkinson, which consists of the letter already noticed, and of the communications made by the bearer of that letter. This letter has already been considered by the supreme court of the United States, and has been declared to import, taken by itself or in connection with Eaton's deposition, rather an expedition against Mexico than the territories of the United States. By that decision I am bound, whether I concurred in it or not. But I did concur in it. On this point the court was unanimous. It is, however, urged that the declarations of Swartwout may be connected with the letter and used against Colonel Burr. Although the confession of one man cannot criminate another, yet I am inclined to think that, on a mere inquiry into probable cause, the declaration of Swartwout made on this particular occasion may be used against Colonel Burr. My reason for thinking so is, that Colonel Burr's letter authorizes Mr. Swartwout to speak in his name. He empowers Mr. Swartwout to make to General Wilkinson verbal communications explanatory of the plans and designs of Burr, which Burr adopts as his own explanations. However inadmissible, therefore, this testimony may be on a trial in chief, I am inclined to admit it on this inquiry. If it be admitted, what is its amount? Upon this point, too, it appears that the supreme court was divided. I therefore hold myself at liberty to pursue my own opinion, which was, that the words, "this territory must be revolutionized," did not so clearly apply to a foreign territory as to reject that sense which would make them applicable to a territory of the United States, at least so far as to admit of further inquiry into their meaning. And if a territory of the United States was to be revolutionized, though only as a means for an expedition against a foreign power, the act would be treason. This reasoning leads to the conclusion that there is probable cause for the allegation that treasonable designs were entertained by the prisoner so late as July last, when this letter was written.

It remains to inquire whether there is also probable cause to believe that these designs have been ripened into the crime itself, by actually levying war against the United States. It has been already observed that, to constitute this crime, troops must be embodied, men must be actually assembled; and these are facts which cannot remain invisible. Treason may be machinated in secret, but it can be perpetrated only in open day, and in the eye of the world. Testimony of a fact which in its own nature is so notorious ought to be unequivocal. The testimony now offered has been laid before the supreme court of the United States and has been determined in the Cases of Bollman and Swartwout, [4 Cranch (8 U. S.) 75], not to furnish probable cause for the opinion that war had been actually levied. Whatever might have been the inclination of my own mind in that case, I should feel much difficulty in departing from the decision then made, unless this case could be clearly distinguished from it. I will, however, briefly review the arguments which have been urged, and the facts now before me, in order to show more clearly the particular operation they have on my own judgment. The fact to be established is, that in pursuance of these designs, previously entertained, men have been actually assembled for the purpose of making war against the United States; and on the showing of probable cause that this fact has been committed, depends the issue of the present inquiry. The first piece of testimony relied on to render this fact probable is the declaration of Mr. Swartwout, that "Colonel Burr was levying an armed body of 7,000 men from the state of New York, and the Western states and territories, with a view to carry an expedition against the Mexican provinces." The term "levying" has been said, according to the explanation of the lexicons, to mean the embodying of troops, and therefore to prove what is required. Although I do not suppose that Mr. Swartwout had consulted a dictionary, I have looked into Johnson for the term, and find its first signification to be "to raise;" its second, "to bring together." In common parlance, it may signify the one or the other. But its sense is certainly decided by the fact. If when Mr. Swartwout left Colonel Burr, which must be supposed to have been in July, he was actually embodying men from New York to the Western states, what could veil his troops from human sight? An invisible army is not the instrument of war, and had these troops been visible, some testimony relative to them could have been adduced. I take the real sense, then, in which this term was used to be, that Colonel Burr was raising, or in other words engaging or enlisting, men through the country described, for the enterprise he meditated. The utmost point to which this testimony can be extended is, that it denotes a future embodying of men, which is more particularly mentioned in the letter itself, and that it affords probable cause to believe that the troops did actually embody at the period des-

ignated for their assembling, which is sufficient to induce the justice to whom the application is made to commit for trial. I shall readily avow my opinion, that the strength of the presumption arising from this testimony ought to depend greatly on the time at which the application is made. If soon after the period at which the troops were to assemble, when full time had not elapsed to ascertain the fact, these circumstances had been urged as the ground for a commitment on the charge of treason, I should have thought them entitled to great consideration. I will not deny that, in the Cases of Bollman and Swartwout, I was not perfectly satisfied that they did not warrant an inquiry into the fact. But I think every person must admit that the weight of these circumstances daily diminishes. Suspicion may deserve great attention when the means of ascertaining its real grounds are not yet possessed; but when those means are, or may have been acquired, if facts to support suspicion be not shown, every person, I think, must admit that the ministers of justice at least ought not officially to entertain it. This, I think, must be conceded by all; but whether it be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide.

The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it. It is therefore capable of proof; and when time to collect this proof has been given, it ought to be adduced, or suspicion becomes ground too weak to stand upon. Several months have elapsed since this fact did occur, if it ever occurred. More than five weeks have elapsed since the opinion of the supreme court has declared the necessity of proving the fact, if it exists. Why is it not proved? To the executive government is intrusted the important power of prosecuting those whose crimes may disturb the public repose or endanger its safety. It would be easy, in much less time than has intervened since Colonel Burr has been alleged to have assembled his troops, to procure affidavits establishing the fact. If, in November or December last, a body of troops had been assembled on the Ohio, it is impossible to suppose that affidavits establishing the fact could not have been obtained by the last of March. I ought not to believe that there has been any remissness on the part of those who prosecute on this important and interesting subject; and consequently, when at this late period no evidence that troops have been actually embodied is given, I must say that the suspicion which in the first instance might have been created ought not to be continued, unless this want of proof can be in some manner accounted for.

It is stated by the attorney for the United States that, as affidavits can only be voluntary, the difficulty of obtaining them accounts for the absence of proof. I cannot admit this position. On the evidence furnished by this very transaction of the attachment felt by our western for their eastern brethren, we justly felicitate ourselves. How inconsistent with this fact is the idea that no man could be found who would voluntarily depose that a body of troops had actually assembled, whose object must be understood to be hostile to the Union, and whose object was detested and defeated by the very people who could give the requisite information! I cannot doubt that means to obtain information have been taken on the part of the prosecution; if it existed, I cannot doubt the practicability of obtaining it; and its non-production at this late hour does not, in my opinion, leave me at liberty to give to those suspicions which grow out of other circumstances that weight to which at an earlier day they might have been entitled. I shall not therefore insert in the commitment the charge of high treason. I repeat, that this is the less important, because it detracts nothing from the right of the attorney to prefer an indictment for high treason, should he be furnished with the necessary testimony.

The CHIEF JUSTICE having delivered his opinion, observed, that as Colonel Burr would be put on his trial for carrying on a military expedition against a nation with whom the United States were at peace, his case was of course bailable. Some discussion then arose as to the amount of bail to be required. The sum was finally fixed at ten thousand dollars; and after a brief adjournment, Colonel Burr, with five sureties entered into a recognizance in that sum, for his appearance at the next circuit court for the district of Virginia, to commence on the 22d day of May following

NOTE.

Historical Sketch of Burr's Western Expedition in the Year 1806.

After his fatal duel with Hamilton, in July, 1804, Colonel Burr became a fugitive and an exile from his home, until the meeting of congress in December following. Ten days after the duel, he left New York at night, by water, landed the next morning at the residence of Commodore Truxton, in New Jersey, and thence made his way, incog., by back roads, to Philadelphia. He remained in that city until a coroner's inquest had pronounced him guilty of murder and a warrant had been issued for his arrest. Fearing that a requisition would be made upon the governor of Pennsylvania by the governor of New York, for his surrender, he secretly left Philadelphia about the middle of August, by sea, sailing for the island of St. Simons, off the coast of Georgia, where a few wealthy planters resided, among whom he had some personal friends. There he was hospitably received, and entertained for about a month. He then visited his daughter, at her home in South Carolina, where he remained until he started on his journey to Washington, to preside over the senate of the United States during the last session of his term as vice president. On reaching Washington, he learned that indictments for murder were pend-

ing against him in two states—New York, where Hamilton died, and New Jersey, where the mortal wound was inflicted. No attempt was made, however, to bring him to trial on either. He was received at Washington with the consideration due to his distinguished political position; and he presided over the deliberations of the senate with a dignity, ability, and impartiality which increased his fame as an unrivalled presiding officer. It was during this session that Judge Chase, of the supreme court, was tried on articles of impeachment preferred by the house of representatives. "The impeachment created an intense interest, and the trial attracted a concourse of people to Washington. Under the direction of the vice president, the senate chamber was fitted up in superb style, with seats and subdivisions for all the dignitaries of the nation, as well as for foreign embassadors and spectators. The senators, as judges of this high court, were placed in a grand semicircle on each side of the vice president—an awful array of judicial authority. Temporary galleries were erected and draped with blue cloth, part of which the vice president, with his usual gallantry, appropriated to the ladies. The scene presented while the trial was in progress, as described minutely in the papers of the day, must have been extremely striking. The trial began on the 4th of February, and ended, in a verdict of acquittal, on the 1st of March. The dignity, the grace, the fairness, the prompt, intelligent decision with which the vice president presided over the august court, extorted praise even from his enemies. 'He conducted the trial,' said a newspaper of the day, 'with the dignity and impartiality of an angel, but with the rigor of a devil.' There was a rising tide of reaction in his favor during the closing days of his public life, which, taken at the flood, might have led, if not to fortune, yet to an endurable existence among his countrymen." Parton's Life of Burr. On Saturday, the 2d of March, the vice president took leave of the senate in a speech which produced a profound sensation. This speech was delivered when the senate, being engaged in executive business, was sitting with closed doors, and no authentic report of it has been preserved. In an account of it published at the time in the Washington Federalist, and prepared at the editor's request, by an unknown hand, it is said to have been pronounced by those who heard it, "the most dignified, sublime, and impressive that ever was uttered." "The whole senate," says the same writer, "were in tears, and so unmanned that it was half an hour before they could recover themselves sufficiently to come to order and choose a vice president pro tem." Yet on retiring from the vice presidency, Colonel Burr was a bankrupt, both in political influence and pecuniary resources. If he returned to his home, it would be to encounter indictments for murder and executions against his body for debt. He therefore determined to seek his fortune in a new country.

During his winter's residence in Washington, many of Colonel Burr's friends and admirers had manifested a deep interest in his future, and had been busy devising schemes for retrieving his fortunes, and for bringing him again into political life as a representative from some new state or territory. Conspicuous among these was General Wilkinson, commander in chief of the army, and appointed, about the close of that session of congress, governor of the territory of Louisiana. Between Wilkinson and Burr a friendship of long standing had subsisted. They had been fellow-soldiers in the war of the Revolution—had shared together the weary march to Quebec in the winter of 1775–76, and the perils of the unsuccessful attack on that city, in which their commander, the gallant Montgomery, fell. Though seldom meeting after the war, they had occasionally corresponded, confidentially, in cipher, of which Wilkinson was the inventor. In 1787, Wilkinson, then a citizen of that portion of Virginia which is now the state of Kentucky, having laden a boat with tobacco and flour, had descended the Ohio and Mississippi rivers to New Orleans, with the ostensible purpose of making arrangements with the Spanish authorities by which to secure to the inhabitants of the upper country the free navigation of the Mississippi and a market for their products. Although, on landing, his cargo was seized by the authorities, he had the address to obtain its release, and such further privileges of trading in that city as induced him to establish himself in business there, carrying on a trade, principally in tobacco, from the upper country, for several years. In the year 1791, however, he resumed his military career, obtaining an appointment in the army of the United States, and being placed in the command of the western posts. He was now about to return to the Louisiana country, as governor of all that portion of it not included in the territory of Orleans, now comprising the state of Louisiana. In that direction it was natural that Colonel Burr should turn his eyes. Wilkinson was an arch intriguer, and some years before had been at the head of a party in the West who favored the separation of the Western territories from the Atlantic states. While carrying on trade in New Orleans he had been deeply implicated in an intrigue with the Spanish authorities, having for its object the separation of the district of Kentucky from the United States, and its annexation to the Spanish territory of Louisiana. Whether he really desired the accomplishment of this object, or was merely playing a game with the Spanish authorities for the advancement of his own selfish interests, may be doubted; but the evidence that he was deeply engaged in such an intrigue is now overwhelming. If Burr at this time contemplated any illicit enterprise, looking either to a separation of the Western states and territories from the Union, or an invasion of the Spanish dominions, or both, Wilkinson was the man, of all others, to whom he would have been most likely to disclose his views, and whose co-operation he would be most likely to seek. He was ambitious, exceedingly fond of pomp and show, extravagant in his habits, poor, and addicted to intrigue. On leaving Washington, at the end of his official term, Colonel Burr went to Philadelphia, and there remained about a month. On the 10th of April he started for Pittsburg, performing the journey on horseback in nineteen days. The next day after reaching Pittsburg, he, with a companion, acting as his secretary, embarked for the lower country in a boat which he had previously ordered to be in readiness for that purpose. "This boat was a rude floating house, or ark, sixty feet long and fourteen wide, containing four apartments; a dining room, a kitchen, with fire-place, and two bed-rooms, all lighted by glass windows, and the whole covered by a roof, which served as a promenade deck. The cost of this commodious structure, he found to his astonishment, was only one hundred and thirty-three dollars. Of propelling power it had none, but merely floated down the swift and winding stream, aided occasionally, and kept clear of snags and sand-banks, by a dexterous use of the pole." Parton's Life of Burr. The Ohio river then wound its way through a wilderness just beginning to be marked by the footprints of approaching civilization. Marietta was the most considerable town on its northwestern bank, above Cincinnati, and its vicinity was the longest settled and best improved portion of the new state of Ohio. Colonel Burr landed at Marietta on the 5th of May, where he saw houses "that would be called handsome anywhere."

Fourteen miles below Marietta is the celebrated island on which Harman Blennerhassett, an Irish gentleman of education and refinement, with his accomplished wife and two young children, then lived in a style which was regarded by the denizens of that new country as a true type of princely magnificence. This island is nearly three miles in length, and less than one-fourth of a mile in width, containing between three and four hundred acres of very fertile

land. At this time it had been the residence of Blennerhassett about seven years. At a cost of some fifty thousand dollars, he had subdued the wilderness, and erected on the summit of the island, near its upper end, a mansion house of commodious proportions. He had laid out and improved a capacious lawn, planted choice fruits, and embellished his grounds with flowers and shrubbery of rare beauty. The highly-colored picture of this "Eden," drawn by Mr. Wirt in his celebrated speech on the trial of Burr, does not much surpass a description given by the Hon. Charles Fenton Mercer, in a deposition which was read during the pendency of the subsequent motion to commit Burr, Blennerhassett, and Smith for trial in another district. He had visited Blennerhassett in his "island home," and spent a night and a day under his roof, shortly before he left it to follow the fortunes of Burr in his disastrous expedition. "That evening and the following day," he says in his deposition, "I spent at the most elegant seat in Virginia, in the society of Mr. Blennerhassett and his lovely and accomplished lady." Blennerhassett "was the youngest son of a distinguished family which could trace its lineage from the time of King John. His grandfather, Robert, having emigrated from Cumberland, in the time of Elizabeth, became the head of three highly respectable branches of Irish gentry." His wife was "a Miss Agnew, daughter of the lieutenant governor of the Isle of Man, and grand-daughter of the celebrated general of that name who fell at the battle of Germantown." Safford's "Blennerhassett Papers." He was educated for the bar, but shortly after having attained the degree of barrister, by the death of his elder brother he succeeded to the family estates, and abandoned the pursuit of his profession. In 1796 Blennerhassett emigrated to the United States, and two years later established himself on the island where Colonel Burr found him. He was a man of literary tastes, exceedingly fond of music and chemistry, in both of which he was quite a proficient. Supplied with an ample library, an extensive chemical apparatus, and musical instruments, and owning a few negro slaves, he was here enjoying a life of elegant ease, and dispensing a generous hospitality to all who visited his "enchanted isle." He had, however, invested too large a proportion of his fortune (originally about $100,000) in unproductive property, which could minister only to refined tastes and luxurious habits; and he could hardly have maintained his style of living many years longer, even if he had abstained from embarking in the disastrous enterprise which precipitated his ruin. On his voyage down the river, Colonel Burr and his secretary landed on the island, with no other motive, probably, than that of strolling over the grounds. Mrs. Blennerhassett, observing them, sent a servant to invite the strangers to the house. Burr declined the invitation, sending his card. On learning the name of the distinguished visiter, the lady, in the temporary absence of her husband, came out herself to press the invitation. Burr yielded, dined with the family, remained with them till eleven o'clock in the evening, and then proceeded on his voyage. The host and hostess were equally captivated by their visiter. At Cincinnati, then a town of about fifteen hundred inhabitants, Colonel Burr spent a day at the house of John Smith, a senator of the United States for the state of Ohio, and there met his friend Jonathan Dayton, an ex-senator from the state of New Jersey, both of whom were subsequently connected with his Western expedition, and were indicted with him for treason. At Louisville, Colonel Burr left his boat and proceeded on horseback to Nashville. There he was greeted with the utmost enthusiasm, public dinners, balls, and parties being given in honor of his visit.

Before leaving Washington, one of the schemes suggested for bringing Colonel Burr into public life again was the following, proposed by Matthew Lyon, a member of congress from Kentucky, which is here given in his own words: "Let Colonel Burr mount his horse on the 4th of March, and ride through Virginia to Tennessee, giving out that he intends settling in Nashville, in the practice of the law. Let him commence the practice, and fix himself a home there. His rencontre with General Hamilton will not injure him. Let him attend the courts in that district. Let him in July next intimate to some of the numerous friends his preëminent talents and suavity of manners will have made for him, that he would willingly serve the district in congress. They will set the thing on foot, and he is sure to be elected; there is no constitutional bar in the way." This scheme, Mr. Lyon says, was suggested by him to General Wilkinson, who appeared to be highly pleased with it. It was subsequently suggested to Burr himself; but he does not appear to have very earnestly entered into it. Colonel Burr remained four days at Nashville, and was the guest of General Jackson, with whom he had contracted a warm friendship at Washington. On the 3d of June, he, with his secretary, embarked in an open boat to descend the Cumberland river, at the mouth of which they found their "ark," and resumed their voyage down the Ohio. At Fort Massac, sixteen miles below the mouth of the Cumberland, he met General Wilkinson, who was on his way to the theatre of his new official duties. According to General Wilkinson's account of this interview, the subjects of their conversations were perfectly legitimate; relating to a project for making a canal around the falls of the Ohio, to land speculations, and to a scheme for getting Burr into congress. Wilkinson fitted Burr out with "an elegant barge, sails, colors, and ten oars, with a sergeant and ten able, faithful hands," to pursue his voyage to New Orleans; and gave him letters of introduction to his friends in that city. June 25th, sixty-seven days after leaving Philadelphia, the voyager landed on the levee of New Orleans. He was strongly prepossessed in favor of the place. "'I hear so many pleasant things of Orleans,' he wrote to his daughter, 'that I should certainly (if one half of them are verified on inspection) settle down there were it not for Theodosia and her boy; but these will control my fate.' The city then contained about nine thousand inhabitants. Three hundred seagoing vessels and six hundred river flatboats arrived annually at its levees. Four forts, one at each angle of the city, half a mile apart, defended the city. Two of these were regularly constructed fortresses, with fosse, glacis, and drawbridge. The two behind the city were stockades. Since the departure of the Spaniards these fortifications had been partly dismantled, but were capable, in a few weeks, of being restored to their original strength. In 1805 the chief defence of the place was a volunteer corps of Americans and creoles, commanded by Daniel Clark, the great merchant of the city, the founder of that prodigious fortune for which his daughter, Mrs. Gaines, has so long contended in the courts. Daniel Clark had emigrated from England in 1786, and had grown in wealth with the ever-growing prosperity of the city. He had been ardent for the transfer of the province to the United States, was now the leader of the American party in New Orleans, and seemed to be a zealous friend of the Union. To him Colonel Burr presented the following letter of introduction from General Wilkinson:

"'My Dear Sir: This will be delivered to you by Colonel Burr, whose worth you know well how to estimate. If the persecutions of a great and honorable man can give title to generous attentions, he has claims to all your civilities and all your services. You cannot oblige me more than by such conduct, and I pledge my life to you it will not be misapplied. To him I refer you for many things improper to letter, and which he will not say to any other I shall be at St. Louis in two weeks, and if you were there we could open a mine, a commercial one at least. Let me hear from you. Farewell, do well, and believe me always your friend.'

"This epistle produced the effect desired. Burr became intimate with Clark, as with all the important persons of the place. He was received everywhere as the great man! Governor Claiborn (governor of Orleans territory) gave him a grand dinner, which was attended by as distinguished a company as New Orleans could assemble. Banquet followed banquet; fête succeeded fête· ball followed ball. The French air that surrounded everything, the French manner and tone of society, were as pleasing as they were novel to the traveller. The days flew swiftly by. Burr staid three weeks in New Orleans. Wilkinson said in his letter of introduction, that Burr would make communications to Clark which were 'improper to letter.' What were they? Burr was not a person to waste three weeks in mere feasting and playing the great man Wherever he was, whatever he was, he was busy. He had the quickest, most active mind that ever animated five feet six inches of mortality It is certain that he did something at New Orleans during those three weeks. What? The question has been answered, first, by Wilkinson in his ponderous memoirs; secondly, by Daniel Clark in his angry octavo, entitled 'Proofs of the Corruption of General James Wilkinson, and of his Connection with Aaron Burr'; thirdly, by Matthew L. Davis, speaking for Burr himself. Wilkinson says the reference in his letter of introduction was simply an election scheme. Clark declares that Burr confided nothing to him whatsoever. He says he liked Burr exceedingly, invited him to dinner, showed him every possible civility, but had not a syllable of confidential conversation with him. In the most positive and circumstantial manner he denies that he had then, or ever had, any participation in or knowledge of Burr's designs. Davis, on the contrary, asserts that Clark and Wilkinson were both ardently engaged with Burr; and that Clark agreed to advance fifty thousand dollars in furtherance of the great project. Other friends of Burr say that Clark made two voyages to Vera Cruz, to spy out the enemy's country. Clark admits having made the voyages, (one in September, 1805, the other in February, 1806;) admits having collected information in Mexico respecting the strength of the fortresses, the number of the garrisons, and the disposition of the people; but asserts that his voyages had none but commercial objects, and that his inquiries were only prompted by curiosity A witness deposed to having heard Clark say that he would willingly join in a private scheme for the conquest of Mexico, provided the adventurers could turn their backs forever on the United States. 'You, for example, might be a duke,' was one expression which the witness swore he had heard Clark use in the course of the same conversation. The difficulty of arriving at certainty on this subject, arises from the fact that most of the existing evidence was given after the explosion. It was amusing, says Burnet (in his 'Notes'), to see men who before the president's proclamation appeared had been loudest in Burr's praises, and deepest in his schemes, making haste after that bolt had shivered the project to atoms to denounce the traitor at every corner, and running to offer their services to the governor in defence of a distracted and imperilled country." Parton's Life of Burr.

In the latter part of July Colonel Burr left New Orleans on horseback, to return to Nashville, travelling a great portion of the way (under the direction of a guide) through an unbroken wilderness, with no better roads than mere Indian trails. He arrived at Nashville on the 6th of August, where he was again received with distinguished attention. He remained there a week, the guest of General Jackson, as on his former visit. He then made a two weeks' tour in Kentucky, visiting Louisville, Frankfort, and Lexington, at all of which he was received and entertained with great distinction. At this time the Spaniards still claimed and held possession of the country on the eastern bank of the lower Mississippi, and about the time of Burr's visit the ill feeling which had long prevailed towards them, among the American citizens of the Mississippi valley, had been greatly inflamed by some outrages committed by the Spanish troops on the American side. A war with Spain was confidently expected, and the impression got abroad in the West that Burr's presence had some reference to approaching hostilities against some portion of the Spanish dominions. A military expedition against the hated "Dons" would at that time have met great favor among the Western people From Kentucky Burr proceeded to St. Louis, where he again met General Wilkinson. It was here, according to Wilkinson's own account, that he first began to suspect Burr "to be revolving some great project, the nature of which he did not disclose." He represents Burr as speaking contemptuously of "the imbecility of the government," and saying "it would moulder to pieces, die a natural death," or words to that effect; adding "that the people of the Western country were ready for revolt." To this Wilkinson says he recollects replying, "that if he had not profited more by his journey he had better remained at Washington or Philadelphia. For surely, said I, my friend, no person was ever more mistaken! The Western people disaffected to the government? They are bigoted to Jefferson and democracy! and the conversation dropped." From this and other similar conversations, Wilkinson says he began to fear that Burr had conceived some dangerous and desperate enterprise. Nevertheless, he strove to promote his election to congress, writing a letter to General Harrison, then governor of the territory of Indiana, urgently soliciting his influence to secure his return to congress from that territory. Wilkinson alleges, however, that his great anxiety to secure the election of Burr to congress arose from his fear that he was about to embark in some dangerous enterprise, which his election to congress might induce him to abandon. In the month of October Burr left the West to return to the Eastern states. On his way he called at Blennerhassett's island, but found neither the master nor the mistress at home. He proceeded to Washington, where he was received by the principal officials with due courtesy. He dined with the president, and conversed freely with members of the cabinet, from whom he learned that there would be no war with Spain. From Washington he went South to meet his son-in-law, Mr. Alston, and his daughter, Theodosia, returning in December to Philadelphia. He made this city his headquarters until he started West the following summer, living, it is said, in a style and situation more obscure than was formerly his custom. "He sought the society of men who had cause to be dissatisfied with the government, such as Commodore Truxton, who had been struck from the navy list, and General Eaton, who could not get his claim against the government paid. To these men, as to others, he spoke in contemptuous terms of the administration; he said a separation of the Western states must come sooner or later; he unfolded his plans and urged them to unite their fortunes with his. Parton's Life of Burr.

From Philadelphia, in the month of December, Burr wrote his first letter to Blennerhassett. If, as has been said, it was "a very innocent communication," it was nevertheless a very artful one. After expressing his regret that the absence of Blennerhassett from home had deprived him of the pleasure of improving his personal acquaintance when visiting the island, he flatteringly alluded to his talents, as suited to a higher sphere than that in which they were then employed. He alluded to his gradually diminishing fortune, and the duty he owed to his children, who might be left destitute if he did not make some effort to add to his present estate. This letter produced the desired effect. Blennerhassett answered it, saying that he felt that the interests of a growing family would summon him again into active life, to the resumption of his former

profession of the bar, mercantile, or other enterprise, if he could find an opportunity of selling or letting his establishment on the island. He says: "Having thus advised you of my desire and motives to pursue a change of life, to engage in anything which may suit my circumstances, I hope, sir, you will not regard it as indelicate in me to observe to you how highly I should be honored in being associated with you in any contemplated enterprise you would permit me to participate in. The amount of means I could at first come forward with would be small. You might command my services as a lawyer, or in any other way you might suggest as being most useful." During the winter of 1805-06, Burr had been busy in maturing his plans for the expedition to be set on foot the ensuing fall. He succeeded in drawing into his schemes a number of prominent men whose names are known, and others, no doubt, who were so fortunate as to keep their connection with him concealed from the public eye. Some of these must have contributed considerable sums of money towards the enterprise, although his exchequer never appears to have been very full. Among the most prominent of his confederates were the Swartwouts, of New York, Ex-Senator Jonathan Dayton, of New Jersey, Senator John Smith, of Ohio, Blennerhassett, Dr. Erich Bollman, a German who had distinguished himself by a gallant attempt to rescue Lafayette from prison, and Colonel Dupiester, a Frenchman, who had been sent by Burr on a confidential mission to Europe, and been employed by him in other diplomatic relations. His daughter, Theodosia, had her whole soul in the enterprise, and her husband, Mr. Alston, (a man of great wealth,) certainly furnished a portion of the means employed in setting it on foot; though he positively and indignantly denied having any connection with it, in a letter to Governor Pinckney, of South Carolina, shortly after the bubble had burst. Many prominent men in the West who were in the confidence of Burr approved, encouraged, and gave countenance to his enterprise, without, perhaps, being actually engaged in it; among whom were General Jackson, of Tennessee, and General Adair, of Kentucky.

In July, 1806, Theodosia, who had determined to accompany her father to the West, and had visited Philadelphia for that purpose, left that city for Bedford Springs, in the mountains of Pennsylvania, with her infant son, there to remain a short time for the benefit of her health. Burr soon followed after. Some time in August, Colonel Burr, with Theodosia and her child, accompanied by Colonel Dupiester, reached Pittsburg, and embarked on their voyage down the river. Burr and Dupiester occasionally left the boat to make detours in the adjacent country, for the purpose of sounding public sentiment in regard to their enterprise. It was on one of these occasions that they visited the house of Colonel Morgan, a prominent citizen of Washington county, Pennsylvania, a full account of which visit, and its results, will be found in the testimony of Colonel Morgan and his two sons, in the following pages. Here Burr committed the fatal indiscretion of expressing sentiments and indicating designs which so shocked the patriotism of his host that they led to a communication to the president, which was probably the first stimulus to any active measures on the part of the administration to fathom and defeat his objects. A few days later, (about the last of August,) the voyagers landed at Marietta. It happened to be on the day of a "general muster" of the militia. Colonel Burr, in company with Colonel Meigs, (subsequently governor of Ohio,) rode to the field, reviewed the troops, and put a regiment through a few evolutions, to the great satisfaction of an admiring multitude. "In the evening he and Theodosia attended a ball, where he completed the conquest of Marietta by the courtly grace of his manners." Proceeding to the island, and leaving his daughter with Mrs. Blennerhassett, Burr immediately commenced active preparations for fitting out the expedition. Contracts for fifteen boats, capable of carrying five hundred men, and a large keel boat for the transportation of provisions, to be built on the Muskingum, a few miles above Marietta, were entered into. Arrangements were also made for purchasing considerable quantities of pork, flour, corn meal, and whisky. These arrangements having been made, Burr left them to be carried out under the superintendence of Blennerhassett, and proceeded to Chillicothe, then the seat of government of the state of Ohio, and thence to Cincinnati, where his confederate, Senator John Smith, resided. Tarrying but a short time here, he proceeded to Kentucky, visited many prominent men, and gained many adherents to his cause. He then visited Nashville, Tennessee, and there contracted for the building of six boats on the Cumberland, and deposited four thousand dollars with General Jackson to pay for them.

Before leaving the East, Colonel Burr had contracted for the purchase of a tract of land of four hundred thousand acres, on the Washita, a branch of the Red river, at the price of forty thousand dollars. On this visit to Kentucky he completed the purchase, paying the first instalment of five thousand dollars thereon. To all persons to whom he did not see fit to disclose more, the colonization and settlement of these lands was represented to be the sole object of his expedition. While Burr was thus engaged maturing his plans in Kentucky and Tennessee, Blennerhassett was no less busy in the vicinity of his own residence, overseeing the building of the boats and the purchase of provisions, kiln-drying corn meal on the island, and obtaining recruits. To most of the young men whom he approached on the subject he represented that the object of the expedition was the settlement of the Washita lands; but to some he plainly intimated that its destination was Mexico, saying that there would undoubtedly be a war with Spain; while he took little pains to conceal the fact from any that something more than a settlement of wild lands was in view. He wrote a series of essays, which were published in a Marietta paper, over the signature of "Querist," in which he endeavored to show that the Western country would derive great advantages from a separation from the Atlantic states. Such views and sentiments, however, were not then regarded as treasonable, and had a few years previously been quite prevalent in the West. While the preparations above alluded to were going on, Comfort Tyler, of New York, was recruiting men and collecting supplies at Pittsburg and its vicinity, with which he was to embark, with several boats, at Beaver, Pennsylvania, and join Blennerhassett's fleet at the island, when the latter should be ready to move. Davis Floyd, of the Indiana territory, was similarly employed in the vicinity of the falls of the Ohio, and was to join the expedition with his boats when the fleet should come down. Some time in October Mr. Alston joined his wife and child on the island. Shortly afterwards, accompanied by Blennerhassett, they proceeded to Lexington, Kentucky, where they met Col. Burr. From this point they returned to their home in South Carolina.

Towards the latter part of October the newspapers of the West began to give out intimations that there was treason at the bottom of Burr's schemes. The Western World, published at Frankfort, Kentucky, openly denounced him as a traitor, plotting the disruption of the Union. The celebrated Joe Daviess, a rank Federalist, was then attorney of the United States for the district of Kentucky. On the 3d of November, during the session of the United States court at Frankfort, he took everybody by surprise by making a motion that Aaron Burr be required to attend the court, to answer a charge to be brought against him of engaging in an enterprise against a power with which the United States were at peace. The motion was regarded by most persons as a mere manifestation of party spite,

and a large majority of the people took sides with Burr, indignantly denouncing the district attorney. Judge Innis, after deliberating on the motion two days, overruled it. The following account of what followed is taken from Collins's History of Kentucky:

"Colonel Burr was in Lexington at the time, and was informed of the motion made by Daviess in an incredibly short space of time after it was made. He entered the court-house shortly after Innis had overruled the motion, and addressed the judge with a grave and calm dignity of manner which increased, if possible, the general prepossession in his favor. He spoke of the late motion as one that had greatly surprised him; insinuated that Daviess had reason to believe that he was absent upon business of a private and pressing nature, which, it was well known, required his immediate attention; that the judge had treated the application as it deserved; but, as it might be renewed by the attorney, in his absence, he preferred that the judge should entertain the motion now, and he had voluntarily appeared, in order to give the gentleman an opportunity of proving his charge. Nowise disconcerted by the lofty tranquility of Burr's manner, than which nothing could be more imposing, Daviess promptly accepted the challenge, and declared himself ready to proceed, as soon as he could procure the attendance of his witnesses. After consulting with the marshal, Daviess announced his opinion that his witnesses could attend on the ensuing Wednesday; and, with the concurrence of Burr, that day was fixed upon by the court for the investigation. Burr awaited the day with an easy tranquility which seemed to fear no danger, and on Wednesday the court-house was crowded to suffocation. Daviess, upon counting his witnesses, discovered that Davis Floyd, one of the most important, was absent, and with great reluctance asked a postponement of the case. The judge instantly discharged the grand jury. Colonel Burr then appeared at the bar, accompanied by his counsel, Henry Clay and Colonel Allen. Colonel Burr arose in court, expressed his regret that the grand jury had been discharged, and inquired the reason. Colonel Daviess replied, and added that Floyd was then in Indiana, attending a session of the territorial legislature. Burr calmly desired that the cause of the postponement might be entered upon the record, as well as the reason why Floyd did not attend. He then, with great self-possession, and with an air of candor difficult to be resisted, addressed the court and crowded audience upon the subject of the accusation. His style was without ornament, passion, or fervor; but the spell of a great mind, and daring, but calm spirit, was felt with singular power by all who heard him. He hoped the good people of Kentucky would dismiss their apprehensions of danger from him, if any such really existed. There was really no ground for them, however zealously the attorney might strive to awaken them. He was engaged in no project inimical to the peace or tranquility of the country, as they would certainly learn whenever the attorney should be ready, which he greatly apprehended would never be. In the mean time, although private business urgently demanded his presence elsewhere, he felt compelled to give the attorney one more opportunity of proving his charge, and would patiently await another attack. Upon the 25th of November, Colonel Daviess informed the court that Floyd would attend on the 2d of December following and another grand jury was summoned to attend on that day. Colonel Burr came into court attended by the same counsel as on the former occasion, and coolly awaited the expected attack. Daviess, with evident chagrin, again announced that he was not ready to proceed; that John Adair had been summoned, and was not in attendance, and that his testimony was indispensable to the prosecution. He again asked a postponement of the case for a few days, and that the grand jury should be kept impanneled until he could compel the attendance of Adair by attachment. Burr, on the present occasion, remained silent, and entirely unmoved by anything that occurred. Not so his counsel. A most animated and impassioned debate sprung up, intermingled with sharp and flashing personalities between Clay and Daviess. Never did two more illustrious orators encounter each other in debate. The enormous mass which crowded to suffocation the floor, the galleries, the windows, the platform of the judge, remained still and breathless for hours, while these renowned and immortal champions, stimulated by mutual rivalry, and each glowing in the ardent conviction of right, encountered each other in splendid intellectual combat. Clay had the sympathies of the audience on his side, and was the leader of the popular party in Kentucky. Daviess was a Federalist, and was regarded as persecuting an innocent and unfortunate man from motives of political hate. But he was buoyed up by the full conviction of Burr's guilt, and the delusion of the people on the subject, and the very infatuation which he beheld around him, and the smiling serenity of the traitor who sat before him, stirred his great spirit to one of his most brilliant efforts. All, however, was in vain. Judge Innis refused to retain the grand jury, unless some business was brought before them; and Daviess, in order to gain time, sent up to them an indictment against John Adair, which was pronounced by the jury 'not a true bill.' The hour being late, Daviess then moved for an attachment to compel the presence of Adair, which was resisted by Burr's counsel, and refused by the court, on the ground that Adair was not in contempt until the day had expired. On the motion of Daviess, the court then adjourned to the following day. When the court resumed its sitting on the following morning, Daviess moved to be permitted to attend the grand jury in their room. This was resisted by Burr's counsel as novel and unprecedented, and refused by the court. The grand jury then retired, witnesses were sworn and sent up to them, and on the 5th of the month they returned, as Daviess had expected, 'not a true bill.' In addition to this, the grand jury returned into court a written declaration, signed by the whole of them, in which, from all the evidence before them, they completely exonerated Burr from any design inimical to the peace or well-being of the country. Colonel Allen instantly moved the court that a copy of the report of the grand jury should be taken and inserted in the newspapers, which was granted. The popular current ran with great strength in his favor, and the United States attorney, for the time, was overwhelmed with obloquy. Before Mr. Clay took any active part as the counsel of Burr, he required of him an explicit disavowal, upon his honor, that he was engaged in any design contrary to the laws and peace of the country. The pledge was promptly given by Burr in language the most comprehensive and particular."

In the latter part of July, before leaving Philadelphia, Burr had despatched Samuel Swartwout to the Louisiana country, with a packet of letters, and a communication in cipher to General Wilkinson. He was accompanied on his journey by a young man named Ogden, a nephew of Jonathan Dayton, of New Jersey, from whom he also bore a letter in cipher to Wilkinson. The following is a copy of the ciphered letter from Burr, borne by Swartwout, as interpreted by General Wilkinson:

"Yours postmarked 13th May is received. I (Aaron Burr) have obtained funds, and have actually commenced the enterprise. Detachments from different points and under different pretences will rendezvous on the Ohio, 1st November—everything internal and external favors views—protection of England is secured. T——— (Truxton) is gone to Jamaica to arrange with the admiral on that station, and will meet at the Mississippi———England———Navy of the United States are ready to join, and final orders are given to my friends and followers—it will be a host of choice spirits. Wilkinson shall be second

to Burr only—Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward 1st August, never to return: with him go his daughter—the husband will follow in October with a corps of worthies. Send forthwith an intelligent and confidential friend with whom Burr may confer. He shall return immediately with further interesting details—this is essential to concert and harmony of movement. Send a list of all persons known to Wilkinson west of the mountains, who could be useful, with a note delineating their characters. By your messenger send me four or five of the commissions of your officers, which you can borrow under any pretence you please. They shall be returned faithfully. Already are orders to the contractor given to forward six months' provisions to points Wilkinson may name—this shall not be used until the last moment, and then under proper injunctions: the project is brought to the point so long desired: Burr guarantees the result with his life and honor—the lives, the honor and fortunes of hundreds, the best blood of our country. Burr's plan of operations is to move down rapidly from the falls on the 15th of November, with the first five hundred or one thousand men, in light boats now constructing for that purpose—to be at Natchez between the 5th and 15th of December—then to meet Wilkinson—then to determine whether it will be expedient in the first instance to seize on or pass by Baton Rouge. On receipt of this send Burr an answer—draw on Burr for all expenses, &c. The people of the country to which we are going are prepared to receive us—their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The gods invite to glory and fortune—it remains to be seen whether we deserve the boon. The bearer of this goes express to you—he will hand a formal letter of introduction to you from Burr, a copy of which is hereunto subjoined. He is a man of inviolable honor and perfect discretion—formed to execute rather than project—capable of relating facts with fidelity, and incapable of relating them otherwise. He is thoroughly informed of the plans and intentions of Burr, and will disclose to you as far as you inquire, and no further—he has imbibed a reverence for your character, and may be embarrassed in your presence—put him at ease and he will satisfy you—29th July."

Burr had entrusted to Dr. Bollman another copy of the same letter, in cipher, to be delivered to Wilkinson in New Orleans. After a journey of nine weeks Swartwout reached the headquarters of General Wilkinson, at Nachitoches, his companion having previously separated from him and pursued his journey to New Orleans. Swartwout inquired for Colonel Cushing, who was second in command, and was at Wilkinson's headquarters. To Colonel Cushing he presented a letter from Jonathan Dayton, introducing Ogden to his acquaintance, but mentioning Swartwout as Ogden's traveling companion. Colonel Cushing introduced Swartwout to Wilkinson as the friend of Dayton. Swartwout observed that Mr. Ogden and himself, being on their way to New Orleans, had learned at Fort Adams that our troops and some militia were assembling at Nachitoches, whence they were to march against the Spanish army, then in the neighborhood, and that the object of his visit was to act with them as a volunteer. While Colonel Cushing was temporarily absent from the room, Swartwout delivered to Wilkinson the packet of which he was the bearer, containing the ciphered letter hereinbefore mentioned, and a letter from Jonathan Dayton, (also in cipher,) of which the following is a copy: "Dear Sir: It is now well ascertained that you are to be displaced next session. Jefferson will affect to yield reluctantly to public sentiment, but yield he will. Prepare yourself, therefore, for it. You know the rest. You are not a man to despair, or even despond, especially when such prospects offer in another quarter. Are you ready? Are your numerous associates ready? Wealth and glory, Louisiana and Mexico! I shall have time to receive a letter from you before I set out for Ohio. Ohio. Address me here, and another in Cincinnati. Receive and treat my nephew (Ogden) affectionately, as you would receive your friend, Dayton."

Wilkinson, according to his own account, on reading these letters, immediately determined to draw from Swartwout all the information he could in relation to Burr's plans. Swartwout remained ten days at headquarters, in the course of which time Wilkinson testifies that he obtained from him the following statements: That he had been despatched by Col. Burr from Philadelphia; that he had passed through the states of Ohio and Kentucky, had proceeded from Louisville to St. Louis, where he expected to find him, (Wilkinson,) but learning that he had descended the river, had procured a skiff, hired hands, and followed him down to Fort Adams, and thence to Nachitoches, under a pretence of a disposition to take part in the campaign against the Spaniards, then depending. "That Colonel Burr, with the support of a powerful association extending from New York to New Orleans, was levying an armed body of seven thousand men, with a view to carry an expedition against the Mexican provinces, and five hundred men under Colonel Swartwout and a Colonel or Major Tyler were to descend the Alleghany, for whose accommodation light boats had been built and were ready." In answer to an inquiry by General Wilkinson, he said: "This territory would be revolutionized, where the people were ready to join them, and there would be some seizing, he supposed, at New Orleans—that they expected to be ready to march about the first of February, and intended to land at Vera Cruz, and march from thence to Mexico." Wilkinson remarked that there were several millions of dollars in bank in New Orleans, to which Swartwout replied, "We know it full well." Wilkinson then observed, they certainly did not mean to violate private property; to which S. replied, "They merely meant to borrow, and would return it; that they must equip themselves in New Orleans; that they expected naval protection from Great Britain—that Captain —— and the officers of our navy were so disgusted with our government that they were ready to join—that similar disgust prevailed throughout the Western country, where the people were zealous in favor of the enterprise, and that pilot-built schooners were contracted for along our Southern coast—that he had been accompanied from the falls of the Ohio to Kaskaskias, and from thence to Fort Adams, by a Mr. Ogden, who had proceeded to New Orleans, with letters from Col. Burr to his friends there."

Whether Wilkinson, up to this time, had been as ignorant of Burr's plans as he subsequently professed to have been, and was moved by patriotic motives only to oppose them, or whether he had made up his mind that it would be more profitable to himself to betray his confederate than to betray his country, is a question about which those who examine the evidence on the subject will, perhaps, always differ in opinion. It is difficult to believe, however, that Burr could have been so fatally stupid as to send such a communication to a man whom he had not the strongest reason to regard as fully committed to his projects. However this may be, Wilkinson soon determined to take active measures for opposing and breaking up the expedition. Having taken this resolution, he hastened to make such terms with the Spanish commander on the Sabine as would obviate the hostilities which had been expected, and justify him in transferring the principal portion of his troops to the Mississippi. He sent forward an officer to put the city of New Orleans in the best possible condition for defence, and he sent a special messenger to Washington with despatches for the president. The messenger reached Washington on the 25th of November, and on the 27th President Jefferson

issued a proclamation, setting forth that unlawful enterprises were on foot in the Western states, having for their object a military expedition against the dominions of Spain; that for this purpose sundry citizens of the United States were fitting out and arming vessels in the Western waters, collecting provisions, arms, and military stores, and seducing honest and well meaning citizens, under various pretences, to participate in said criminal enterprises; warning all persons engaged therein to "withdraw from the same without delay," "as they will answer the same at their peril, and incur prosecution with all the rigors of the law;" and commanding all officers, civil and military, to use their utmost exertions to bring the offending persons to punishment. The name of Burr was not mentioned in the proclamation.

On the 25th of November Gen. Wilkinson arrived in New Orleans. Doctor Bollman (who had previously forwarded to him, at Nachitoches, the ciphered letter entrusted to his care) called upon him the next day after his arrival. They had some conversation about Burr's plans, Wilkinson permitting Bollman to remain under the impression that he was connected with them. On the 5th of January, 1807, Wilkinson called on Bollman, and (the mail having arrived the day before) inquired whether he had received any intelligence from Burr. Bollman replied that he had received a letter from him of the 30th of October, in which he gave assurances that he should be in Natchez with 2,000 men on the 20th of December, where he should wait until he heard from New Orleans; that he would be followed by 4,000 men more, and if he had chosen could have raised 12,000 as easily as 6,000, but did not think that number necessary. Wilkinson then threw off his disguise, and told Bollman he should certainly oppose Burr, if he came that way. On receiving this information, Wilkinson appears to have become greatly alarmed. At all events, he succeeded in getting up a prodigious excitement in New Orleans. Martial law was proclaimed; public meetings were held, and harangued by Wilkinson and by Governor Claiborn. Volunteer troops offered their services, new defences were erected, and a detachment of troops was stationed above the city, with orders to stop and overhaul every descending boat. A secret session of the legislature was held; Governor Claiborn issued a proclamation; the alarm spread, and proclamations were issued by the governors of neighboring territories. The Spanish authorities became equally alarmed, and began to strengthen the defences of Mexico. On affidavits made by Gen. Wilkinson, Swartwout, Bollman, Ogden, and General Adair were arrested and immediately shipped to Baltimore. Bollman and Swartwout, on reaching Baltimore, were, by orders of the president, brought to Washington. They were taken before the circuit court of the district of Columbia, and upon the affidavits of General Wilkinson and General Eaton, and a few other unimportant affidavits forwarded by Wilkinson from New Orleans, were committed for treason. The supreme court of the United States being then in session, an application was made to it for a writ of habeas corpus. After full argument of the question whether that court had the power to issue the writ of habeas corpus ad subjiciendum, in case of a commitment by a circuit court, the writ was granted. On the return of the writ by the marshal of the district, showing that he detained the prisoners by virtue of a commitment issued by said circuit court, Mr. Lee, counsel for the prisoners, moved their discharge. As all the evidence before the circuit court was in the form of affidavits, the record brought up all the facts. The case was elaborately argued for three days, by Cæsar Rodney, attorney general of the United States, and Walter Jones, United States attorney for the District of Columbia, on behalf of the United States, and by Charles Lee, F. S. Key, and Harper, for the prisoners. Chief Justice Marshall then delivered the opinion of the court which was so often referred to on the trial of Col. Burr, and which is appended hereto. The prisoners were discharged.

To go back with our narrative: In the latter part of October, 1806, the president sent a confidential agent, named Graham, to the West, "with instructions to investigate the plots going on, to enter into conferences with the governors, and all other officers, civil and military, and with their aid to do on the spot whatever should be necessary to discover the designs of the conspirators, arrest their means, bring their persons to punishment, and to call out the force of the country to suppress any unlawful enterprise in which it should be found they were engaged." Graham arrived at Marietta about the middle of November. He was at this time chief clerk of the state department, but had previously been secretary of the territory of Orleans. Blennerhassett had received the impression from Burr that Graham was one of the friends in New Orleans upon whom he relied, and when he met him at Marietta, believing him to be a confederate, disclosed to him important facts touching Burr's plans and proceedings. Graham finally undeceived him as to his own relations to Burr, and believing him to be the victim of a cruel deception, endeavored to dissuade him from further connection with the enterprise, but all to no effect. The situation of things at Marietta and the island having been asertained by Graham, he proceeded to Chillicothe, where the legislature of Ohio was then sitting, and had an interview with the governor (Tiffin). The governor communicated with the legislature, and that body, sitting with closed doors, promptly passed an act to suppress the expedition. Under the authority of this act, the governor ordered out the militia of the vicinity, under the command of the major general of the district, to whom he gave instructions to seize the boats which had been built on the Muskingum, the stores which had been collected at Marietta, and all boats of a suspicious character descending the river.

Comfort Tyler and Ireal Smith, with four boats and about thirty men, arrived at the island, from Beaver, Pennsylvania, on the evening of the 7th of December. Of the fifteen boats contracted for on the Muskingum, eleven had been completed, and were to be delivered on the Ohio on the 10th of December. On the 9th, however, they were seized by the militia, with the provisions which had been purchased and stored at Marietta. Nearly all the recruits who had been engaged in that vicinity had abandoned the expedition. They had agreed to join it under the belief that there was nothing unlawful, or at least nothing criminal in it. Although they had been given vaguely to understand that they might be required to fight the Spaniards, either in Mexico or nearer home, they had been led to believe that this would only be required of them in case of a war with Spain, then confidently anticipated by them. The impression had been made upon their minds that the expedition, if not having the express sanction of the general government, was at least connived at by the administration. The visit of Graham, the objects of which soon began to leak out, rumors of the secret proceedings of the Ohio legislature, and of the president's proclamation, in advance of its arrival, had opened their eyes. They had no idea of adhering to a cause thus denounced as unlawful and criminal. Public excitement against the adventurers began to run high on both sides of the river, and Blennerhassett, finding himself abandoned by nearly all of those whom he had enlisted in the enterprise, began to despond and to waver, and would probably have abandoned it himself, but for the influence of his wife, who was a woman of superior energy. She met all the difficulties of the situation with a spirit that never quailed, and a resolution that never relaxed.

About the time of Tyler's arrival, the Wood county (Virginia) militia were being assembled to oppose the expedition. On the same day that the boats on the Muskingum were seized, the

party on the island received information that the Wood county militia was to make a descent upon them the following day. Hurried preparations were therefore made for leaving that night. It was arranged that Mrs. Blennerhassett, with her children, should remain on the island until she could obtain from Marietta a boat which had been fitted up for the special accommodation of the family. She was then to follow, with the personal effects which had been left in her care. Accordingly, a few trunks and boxes were carried on board the boats, and about midnight the little flotilla, consisting of the four boats brought down by Tyler, and one small boat added by Blennerhassett, cut loose from the shore and floated off. The next morning the militia arrived on the island, to find that the game had flown. The colonel left a small party in charge, and marched across the great "bend" of the river between the island and the mouth of the Great Kanawha, to intercept the boats at that point. The distance across, by land, being but little more than half the distance round by the river, this was an easy task. He stationed a company on the bank of the river, with strict injunctions to watch all night; but King Alcohol got the better of duty and discipline, the watchers all got gloriously drunk, and the flotilla glided by them in the darkness of the night, and pursued its voyage unchallenged. With like impunity it passed safely all the towns and villages below, although orders had been sent to all of them to arrest its progress. During the absence of the colonel on this expedition, a boat from Pittsburg touched at the mouth of the Little Kanawha, about two miles above the island, having on board fourteen young gentlemen, on their way to join the expedition among whom were Morgan Neville and William Robinson, Jr., names which have since become widely and honorably known. They were all arrested by the militia, as accomplices of Burr, and taken to the island. Three Wood county justices were sent for, and an examination was had before them, in which the prisoners, all young gentlemen of education, outwitted their accusers and the country justices, and were discharged. While this examination was going on, (Mrs. Blennerhassett being absent, at Marietta, in a fruitless endeavor to get possession of the "family boat,") a wild spirit of license and riot broke out among the militiamen at the mansion house. "First of all, the men broke into the wine-cellar, and there drank themselves into vandals. Then they ranged the house, destroying or disfiguring wherever they went; firing rifle balls through painted ceilings, tearing down costly drapery, and dashing to pieces mirrors and vases. (In 1811, the house, being built of wood, was entirely consumed by an accidental fire.) Then they rushed, like so many savages, about the grounds, destroying the shrubbery, and breaking down trellises and arbors. The ornamental fences were torn away, piecemeal, to make fires for the sentinels at night." Parton. In the midst of this riot and destruction, Mrs Blennerhassett returned, without her "family boat," the same having been denied her by the authorities. In this dilemma, the party of young men who had just been released, and were preparing to resume their journey, offered her an apartment in their boat, which she accepted, and, on the 17th of December, left her island home in possession of the rioters who had laid it desolate.

On the acquittal of Burr by the grand jury, at Frankfort, he hastened to Nashville. Graham also hastened to the same place, after rousing Ohio and Kentucky, and learning that boats for the expedition were being fitted out on the Cumberland. "An express with the president's proclamation reached the governor of Tennessee on the 19th, and preparations were immediately made for the seizure of the boats and the arrest of the men. But timely information was conveyed to Burr, and on the 22d, with two boats and a few men, armed only according to the custom of the country, he dropped down the Cumberland. The next day Graham arrived at Nashville, to find the 'conspirators' beyond his reach." At the falls of the Ohio, the party under Tyler was joined by Floyd, with three boats, and a number of men. At the mouth of the Cumberland all the different detachments met—eleven boats, with about sixty men. Here the men were drawn up in a circle on the bank of the river, and Colonel Burr addressed them briefly. He told them he had intended here to explain his designs, or his plans, but circumstances had rendered it necessary to defer doing so for the present. Here, also, Burr purchased a trading boat of one Ellis, with its cargo, consisting of "bar-iron, hoes, mattocks, and a few barrels of apples."

The principal incidents of the expedition from this point until it was broken up are thus briefly sketched by Parton: "Ignorant of Wilkinson's treachery, away went Burr with his flotilla down the Ohio, down the Mississippi, stopping boldly at forts on the banks, asking and receiving favors, and occasionally picking up a recruit or two. He wore a smiling face, and reassured every one by the cheerful serenity of his bearing. It was not until he reached Bayou Pierre, about thirty miles above Natchez, that he heard of the course which had been pursued by Wilkinson, and of the prodigious excitement which his measures had created in the lower country. There, too, he read the proclamation of the governor of Mississippi, charging him and his followers with being conspirators against their country, and calling on the officers of the government to renew their oath of fidelity to the United States, and give their best efforts towards crushing the nefarious plot. Whatever his feelings may have been at the discovery, Col. Burr never for one moment lost his self-possession, but proceeded on the very instant to grapple with this new complication of difficulties. He wrote a public letter denying the truth of the governor's allegations, and asserting that he had no objects but such as were lawful and honorable. 'If,' said he, 'the alarm which has been excited should not be appeased by this declaration, I invite my fellow citizens to visit me at this place, and to receive from me, in person, such further explanations as may be necessary to their satisfaction, presuming that when my views are understood, they will receive the countenance of all good men.' This letter he requested might be read to the militia, who were assembled for his arrest. But the excitement had risen to a height which could not be allayed by fine words. The news of Burr's arrival at Bayou Pierre reached Natchez on the 14th of January, when the whole militia force of the neighborhood, who had been for weeks expecting the summons, seized their arms and hurried to the rendezvous. In a few hours two hundred and seventy-five men were ready to embark. All one cold and dismal night they worked their way up the river to a point near where the dread flotilla was moored. There disembarking, they were joined by a troop of cavalry, and were soon in readiness to march against the foe. It was thought best, however, first to ascertain if Col. Burr was disposed to resist their formidable array, or would surrender peacefully to the lawful authorities. For this purpose, George Poindexter, the attorney general of the territory, and Major Shields, of the militia, visited the flotilla, and had an interview with its commander. A letter from the acting governor was handed to Burr, who read it, and spoke with some contempt of the public alarm to which it alluded 'As to any projects,' said he, 'which may have been formed between General Wilkinson and myself, heretofore, they are now completely frustrated by the perfidious conduct of Wilkinson, and the world must pronounce him a perfidious villain. If I am sacrificed, my portfolio will prove him to be such.' He declared that so far was he from having any design hostile to the United States, he had intended to meet the governor at the general muster at Bayou Pierre. Upon the attorney general's urging him to surrender, he demanded an interview with the

governor. After some further colloquy, the parties separated, Burr agreeing to meet Governor Mead on the following day at a designated house near by. The governor came at the time appointed, and, after meeting Burr, demanded his unconditional surrender, and that of his whole party, to the civil authorities, and gave him fifteen minutes to decide. Resistance being out of the question, Burr only requested that if Wilkinson should attempt to get possession of his person by a military force, it might be resisted. He then surrendered, and was conducted to the neighboring town of Washington, where two citizens became sureties for his appearance at court on the following day, in the sum of ten thousand dollars. His men remained in the vicinity of the flotilla. A court of justice was to Aaron Burr what his native heath was to MacGregor. On that field he was invincible. It was only after warm discussions that it was concluded that he could be lawfully tried in the territory. The next step was to get him indicted for some offence. A grand jury was impanneled, and witnesses sent to them. Imagine the feelings of the attorney general when he read the result of all his toils in the following presentments:

" 'The grand jury of the Mississippi territory, on a due investigation of the evidence brought before them, are of opinion that Aaron Burr has not been guilty of any crime or misdemeanor against the laws of the United States or of this territory, or given any just cause of alarm or inquietude to the good people of the same. The grand jurors present, as a grievance, the late military expedition, unnecessarily, as they conceive, fitted out against the person and property of the said Aaron Burr, when no resistance had been made to the civil authorities. The grand jurors also present, as a grievance destructive of personal liberty, the late military arrests, made without warrant, and, as they conceive, without other lawful authority; and they do sincerely regret that so much cause has been given to the enemies of our glorious constitution to rejoice at such measures being adopted, in a neighboring territory, as, if sanctioned by the executive of our country, must sap the vitals of our political existence, and crumble this glorious fabric in the dust.'

"It was of no avail for the attorney general to declare that such presentments were a disgrace and an outrage, nor for the judge to pronounce them impertinent and useless. The people were with the prisoner. Nothing approaching or resembling a breach of the law had been committed by him; and, in short, the grand jury had made up its mind, and would not recede from its position. His companions were at perfect liberty. A Natchez newspaper of the time, commenting on this attempt to indict, says that 'Burr and his men were caressed by a number of the wealthy merchants and planters of Adams county; several balls were given to them as marks of respect and confidence.' Also, 'that the proceedings against the accused were more like a mock trial than a criminal prosecution, and that, during the trial, Judge Bruin appeared more like his advocate than his impartial judge.' All of which is extremely probable. Having, as he thought, fully complied with his recognizances, Colonel Burr demanded a legal release from the court. This was refused. Learning that farther and more arbitrary proceedings were intended against him by the government officials, and perceiving the utter hopelessness of attempting to proceed, and that his presence must embarrass, but could not assist his band, he resolved to fly. Disguising himself in the dress of a boatman, he crossed to the eastern side of the Mississippi, and disappeared in the wilderness. At the meeting of the court on the following morning, he, of course, did not present himself, and there was a great show of surprise. The governor, who, it was said, had connived at his escape, promptly offered two thousand dollars for his arrest. Two or three days passed without any tidings of the fugitive, though the surrounding country was scoured by parties in search. At length, a colored boy was seen, riding one of Burr's horses, and wearing an overcoat that had been his. He was seized forthwith, and thoroughly searched. Sewed in the cape of the coat was found a note addressed to 'C. T. and D. F.,' (Comfort Tyler and Davis Floyd,) which read as follows: 'If you are yet together, keep so, and I will join you tomorrow night. In the mean while, put all your arms in perfect order. Ask no questions of the bearer, but tell him all you may think I wish to know. He does not know that this is from me, nor where I am.' In consequence of this discovery, Burr's men were arrested and placed under guard, and kept as prisoners until the alarm was over. But no further trace of the chief was seen in the neighborhood. He had left the vicinity, and was making his way through a dismal wilderness, towards the port of Pensacola, where lay a British man-of-war, in which he hoped to find a temporary refuge."

Blennerhassett, after his discharge from custody, located his family in Natchez, and, in June following, left that place on horseback to return to his island, and look after his affairs in that vicinity. When he reached Lexington, Kentucky, he was there arrested for treason, and conveyed thence, under a guard, to Richmond. "Others of Burr's confederates, who had the means, returned to the Eastern states, and forgot the dream of glory in the pursuit of civil life. A large number of the band remained in the territory, supplying it, as the attorney general afterwards remarked, with a superfluity of school-masters, music-masters and dancing-masters, for many years. The narrative of these events, published in all the newspapers of the land, drew public attention to the southwestern territories of the Union, and attracted (says Dr. Monette, the historian of the Valley of the Mississippi) thousands of emigrants thither from the Atlantic and Western states."

The Counsel Engaged in the Trial of Colonel Burr.

Seldom has such an array of eminent counsel appeared together in any one case as participated in the great trial which constitutes the subject-matter of this volume.

The leader of the prosecution was George Hay, attorney of the United States for the district of Virginia; a man of fair ability, but hardly equal to the task imposed upon him. He was the son-in-law of Colonel Monroe (afterwards president of the United States), and a zealous Democrat of the Jefferson school. He prosecuted the case with zeal, it is true, but the charge that he displayed an "intemperate zeal" (sometimes plainly intimated by counsel on the other side) does not appear to be justified by the reports of the trial.

Mr. Hay was ably assisted by William Wirt, then thirty-five years of age, and just rising into eminence. No other lawyer in the case, on either side, so commanded the attention and won the admiration of the throng of spectators who attended the trial, as he. While his handsome person, graceful manners, pleasing wit, and brilliant declamation invariably captivated the bystanders, there was always solid matter enough in his arguments to attract the heaviest guns of his adversaries. It is said that he engaged in the prosecution at the personal request of President Jefferson.

The prosecution was also assisted by Alexander MacRae, "the son of a Scotch parson, who was distinguished in the Revolutionary war, first, for being himself a hot Tory, and, secondly, for being the father of seven sons, all of whom were ardent Whigs." He is described by Parton as "a lawyer of respectable ability and a sharp tongue—sharp from ill-nature more than wit." He was neither pleasing nor powerful in argument. At the time of the trial he was lieutenant governor of Virginia.

On the part of the defence, the real leader and principal tactitian was Burr himself. "No step

was taken" (says Parton), "not a point conceded," without his express permission. He appeared in court attired with scrupulous neatness, in black, with powdered hair and queue. His manner was dignity itself—composed, polite, confident, impressive. He had the air of a man at perfect peace with himself, and simply intent on the business of the scene. It was observed that he never laughed at the jokes of counsel, which, at some stages of the trial, were numerous and good." He never lost his temper, and never, under any provocation, was betrayed into an offensive personal retort. He brought forward nearly every motion made on his side, and stated the grounds of it with remarkable brevity and clearness. He was equally happy in briefly summing up, at the close of a debate, and presenting in perspicuous order the strong points brought forward in the more elaborate arguments of his counsel. He never, in the whole course of the trial, indulged in an argument of any considerable length. Deep, abstruse, metaphysical reasoning was not his fort. He left all that to more competent hands.

Edmund Randolph, in point of age, experience, and position, deserves to be mentioned first, of the counsel who assisted in the defense. He was a dignified Virginia gentleman of the old school. He had been a member of the continental congress during the Revolution, attorney general and secretary of state under Washington, and governor and attorney general of his own state. He was a man of much learning and fair ability; but his powers were then rather on the wane.

Second among Burr's counsel should be ranked John Wickham, of Richmond, in whom was combined, more than in any one else engaged in this trial, on either side, all the elements which constitute the able and accomplished barrister. He was an Englishman by birth, and "had learning, logic, wit, sarcasm, eloquence, a fine presence, and persuasive manner."

Next should be mentioned Luther Martin, of Maryland, "who (says Parton), in the single particular of legal learning, was the first lawyer of his day. His memory was as wonderful as his reading, so that his acquirements were at instantaneous command. Burr had become acquainted with him at Washington three years before, during the trial of Judge Chase, in whose defence he greatly distinguished himself." He was coarse in his manners, ungrammatical in his language, verbose and addicted to repetitions in his style, and utterly regardless of order in the arrangement of his arguments. These defects were aggravated by an unfortunate impediment in his speech, arising from an excessive flow of saliva. Withal, he was "a mighty drinker," and though able to carry an incredible cargo of brandy, often exhibited unmistakable signs of being over-laden. Blennerhassett says of him, in his journal: "Fancy has been as much denied to his mind as grace to his person or habits. These are gross and incapable of restraint, even on the most solemn public occasions. Hence his invectives are rather coarse than pointed, his eulogiums more fulsome than pathetic." Nevertheless, he was a great and powerful man, possessing many excellent qualities of the heart as well as of the head. He entered upon the defence of Colonel Burr with all the zeal that the warmest personal friendship for his client, and intense political enmity to Jefferson and his administration, could inspire in his ardent and passionate nature.

Benjamin Botts, father of John Minor Botts, of the present generation, was another distinguished lawyer who took a prominent part in conducting the defence. He was the youngest of Burr's counsel; a ready, bold, dashing man, who always charged his adversary on the "double quick," and generally dealt effective blows. He had great power of caricaturing the arguments of his opponent, and exposing them in a ludicrous light.

Charles Lee appeared, also, as counsel for Burr at an advanced stage of the trial. He was one of the most distinguished lawyers of Virginia, had at one time been attorney general of the United States, and had been counsel for Bollman and Swartwout, before the supreme court. He did not take a very active part in the trial, but the few brief addresses he made to the court were models of terse, vigorous, and compact argument.

Last, and least, was "a certain Jack Baker," who has been described as "a lame man, with a crutch; a merry fellow with plenty of 'horse wit' and an infectious laugh; no speaker and no lawyer, but the best of good fellows." He just took part enough in the trial to get his name once or twice in the reports, and thereby save it from oblivion.

It is stated in Blennerhassett's journal that all these distinguished lawyers tendered their services gratuitously to Colonel Burr. Mr. Wickham and Mr. Botts made a similar tender of their services to Blennerhassett.

Case No. 14,692b.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 22.]

Circuit Court, D. Virginia. May 26, 1807.

CRIMES—COMMITMENT—POWER OF COURT.

[1. The circuit court of the United States, sitting as a court, possesses the power to commit any person charged with an offense against the United States.]

[2. The court should hear a motion to commit a person for a crime notwithstanding the grand jury is in session ready to receive an indictment, and the prosecutor has evidence to support it, and the result of the motion may be the publication of evidence unfavorable to justice and the right decision of the case.]

[Cited in Erwin v. U. S., 37 Fed. 487.]

[At law. Motion to commit Aaron Burr on a charge of high treason in levying war against the United States. Pending the hearing by the grand jury of charges against Burr for high treason, Mr. Hay, Dist. Atty., gave notice in open court of his intention to submit a motion to commit Burr on the charge of high treason. On the previous examination (Case No. 14,692a), he said there was no evidence of an overt act, and he was committed for a misdemeanor only. The evidence is different now. The grand jury, being present, were requested to withdraw.]

Mr. Hay then stated more at large the grounds of his application, and moved to commit Mr. Burr on a charge of high treason against the United States, on the evidence formerly introduced, and on additional testimony to be now brought forward. In answer to a question from Mr. Wickham, he stated that when the witnesses were present he intended to examine them viva voce; but where they were absent to make use of their affidavits, regularly taken and certified.

This motion was discussed at length, throughout the day, by Messrs. Botts, Wick-

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

ham, Randolph and Burr, in opposition, and Messrs. Hay and Wirt in support of it.

By some of Mr. Burr's counsel the power of the court to commit after the grand jury had been empannelled was called in question, while others admitted the power, but denied the expediency of exercising it. It was urged that the office of the grand jury was to perform the very duty which the court, by this motion, was called on to perform. It was denied that any precedent could be found, either English or American, for the proposed proceeding. It was argued that a public examination of the evidence the district attorney might see fit to bring forward against Col. Burr would have a tendency to increase the prejudice already existing in the public mind against him, and in spite of all precautions this testimony would reach the ears of the grand jury. Col. Burr, it was said, having appeared pursuant to his recognizance, and being ready to answer the charges against him, ought rather to be discharged therefrom than committed, if the government was not ready to proceed against him before the grand jury. The proposed proceeding was denounced as oppressive in its effects, whether so intended or not. The acts of the government towards Col. Burr, in seizing and destroying his property; in his arrest and conveyance to Richmond under a military guard, after his case had been submitted to a grand jury and no bill found; after he had been tried and acquitted, were characterized as illegal and oppressive. As to Gen. Wilkinson, it was asked why he was not present, if his testimony was so important?

In support of the motion, it was argued that the general power of the court to commit being conceded, it was incumbent on the other side to produce precedents showing that this power ceased when a grand jury was empannelled, if they so contended. The course of the government towards Col. Burr was defended with zeal, and pronounced moderate and humane. Gen. Wilkinson, it was said, was supposed to be on the way from New Orleans, but there had not been time for him to come, on a reasonable calculation. It was well known to the accused that he would be put on his trial for high treason should Gen. Wilkinson arrive. He might know of his arrival or landing as soon as the counsel for the prosecution, and would have it in his power to effect an escape by merely paying his recognizance.

At the conclusion of the argument, which was closed by Mr. Burr, the court adjourned.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice, delivered the following opinion:

In considering the question which was argued yesterday, it appears to be necessary to decide: 1st. Whether the court, sitting as a court, possesses the power to commit any person charged with an offence against the United States. 2d. If this power be possessed, whether circumstances exist in this case which ought to restrain its exercise.

The first point was not made in the argument, and would, if decided against the attorney for the United States, only change the mode of proceeding. If a doubt can exist respecting it, that doubt arises from the omission in the laws of the United States to invest their courts, sitting as courts, with the power in question It is expressly given to every justice and judge, but not to a court. This objection was not made on the part of Colonel Burr, and is now mentioned, not because it is believed to present any intrinsic difficulty, but to show that it has been considered. This power is necessarily exercised by courts in discharge of their functions, and seems not to have been expressly given, because it is implied in the duties which a court must perform, and the judicial act contemplates it in this light. They have cognizance of all crimes against the United States; they are composed of the persons who can commit for those crimes; and it is obviously understood, by the legislature, that the judges may exercise collectively the power which they possess individually, so far as is necessary to enable them to retain a person charged with an offence in order to receive the judgment which may finally be rendered in his case. The court say, this is obviously understood by the legislature, because there is no clause expressly giving to the court the power to bail or to commit a person who appears in discharge of his recognizance, and against whom the attorney of the United States does not choose to proceed; and yet the thirty-third section of the judicial act evinces a clear understanding in the legislature that the power to take bail is in possession of the court. If a person shall appear in conformity with his recognizance, and the court passes away without taking any order respecting him, he is discharged. A new recognizance, therefore, or a commitment on the failure to enter into one, is in the nature of an original commitment, and this power has been uniformly exercised.

It is believed to be a correct position, that the power to commit for offences of which it has cognizance is exercised by every court of criminal jurisdiction, and that courts as well as individual magistrates are conservators of the peace. Were it otherwise, the consequence would only be that it would become the duty of the judge to descend from the bench, and, in his character as an individual magistrate, to do that which the court is asked to do. If the court possesses the power, it is certainly its duty to hear the motion which has been made on the part of the United States; for, in cases of the character of that under consideration, its duty and its power are co-extensive with each other. It was observed when the motion

was made, and the observation may now be repeated, that the arguments urged on the part of the accused rather prove the motion on the part of the United States unnecessary, or that inconveniencies may arise from it, than the want of a legal right to make it. The first is, that the grand jury being now in session ready to receive an indictment, the attorney for the United States ought to proceed by bill instead of applying to the court, since the only purpose of a commitment is to bring the accused before a grand jury. This statement contains an intrinsic error which destroys its operation. The commitment is not made for the sole purpose of bringing the accused before a grand jury; it is made for the purpose of subjecting him personally to the judgment of the law, and the grand jury is only the first step towards that judgment. If, as has been argued, the commitment was simply to detain the person until a grand jury could be obtained, then its operation would cease on the assembling of a grand jury; but such is not the fact. The order of commitment retains its force while the jury is in session, and if the prosecutor does not proceed, the court is accustomed to retain a prisoner in confinement, or to renew his recognizance to a subsequent term.

The arguments drawn from the general policy of our laws; from the attention which should be bestowed on prosecutions, instituted by special order of the executive; from the peculiar inconveniencies and hardships of this particular case; from the improper effects which inevitably result from this examination, are some of them subjects for the consideration of those who make the motion, rather than of the court; and others go to the circumspection with which the testimony in support of the motion ought to be weighed, rather than to the duty of hearing it.

It has been said that Colonel Burr already stands charged with treason, and that, therefore, a motion to commit him for the same offence is improper. But the fact is not so understood by the court. The application to charge him with treason was rejected by the judge to whom it was made, because the testimony offered in support of the charge did not furnish probable cause for the opinion that the crime had been committed. After this rejection, Colonel Burr stood, so far as respected his legal liability to have the charge repeated, in precisely the same situation as if it had never been made. He appears in court now as if the crime of treason had never before been alleged against him. That it has been alleged, that the government had had time to collect testimony for the establishment of the fact, that an immense crowd of witnesses are attending for the purpose, that the prosecutor in his own judgment has testimony to support the indictment, are circumstances which may have their influence on the motion for a commitment, or on a continuance, but which cannot deprive the attorney for the United States of the right to make his motion. If he was about to send up a bill to the grand jury, he might move that the person he designed to accuse should be ordered into custody, and it would be in the discretion of the court to grant or to reject the motion.

The court perceives and regrets that the result of this motion may be publications unfavorable to the justice and to the right decision of the case; but if this consequence is to be prevented, it must be by other means than by refusing to hear the motion. No man, feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice, especially in criminal prosecutions, can view, without extreme solicitude, any attempt which may be made to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him, but by public feelings, which may be and often are artificially excited against the innocent as well as the guilty. But the remedy, for a practice not less dangerous than it is criminal, is not to be obtained by suppressing motions which either party may have a legal right to make.

If it is the choice of the prosecutor on the part of the United States to proceed with this motion, it is the opinion of the court that he may open his testimony.

Case No. 14,692c.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 29.]

Circuit Court, D. Virginia. May 28, 1807.

CRIMES — PRELIMINARY HEARING — AFFIDAVITS — VENUE — AUTHENTICATION.

[1. Where a witness resides at a great distance, and there is no evidence that the materiality of his testimony was known to the prosecutors in time to have directed his attendance, the magistrate will act upon his affidavit.]

[Cited in Re Alexander, Case No. 162.]

[2. An affidavit whose certificate does not state the place where it is taken is not admissible as evidence.]

[3. A certificate stating that a person of the same name with the one who administered the oath is a magistrate, but not stating that the person who administered it is a magistrate, is an insufficient authentication. The court will not presume any fact to sustain it.]

[Cited in Woodworth v. Hall, Case No. 18,016.]

[At law. On examination of Aaron Burr for commitment for high treason in levying war against the United States.]

[Mr. Hay, Dist. Atty., offered the affidavit of Jacob Dunbaugh, which was] "taken on the fifteenth of April, 1807, before B. Cenas, a justice of the peace," to which was sub-

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

joined a certificate of Governor William C. C. Claiborne, dated "at New Orleans, the sixteenth of April, 1807," stating "that B. Cenas was a justice of the peace for the county of New Orleans." To the reading of this affidavit several objections were taken by the counsel for Colonel Burr, but those most relied on were the following: 1st, That an affidavit could, under no circumstances, be read, unless it were shown, that the witness could not be produced, and that the government had not had sufficient time to procure the attendance of Jacob Dunbaugh. 2dly, That though the governor of New Orleans had certified that B. Cenas was a justice of the peace, yet he had not said, that it was the same B. Cenas before whom that affidavit was taken. 3dly, That B. Cenas had not stated in the caption of his certificate, or elsewhere, that the affidavit was taken "at New Orleans," so as to show that he was acting within his jurisdiction. The argument on these points was continued to the adjournment of the court, who took time to consider the subject till the next day.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice. On the part of the United States, a paper, purporting to be an affidavit, has been offered in evidence, to the reading which two exceptions are taken: 1st, That an affidavit ought not to be admitted, where the personal attendance of the witness could have been obtained. 2dly, That this paper is not so authenticated as to entitle itself to be considered as an affidavit.

That a magistrate may commit upon affidavits has been decided in the supreme court of the United States, though not without hesitation. The presence of the witness, to be examined by the committing justice, confronted with the accused, is certainly to be desired, and ought to be obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An ex parte affidavit, shaped, perhaps, by the person pressing the prosecution, will always be viewed with some suspicion, and acted upon with some caution; but the court thought, it would be going too far to reject it altogether. If it was obvious that the attendance of the witness was easily attainable, but that he was intentionally kept out of the way, the question might be otherwise decided. But the particular case before the court does not appear to be of this description. The witness resides at a great distance; and there is no evidence that the materiality of his testimony was known to the prosecutors or to the executive, in time to have directed his attendance. It is true, that general instructions, which would apply to any individual, might have been sent, and the attendance of this, or any other material witness, obtained under those instructions; but it would be requiring too much, to say that the omission to do this ought to exclude an affidavit. This exception, therefore, will not prevail.

The second is, that the paper is not so authenticated as to be introduced as testimony on a question which concerns the liberty of a citizen. This objection is founded on two omissions in the certificate. The first is, that the place at which the affidavit was taken does not appear. The second, that the certificate of the governor does not state the person who administered the oath to be a magistrate; but goes no further than to say, that a person of that name was a magistrate. That, for aught appearing to the court, this oath may, or may not, in point of fact, have been legally administered, must be conceded. The place, where the oath was administered, not having been stated, it may have been administered where the magistrate had no jurisdiction, and yet the certificate be perfectly true. Of consequence, there is no evidence before the court, that the magistrate had power to administer the oath, and was acting in his judicial capacity.

The effect of testimony may often be doubtful, and courts must exercise their best judgment in the case; but of the verity of the paper there ought never to be a doubt. No paper writing ought to gain admittance into a court of justice as testimony, unless it possesses those solemnities which the law requires. Its authentication must not rest upon probability, but must be as complete as the nature of the case admits of: this is believed to be a clear legal principle. In conformity with it is, as the court conceives, the practice of England and of this country, as is attested by the books of forms; and no case is recollected, in which a contrary principle has been recognized. This principle is, in some degree, illustrated by the doctrine with respect to all courts of limited jurisdiction. Their proceedings are erroneous, if their jurisdiction be not conclusively shown. They derive no validity from the strongest probability that they had jurisdiction in the case: none, certainly, from the presumption, that being a court, an usurpation of jurisdiction will not be presumed. The reasoning applies in full force to the actings of a magistrate, whose jurisdiction is local. Thus, in the case of a warrant, it is expressly declared, that the place where it was made ought to appear. The attempt to remedy this defect, by comparing the date of the certificate given by the magistrate with that given by the governor, cannot succeed. The answer given at bar to this argument is conclusive: the certificate wants those circumstances which would make it testimony; and without them no part of it can be regarded.

The second objection is equally fatal. The governor has certified that a man of the same name with the person who has administered the oath is a magistrate, but not that the person who has administered it is a magistrate. It is too obvious to be controverted that there may be two or more persons of

the same name, and, consequently, to produce that certainty, which the case readily admits of, the certificate of the governor ought to have applied to the individual who administered the oath. The propriety of this certainty and precision in a certificate, which is to authenticate any affidavit to be introduced into a court of justice, is so generally admitted, that I do not recollect a single instance in which the principle has been departed from. It has been said, that it ought to appear that there are two persons of the same name, or the court will not presume such to be the fact. The court presumes nothing. It may or may not be the fact, and the court cannot presume that it is not. The argument proceeds upon the idea that an instrument is to be disproved by him who objects to it, and not that it is to be proved by him who offers it. Nothing can be more repugnant to the established usage of courts. How is it to be proved, that there are two persons of the name of Cenas in the territory of Orleans? If, with a knowledge of several weeks, perhaps months, that this prosecution was to be carried on, the executive ought not to be required to produce this witness, ought the prisoner to be required, with the notice of a few hours, to prove that two persons of the same name reside in New Orleans? It has been repeatedly urged that a difference exists between the strictness of the law which would be applicable to a trial in chief, and that which is applicable to a motion to commit for trial. Of the reality of this distinction, the present controversy affords conclusive proof. At a trial in chief, the accused possesses the valuable privilege of being confronted with his accuser. But there must be some limit to this relaxation, and it appears not to have extended so far as to the admission of a paper not purporting to be an affidavit, and not shown to be one. When it is asked whether every man does not believe that this affidavit was really taken before a magistrate, it is at once answered that this cannot affect the case. Should a man of probity declare a certain fact within his own knowledge, he would be credited by all who knew him; but his declaration could not be received as testimony by the judge who firmly believed him. So a man might be believed to be guilty of a crime, but a jury could not convict him unless the testimony proved him to be guilty of it. This judicial disbelief of a probable circumstance does not establish a wide interval between common law and common sense. It is believed in this respect to show their intimate union. The argument goes to this, that the paper shall be received and acted upon as an affidavit, not because the oath appears to have been administered according to law, but because it is probable that it was so administered. This point seems to have been decided by the constitution. "The right of the people," says that instrument, "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized." The cause of seizing is not to be supported by a probable oath, or an oath that was probably taken, but by oath absolutely taken. This oath must be a legal oath; and, if it must be a legal oath, it must legally appear to the court to be so. This provision is not made for a final trial; it is made for the very case now under consideration. In the cool and temperate moments of reflection, undisturbed by that whirlwind of passion with which, in those party conflicts which most generally produce acts or accusations of treason, the human judgment is sometimes overthrown, the people of America have believed the power even of commitment to be capable of too much oppression in its execution to be placed, without restriction, even in the hands of the national legislature. Shall a judge disregard those barriers which the nation has deemed it proper to erect? The interest which the people have in this prosecution has been stated; but it is firmly believed that the best and true interest of the people is to be found in a rigid adherence to those rules which preserve the fairness of criminal prosecutions in every stage, If this was a case to be decided by principle alone, the court would certainly not receive this paper: but if the point is settled by decision, it must be conformed to.

It has been said to be settled in the supreme court of the United States by admitting the affidavit of Wilkinson, to which an exception was taken, because it did not appear that the magistrate had taken the oaths prescribed by law. It is said that as by law he could not act until he had taken the oaths and he was found acting, it must be presumed that this prerequisite was complied with; that is, that his acting as a magistrate under his commission was evidence that he was authorized so to act. It will not be denied that there is much strength in the argument; but the cases do not appear to be precisely parallel. The certificate that he is a magistrate, and that full faith is due to his acts, implies that he has qualified, if his qualification is necessary to his being a complete magistrate, whose acts are entitled to full faith and credit. It is not usual for a particular certificate, that a magistrate has qualified, to accompany his official acts. There is no record of his qualification, and no particular testimonial of it could be obtained. These observations do not apply to the objections which exist. But it is said that the certificate is the same with that in Wilkinson's affidavit. If this objection had been taken and overruled, it would have ended the question; but it was not taken, so far as is now recollected, and does not appear

to have been noticed by the court. It is not recollected by the judge who sat on that occasion to have been noticed. A defect, if it be one, which was not observed, cannot be cured by being passed over in silence. The case in Washington was a civil case, and turned upon the point, that no form of the commission was prescribed, and consequently, that it was not necessary to appear on the face of it that it was directed to magistrates. That it was the duty of the clerk to direct it to magistrates, and he should not be presumed to have neglected his duty in a case in which his performance of it need not appear on the face of the instrument. That the person intending to take this exception ought to have taken it sooner, and not surprise the opposite party when it was too late to correct it. But the great difference is, that the privy examination was a mere ministerial act; the administering an oath is a judicial act. The court is of opinion that the paper purporting to be an affidavit made by Dunbaugh cannot be read because it does not appear to be an oath.

Case No. 14,692d.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 37.]

Circuit Court, D. Virginia. June 13, 1807.

CRIMINAL LAW — SUBPŒNA DUCES TECUM — TIME OF ISSUE — TO PRESIDENT — RIGHT TO — MATERIALITY OF EVIDENCE.

[1. Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.]

[2. A subpœna may issue to the president of the United States to compel his attendance as a witness, and an accused person is entitled to it of course.]

[3. A subpœna duces tecum may issue to the president of the United States, directing him to bring any paper of which the party praying it has a right to avail himself as testimony.]

[4. In Virginia, a motion for a subpœna duces tecum is to the discretion of the court; and as a legal means of obtaining testimony it cannot be regularly opposed by the opposite party in his character as such.]

[5. A motion to the discretion of a court is a motion not to its inclination, but to its judgment, which is to be guided by sound legal principles.]

[6. The court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense.]

[7. An accused person has the right, before indictment found, to compel, by way of precaution, the production of letters containing statements of his conduct written by the person who is declared to be the essential witness against him.]

[8. And in such case he is entitled to the production of the original letter, a copy not being sufficient.]

[9. Where it does not affirmatively appear that letters and executive orders in the hands of the president of the United States which may be material to the defense of an accused contain any matter which it would be imprudent to disclose, a subpœna duces tecum will issue. The fact that such letters and orders may contain matter not essential to the defense, and which ought not to be disclosed, will appear on the return.]

[At law. Motion for a subpœna duces tecum directed to the president of the United States.]

[Tuesday, June 9, 1807. The grand jury were adjourned to the following Thursday.]

Mr. Burr then addressed the court. There was a proposition which he wished to submit to them. In the president's communication to congress, he speaks of a letter and other papers which he had received from Mr. Wilkinson, under date of 21st of October. Circumstances had now rendered it material that the whole of this letter should be produced in court; and further, it has already appeared to the court, in the course of different examinations, that the government have attempted to infer certain intentions on my part from certain transactions. It becomes necessary, therefore, that these transactions should be accurately stated. It was, therefore, material to show in what circumstances I was placed in the Mississippi territory; and of course, to obtain certain orders of the army and the navy which were issued respecting me. I have seen the order of the navy in print; and one of the officers of the navy had assured me that this transcript was correct. The instructions in this order were, to destroy my person and my property in descending the Mississippi. Now I wish, if possible, to authenticate this statement; and it was for this purpose, when I passed through Washington lately, that I addressed myself to Mr. Robert Smith. That gentleman seemed to admit the propriety of my application, but objected to my course. He informed me that if I would apply to him through one of my counsel, there could be no difficulty in granting the object of my application. I have since applied in this manner to Mr. Smith, but without success. Hence I feel it necessary to resort to the authority of this court to call upon them to issue a subpœna to the president of the United States, with a clause, requiring him to produce certain papers; or, in other words, to issue the subpœna duces tecum. The attorney for the United States will, however, save the time of this court, if he will consent to produce the letter of the 21st October, with the accompanying papers, and also authentic orders of the navy and war departments.

Mr. Hay declared that he knew not for what this information could be wanted; to what purpose such evidence could relate; and whether it was to be used on the motion for commitment or on the trial in chief.

Mr. Burr, Mr. Wickham, and Mr. Martin

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

observed that perhaps it would be used on both, according as circumstances might require.

Mr. Hay declared that all delay was unnecessary; but he pledged himself, if possible, to obtain the papers which were wanted; and not only those, but every paper which might be necessary to the elucidation of the case.

After considerable of conversation between counsel as to the objects of applying for the subpœna, and the probability of obtaining the papers without it, Mr. Wickham remarked that as to the order from the navy department, a copy might be sufficient, but as to Wilkinson's letter, "We wish to see itself here; and surely it may be trusted in the hands of the attorney for the United States."

Mr. Hay then said: It seems, then, that copies of papers from the government of the United States will not be received! After such an observation, sir, I retract everything that I have promised; let gentlemen, sir, take their own course.

Mr. Wickham explained, disavowing any insinuation against the fairness of the conduct of the government. But he wanted the highest possible degree of evidence, and to confront General Wilkinson with his own letter.

Mr. Hay was satisfied with the explanation, and renewed his promise to apply for the papers if the court deemed them material.

After some further conversation which did not result in any arrangement satisfactory to Mr. Burr's counsel—

The CHIEF JUSTICE said: If the attorney for the United States is satisfied that the court has a right to issue the subpœna duces tecum, I will grant the motion.

Mr. Hay. I am not, sir.

CHIEF JUSTICE. I am not prepared to give an opinion on this point, and therefore I must call for argument.

After some further conversation, the court adjourned.

Wednesday, June 10, 1807.

The court met according to adjournment. The subject of the subpœna duces tecum was resumed.

The following affidavit, drawn up and sworn to by Mr. Burr, was read in support of the motion for the subpœna.

"Aaron Burr maketh oath, that he hath great reason to believe that a letter from General Wilkinson to the president of the United States, dated 21st October, 1806, as mentioned in the president's message of the 22d January, 1807, to both houses of congress, together with the documents accompanying the said letter, and copy of the answer of said Thomas Jefferson, or of any one by his authority, to the said letter, may be material in his defence, in the prosecution against him. And further, that he hath reason to believe the military and naval orders given by the president of the United States, through the departments of war and of the navy, to the officers of the army and navy, at or near the New Orleans stations, touching or concerning the said Burr, or his property, will also be material in his defence.

"Aaron Burr.

"Sworn to in open court, 10th June, 1807."

Upon this motion a protracted debate arose, occupying two entire days, and extending into the third, in which the motion was supported by Messrs. Wickham, Botts, Randolph, Martin, and Burr, and opposed by Messrs. Hay, MacRae, and Wirt. Much ability and eloquence were displayed on both sides. But few points of law were contested in the argument, and these are all clearly stated in the opinion of the court, which is here given in full. The arguments turned more upon the propriety of granting the motion, than upon any strictly legal question; although the right of the accused to apply to the court for process to obtain any testimony whatever, at this stage of the case, was denied by the counsel for the United States. The discussion took a wide range, and the course of the government towards Col. Burr, and the conduct of Gen. Wilkinson in respect to him, were animadverted upon with much severity by counsel for the defence, and zealously defended by the counsel for the United States.

On the part of the prosecution it was insisted that the subpœna was unnecessary, because certified copies of any documents in the executive departments could be obtained by a proper application. It was said to be improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety. It was argued that the documents demanded could not be material to the defence, and objected that the affidavit did not even state, in positive terms, that they would be material.

On the part of the defence it was denied that any affidavit whatever was necessary to support the motion. The proposition that the president could withhold a paper material to the defence, merely because it contained confidential communications, was denied, and pronounced wholly untenable in law. If the letter contained state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpœna; but it was not to be assumed until he did say so. Or, if the letter contained anything of a confidential character, not relating to the case, the president could point out such parts as he did not wish to have exposed, and they need not be read in court. A copy of the letter, it was said, would not answer the purposes of the defence. Gen. Wilkinson was admitted to be the witness upon whom the prosecution mainly depended. His relation to the pros-

ecution was such, that he had the strongest possible motive for bolstering it up; and if he failed in it, he would himself sink into irreparable disgrace. When he should come upon the stand to sustain a prosecution in which he had so much at stake, it might be of the utmost importance to confront him with his letter in his own handwriting. A copy would not do, because he might deny it; and no confidence was reposed by the defence in his integrity. The contents of the letter were only known to the defence in so far as they had been divulged by the president in a communication to congress. In that communication the president had stated that he had received a letter from Gen. Wilkinson in relation to the transactions of Mr. Burr, "of whose guilt," he says, "there can be no doubt." The president was severely censured (by Mr. Randolph) for thus assuming the functions of a judge, and pronouncing judgment against Mr. Burr in transacting his executive duties. The president had stated in said communication that Gen. Wilkinson had written at large to him respecting Mr. Burr. The defence wanted this letter, and had no doubt that in some of those things which Gen. Wilkinson had stated to the president, they would be able to trip him up.

As to the orders of the war and navy departments, it was said that certified copies would answer. But the secretary of the navy had already refused to furnish copies to one of Mr. Burr's counsel, on an application to him therefor, and they could not run the risk of another refusal. One of these orders (or what purported to be one) had been published in the Natchez Gazette, and it amounted to an order calling forth a military force to attack Mr. Burr and his associates, and destroy their property. It was contended that the president had no legal or constitutional power to issue such an order as this was represented to be; and if an unconstitutional and illegal order had been issued to destroy any man and his property, that man was justified in resisting it. Authenticated copies of these orders, therefore, might be necessary to defend Mr. Burr against any attempt to prove that he had resisted, or made any preparation to resist, the military forces called forth against him. If no orders had been issued calling forth a military force to attack him, then he had a right to resist any such force as being a mere unauthorized mob. On these grounds it was of the utmost importance to the defence to know exactly what orders had been issued in relation to Col. Burr.

At the close of the discussion Mr. Hay said he had in his possession a copy of the very paper which had been so denounced by the counsel for cruelty and severity; the order issued by the secretary of the navy, which he proposed to read in order to show that there was no such thing in it. The opposite counsel desired to look at the paper, to ascertain whether it was the same they had seen in the Natchez Gazette; but Mr. Hay refused to let them take it. He finally put it up again, declaring that he believed it to be the same, but gentlemen did not want it to be read.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice. The object of the motion now to be decided is to obtain copies of certain orders, understood to have been issued to the land and naval officers of the United States for the apprehension of the accused, and an original letter from General Wilkinson to the president in relation to the accused, with the answer of the president to that letter, which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpœna duces tecum, to be directed to the president of the United States. In opposition to this motion, a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the grand jury shall have found a true bill, the party accused is not entitled to subpœnas nor to the aid of the court to obtain his testimony. It will not be said that this opinion is now, for the first time, advanced in the United States; but certainly it is now, for the first time, advanced in Virginia. So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive. That would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by the grand jury. The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted that a person who appears before a court under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of the recognizance will be brought before the court. In the first event, he has the right, and it is perhaps his duty, to prepare for his defence at the trial. In the second event, it will not be denied that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case it would seem reasonable that he should be entitled to the process of the court to procure the attendance of his witnesses. The genius and character of our

laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial. The objection that the attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very insufficient excuse to a prisoner, who had failed to prepare for his trial, to say that he was not certain the attorney would proceed against him. Had the indictment been found at the first term, it would have been in some measure uncertain whether there would have been a trial at this, and still more uncertain on what day that trial would take place; yet subpœnas would have issued returnable to the first day of the term; and if after its commencement other subpœnas had been required, they would have issued, returnable as the court might direct. In fact, all process to which the law has affixed no certain return day is made returnable at the discretion of the court. General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth amendment to the constitution gives to the accused, "in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor." The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court. This observation derives additional force from a consideration of the manner in which this subject has been contemplated by congress. It is obviously the intention of the national legislature, that in all capital cases the accused shall be entitled to process before indictment found. The words of the law are, "and every such person or persons accused or indicted of the crimes aforesaid, (that is, of treason or any other capital offence,) shall be allowed and admitted in his said defence to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial as is usually granted to compel witnesses to appear on the prosecution against them." This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens that sentences which ought to be the most explicit are of doubtful construction; and in this case the words "accused or indicted" may be construed to be synonymous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word "or" may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense is furnished by the section itself. It commences with declaring that any person who shall be accused and indicted of treason shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words are, "accused and indicted." So with respect to the subsequent clause, which authorizes a party to make his defence, and directs the court, on his application, to assign him counsel. The words relate to any person accused and indicted. But, when the section proceeds to authorize the compulsory process for witnesses, the phraseology is changed. The words are, "and every such person or persons accused or indicted," &c., thereby adapting the expression to the situation of an accused person both before and after indictment. It is to be remarked, too, that the person so accused or indicted is to have "the like process to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against him." The fair construction of this clause would seem to be, that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground. The right of the prosecutor to take out subpœnas, or to avail himself of the aid of the court, in any stage of the proceedings previous to the indictment, is not controverted. This act of congress, it is true, applies only to capital cases; but persons charged with offences not capital have a constitutional and a legal right to examine their testimony; and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief, which is perceived, can be produced by it. The process would only issue when, according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpœna is made returnable; so that it becomes incum-

bent on the accused to be ready for his trial at that term.

This point being disposed of, it remains to inquire whether a subpœna duces tecum can be directed to the president of the United States, and whether it ought to be directed in this case? This question originally consisted of two parts. It was at first doubted whether a subpœna could issue, in any case, to the chief magistrate of the nation; and if it could, whether that subpœna could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony. While the argument was opening, the attorney for the United States avowed his opinion that a general subpœna might issue to the president; but not a subpœna duces tecum. This terminated the argument on that part of the question. The court, however, has thought it necessary to state briefly the foundation of its opinion, that such a subpœna may issue. In the provisions of the constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. At any rate, if an exception to the general principle exist, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence, (with one only reservation,) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to is the case of the king. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpœna ad testificandum. If, in any court of the United States, it has ever been decided that a subpœna cannot issue to the president, that decision is unknown to this court.

If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpœna, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. In point of fact it cannot be doubted that the people of England have the same interest in the service of the executive government, that is, of the cabinet counsel, that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alleged, that a subpœna might not be directed to them. It cannot be denied that to issue a subpœna to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the court can have no choice in the case. If, then, as is admitted by the counsel for the United States, a subpœna may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpœnas, is to be looked for in the conduct of a court after those subpœnas have issued; not in any circumstance which is to precede their being issued. If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpœna duces tecum, then, may issue to any person to whom an ordinary subpœna may issue, directing him to bring any paper of which the party praying it has a right to avail

himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper. When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpœna to the chief magistrate, and some doubt also concerning the propriety of directing any paper in his possession, not public in its nature, to be exhibited in court. The impression that the questions which might arise in consequence of such process, were more proper for discussion on the return of the process than on its issuing, was then strong on the mind of the judges; but the circumspection with which they would take any step which would in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpœna duces tecum to any person whatever, provided the case be such as to justify the process. This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles. A subpœna duces tecum varies from an ordinary subpœna only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody In some of our sister states whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. In this state it issues, not absolutely of course, but with leave of the court No case, however, exists as is believed, in which the motion has been founded on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed that the opposite party can, regularly, take no more interest in the awarding a subpœna duces tecum than in the awarding an ordinary subpœna. In either case he may object to any delay, the grant of which may be implied in granting the subpœna; but he can no more object regularly to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiæ, to prevent the court from making an improper order, or from burthening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation. If, then, the subpœna be issued without inquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if, in the other, he is not a judge, absolutely for himself, his judgment ought to be controlled only so far as it is apparent that he means to exercise his privileges not really in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence. These observations are made to show the nature of the discretion which may be exercised. If it be apparent that the papers are irrelative to the case, or that for state reasons they cannot be introduced into the defence, the subpœna duces tecum would be useless. But, if this be not apparent, if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them? The counsel for the United States takes a very different view of the subject, and insist that a motion for process to obtain testimony should be supported by the same full and explicit proof of the nature and application of that testimony, which would be required on a motion, which would delay public justice, which would arrest the ordinary course of proceeding, or would in any other manner affect the rights of the opposite party. In favor of this position has been urged the opinion of one, whose loss as a friend and as a judge I sincerely deplore; whose worth I feel, and whose authority I shall at all times greatly respect. If his opinions were really opposed to mine, I should certainly revise, deliberately revise, the judgment I had formed; but I perceive no such opposition.

In the trials of Smith and Ogden [U. S. v. Smith, Case No. 16,342], the court in which Judge Patterson presided, required a special affidavit in support of a motion made by the counsel for the accused for a continuance and for an attachment against witnesses who had been subpœnaed and who had failed to attend. Had this requisition of a special affidavit been made as well a foundation for an attachment as for a continuance, the cases would not have been parallel, because the attachment was considered by the counsel for the prosecution merely as a means of pun-

ishing the contempt, and a court might certainly require stronger testimony to induce them to punish a contempt, than would be required to lend its aid to a party in order to procure evidence in a cause. But the proof furnished by the case is most conclusive that the special statements of the affidavit were required solely on account of the continuance. Although the counsel for the United States considered the motion for an attachment merely as a mode of punishing for contempt, the counsel for Smith and Ogden considered it as compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process. The continuance was to arrest the ordinary course of justice; and, therefore, the court required a special affidavit, showing the materiality of the testimony before this continuance could be granted. Prima facie the evidence could not apply to the case; and there was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance. Colden proceeded: "The present application is to put off the cause on account of the absence of witnesses, whose testimony the defendant alleges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify. If the court cannot or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postponed. Or, if it appears to the court, that the matter disclosed by the affidavit might not be given in evidence, if the witness were now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear, and of whose voluntary attendance there is too much reason to despair; or, on account of the absence of witnesses who, if they were before the court, could not be heard on the trial." See the trials of Smith and Ogden [supra]. This argument states, unequivocally, the purpose for which a special affidavit was required.

The counsel for the United States considered the subject in the same light. After exhibiting an affidavit for the purpose of showing that the witnesses could not probably possess any material information, Mr. Standford said: "It was decided by the court yesterday that it was incumbent on the defendant, in order to entitle himself to a postponement of the trial on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit, in common form, would not be sufficient for this purpose, but that the particular facts expected from the witnesses must be disclosed in order that the court might, upon those facts, judge of the propriety of granting the postponement."

The court frequently treated the subject so as to show the opinion that the special affidavit was required only on account of the continuance; but what is conclusive on this point is, that after deciding the testimony of the witnesses to be such as could not be offered to the jury, Judge Patterson was of opinion that a rule, to show cause why an attachment should not issue, ought to be granted. He could not have required the materiality of the witness to be shown on a motion, the success of which did not, in his opinion, in any degree depend on that materiality; and which he granted after deciding the testimony to be such as the jury ought not to hear. It is, then, most apparent that the opinion of Judge Patterson has been misunderstood, and that no inference can possibly be drawn from it, opposed to the principle which has been laid down by the court. That principle will therefore be applied to the present motion.

The first paper required is the letter of General Wilkinson, which was referred to in the message of the president to congress. The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:

First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial. It is with some surprise an argument was heard from the bar, insinuating that the award of a subpœna on this ground gave the countenance of the court to suspicions affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In contests of this description, the court takes no part; the court has no right to take a part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor if, in this case, the accused should produce a witness completely exculpating himself, and the attorney for the United States should be arrested in his attempt to prove what the same witness had

said upon a former occasion, by a declaration from the bench that such an attempt could not be permitted, because it would imply a suspicion in the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion would be formed.

The second objection is, that the letter contains matter which ought not to be disclosed. That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defence, is a position which the court would very reluctantly deny. It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country. At present it need only be said that the question does not occur at this time. There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpœna.

Thirdly, it has been alleged that a copy may be received instead of the original, and the act of congress has been cited in support of this proposition. This argument presupposes that the letter required is a document filed in the department of state, the reverse of which may be and most probably is the fact. Letters addressed to the president are most usually retained by himself. They do not belong to any of the departments. But, were the facts otherwise, a copy might not answer the purpose. The copy would not be superior to the original, and the original itself would not be admitted, if denied, without proof that it was in the handwriting of the witness. Suppose the case put at the bar of an indictment on this letter for a libel, and on its production it should appear not to be in the handwriting of the person indicted. Would its being deposited in the department of state make it his writing, or subject him to the consequence of having written it? Certainly not. For the purpose, then, of showing the letter to have been written by a particular person, the original must be produced, and a copy could not be admitted. On the confidential nature of this letter much has been said at the bar, and authorities have been produced which appear to be conclusive. Had its contents been orally communicated, the person to whom the communications were made could not have excused himself from detailing them, so far as they might be deemed essential in the defence. Their being in writing gives no additional sanctity; the only difference produced by the circumstance is, that the contents of the paper must be proved by the paper itself, not by the recollection of the witness.

Much has been said about the disrespect to the chief magistrate, which is implied by this motion, and by such a decision of it as the law is believed to require. These observations will be very truly answered by the declaration that this court feels many, perhaps, peculiar motives for manifesting as guarded a respect for the chief magistrate of the Union as is compatible with its official duties. To go beyond these would exhibit a conduct which would deserve some other appellation than the term respect. It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential to his defence, which may, for aught that now appears, be essential, had been withheld from him. I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

The propriety of requiring the answer to this letter is more questionable. It is alleged that it most probably communicates orders showing the situation of this country with Spain, which will be important on the misdemeanor. If it contain matter not essential to the defence, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear on the return. The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited. It is said they cannot be material, because they cannot justify any unlawful resistance which

may have been employed or meditated by the accused. Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material; because they might tend to weaken the endeavor to connect such overt act with any overt act of which this court may take cognizance. The court, however, is rather inclined to the opinion that the subpœna in such case ought to be directed to the head of the department in whose custody the orders are. The court must suppose that the letter of the secretary of the navy, which has been stated by the attorney for the United States, to refer the counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpœna, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material, and ought to be admitted. It is only because the subpœna is to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purposes of defence, and not for such as this court will forever discountenance.

Case No. 14,692e.

UNITED STATES v. BURR.[1]

In re WILLIE.

[Coombs' Trial of Aaron Burr, 67.]

Circuit Court, D. Virginia. June 18, 1807.

WITNESS — PRIVILEGE — INCRIMINATING ANSWER.

[1. In determining the right of a witness to refuse to answer on the ground that his answer might tend to incriminate him, it is the province of the court to judge whether any direct answer to the question proposed will furnish evidence against the witness.]

[Cited in Counselman v. Hitchcock, 12 Sup. Ct. 199.]

[2. If any direct answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict the witness of any crime, he is not bound to answer it so as to furnish matter for that conviction.]

[Cited in Counselman v. Hitchcock, 12 Sup. Ct. 199.]

[3. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer.]

[Cited in Counselman v. Hitchcock, 12 Sup. Ct. 199.]

[4. The secretary of a person charged with treason cannot refuse to answer whether he has present knowledge of the cipher in which is written a letter purporting to have been written by the accused, as any direct answer could not tend to implicate him.]

[At law. The questions herein arose upon the proposition of the attorney for the United States to send before the grand jury, then in session considering the charges against Aaron Burr, a certain letter in cipher, addressed to Dr. Bollman under a fictitious name, and alleged to be in the handwriting of Mr. Willie, Burr's secretary. Mr. Willie was called to the stand to prove the authenticity and materiality of the letter.]

Mr. Williams, his counsel, hoped that no question would be put the answer to which might tend to criminate himself.

Mr. MacRae.—Did you copy this paper?

Mr. Williams, (after consulting with his client.)—He says that if any paper he has written have any effect on any other person, it will as much affect himself.

Mr. Wirt.—He has sworn in his deposition that he did not understand the cipher of this letter. How, then, can his merely copying it implicate him in a crime when he does not know its concents?

Mr. MacRae.—We will change our question. Do you understand the contents of that paper?

Mr. Williams.—He objects to answering. He says that though that question may be an innocent one, yet the counsel for the prosecution might go on gradually from one question to another, until he at last obtained matter enough to criminate him.

Mr. MacRae.—My question is not, "Do you understand this letter, and then what are its contents?" If I pursued this course, I might then propound a question to which he might object; but unless I take that course, how can he be criminated?

Mr. Botts.—If a man know of treasonable matter, and do not disclose it, he is guilty of misprision of treason. Two circumstances, therefore, constitute this crime: knowledge of the treason, and concealment of it. The knowledge of the treason, again, comprehends two ideas: that he must have seen and understood the treasonable matter. To one of these points Mr. Willie is called upon to depose. If this be established, who knows but the other elements of the crime may be gradually unfolded so as to implicate him? The witness ought to judge for himself.

Mr. MacRae.—I did not first ask if he copied and then understood it? but first, if he understood it? Had he answered this question in the affirmative, I certainly should not have pressed the other question upon him, because that might have amounted to self-crimination; but, if he did not understand it, it could not criminate him.

Mr. Hay.—I will simply ask him whether he knows this letter to be written by Aaron Burr, or by some one under his authority?

The CHIEF JUSTICE said that that was a proper question.

Mr. Williams.—He refuses to answer; it might tend to criminate him.

THE COURT were of opinion that Mr. Wil-

[1] [For reference to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

lie should answer upon oath whether or not he thought that answering the proposed question might have a tendency to criminate himself.

Here a long desultory argument ensued.

CHIEF JUSTICE.—Has the witness a right to refuse to answer?

Mr. Williams.—The knowledge of the treason and concealment of it, amount to a misprision of treason.

CHIEF JUSTICE.—The better question is, Do you understand it?

Mr. Williams.—He ought not to have such a question put to him, because he might be obliged to answer "Yes." He ought not to be compelled to answer, if it might possibly criminate him. The witness is to judge for himself, though the question may not seem to affect him. He referred to the case of Young Goosely [see Case No. 15,230], before referred to by Mr. Randolph.

Mr. Botts.—I will give Mr. Hay the benefit of an authority,—1 MacNal. Ev. 257, 258, —which shows that the possibility of crimination is sufficient to excuse the witness from answering.

Mr. Williams.—What the witness says here tending to his own crimination, may be used as evidence against him on a prosecution. If he answer at all, he is deprived of the privilege given by the law, not to criminate one's self.

CHIEF JUSTICE.—If he be to decide upon this, it must be on oath. He asked Willie whether his answering the question, whether he understood that letter, would criminate himself? He answered, It may in a certain case.

CHIEF JUSTICE.—I wish to consider the question until to-morrow.

GRIFFIN, District Judge, to Mr. Williams.—The Case of Goosely was not as you represented it. It was the court who knew that the witness was one of those who robbed the mail.

Mr. Hay.—The doctrine is most pernicious and contrary to the public good.

Mr. Williams.—The public good does not require the conviction of Colonel Burr so much as to dispense with the law.

It was then agreed that the point should be argued to-morrow, and Colonel Burr's counsel promised to produce their authorities to show that Willie could not be compelled to answer such questions as might, in his own opinion, tend to criminate himself.

The court then adjourned till to-morrow.

[The point was argued at some length on the two following days by Mr. Botts, Mr. Williams, Mr. Martin, and Mr. Wickham on one side, and by Mr. MacRae and Mr. Hay on the other. Mr. Martin contended that "a witness is not compelled to answer when it tends to criminate him, nor where it does not relate to the issue," and cited authorities in support of the proposition.]

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice. In point of law, the question now before the court relates to the witness himself. The attorney for the United States offers a paper in cipher, which he supposes to have proceeded from a person against whom he has preferred an indictment for high treason, and another for a misdemeanor, both of which are now before the grand jury, and produces a person said to be the secretary or clerk of the accused, who is supposed either to have copied this paper by his direction, or to be able to prove, in some other manner, that it has proceeded from his authority. To a question demanding whether he understands this paper the witness has declined giving an answer, saying that the answer might criminate himself; and it is referred to the court to decide whether the excuse he has offered be sufficient to prevent his answering the question which has been propounded to him.

It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. For the witness who considers himself as being within this exception it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say upon his oath that his answer to that question might criminate himself.

When this opinion was first suggested, the court conceived the principle laid down at the bar to be too broad, and therefore required that authorities in support of it might be adduced. Authorities have been adduced, and have been considered. In all of them the court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was at liberty to refuse an answer. These cases do not appear to the court to support the principle laid down by the counsel for the witness in the full latitude in which they have stated it. There is no distinction which takes from the court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could, in any degree, affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. The case of Goosely, in this court, is, perhaps, the strongest that has been adduced. But the general doctrine of the judge in that case must have referred to the circumstances, which showed that the answer might criminate him.

When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle

by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this:

When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, from this statement of things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.

The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.

To apply this reasoning to the particular case under consideration: To know and conceal the treason of another is misprision of treason, and is punishable by law. No witness, therefore, is compellable by law to disclose a fact which would form a necessary and essential part of this crime. If the letter in question contain evidence of treason, which is a fact not dependent on the testimony of the witness before the court, and, therefore, may be proved without the aid of his testimony; and if the witness were acquainted with that treason when the letter was written, he may probably be guilty of misprision of treason, and, therefore, the court ought not to compel him to answer any question, the answer to which might disclose his former knowledge of the contents of that letter.

But if the letter should relate to misdemeanor and not to the treason, the court is not apprized that a knowledge and concealment of the misdemeanor would expose the witness to any prosecution whatever. On this account the court was, at first, disposed to inquire whether the letter could be deciphered, in order to determine from its contents how far the witness could be examined respecting it. The court was inclined to this course from considering the question as one which might require a disclosure of the knowledge which the witness might have had of the contents of this letter when it was put in cipher, or when it was copied by himself; if, indeed, such were the fact. But, on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher, it appears to the court that the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact.

The court is, therefore, of opinion that the witness may answer the question now propounded.

The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case

the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer.

Case No. 14,692f.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 72.]

Circuit Court, D. Virginia. June 27, 1807.

CONTEMPT—OBSTRUCTING JUSTICE.

[1. An offer of a sum of money to a witness to remove his objections to going without the jurisdiction of the court to testify, is not necessarily an attempt to contaminate the source of justice, and a contempt of the court in which it is administered.]

[2. *Held*, on the evidence, that no contempt was intended to the court by General Wilkinson in procuring witnesses to testify, and that he was not guilty of any intentional abuse of its process, or of any oppression in the manner of executing it.]

[At law. Motion for attachment against General Wilkinson "for a contempt in obstructing the administration of the justice of the court."]

Mr. Burr's counsel called James Knox and Chandler Lindsley, (two of the witnesses of the United States,) whose affidavits had been drawn and were intended as the ground of the motion for the attachment.

The CHIEF JUSTICE asked if the papers could not be put into his hands, and the argument take place to-morrow; he wished to consider the question before it was discussed. This led to a debate of considerable length, in which the counsel for the prosecution favored the course suggested by the CHIEF JUSTICE, and the counsel for Colonel Burr opposed all delay.

At the close of the discussion, some conversation ensued relative to the form of the motion for an attachment against General Wilkinson. The counsel for the United States insisted upon a specification of the conduct for which it was to issue; that if generally expressed as a "contempt of the court," nothing but the spirit of divination could enable him to discover the specific offence charged against him, nor to prepare for his defence; that the precise circumstances which constituted the offence ought to be particularized.

Mr. Burr and his counsel said that the specification was to be found in the two affidavits, and that it was from delicacy to gentlemen, he had not attempted to make these affidavits matter of record, by introducing them on the face of the motion. The motion reduced to writing, stated the offence to be "for a contempt in obstructing the administration of the justice of this court."

The court then adjourned.

[1] [For reference to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

Saturday, June 20, 1807.

The court met pursuant to adjournment. Present: MARSHALL, Chief Justice, and GRIFFIN, District Judge.

Mr. Randolph rose to proceed with the motion, when he was interrupted by Mr. Hay, who communicated returns to subpœnas duces tecum (reported in the main case, No. 14,693), after which Mr. Randolph brought forward the motion. He said: The ground on which we make the motion is this: that Gen. Wilkinson, who is now before the court, in a case depending between the United States and Mr. Burr, deliberately abused the process of the law relative to a witness who has been summoned in this case. He contrived, on his own affidavit, and by his own power, to obstruct the free course of legal testimony, and to intimidate and coercively bring to this court a witness by the abuse of military authority. For this illegal proceeding it is the duty of the court to take notice of Gen. Wilkinson. As the cases ought to be kept distinct, I speak of him only; but it may be necessary to carry the principle into immediate execution as to other persons. The grounds of this accusation are the depositions of James Knox and Chandler Lindsley, which will be read to the court.

Mr. Hay objected to the introduction of these affidavits, because he understood they had been written and dictated by the counsel of Colonel Burr. He did not pretend to say that they contained anything which they did not believe to be true, nor did he know their contents. He understood that those witnesses had voluntarily gone and given information to the counsel, upon which the counsel had written or dictated the terms of these affidavits. The legal authorities showed that a court would never issue an attachment founded on affidavits taken by the agent or attorney of the party applying for it. He cited the case of the King v. Wallace, 3 Term R. 403, where the court had set aside an affidavit because it was sworn to before the attorney for the prosecution, and refused to grant an attachment.

Mr. Baker said: As to the affidavit of Knox, I know nothing; but as to the affidavit of Lindsley, it was written by himself. The facts are simply these: He called upon me with his affidavit already written, (I had never seen him before,) to know whether it was correctly written or not. I read it, corrected some inaccuracies in style, and wrote it over again. It was not sworn to when he brought it to me. After I had corrected those grammatical errors, and submitted it to Mr. Lindsley's inspection, he said that the statement was perfectly correct.

Mr. MacRae said, as the witnesses are now before the court, and can be examined viva voce, there is no inconvenience in the objection.

Mr. Wickham insisted that the regular and

established practice is, that when in the course of a trial collateral points arise in which it is necessary that testimony should be heard, not to produce viva voce testimony, but affidavits in support of them.

Mr. Burr said that, if agreeable to the court, he would have no objection to the examination of the witnesses in court, although the practice is, on principles of convenience, otherwise. As to the origin of this business, it was not perfectly understood, and some unfounded insinuations had been made concerning it. James Knox had called on him, stated the usage which he had received, and asked whether any redress could be obtained. One of his counsel, who was present at the interview, had concurred with him in opinion that some notice should be taken of this proceeding. At first they thought of referring him to Mr. Hay, but on reconsideration they thought that perhaps Mr. Hay might think himself disqualified from acting. Mr. Knox's own idea was that he ought to come into court and complain himself of the treatment he had received.

Mr. Wirt spoke against receiving the affidavits, and urged that the witnesses ought to be examined before the court.

Mr. Botts observed that Mr. Burr had signified his acquiescence in that course.

James Knox was then called, when Mr. MacRae said, that as the business was of importance to General Wilkinson, it was very desirable that he should be present at the examination of this and the other witnesses who might be introduced; that he was now before the grand jury, and he had applied to the gentlemen on the other side to postpone the motion until he could be present, but they objected to any delay. He therefore found it necessary to apply to the court to suspend the examination for a short time, till the general could be present.

Mr. Martin said, the question was whether a rule should be granted to show cause, with which neither General Wilkinson nor his counsel had anything to do, and were not in fact, as much as supposed to be present. This led to some further discussion, in which Messrs. MacRae, Wirt, and Martin participated, when

The CHIEF JUSTICE observed, that if the motion were to be postponed until Monday, and the witnesses on both sides were then heard, it would answer every purpose; and it might be considered then as a motion for an attachment, not for a rule to show cause.

Mr. Randolph said, we shall move then immediately for an attachment.

The examination was then postponed till Monday, and the court adjourned to that day.

Monday, June 22, 1807.

The court met pursuant to adjournment.

Mr. Randolph directed that James Knox and Chandler Lindsley be called, and was proceeding to open the motion he had introduced on Saturday, when Mr. MacRae objected to proceeding until General Wilkinson could be present, who was still under examination before the grand jury. After some discussion as to the propriety of proceeding in the absence of General Wilkinson, the court adjourned.

Tuesday, June, 23, 1807.

The court met pursuant to adjournment.

General Wilkinson appeared in court, and took his seat among the counsel for the United States.

Mr. Burr observed to the court, that as General Wilkinson was then present, he would proceed with his inquiry. He would have it, however, distinctly understood, that if the charge could not be brought home to General Wilkinson himself, so as to support the motion against him, yet it must attach according to the testimony, to any of his subordinate officers, as Mr. Gaines, or any other.

Mr. Hay objected to this extension of the motion, which he had understood to be confined to General Wilkinson alone, particularly as they had not given any intimation of such an intention before, and as no other person had any notice.

Mr. Randolph insisted that the evidence to be introduced must attach to General Wilkinson or any of his subordinate officers, or other persons, according to what the witnesses should prove. He read the charge against General Wilkinson: that he, in conjunction with others, did wilfully and unlawfully cause compulsory process to be served on James Knox and Chandler Lindsley, whilst in the city of New Orleans, whence they were transported by water to the city of Richmond, to give testimony for the United States in the case of Aaron Burr; the effect of which unlawful measures was directly and essentially tending to obstruct the free course of testimony, and of the administration of justice in this court, and to invade the privileges of witnesses.

The witnesses were then introduced. James Knox was first sworn, and testified as follows:

He says that he went to New Orleans some time in March. Soon after his arrival he received a note from General Wilkinson, making some inquiry concerning Sergeant Dunbaugh. He waited on the general, who received and treated him handsomely, took him by the hand, and asked him if he were not afraid, after what had happened, and what had been said about him? He told him that he was not afraid. He asked him whether he were at liberty to reveal what had occurred in coming down the river? The witness said he was at liberty to reveal what he knew, but did not wish to do so. He inquired whether the witness were a Freemason? He then began to take notes. The witness stopped him from taking down, and told him it was not his wish to have what he

said taken down. He complained of distress; expected to be ruined. Said that there was a great force coming down the river. He asked the witness his circumstances; what money was due to him for his services in coming down? He answered, one hundred and fifty dollars. Asked him if he were in want of money, and offered to supply him which the witness refused. He said he was very unhappy; had lost his wife; but all that was nothing to his trouble on account of the state of the country. The witness said that a subpœna had been served on him about the 12th of May, by Mr. Gaines, to attend this court; that he told him he was not prepared to come round then, but he expected to get money in ten or twelve days, and would then be ready. He went to Gaines's office about four days afterwards; was taken by a sheriff on Sunday evening, who took him to Judge Hall's. The judge was from home. He went again, and was told by the judge that he must give his deposition or go round to Richmond. He answered that he had no objection to going to Richmond, but, having no counsel, would not give his deposition, lest he should commit himself. No person but the sheriff was present. The governor desired the sheriff to take his word if the judge could not be found; saw the judge, and was bailed until eleven o'clock; gave two securities, bound in five hundred dollars each, to avoid being put in gaol. When he appeared, the judge had before him a number of printed interrogatories. The witness asked the liberty of reading them. He permitted him to do so. The judge asked him if he would answer. The witness refused until he had counsel, but offered to be placed in confinement until he could procure counsel. He afterwards saw, as his counsel, Mr. Carr, who informed him that the judge had no right to demand such answers. The judge still persisted to interrogate him, to some of which interrogatories he answered in order to save trouble. The witness then related everything that passed from Meadville until his arrival in New Orleans. Mr. Fort was then sent for and interrogated. He made some observations, and refused to answer, (being, he said, about Tom, Dick, and Harry.) After which the judge gave the deputy marshal a note, who put Fort and the witness into gaol, among forty or fifty negroes and criminals. Fort was bailed by his friends; but they required bail of the witness in five or six thousand dollars, and he remained in gaol until the vessel was ready in which he embarked. He requested leave to get his clothes. Dunbaugh then came with some men with belts and side arms. The witness asked if they were a guard? He was answered no, but that they were some acquaintances. That he has since been told by Dunbaugh they were a guard. They went with Dunbaugh and himself to th water edge. The witness asked whether Lieutenant Gaines were on board? They said no, but soon would be. When Dunbaugh came to the gaol he had an order, which was handed to the gaoler. While in gaol the witness wrote to Lindsley and Doctor Mulhollon to come and see him, and told them if they came to New Orleans what they might expect. He was informed by the gaoler that they would be confined. He did not send the note. He did not see Gaines until the next day. When Lieutenant Gaines came on board the vessel, he said the witness was in a bad humor. The witness told him he was; and Gaines said that he had better be satisfied, and bear his situation with patience. He asked Gaines for leave to go on shore for his clothes; he did not care what guard was sent with him. Gaines said that it was not in his power to grant it, but the power was in General Wilkinson. The witness was not permitted to get his clothes, and came without any except what he had on at the time, and except that Lindsley brought him one of his shirts, which he had lent him. Gaines, after having told him that he might put him in irons, and bring him round in that manner, offered him forty dollars. The witness said that if he would let him go on shore he did not want it; otherwise must take it. It was paid and sent on shore; twenty dollars were paid to his landlord, and the other twenty dollars returned to him by Governor Claiborne, who came on board and went with them six or eight miles on the passage. And also, when they came to anchor in Hampton Roads, Gaines asked him if he had any objection to coming to Richmond? He answered that he never had any objection. Gaines said that he was sent by the authority of Judge Hall. General Wilkinson spoke to him next day, and asked him if he had any objection to come to Richmond. He answered he had not, if properly treated; but he had been brought off without clothes or money. General Wilkinson had not heard of his not being permitted to bring his clothes until that morning. General Wilkinson agreed he was ill treated. Told him that he (witness) must understand that he was brought round by the direction of Judge Hall. General Wilkinson proposed to let the witness go to Richmond upon his parole of honor, which was refused. Wilkinson said, if the witness wanted twenty dollars he should have it. Afterwards he talked to Mr. Lindsley, and returned to the witness, and said if he wanted fifty dollars he might have it. Witness wanting money to purchase clothes, took it. He observed, in the first conversation, that he had twice asked favors of him and Gaines, and would never ask a third favor of any person. He came to Richmond with Moxley in a pilot boat. Moxley told him that he had orders from General Wilkinson to take charge of the passengers on board the Revenge, and bring them to Richmond, and there wait his (Wilkinson's) orders.

Cross-examination by the counsel for the

United States: Have you any military commission? Answer. None. Where were you born? Answer. In Maryland; left it very young; resided in Pennsylvania, and left it some time in November last. Left Pennsylvania (Meadville) for New Orleans on the 24th or 25th of November; went down the Alleghany and Ohio to Beaver; went from thence, with about twenty or thirty, to Blennerhassett's Island, where he did not recollect to have staid but two days, or a day and a half; left that place some time in December, Blennerhassett and another with them, who were the only persons who joined them there. Stopped at Shawnee Town; went with about double the number to Cumberland Island, just opposite to the mouth of Cumberland river; staid a day and a half; met with Colonel Burr and a few others; the whole number about fifty or sixty, about seven or eight boats, five fire-arms; went thence to Fort Massac; Sergeant Dunbaugh met them there with a musket, and after meeting with Colonel Burr, he considered himself under his direction; went to Natchez; Colonel Burr did not accompany them; went from Natchez to New Orleans. Some of the boats were chartered and others sold. They arrived at New Orleans on the 13th or 16th of March. The first notice he had, after seeing General Wilkinson, of the proceedings against him, was when he was carried before Judge Hall. He was said to be carried under an affidavit of General Wilkinson before Judge Hall. Captain Gaines requested him to write to him on shore, and he would get what he wanted. He was not permitted to send the letter. Never mentioned this to General Wilkinson till they arrived in Hampton Roads. That he was treated as others while on his way; that is, as well as some, not so well as some, and better than others. Arrived at Richmond on Friday evening; put up at the Bell tavern. Three days elapsed before he saw Colonel Burr. He mentioned the treatment he had received to Colonel Burr, and intended mentioning it to the court on his first appearance, but was told it was unnecessary. That General Wilkinson used no terror against him, and offered to relieve him if he wanted money. Whilst at the mouth of Cumberland river, and when Colonel Burr made his escape, he was one that took Colonel Burr in a wherry and carried him some distance, and left him in the woods; did not hear him address any one. The note written him by General Wilkinson, and sent by Dunbaugh, was left at his house sealed; the object was to obtain some information about Dunbaugh. No letters. Carried Colonel Burr's things to a Parson Bruin's as he was told. They had but few guns, which were traded for as they descended the river. The vessel sailed from New Orleans in half an hour after General Wilkinson came on board. The one hundred and fifty dollars offered him by General Wilkinson, he was induced to believe, was to bribe him to give evidence against Colonel Burr, or it might be considered as a bribe. Said he could obtain from Colonel Tyler a sufficiency to carry him home under his agreement with that gentleman. This conversation took place before the subpœna was served.

Lieutenant Gaines was then sworn. He stated that he received a letter from the attorney general of the United States, enclosing subpœnas for witnesses against Colonel Burr. That he went to New Orleans in consequence, and arrived there on the 7th of May. Called several times at the house where James Knox stayed with Mr. Lindsley and Dr. Mulhollon, and could not find them. He was told by the landlord that those gentlemen walked out whenever he approached; they supposed he had something against them. He told his business and at length saw them. They said that the reason why they endeavored to keep out of his way, was that they had belonged to Burr's party, and did not wish to appear against him. He told them that the commander-in-chief offered them a passage in the United States vessel with him. He desired Knox and Lindsley to say whether they would come or not? Knox said he could not come until he had made some money arrangements, (though Lindsley seemed disposed to come on.) That he then applied to Judge Hall; the judge directed him to obtain an affidavit of the refusal, and that he would take the proper steps. He said that the subpœna might be served by the marshal or sheriff, and proposed that he (Lieutenant Gaines) should be appointed by the marshal, a deputy. He refused, unless he could afterwards be released from any further service in that capacity. Next day the judge told him that the marshal had left a deputation for him, and asked him if he would act; he answered that he would, on the foregoing condition, and that he should not attend to Knox, at New Orleans. Knox appeared always ill-natured, which induced him to ask him if he could do anything for him. He obtained from the United States agent at that place forty dollars, and offered it to Knox, which he, after some hesitation, accepted. In reply to his inquiries, whether Knox wanted assistance, he hesitated, and then said that he wished to go on shore himself, to get some necessaries out of his trunk. He told him that as the vessel was going to sail so soon, he could not, but offered him pen, ink, and paper, and requested him to write to some friend on shore to do what he wanted done, or he would act for him himself. He was then in a very ill humor, and was so when the witness returned on board. James Knox was under no restraint from the time the vessel sailed till they arrived at Hampton Roads. To a question put by Mr. Burr's counsel, by whose authority he acted, Lieutenant Gaines answered, that in every step relative to Knox he acted under the authority of the marshal

at New Orleans, except that he was authorized by the commander-in-chief to offer him a passage in a public vessel. In serving the subpœna he acted under the authority of the attorney general. When at Hampton Roads he inquired of Knox whether he had any disposition to go to Richmond? He said that he wished to come to Richmond, but wished also to leave that vessel. He told him he should leave it, but had not determined how he would be conveyed to Richmond. General Wilkinson told him all would come in a vessel, except those who would come in the stage. His getting off gave him no concern, because he supposed that Knox could be caught again in some part of the country, if he attempted to go away. Whilst the witness was on shore, General Wilkinson procured a vessel in which Knox and others were sent to Richmond. He considered Knox under his authority, not as a military officer, but as a deputy marshal. That he was committed to his charge as such, in virtue of a warrant of commitment issued by Judge Hall. He did not know the reason why the judge made such an order. That General Wilkinson never attempted to exercise any authority over Knox on his passage. That the deputation was not of his own procuring. That he had received an order from the department of war to leave the garrison at which he commanded under the direction of some other person, and to attend to the orders of the attorney general.

Question by Colonel Burr. Did you have previous conversation with General Wilkinson about this deputation? Answer. I had none. I never heard nor had any conception of such a deputation till it was mentioned by Judge Hall. He gave to Sergeant Dunbaugh an order at New Orleans to receive from prison and deliver to the commanding officer on board the United States schooner Revenge, the body of James Knox, and he was accordingly conveyed on board.

Question by Mr. Baker. Was not Dunbaugh a sergeant in the army, and did you not consider him acting as such under you? Answer. I should not have considered any citizen of New Orleans bound to obey my order; I did not consider Sergeant Dunbaugh farther bound than in compliance with his promise. He was called Sergeant Dunbaugh, but I did not consider him under my authority, as a military officer. I took no oath of office; I gave no bond to perform the duties of a deputy marshal; I do not know that I shall get any pay; I have no promise of any. General Wilkinson made his affidavit at his own quarters, before Mr. Cenas. I do not recollect whom General Wilkinson consulted; an attorney had been with him. I delivered to General Wilkinson the subpœnas received from the attorney general of the United States, and among them one for myself, another for Mr. Graham. I always considered myself bound to obey the orders of General Wilkinson. I was bound before the deputation to obey him, and I continued so. I considered General Wilkinson as having the power of controlling myself, and every person belonging to the army and navy of the United States, on board the Revenge, if he chose to exercise that control; but I do not consider that he did exercise such control. The subpœnas which I delivered to General Wilkinson came into my hands afterwards, but nothing passed between the general and myself on the subject, except that I stated to him the orders I had received, and the power I possessed. My impression was that General Wilkinson must have been privy to the whole, and perhaps recommended that I should transact this business. I communicated to him what Judge Hall had said; that an affidavit must be made of the materiality of Knox as a witness before he could take any steps to compel his attendance. General Wilkinson knew that Knox was put on board the Revenge unwillingly. On our way to Virginia we stopped at the Havana for fresh supplies of water and other necessaries. Some on board were sick; they prevailed on the officers to call. While preparing to go on shore, a shot was fired from the Moro castle, and orders given to come on shore. They went on shore at the request of the sick persons on board made to General Wilkinson and Captain Read. They did not land until after four o'clock in the afternoon, and a little after dark they set sail again. Had good provisions, &c., on board. Heard Captain Read direct the cook to let those people have their provisions regularly. To a question put by Mr. Burr's counsel, he answered that General Wilkinson pointed out the witnesses on whom the subpœnas must be served. He, on several occasions, received advice and instructions from the counsel whom he consulted how to act in executing the business in which he was engaged.

Mr. Randolph.—Upon what authority were the forty dollars received from the military agent? Answer. The money received from the military agent was applied for after several applications from Knox, and General Wilkinson advised me to consult Judge Hall as to whether it were legal to demand money for him, and was told by the judge that it was regular to advance a reasonable sum; and was also told by the military agent that General Wilkinson had advised him to advance that sum. The general advised me to consult the attorney general there, or Mr. Duncan, and the general's own idea corresponded on the subject.

Mr. Graham being sworn, gave the following testimony: A short time after the arrival of Captain Gaines at New Orleans, I was told that he had subpœnas for witnesses, and one for myself; that there was a public vessel that would carry us to Richmond. I then waited on General Wilkinson to know whether I could be accommodated in that vessel? My health was bad at that time.

General Wilkinson agreed that I should, and then said that he understood that there were several witnesses in town, some of whom were unwilling, others unable to come round, and asked me whether I knew any legal means or process by which those who were unwilling could be compelled to come? I told him I did not know, but I supposed the federal judge could inform him. As there was a misunderstanding between the general and the judge, I offered to ask the judge myself whether there were such process, and I did so. At this, or some subsequent time, General Wilkinson told me to ask the judge whether there were any impropriety in advancing money to the witnesses, and to what amount? The judge said, that so far from being improper, the witnesses had a right to demand it. The judge said, in answer to the other question, that if the witness refused to enter into recognizance, or to answer such questions as would satisfy him of the materiality or relevancy of his evidence, from the law, (which he showed me,) he would be authorized to send such witness round under the care of the district marshal. He saw, a few days after, in an outer room at the judge's, Mr. Knox talking with Mr. Keene, a lawyer. Some short time after, when these gentlemen came into the room, the judge asked Knox if he were then willing to answer questions or enter into recognizance? He declined doing either. The judge had that clause of the law before him. He pointed it out to Mr. Keene, and a Mr. Fort, who was in the same situation with Knox, and advised them to do one of the two, or he should be obliged to act rigidly towards them; that he was very unwilling to act against them, but it was his duty, and he must do it. The same gentleman had a curiosity to know what questions they intended to put to him, and then the printed interrogatories were shown to him. The judge asked Mr. Fort to answer these interrogatories, which he refused to do. The judge then sent for the marshal, and committed both of them. In the afternoon Captain Fort gave security in five hundred dollars for his appearance at Richmond, and was released. He understood Captain Fort was going in the ship Amity to New York, in order to come to Richmond; but as Fort told the witness he could not leave New Orleans without injury to his business, it was his own opinion that he would not leave that place. Mr. Keene intimated to the judge that he did not appear as an attorney; but expressed some doubt of the correctness of the proceedings, and of the power of the judge to send Knox round. The ship's stores were good, and the persons treated civilly and not restrained. They slept where he did. They called in at the Havana on account of bad winds, and being chased close in by a British cruiser, Captain Read, who commands the vessel, Mr. Gaines, Mr. Smith, and himself, went on shore to procure fruit, &c. Remained there about three hours. His impression was, that if the gun had not been fired from the fort, they should not have gone in. That part of the navy of the United States which is at New Orleans, and was formerly under the control of the government, and the officers about New Orleans, when the country was considered to be in a state of danger, was put under the command of General Wilkinson. He saw no guard on his way to New Orleans. I went, said Mr. Graham, partly by land, and partly by water. I went down the river with Captain Fort, who said that he was one of a party whose object was to go against Mexico, of which declaration he made no secret. I do not know by what authority Fort was brought before the judge, but Judge Hall said he felt himself bound to act under the law. I advised Fort not to oppose the judge, who was a very determined man. Fort replied, that Mr. Alexander said that the judge had no right to send him. The judge and Mr. Keene both requested him to request Mr. Gaines to remove Knox out of the prison to the vessel.

Lieutenant Gaines, upon being called up again, said he is an officer of the United States army; never consulted General Wilkinson about accepting the appointment of deputy marshal. He understood Fort was included in the same affidavit with Knox. He sailed from New Orleans in the Revenge; saw General Wilkinson exercise no kind of authority on the voyage.

Mr. Graham said, that General Wilkinson opposed their stopping at the Havana for two reasons: first, that it would occasion delay; and secondly, that his enemies might charge it against him as an improper act. The gun was fired from the Moro castle. I understood that the judge had requested Mr. Gaines to accept the deputation. Gaines did not wish to act. He was urged by myself and others to accept it, and he did accept it, I believe, from motives of patriotism. General Wilkinson exercised no control over the persons on board, and no restraint was used, except what has been mentioned with respect to the witness, Mr. Knox.

After the testimony was closed, a dispute arose between the counsel which side should begin the argument, both parties claiming the right. After some observations by gentlemen on both sides, it was determined that the correct distinction was, that he who obtained a rule to show cause should close, and, of course, begin the argument.

The court then adjourned till to-morrow, eleven o'clock.

Wednesday, June 24, 1807.

The court met according to adjournment.

Mr. Graham was called by Mr. MacRae, and questioned relative to the state of the public mind at New Orleans, and whether great alarms were not excited by the conspiracy. He answered, that he had not arrived at that place till the month of March, and at that time the public mind was much agitated.

To a question put by Colonel Burr, whether General Wilkinson himself had not contributed to excite those alarms by his violent measures, Mr. Hay objected as improper. Colonel Burr insisted on the propriety of his question.

THE COURT was of opinion, that the witness was only bound to answer such questions as directly applied to the subject before them.

Mr. Graham said, that there was a considerable portion of the people at New Orleans who believed that there was another portion unfriendly to the government. He did not know the measures pursued by the executive at New Orleans. He was then interrogated as to the post offices being robbed of letters. He did not recollect that General Wilkinson particularly informed him how letters of information were received by him; only he observed, concerning a letter partly in cipher, that he had received it from a house at New Orleans; (which Mr. Graham named, but it is not inserted, as he was not distinctly heard;) that the practice of opening letters, if it existed at all, had ceased when he arrived at New Orleans; that General Wilkinson showed him three or four letters. He did not know how those letters were taken from the post office, but it was generally said at New Orleans that the postmaster there had given him those letters.

Colonel Burr asked him whether a considerable number of letters directed to himself, or to others, had not been taken from the post office there? He answered that he knew not; but there was an impression on his mind that letters were improperly taken from the post office; whether by General Wilkinson or not, he knew not. He rather thought not.

Mr. Martin.—Did you not understand that General Wilkinson had placed guards on the river, and on the roads, to stop travellers and passengers from passing?

Mr. Graham.—I did understand that he had placed guards at two points, near New Orleans, for the purpose of arresting suspected characters. I had understood, also, that certain persons had been seized.

Mr. Martin.—Did General Wilkinson never tell you how he got those letters?

Mr. Graham.—He did not.

Captain Murray was then called and sworn. Being interrogated by Colonel Burr, he stated that he was stationed at Ville Grove, two miles above New Orleans. His orders from Governor Claiborne were to stop boats coming down the river and examine them; to examine papers, but break no seal; but that from his orders he would have deemed it his duty to have transmitted letters addressed to suspicious persons to the executive at New Orleans.

Colonel Burr.—Would you have obeyed the governor, since, as an officer, you are strictly bound to obey General Wilkinson?

Captain Murray.—Yes, I should. The orders from Governor Claiborne originated with and always came through General Wilkinson.

The testimony being here closed, a protracted debate ensued, occupying two days, with the exception of some intervening business, which will hereafter be noticed. Mr. Randolph opened in support of the motion, and was replied to by Mr. MacRae. Mr. Botts then addressed the court in support of the motion, and was followed by Mr. Hay on the other side. Messrs. Wickham and Martin rejoined, the latter making the closing argument.

Mr. Randolph, in opening the argument, stated that this was a motion for an attachment against General Wilkinson, to bring him before the court to answer such interrogatories as might be put to him, for a contempt. It was customary, he believed, whenever strong suspicions were excited, that an attachment should go; because it was always within the power of the party charged to purge himself upon his own oath. He commented upon the testimony at length. Great ingenuity was displayed by Mr. R. and the counsel who followed on the same side, in giving the facts testified to by the witnesses a coloring unfavorable to General Wilkinson. The acts of that aristocratic and imperious officer in inviting poor Knox to his house, offering him money, and treating him with so much apparent respect and kindness, were represented as mere arts to draw from him an ex parte deposition which might be held in terrorem over him, when he should come to testify before this court. Failing to get from him such a deposition as he desired, it was alleged that General Wilkinson had then caused him to be arbitrarily and illegally imprisoned with felons and negroes; not to secure his attendance upon this court, but because he had refused to give his deposition. Judge Hall, it was said, must be presumed to have acted under the influence of General Wilkinson, who was exercising a military dictatorship in New Orleans. Knox was taken from the jail to the "prison ship," it was contended, by mere military force. Captain Gaines was never clothed with any civil authority, under his pretended appointment as deputy marshal. The act of congress required that a deputy marshal should qualify in the same way as his principal, by giving bond and taking an oath of office. Captain Gaines had done neither, and hence had no authority to act in the capacity of a deputy marshal. He was in realty acting in his military capacity, under the command of General Wilkinson. His order to Sergeant Dunbaugh, to take the witness from the jail and put him on board the vessel, was "in true military style," and was executed by Dunbaugh as a military command from his superior officer, which he was obliged to obey. The "rifling of private papers by unreasonable and illegal search," by General Wilkinson, was also made the

subject of some very severe strictures, by Mr. Botts.

Messrs. Hay and MacRae defended General Wilkinson against all these charges with zeal and ability. They contended that he had acted with great moderation and caution, considering his situation; "threatened in New Orleans by traitors without and enemies within." That so far from exercising the military power reposed in him in an arbitrary manner, to compel the attendance of witnesses before this court, he had turned the whole matter over to the civil authorities. Even admitting that Judge Hall had acted arbitrarily and illegally, (which was denied,) General Wilkinson could not be held responsible for his acts, as there was no evidence that he had exercised any influence over him. The contrary was presumable, from the fact that Judge Hall and General Wilkinson were not then on good terms, owing to a former difficulty between them. It was conceded that an attachment would lie for preventing or obstructing the attendance of a witness before the court, but denied that there could be any contempt in compelling a witness to come, in obedience to his summons, however illegal the means employed. If General Wilkinson had resorted to illegal means to compel the attendance of the witness, he might have his action against him; but it could not constitute a ground of contempt. It was also contended that the acts complained of were committed, if at all, without the jurisdiction of the court, and therefore could not be inquired into in this proceeding.

MARSHALL, Chief Justice. The motion now under consideration was heard at this time, because it was alleged to be founded on a fact which might affect the justice of the case in which the court is about to be engaged, and because, while the bills were depending before the grand jury, the court might, without impeding the progress of the business, examine into the complaint which has been made. The motion is to attach General Wilkinson for a contempt of this court, by obstructing the fair course of justice, with regard to a prosecution depending before it. In support of this charge has been offered the testimony of Mr. Knox, who states a conversation between General Wilkinson and himself, previous to his being served with a subpœna, the object of which was to extract from him whatever information he might possess, respecting the expedition which was the subject of inquiry in this court; and who states also, that he was afterwards summoned before Judge Hall, who examined him upon interrogatories, and committed him to gaol, whence he was taken by order of the deputy marshal, who was a military as well as civil officer, and put on board the Revenge, in which General Wilkinson sailed, for the purpose of being brought from New Orleans to Richmond.

That unfair practices towards a witness who was to give testimony in this court, or oppression under color of its process, although those practices and that oppression were acted in another district, would be punishable in the mode now suggested, provided the person who had acted therein came within the jurisdiction of the court, is a position which the court is not disposed to controvert; but it is also believed that this mode of punishment ought not to be adopted, unless the deviation from law could be clearly attached to the person against whom the motion was made, and unless the deviation were intentional, or unless the course of judicial proceeding were or might be so affected by it as to make a punishment in this mode obviously conducive to a fair and correct administration of justice. The conversation which took place between General Wilkinson and the witness, on the arrival of the latter in New Orleans, was manifestly held with the intention of drawing from him any information which he might possess relative to the expedition which was then the subject of inquiry. In this intention there was nothing unlawful. Government, and those who represent it, may justifiably and laudably use means to obtain voluntary communications, provided those means be not such as might tempt the person making them to give an improper coloring to his representations, which might afterwards adhere to them when repeated in court. The address stated to have been employed, the condescension and regard with which the witness was treated, are not said by himself to have been accompanied with any indications of a desire to draw from him more than the truth. The offer of money, if with a view to corrupt, could not be too severely reprehended. It is certainly a dangerous species of communication between those who are searching for testimony, and the person from whom it is expected. But in this case the court cannot contemplate the offer as being made with immoral views. The witness had a right to demand from those he was expected to serve a small sum of money, sufficient to subsist him on his return to his home. He was asked whether, on receiving this sum, his objections to giving testimony would be removed. This was certainly a delicate question, but it might be asked without improper motives, and it was pressed no further. This is not shown to be an attempt to contaminate the source of justice, and a consequent contempt of the court in which it is administered.

The imprisonment of Mr. Knox, and the order for conveying him from New Orleans to Richmond, were the acts of Judge Hall. Whether his proceedings were legal or illegal, they are not shown to have been influenced by General Wilkinson, and this court cannot presume such to have been the fact; General Wilkinson, therefore, is not responsible for them. They were founded, it is true, on an affidavit made by him; but

there was no impropriety in making this affidavit, and it remained with the judge to decide what the law would authorize in the case. All the subsequent proceedings were directed by the civil authority. The agents who executed the orders of the judge were indeed military men, who most probably would not have disobeyed the commander-in-chief; but that officer is not responsible, in this way, for having failed to interpose his authority, in order to prevent the execution of the orders of the judge, even if those orders ought not to have been given.

Upon a full view of the subject, the case appears to have been this: General Wilkinson was desirous that the testimony of the witness should be obtained; and aware of the accusations which had before been brought against him for the use he had made of the military power, he was desirous of obtaining the testimony by lawful means, and therefore referred the subject to a judge of the territory, under whose orders all subsequent proceedings were taken. Whether the judge did or did not transcend the limits prescribed by law, those ministerial officers who obeyed his orders cannot be supposed to have acted with a knowledge that he had mistaken his power. Should it be admitted that this would be no defence for them in an action to obtain compensation for the injury, yet it furnishes sufficient evidence that no contempt was intended to this court by General Wilkinson, that he has not been guilty of any intentional abuse of its process, or of any oppression in the manner of executing it.

It is said that Captain Gaines, the gentleman whom the marshal appointed as his deputy for this particular purpose, had not taken the oath of office, and was therefore not legally qualified to act in that character. However correct this observation may be in itself, it does not appear to the court to justify an attachment against General Wilkinson. The person who sees in the possession of another a commission as deputy marshal, and sees that others are acting under that commission, ought not to be subjected to a process of contempt for having made no inquiries respecting the oath which the law requires to be taken.

The attachment will not be awarded, because General Wilkinson cannot be considered as having controlled or influenced the conduct of the civil magistrate, and because in this transaction his intention appears to have been not to violate the laws. In such a case, where an attachment does not seem to be absolutely required by the justice due to the particular individual against whom the prosecution is depending, the court is more inclined to leave the parties to the ordinary course of law, than to employ the extraordinary powers which are given for the purpose of preserving the administration of justice in that purity which ought to be so universally desired.

Case No. 14,692g.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 127.]

Circuit Court, D. Virginia. Aug. 11, 1807.

JURORS—QUALIFICATIONS—FORMED AND EXPRESSED OPINIONS.

[1. Persons who have deliberately formed and delivered an opinion on the guilt of an accused, are disqualified to serve as jurors.]

[Cited in U. S. v. Hanway, Case No. 15,299.]

[2. An opinion formed and delivered not upon the full case, but upon a point so essential as to go far towards a decision of the whole case, and to have a real influence on the verdict, will disqualify the person as a juror.]

[3. The forming and delivering of an opinion that a person indicted for treason entertained the treasonable designs with which he is charged, and that he retained those designs, and was prosecuting them when the act charged in the indictment was alleged to have been committed, is good cause of challenge.]

[At law. On challenge of jurors for cause on the trial of Aaron Burr. The examination of the jurors summoned and the running comments of counsel and court will be found reported in the main case, No. 14,693.]

Mr. Martin addressed the court at length on the qualifications of jurors. He insisted that the constitutional guaranty that every criminal shall be tried by an "impartial jury," required that the jurors should be perfectly indifferent and free from prejudice. He enforced with much power the position that a man who had formed an opinion as to the criminal intention of the accused, although not as to the act, could not be considered an impartial juror. He argued that Colonel Burr was not to be denied a fair trial because the public mind had been so filled with prejudice against him that there was some difficulty in finding impartial jurors. He referred to the inflammatory articles which had been published against Colonel Burr in the Alexandria Expositor and other newspapers, and inquired if he was to be held responsible for such publications. He referred, also, to the repeated declarations of the guilt of Colonel Burr by the counsel for the prosecution, at the examination in June, as tending to create "such a ferment in the public mind that the prisoner could not have a fair trial." In the course of his argument he cited the following authorities: 1 Reeves' Hist. Eng. Law, p. 329; 2 Reeves' Hist. Eng. Law, 446; Carr's English Liberties, 244, 248, 249; 2 McNally, 667; and Rex v. Dean of St. Asaph, and Rex v. Robinson, 3 Term R. 428, note.

Mr. Botts and Colonel Burr followed in some brief remarks.

Messrs. MacRae, Wirt, and Hay replied at some length They insisted that mere impressions as to the criminal intentions of the

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

accused were not sufficient to disqualify a juror, unless he had formed an opinion of his guilt as charged in the indictment. They relied much upon U. S. v. Callender [Case No. 14,709], in which Judge Chase refused to reject a juror (Basset) who said that he had read the book, (for the publication of which the accused was prosecuted for a libel.) and had made up his mind that it was libellous, but had not made up his mind as to Callender being the publisher of the libel. Basset they insisted, had formed an opinion as to one material ingredient of the crime charged, but was not disqualified because he had not made up his mind as to the guilt of the accused, as charged in the indictment. So in this case; a juror who has merely formed an opinion as to the intentions of the accused has only made up his mind as to one ingredient of the crime charged in the indictment, and therefore is not disqualified, according to the principle settled in U. S. v. Callender [supra].

Mr. Wickham rejoined, reviewing the arguments of the counsel for the prosecution. He denied that the decision in U. S. v. Callender was a sufficient precedent to justify the swearing of the jurors whose cases were under consideration; and adverted to the fact that Judge Chase had been impeached for giving that very decision, and eighteen out of thirty-four senators had voted that the decision was erroneous and corrupt.[2]

Mr. Randolph closed the debate by a brief address.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice. The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him. The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions All the provisions of the law are calculated to obtain this end. Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

It would be strange if the law was chargeable with the inconsistency of thus carefully protecting the end from being defeated by particular means, and leaving it to be defeated by other means. It would be strange if the law would be so solicitious to secure a fair trial as to exclude a distant, unknown relative from the jury, and yet be totally regardless of those in whose minds feelings existed much more unfavorable to an impartial decision of the case. It is admitted that where there are strong personal prejudices, the person entertaining them is incapacitated as a juror, but it is denied that fixed opinions respecting his guilt constitute a similar incapacity. Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. Is there less reason to suspect him who has prejudged the case, and has deliberately formed and delivered an opinion upon it? Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case. It is for this reason that a juror who has once rendered a verdict in a case, or who has been sworn on a jury which has been divided, cannot again be sworn in the same case. He is not suspected of personal prejudices, but he has formed and delivered an opinion, and is therefore deemed unfit to be a juror in the cause.

Were it possible to obtain a jury without any prepossessions whatever respecting the

[2] This, however, was immediately discovered to be a mistake: as on the second article of the impeachment, which was for overruling the objection to Basset, ten senators only voted "Guilty," and twenty-four "Not guilty."

guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule. They ought to hear the statement made by himself or given by others, and conscientiously determine, according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially, on the testimony which may be offered to them, or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce. The court has considered those who have deliberately formed and delivered an opinion on the guilt of the prisoner as not being in a state of mind fairly to weigh the testimony, and therefore as being disqualified to serve as jurors in the case.

This much has been said relative to the opinion delivered yesterday, because the argument of to-day appears to arraign that opinion, and because it seems closely connected with the point which is now to be decided. The question now to be decided is whether an opinion formed and delivered, not upon the full case, but upon an essential part of it, not that the prisoner is absolutely guilty of the whole crime charged in the indictment, but that he is guilty in some of those great points which constitute it, does also disqualify a man in the sense of the law and of the constitution from being an impartial juror. This question was adjourned yesterday for argument and for further consideration. It would seem to the court that to say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony, and would perhaps be applying the letter of the rule requiring an impartial jury with a strictness which is not necessary for the preservation of the rule itself. But if the opinion formed be on a point so essential as to go far towards a decision of the whole case, and to have a real influence on the verdict to be rendered, the distinction between a person who has formed such an opinion and one who has in his mind decided the whole case appears too slight to furnish the court with solid ground for distinguishing between them. The question must always depend on the strength and nature of the opinion which has been formed. In the case now under consideration, the court would perhaps not consider it as a sufficient objection to a juror that he did believe, and had said, that the prisoner at a time considerably anterior to the fact charged in the indictment entertained treasonable designs against the United States. He may have formed this opinion, and be undecided on the question whether those designs were abandoned or prosecuted up to the time when the indictment charges the overt act to have been committed. On this point his mind may be open to the testimony. Although it would be desirable that no juror should have formed and delivered such an opinion, yet the court is inclined to think it would not constitute sufficient cause of challenge. But if the juror have made up and declared the opinion that to the time when the fact laid in the indictment is said to have been committed the prisoner was prosecuting the treasonable design with which he is charged, the court considers the opinion as furnishing just cause of challenge, and cannot view the juror who has formed and delivered it as impartial, in the legal and constitutional sense of that term.

The cases put by way of illustration appear to the court to be strongly applicable to that under consideration. They are those of burglary, of homicide, and of passing counterfeit money, knowing it to be counterfeit, cases in which the intention and the fact combine to constitute the crime. If, in case of homicide, where the fact of killing was admitted or was doubtful, a juror should have made up and delivered the opinion that, though uninformed relative to the fact of killing, he was confident as to the malice, he was confident that the prisoner had deliberately formed the intention of murdering the deceased, and was prosecuting that intention up to the time of his death, or if on the charge of passing counterfeit bank notes, knowing them to be counterfeit, the juror had declared that, though uncertain as to the fact of passing the notes, he was confident that the prisoner knew them to be counterfeit, few would think such a person sufficiently impartial to try the cause according to testimony. The court considers these cases as strikingly analogous.

It has been insisted that in Callender's Case an opinion was given different from that which is now delivered. I acknowledge that I had not recollected that case accurately. I had thought that Mr. Basset had stated himself to have read the book charged as a libel, and to have formed the opinion that the publication was a libel. I find by a reference to the case itself that I was mistaken; that Mr. Basset had not read the book, and had only said that if it were such a book as it had been repre-

sented to him he had no doubt of its being a libel. This was going no further than Mr. Morris has gone, the challenge against whom has been overruled. Mr. Morris had frequently declared that if the allegations against the prisoner were true he was guilty, and Mr. Morris was determined to be an impartial juror.

With respect to the general question put in Callender's Case, the court considers it as the same with the general question put in this case. It was, "Have you made up and delivered the opinion that the prisoner is guilty or innocent of the charge laid in the indictment?" That is in substance, "Have you made up and delivered the opinion that the prisoner has been guilty of publishing a false, wicked, and malicious libel, which subjects him to punishment, under the act of congress on which he is indicted?" The same question is now substantially put. Explanatory questions are now put when they are necessary, and certain explanatory questions might have been put in Callender's Case, had they been necessary. Had the case of Mr. Basset even been such as I thought it, had he read "The Prospect Before Us," and thought it a libel, without deciding who was its author, he would have gone no further than to have formed an opinion that certain allegations were libellous, which is not dissimilar to the opinion that certain acts amount to treason. If, for example, a juror had said that levying an army for the purpose of subverting the government of the United States by force, and arraying that army in a warlike manner, amounted to treason, no person could suppose him on that account unfit to serve on the jury. The opinion would be one in which all must concur, and so was the opinion that "The Prospect Before Us" was a libel. Without determining whether the case put by Hawk. bk. 2, c. 43, § 28, be law or not, it is sufficient to observe that this case is totally different. The opinion which is there declared to constitute no cause of challenge is one formed by the juror on his own knowledge; in this case the opinion is formed on report and newspaper publications.

The argument drawn from the situation of England during the rebellions of 1715 and 1745, with respect to certain prominent characters whose situations made it a matter of universal notoriety that they were the objects of the law, is founded entirely on the absolute necessity of the case, and the total and obvious impossibility of obtaining a jury whose minds were not already made up. Where this necessity exists the rule perhaps must bend to it, but the rule will bend no further than is required by actual necessity. The court cannot believe that at present the necessity does exist. The cases bear no resemblance to each other. There has not been such open, notorious war as to force conviction on every bosom respecting the fact and the intention. It is believed that a jury may be obtained composed of men who, whatever their general impressions may be, have not deliberately formed and delivered an opinion respecting the guilt or innocence of the accused.

In reflecting on this subject, which I have done very seriously since the adjournment of yesterday, my mind has been forcibly impressed by contemplating the question precisely in its reverse. If, instead of a panel composed of gentlemen who had almost unanimously formed and publicly delivered an opinion that the prisoner was guilty, the marshal had returned one composed of persons who had openly and publicly maintained his innocence; who had insisted that, notwithstanding all the testimony in possession of the public, they had no doubt that his designs were perfectly innocent; who had been engaged in repeated, open and animated altercation to prove him innocent, and that his objects were entirely opposite to those with which he was charged—would such men be proper and impartial jurors? I cannot believe they would be thought so. I am confident I should not think them so. I cannot declare a juror to be impartial who has advanced opinions against the prisoner which would be cause of challenge if advanced in his favor.

The opinion of the court is that to have made up and delivered the opinion that the prisoner entertained the treasonable designs with which he is charged, and that he retained those designs and was prosecuting them when the act charged in the indictment is alleged to have been committed, is good cause of challenge.

Case No. 14,692h.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 146.]

Circuit Court, D. Virginia. Aug. 18, 1807.

TRIAL—TREASON—ORDER OF PROOF.

[On the trial of a person indicted for treason in levying war against the United States, the court cannot control the order of proof to the extent of requiring the prosecution to prove the overt act charged before proving the intention with which such act was committed.]

[At law. Trial of indictment of Aaron Burr for treason in levying war against the United States.]

Mr. Hay proceeded to the examination of the evidence on the part of the United States. General William Eaton was sworn, when Mr. Burr objected to this order of examining the witnesses. He said Mr. Hay had not stated the nature of General Eaton's testimony, but he presumed that it related to certain conversations said to have happened at Washington; adding that the propriety of admitting any

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

other testimony depended on the previous proof of an overt act.

Mr. Hay.—Our object is to prove by him what is contained in his deposition, which has been published. Upon this motion, (to compel the prosecution first to prove an overt act,) a long and animated debate arose, in which Messrs. Botts, Wickham, Lee, and Martin supported the motion, and Mr. Wirt opposed it.

By Colonel Burr's counsel it was urged, that as the charge of treason could not be established without proving an overt act of war, at the place specified in the indictment, the prosecutor should be required to prove an overt act before introducing evidence of intention merely. Why, it was asked, should the prosecutor be permitted to spend days, and perhaps weeks, inquiring into the intentions of Colonel Burr, when it had not been made to appear that such evidence could have any bearing on the case? All such evidence must amount to nothing if the prosecution failed in the end to prove an overt act of war on Blennerhassett's Island; which they must fail to do, because none had been committed. On an indictment for murder, it was said, the prosecutor could not go into evidence of the evil intentions of the accused until the homicide had first been proved, unless that fact was admitted. So in a case of arson, or burglary; the burning or entry of the house must be proved (if denied) before you could introduce evidence of intentions. The argument was pressed with much force and ingenuity, and a number of authorities cited.

In opposition to the motion it was objected that the court had no authority to dictate as to the order in which the prosecution should bring forward their evidence. If competent, and material to the issue, the court could not reject it. Intention being an ingredient of the crime of treason, such evidence was material to the issue, and therefore must be received. The counsel for the prosecution thought that to begin with this evidence was the most lucid way of presenting the transaction to the jury, and they had a right to exercise their own judgment on that point. The most natural and luminous way of proceeding was to commence at the inception of the conspiracy, and trace it, step by step, to its consummation.

At the close of the argument on this motion the court adjourned.

Before MARSHALL, Circuit Justice, and GRIFFIN, District Judge.

MARSHALL, Circuit Justice. Although this is precisely the same question relative to the order of evidence which was decided by this court on the motion to commit, yet it is now presented under somewhat different circumstances, and may, therefore, not be considered as determined by the former decision. At that time no indictment was found, no pleadings existed, and there was no standard by which the court could determine the relevancy of the testimony offered, until the fact to which it was to apply should be disclosed. There is now an indictment specifying the charge which is to be proved on the part of the prosecution, there is an issue made up which presents a point to which all the testimony must apply, and consequently it is in the power of the court to determine with some accuracy, on the relevancy of the testimony which may be offered.

It is contended in support of the motion which has been made, that, according to the regular order of evidence and the usage of courts, the existence of the fact on which the charge depends ought to be shown before any testimony explanatory or confirmatory of that fact can be received. Against the motion, it is contended that the crime alleged in the indictment consists of two parts, the fact and the intention; that it is in the discretion of the attorney for the United States first to adduce the one or the other, and that no instance has ever occurred of the interference of a court with that arrangement which he has thought proper to make.

As is not unfrequent, the argument on both sides appears to be, in many respects, correct. It is the most useful and appears to be the natural order of testimony to show first the existence of the fact respecting which the inquiry is to be made. It is unquestionably attended with this advantage: there is a fixed and certain object to which the mind applies with precision all the testimony which may be received, and the court can decide with less difficulty on the relevancy of all the testimony which may be offered; but this arrangement is not clearly shown to be established by any fixed rule of evidence, and no case has been adduced in which it has been forced by the court on the counsel for the prosecution. On one side it has been contended that by requiring the exhibition of the fact in the first instance a great deal of time may be saved, since there may be a total failure of proof with respect to the fact; and this argument has been answered by observing that should there even be such failure they could not interpose and arrest the progress of the cause, but must permit the counsel for the prosecution to proceed with that testimony which is now offered. Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it as compounded of fact and law. Two assemblages of men, not unlike in appearance, possibly may be, the one treasonable and the other innocent. If, therefore, the fact exhibited to the court and jury should, in the opinion of the court, not amount to the act of levying war, the court could not stop the prosecution, but must permit the counsel for the United States to proceed to show the intention of the act, in order to enable the jury to decide upon the fact coupled with the intention. The consumption of time would probably be nearly the same whether the counsel for the prosecution commenced with the fact or the intention, provid-

ed those discussions which respect the admissibility of evidence would be as much avoided in the one mode as in the other. The principal importance which, viewing the question in this light, would seem to attach to its decision, is the different impressions which the fact itself might make, if exhibited at the commencement or close of the prosecution. Although human laws punish actions, the human mind spontaneously attaches guilt to intentions. The same fact, therefore, may be viewed very differently where the mind is prepared by a course of testimony calculated to impress it with a conviction of the criminal designs of the accused, and where the fact is stated without such preparation. The overt act may be such as to influence the opinion on the testimony afterwards given respecting the intention; and the testimony respecting the intention may be such as to influence the opinion on the testimony which may be afterwards given respecting the overt act. On the question of consuming time, the argument was placed in one point of view, by the counsel for the defence, which excited some doubt. The case was supposed of only one witness to the overt act, and a declaration that it could be proved by no other. The court was asked whether the counsel would be permitted then to proceed to examine the intentions of the accused, and to do worse than waste the time of the court and jury, by exposing, without a possible object, the private views and intentions of any person whatever. Perhaps in such a case the cause might be arrested; but this does not appear to warrant the inference that it might be arrested because the fact proved by the two witnesses did not appear to the court to amount to the act of levying war. In the case supposed the declaration of war is positive, and a point proper to be referred to the court occurs, which suspends the right of the jury to consider the subject, and compels them to bring in a verdict of not guilty. In such a case no testimony could be relevant, and all testimony ought to be excluded. Suppose the counsel for the prosecution should say that he had no testimony to prove the treasonable intention; that he believed confidently the object of the assemblage of men on Blennerhassett's island to be innocent; that it did not amount to the crime of levying war—surely it would be a wanton and useless waste of time to proceed with the examination of the overt act. When such a case occurs, it cannot be doubted that a nolle prosequi will be entered, or the jury directed, with the consent of the attorney, to find a verdict of not guilty.

It has been truly stated that the crime alleged in the indictment consists of the fact, and of the intention with which that fact was committed. The testimony disclosing both the fact and the intention must be relevant. The court finds no express rule stating the order in which the attorney is to adduce relevant testimony, nor any case in which a court has interfered with the arrangement he has made. No alteration of that arrangement, therefore, will now be directed. But it is proper to add that the intention which is considered as relevant in this stage of the inquiry is the intention which composes a part of the crime, the intention with which the overt act itself was committed—not a general evil disposition, or an intention to commit a distinct fact. This species of testimony, if admissible at all, is received as corroborative or confirmatory testimony. It does not itself prove the intention with which the act was performed, but it renders other testimony probable which goes to that intention. It is explanatory of, or assistant to, that other testimony. Now it is essentially repugnant to the usages of courts, and to the declarations of the books by whose authority such testimony is received, that corroborative or confirmatory testimony should precede that which it is to corroborate or confirm. Until the introductory testimony be given, that which is merely corroborative is not relevant, and of consequence, if objected to, cannot be admitted without violating the best settled rules of evidence.

This position may be illustrated by a direct application to the testimony of General Eaton. So far as his testimony relates to the fact charged in the indictment, so far as it relates to levying war on Blennerhassett's island, so far as it relates to a design to seize on New Orleans, or to separate by force the Western from the Atlantic states, it is deemed relevant and is now admissible. So far as it respects other plans to be executed in the city of Washington, or elsewhere, if it indicate a treasonable design, it is a design to commit a distinct act of treason, and is therefore not relevant to the present indictment. It can only, by showing a general evil intention, render it more probable that the intention in the particular case was evil. It is merely additional or corroborative testimony, and, therefore, if admissible at any time, is only admissible according to rules and principles which the court must respect, after hearing that which it is to confirm.

The counsel will perceive how many questions respecting the relevancy of testimony the arrangement proposed on the part of the prosecution will most probably produce. He is, however, at liberty to proceed according to his own judgment, and the court feels itself bound to exclude such testimony only as at the time of its being offered does not appear to be relevant.

Case No. 14,693.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 1.]

Circuit Court, D. Virginia. Aug. 31, 1807.

JURORS—QUALIFICATIONS—CHALLENGE—BAIL—MOTION FOR ATTACHMENT FOR CONTEMPT—PENDING CRIMINAL PROSECUTION — EVIDENCE BEFORE GRAND JURY — WITNESS — REFRESHING RECOLLECTION BY MEMORANDA — TREASON — PROOF OF INTENTION BEFORE PROOF OF OVERT ACT—FACTS OUT OF DISTRICT—LEVYING WAR—WHAT CONSTITUTES—PRINCIPALS—INDICTMENT—EVIDENCE —PLEADING AS WAIVER—VERDICT.

[1. A man must not only have formed but declared an opinion to disqualify him as a juror.]

[2. A person accused should be retained in custody or required to give security for his appearance while his examination is pending, but only on evidence sufficient to furnish probable cause.]

[3. The pendency of a criminal prosecution is no objection to the hearing of a motion for attachment for a contempt in obstructing the administration of the justice of the court, in the irregular examination of witnesses prior to the hearing, practicing on their fears, and forcibly deporting them from another district to testify against accused.]

[4. A paper to go before the grand jury must be relevant to the case; but the fact that it is referred to by a witness and wanted by the grand jury is sufficient to establish its relevancy.]

[Distinguished in U. S. v. Watkins, Case No. 16,649, on the point as to the power and duty of the court to instruct the grand jury as to the admissibility and competency of evidence to be offered.]

[5. The prosecution may challenge a juror for cause.]

[Cited in U. S. v. Douglass, Case No. 14,989.]

[6. A witness cannot refresh his memory as to conversations by reference to memoranda copied by himself from notes made by him at the times of the conversations.]

[7. On the trial of an indictment for treason in levying war against the United States, any proof of intention formed before the overt act charged, if relevant thereto, may be admitted before proof of the act itself. Proof of remote intentions may be relevant by proof of the continuance of the intentions, and consequently is admissible.]

[Cited in U. S. v. Doebler, Case No. 14,977.]

[8. Facts out of the district may be proved after the overt act, as corroborative evidence of the intention.]

[9. When war is actually levied by an assemblage of men in a posture of war, for a treasonable object, any one who, being leagued in the general conspiracy, performs any overt act constituting a part in such fact of levying war, however remote from the scene of action, or however minute that part, is guilty as a principal traitor, for the fact of levying war may consist of a multiplicity of acts performed in different places by different persons.]

[Cited in U. S. v. Greathouse, Case No. 15,254.]

[10. Quære, whether a person who advises or procures a treasonable warlike assemblage, and does nothing more, is guilty of treason under the constitution.]

[11. To constitute the assemblage of a body of men for the purpose of making war against the government an act of levying war, it must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility.]

[Cited in U. S. v. Hanway, Case No. 15,299.]

[12. An indictment for treason in levying war against the United States must specify an overt act. It is not sufficient if it merely charge defendant in general terms with having levied war, omitting the expression of place or circumstance. And the charge must be proved as laid.]

[13. An indictment for treason in levying war against the United States, charging defendant with being present at the place of the treasonable assemblage charged as the overt act, cannot be sustained if defendant was not with the assemblage at any time before it reached such place; if he did not join it there, or intend to join it there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state; and if the overt acts of treason to be performed by him were to be distinct overt acts.]

[14. Proof of procurement of a warlike assemblage, if admissible to establish a charge of actual presence under an indictment for treason in levying war against the United States, must be made in the same manner and by the same kind of testimony which would be required to prove actual presence.]

[15. A person who advised or procured the warlike assemblage charged as the overt act of treason cannot be convicted of treason until after the conviction of one of those charged with the overt act.]

[16. Pleading to an indictment in which a person is charged as having committed an act cannot be construed to waive a right which he would have possessed had he been charged with having advised the act.]

[17. On the trial of an indictment for treason in levying war against the United States, no testimony relative to the conduct or declarations of the prisoner elsewhere and subsequent to the overt act charged is admissible, in the absence of proof of the overt act by two witnesses.]

[18. A verdict: "We of the jury say that A. B. is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty,"—is, in effect, a verdict of acquittal, and will be allowed to stand as rendered, an entry being made on the record of "Not guilty."]

[2] Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

The court was opened at half past twelve o'clock, when Col. Aaron Burr appeared, with his counsel, Edmund Randolph, John Wickham, Benjamin Botts and John Baker. [Luther Martin also appeared as counsel at a later stage of the trial.]

George Hay, Dist. Atty., William Wirt, and Alexander MacRae, counsel for the prosecution.

The clerk having called the names of the gentlemen who had been summoned on the grand jury, Mr. Burr's counsel demanded a sight of the panel, which was shown to them.

Mr. Burr addressed the court, pointing out some irregularities in summoning a part of the panel. The marshal, he said, by the law of Virginia under which he acted, was re-

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

[2] [Prior proceedings on the examination for commitment will be found reported as Case No. 14,692a.]

quired to summon twenty-four freeholders of the state to compose the grand jury. When he has summoned that number his function is completed. He proposed to inquire of the marshal and his deputies what persons they had summoned, and at what periods, to ascertain whether some had not been substituted in the place of others stricken off the panel. After some discussion as to the authority of the marshal to excuse grand jurors who had once been summoned, and to substitute others on the panel in lieu of them,

MARSHALL, Chief Justice, remarked that it was not in the power of the marshal to summon more than twenty-four, as the act of assembly authorized only that number. If he should summon twenty-five, the last would not have power to act; and the marshal would have no power to displace any one of the others, to put the last in his place. When the panel had been completed by the marshal, its deficiencies could only be supplied from the bystanders, under the directions of the court.

Mr. Burr said, the court having established the principle, we must ask their aid to come at the facts. We wish to know when certain persons were summoned, when discharged, and whether other persons were substituted in their stead.

Major Scott, the marshal, said he had not the least objection to state all the facts. A few days ago he had received a letter from Col. John Taylor, of Caroline, one of those whom he had summoned on the jury, stating that a hurricane had destroyed his carriage-house, and with it his carriages, so that he could not use them; and that indisposition would prevent him from riding to Richmond on horseback. This letter he had laid before their honors, and the chief justice had deemed his excuse reasonable. He had then summoned Mr. Barbour to serve in Col. Taylor's place. He had also received a letter from Mr. John MacRae, informing him that he was going to leave the state for his health. He had, in consequence, summoned Doctor Foushee in his place. He added, that he felt it his duty to bring twenty-four jurymen into court, and acted upon that principle.

THE COURT decided that Mr. Barbour and Dr. Foushee were not on the grand jury.

Mr. Burr said, the panel being now reduced to sixteen, he understood it to be the proper time to make any other exceptions to the panel. With regret he should proceed to exercise the privilege of challenging for favor; and in the exercise of this right he should perhaps appeal to the authority of the court to try the jurors challenged.

Mr. Hay called for the law justifying the application.

Mr. Burr said he desired it to be distinctly understood that he claimed the same right of challenging the grand jury for favor that he had of challenging the petit jury. He admitted it was not a peremptory challenge, but that he must show good cause to support it. It would, of course, be necessary to appoint triers to decide, and before whom the party and the witnesses to prove or disprove the favor must appear.

Mr. Botts argued and cited authorities in support of the motion.

Mr. Hay disavowed the intention of opposing substantial exceptions, and admitted the law to be as stated by the opposite counsel.[3]

Mr. Burr.—I shall, then, proceed to name the persons and causes of challenge. The first I shall mention is William B. Giles, against whom there are two causes of challenge. The first is a matter of some notoriety, because dependent on certain documents or records; the second is a matter of fact, which must be substantiated by witnesses. As to the first, Mr. Giles, when in the senate of the United States, had occasion to pronounce his opinion on certain documents by which I was considered to be particularly implicated. Upon those documents he advocated the propriety of suspending the writ of habeas corpus. The constitution however, forbids such suspension, except in cases of invasion or insurrection, when the public safety requires it. It was therefore to be inferred that Mr. Giles did

[3] This is in accordance with both Robertson's and Carpenter's reports. But in his speech on the motion to arrest the evidence, Mr. Hay said the challenge of grand jurors was "not warranted by any English precedent," and intimated that he had acquiesced in it because he was indifferent "whether A, B and C, or D, E and F composed a part" of the grand jury. Mr. Martin, in his reply to Mr. Hay, said, "if he had examined Hawkins's Pleas of the Crown, even in the index, he would have found that grand jurors may be challenged. It is there briefly stated that any person under prosecution may, before he is indicted, challenge a grand juror, as being outlawed for felony, &c., a villein, or returned at the instance of the prosecutor, or not returned by the proper officer." He also referred to the "American Museum," where, he said, it would be seen "that in a case that came before Judge Grimke, in South Carolina, it was expressly decided that the counsel of the accused have a right to challenge, for good cause, all or any of the grand jury." These authorities do not seem to sustain Mr. Burr's position, that he had the same right to challenge the grand jury "for favor" that he had of challenging the petit jury. Hawkins says, "it seems" that grand jurors may be challenged as aforesaid, but refers to no decision on that subject. At most the authority goes no further than this: that a grand juror may be challenged for incompetency, or for being irregularly or improperly returned. This is a very different thing from a general right of challenge "for favor." It is believed that no authority, anterior to this trial, can be found extending the right to challenge grand jurors further than the citation from Hawkins goes. Later decisions and dicta may be found, admitting the right of challenge for favor; but it is believed they are all based upon the authority of Burr's Case, or on special statutory provisions. In Com. v. Clark, 2 Browne, 325, Judges Tilghman and Breckenridge allowed a challenge for favor. In U. S. v. White [Case No. 16,679], the court said that "an exception for favor which might be a good cause of challenge, cannot be pleaded to the indictment." The decision in the former case, and the implication in the latter, are both based upon the authority of Burr's Case.

suppose that there was a rebellion or insurrection, and a public danger of no common kind. It is hardly necessary to observe that with this rebellion, and this supposed danger, I myself had been supposed to be connected. Perhaps this may be a sufficient reason to set aside Mr. Giles. But if not, I shall endeavor to establish by evidence that he has confirmed these opinions by public declarations; that he has declared that these documents, involving me, contained guilt of the highest grade.

Mr. Botts.—There is no necessity of adding anything to the observations of Colonel Burr. If the right of challenge exists, the right to try the challenge exists also. But while I am up, I will declare that no reflection is intended to be made on the character or conduct of Mr. Giles. That gentleman will be candid enough to admit that there is not the least design to wound his feelings. It is with the utmost reluctance that Colonel Burr has prevailed upon himself to advance this exception. I have authorities, however, to prove that these two causes are sufficient to disqualify Mr. Giles. The first relates to his public, the second to his individual conduct.

Mr. Giles.—As to exceptions to myself personally, I can have no objection to have them tried. The court will, however, perceive the delicate situation in which I shall be placed. The triers will have to interrogate witnesses, and the result either way is ineligible. I have no objection to state to the court every impression I have ever had upon this subject. But to calling witnesses to detail loose conversations, so liable to be misunderstood, forgotten, or misrepresented, I am certainly opposed.

Mr. Hay.—I was about to make a proposition which might relieve us from all this useless embarrassment, and which might gratify the views of the accused. If the gentlemen who are challenged on the jury will consent to withdraw themselves, I can have no objection. I am content that every one who has made declarations expressive of a decisive opinion should be withdrawn from the jury. I am not disposed to spend time on such points as these.

Mr. Burr.—It will certainly save time, and I assent to the proposition.

Mr. Giles.—The circumstances which have just occurred place me in an unpleasant situation. I have no objection to disclose in the usual way, with candor, the real state of my mind in relation to the accused. But I have an objection to the introduction of witnesses to prove casual expressions, which are so liable to be misconceived. In the present state of things, expressions might be imputed to me which I never used, or expressions which I really used might be mistaken or misrepresented by the witness; or the witness might deduce inferences from my expressions which they did not justify. It was by no means agreeable to me to have been summoned on this grand jury. But for some time past I have invariably pursued this maxim: "Neither to avoid nor to solicit any public appointment; but when called to the discharge of any public duty by the proper authority, conscientiously to attempt its execution." In undertaking to serve on the present grand jury, I was influenced by the same consideration. With respect to my public conduct, I presume it is of public notoriety, and it will speak for itself. I not only voted for the suspension of the privilege of the writ of habeas corpus, in certain cases, but I proposed that measure. I then thought, and I still think, that the emergency demanded it; that it was fully justified by the evidence before the senate; and I now regret that the nation had not energy enough to support the senate in that measure. This opinion was formed upon the state of the evidence before the senate, which, in all questions of a general nature, is of a very different character from the legal evidence necessary in a judicial investigation. My mind is, however, free to receive impressions from judicial evidence. In relation to the accused, I feel very desirous, and have often so expressed myself, that the various transactions imputed to him should undergo a full and fair judicial investigation; and that, through that medium, they should receive their just and true character, whatever in point of fact they might be, and that he should be presented in that character to the world. I have no personal resentments against the accused; and if he has received any information inconsistent with this statement, it is not true. However, as it is left to me to elect whether to serve on the grand jury or not, I will certainly withdraw.

The CHIEF JUSTICE.—The court thinks that if any gentleman has made up and declared his mind it would be best to withdraw.

Mr. Burr.—A gentleman who has prejudged this cause is certainly unfit to be a juryman. It would be an effort above human nature for this gentleman to divest himself of all prepossessions. I believe his mind to be as pure and unbiased as that of any gentleman under such circumstances. But the decisive opinion he has formed upon this subject, though in his public character, disqualifies him for a juryman. But he is one of the last men on whom I would wish to cast any reflections. So far from having any animosity against him, he would have been one of those whom I should have ranked among my personal friends. The other gentleman whom I shall challenge is Wilson Cary Nicholas.

Mr. Nicholas desired that the objection against him should be stated.

Mr. Burr.—The objection is, that he has entertained a bitter personal animosity against me; and therefore I cannot expect from him that pure impartiality of mind which is necessary to a correct decision. I feel the deli-

cacy of my situation; but if the gentleman will consent to withdraw, I will waive any further inquiry.

Col. Wilson C. Nicholas rose and addressed the court as follows: My being in this situation certainly was not a thing of choice. When I was summoned by the marshal, I urged him in the strongest manner to excuse me. I mentioned to him that it would be extremely inconvenient to me to attend the court, and that it would be very unpleasant to serve on the jury, on account of the various relations in which I had stood to Colonel Burr. I had been in congress at the time when the attempt was made to elect Colonel Burr president of the United States. My feelings and opinions on that occasion are well known. I had served three years in the senate while Colonel Burr was president of that body, and was one of those who, previous to the last election, had taken a very decided part in favor of the nomination of the present vice president, for the office at that time filled by Colonel Burr. Moreover, from the time that Colonel Burr first went to the Western country, my suspicions were very much excited as to his probable objects in that part of the United States; in consequence of which I gave early, and perhaps too great, credit to the charges which were brought against him. Such was my opinion of the importance of New Orleans, not only to the prosperity, but to the union of the states, that I felt uncommon anxiety at what I believed to be the state of our affairs in the West, and had expressed my impressions very freely in conversation, and in letters to my friends during the last winter. Under these circumstances, I doubted the propriety of my being put on the jury; but I felt no distrust of myself, as I was confident that I could discharge the duty under just impression of what I owe to my country, to the accused, and to my own character. The marshal assured me that he felt the strongest disposition to oblige me, but that he thought he could not do it consistently with his duty. He supposed there was scarcely a man to be found who had not formed and expressed opinions about Colonel Burr. That he, too, was in a situation of great delicacy and responsibility, and that without the utmost circumspection on his part, he would be exposed to censure. I renewed my application to the marshal several times, and always received the same answer. Thus situated, I determined to attend the court, both from a sense of duty and because I would not put it in the power of the malicious and those disposed to slander me to assign motives for absenting myself which had no kind of influence on me. Another reason for pursuing this course presented itself some time after I had formed this determination. I conceived that an attempt had been made to deter me from attending this court. I was informed by a friend in the city, that he had heard that one of the most severe pieces which had ever been seen was preparing for publication, if I did attend, and serve on the grand jury. From what quarter this attack was to come, I do not know. The only influence which that circumstance had was to confirm me in the determination I had made, as I was much more inclined to defy my enemies than to ask their mercy or forbearance. From the first I hesitated whether I ought not to make the same representation to the court that I had made to the marshal. As I was in doubt on the subject before I came from home, I committed to paper the substance of what I have now said, and consulted three gentlemen who were lawyers, men of honor, and my personal friends. Their advice to me was not to mention it, for they did not believe that the court would or ought to discharge me for the reasons I had mentioned. As I was in doubt myself I determined to follow their advice, and the more readily as they seemed confident that I would not be discharged, and I was not ambitious of acquiring in this way a reputation for scrupulous delicacy. I was perfectly willing that my reputation should rest on the general tenor of my life, and did not believe that my character required such a prop. At present I feel myself embarrassed how to act. I certainly was, and am, anxious not to serve on the jury, but am unwilling to withdraw, lest it should be thought that I shrink from the discharge of public duty of great responsibility, and am not willing to be driven from the discharge of that duty in a way which should lead to a belief that the objection to me is either acknowledged to be well founded or has been sustained by the court. Upon this subject, the example of Mr. Giles has great weight with me. That consideration, and a hope that my motives cannot now be misunderstood or misrepresented, will induce me to do as he has done.

Colonel Burr.—The circumstance mentioned by the gentleman, that an attempt has been made to intimidate him, must have been a contrivance of some of my enemies for the purpose of irritating him, and increasing the public prejudice against me, since it was calculated to throw a suspicion on my cause. Such an act was never sanctioned by me, nor by any of my friends. I view it with indignation, and disclaim any knowledge of the fact in question.

THE COURT established the following as being the proper questions to be put to jurors: First, have you made up your mind on the case, or on the guilt of Colonel Burr, from the statements you have seen in the papers or otherwise? and finally, have you formed and expressed (or delivered) an opinion on the guilt or innocence of Colonel Burr (or the accused?)

Mr. Joseph Eggleston asked to be excused from serving on the grand jury. He had, on reading the deposition of Gen. Eaton in the newspapers, expressed considerable warmth

and indignation on the subject likely to come before the grand jury, and on that account it might be both indelicate and improper for him to serve on that body. But after being examined by the CHIEF JUSTICE as to the nature of the opinions he had formed, Mr. Burr remarked, that the industry which had been used to prejudice the public mind against him left him very little chance of an impartial jury, and that on the subject of Major Eggleston's application to be excused he should remain perfectly passive. The court did not excuse him.

The panel was here called over, and fourteen only appeared. The marshal then summoned from the bystanders John Randolph, Jr., and William Foushee. The court appointed Mr. John Randolph foreman of the grand jury. Being called upon to take the foreman's oath, Mr. Randolph asked to be excused from serving, on the ground that he had formed an opinion concerning the nature and tendency of certain transactions imputed to Col. Burr.

Mr. Burr remarked that he was really afraid they should not be able to find any man without such prepossessions.

The CHIEF JUSTICE remarked that a man must not only have formed, but declared an opinion, to disqualify him. Mr. Randolph said he did not recollect of having declared one; and he was not excused.

Mr. John Randolph was then sworn as foreman; and the rest of the panel being called to the book, when the name of Dr. Foushee was called he stated that from reading the president's message, Gen. Eaton's deposition, and other publications, he had formed an opinion of Col. Burr's guilt. After some discussion, Dr. Foushee was permitted to withdraw, and Col. James Barbour was summoned in his place.

The grand jury were then sworn, as follows: John Randolph, Junior, Foreman, Joseph Eggleston. Joseph C. Cabell, Littleton W. Tazewell, Robert Taylor, James Pleasants, James M. Garnett, William Daniel, John Brockenbrough, John Mercer, Edward Pegram, Mumford Beverly, John Ambler, Thomas Harrison, Alexander Shephard, and James Barbour.

The CHIEF JUSTICE delivered an appropriate charge to the grand jury, in which he particularly dwelt upon the nature of treason, and the testimony requisite to prove it; after which the jury retired.

Mr. Burr then stated his desire that the court should instruct the grand jury on certain leading points, as to the admissibility of certain evidence which he supposed would be laid before the grand jury by the attorney for the United States.

Mr. Hay objected to the proposition as unprecedented. After some discussion, in which Messrs. Burr, Hay, Randolph, and Botts participated,

The CHIEF JUSTICE observed that he was not prepared at present to say whether the same evidence was necessary before the grand jury as before the petit jury; whether two witnesses to an overt act were required to satisfy a grand jury. This was a point he would have to consider. That he had not made up his mind on the evidence of facts said to be done in different districts; how far the one could be adduced as evidence in proof or confirmation of the others; but his present impression was, that facts done without the district may be brought in to prove the material fact said to be done within the district, when that fact was charged.

The question was postponed for further discussion, on Mr. Hay's pledging himself that no evidence should be laid before the grand jury without notice being first given to Mr. Burr and his counsel.

Saturday, May 23, 1807.

The counsel for Col. Burr observed that, if it met the approbation of the court, the discussion of the propriety of giving special instructions to the grand jury would take place on Monday next. This proposition was assented to, and it was understood that Mr. Burr's counsel were to give due notice of the propositions they intended to submit.

The grand jury appearing pursuant to adjournment, the CHIEF JUSTICE informed them that the absence of Gen. Wilkinson, a witness deemed important by the counsel for the United States, and the uncertainty of his arrival at any particular period, made it necessary that they should be adjourned.

After some conversation between the court and bar as to the propriety of adjourning the grand jury to some future day of the term, they were finally adjourned till the Monday following.

Monday, May 25, 1807.

The grand jury appeared in court, and on its being stated by their foreman that they had been two days confined to their chambers, and had no presentment to make, or bill before them, Mr. Hay observed that he had two bills prepared, but wished to postpone the delivering of them till the witnesses were present, and until it was ascertained that all the evidence relied upon by the counsel for the prosecution could be had. He thought it probable that in the course of a week he should hear of Gen. Wilkinson, who was still absent, and whose testimony was deemed very important. After some conversation as to the propriety of adjourning the grand jury to a distant day of the term,

Mr. Hay gave notice of his intention to submit a motion to commit Mr. Burr on a charge of high treason. On the previous examination, he said, there was no evidence of an overt act, and he was committed for a misdemeanor only. The evidence is different now.

Some remarks having been made as to the impropriety of discussing the subject in the presence of the grand jury, they were requested to withdraw.

[The argument and opinion delivered on the

motion to commit will be found reported as Case No. 14,692b. The opinion was delivered on Tuesday, May 26, 1807. It closed with these words: "If it is the choice of the prosecutor on the part of the United States to proceed with this motion, it is the opinion of the court that he may open his testimony."]

Mr. Hay then rose, and observed that he was struck with the observations of the court relative to "publications," and he would attempt, if possible, to make some arrangement with the counsel on the other side, to obviate that inconvenience; and he understood they were disposed to do the same.

The counsel on both sides then retired by permission of the court for this purpose. They returned in a short time, and Mr. Hay informed the court that the counsel for the United States and for Colonel Burr, not having yet been able to agree upon any arrangement which would attain his object, namely, that of having Colonel Burr recognized in a sum sufficiently large to insure his appearance to answer the charge of high treason against the United States, without incurring the inconvenience resulting from a public disclosure of the evidence at this early stage of the proceeding, wished to have further time for that desirable purpose. This was granted by the court, and it then adjourned till next day.

Wednesday, May 27, 1807.

Mr. Hay informed the court that all hopes of the arrangement which he had mentioned yesterday were at an end; for he had received a letter from Colonel Burr's counsel positively refusing to give additional bail. He therefore deemed it his duty to go on with the examination of the witnesses in support of his motion to commit Mr. Burr. He observed, that he regretted extremely that it became necessary in his judgment to pursue this course. He felt the full force of the objections to a disclosure of the evidence, and to the necessity of the court's declaring its opinion, before the case was laid before a jury; but those considerations must yield to a sense of what his engagements to the United States imperiously demanded of him; that in adducing the evidence, he should observe something like chronological order. He should first read the depositions of the witnesses who were absent, and afterwards bring forward those who were present, so as to disclose all the events, as they successively happened.

Mr. Wickham stated that there were two distinct charges against Colonel Burr. The first was for a misdemeanor, for which he had already entered into recognizance; the second was a charge of high treason against the United States, which was once proposed without success, and is now again repeated. On this charge the United States must substantiate two essential points: first, that there was an overt act committed; and secondly, that Colonel Burr was concerned in it. Everything that does not bear upon these points is of course inadmissible; the course therefore laid down by the attorney for the United States is obviously improper. He proposes to examine his witnesses in a kind of chronological order.

Colonel Burr required that the evidence should be taken in strict legal order. The court and even the opposite counsel will see the propriety of observing this order. If the attorney for the United States has affidavits to produce, let him first demonstrate that they have a right to produce them. We first call upon him to prove by strict legal evidence, that an overt act of treason has been committed. If he cannot establish that one point, all the evidence which he can produce is nugatory and unavailing.

Mr. Hay protested against the right of counsel for the accused to dictate to him the order of introducing his testimony. The two charges against Aaron Burr, he said, were naturally and intimately blended. They form distinct parts of one great design. What that great design was, in all its bearings and ramifications, he was not absolutely certain; but had always conceived that before Mexico was invaded New Orleans was to be taken. How, then, was it possible to separate these two allegations? How could the prosecution separate, line by line, and word by word, the evidence produced to prove these two distinct allegations? It appeared to him as though the counsel for the defence were determined to stop him at the very threshold of everything which he attempted to do. How could he advance if every inch of ground was to be measured out to him with such strictness and objections? The proposition was wholly unprecedented, that the counsel before an examining court should be instructed how to bring out his evidence. He claimed the right to bring it forward in its chronological order.

After some remarks by Mr. Wickham and Mr. Burr

The CHIEF JUSTICE said it would certainly be better, if the evidence was produced to prove the fact first, and that to show their coloring afterwards; for no evidence certainly has any bearing on the present case unless an overt act be proved. However, if the attorney for the United States thinks the chronological order the best, he may pursue his own course; but the court trusts to him, that he will produce nothing which does not bear upon the case.

After some further remarks by Mr. Hay and Mr. Randolph, Mr. Hay produced Gen. Wilkinson's affidavit.

Mr. Botts objected to the admissibility of the paper, on the ground that it was not competent evidence. He said on this question the supreme court were divided.

The CHIEF JUSTICE here interposed, and remarked that the supreme court were divided on the question of the competency of

the letter annexed to the affidavit, not as to the admissibility of the affidavit itself.

Mr. Botts proceeded to state his objections to the competency of the affidavit in this court in the present proceeding. First, he objected that an ex parte affidavit ought not to be received when the witness himself could be produced in court. General Wilkinson could and ought to have been here, and this being the case, his affidavit ought not to be received. But the proposition which he mainly pressed was, that no evidence of any nature whatever, ought to be taken until there is indubitable proof that there was war levied in this district, (Virginia,) and until it is proved that an overt act was committed by Mr. Burr.

Mr. Hay, interrupting, observed that the gentleman was renewing a proposition which had been decided by the court.

Mr. Burr said he had understood the gentleman who spoke first apprized the court that the evidence should come forward subject to discussion, which would be made as the evidence went on. The gentleman was only going into the nature of the evidence presented.

Mr. Botts resumed. He quoted the constitutional definition of treason, and asked if it meant that, if one-half of the crime of treason was to be found in this district, you might look for the other half elsewhere? If the affidavit imported anything, it was a declaration or confession; and no declaration or confession could constitute any ingredient of an overt act, unless that confession be made "in open court." He enforced his views at considerable length.

Messrs. Wickham and Randolph followed, in support of the motion to exclude the testimony at this stage of the proceeding.

The CHIEF JUSTICE stated that the supreme court had already decided, that the affidavit might be admitted under certain circumstances; but they had also determined that General Wilkinson's affidavit did not contain any proof of an overt act; that he was certainly extremely willing to permit the attorney for the United States to pursue his own course in the order of drawing out his evidence, under a full confidence that he would not waste the time of the court by producing any extraneous matters; but where was the necessity of producing General Wilkinson's affidavit first? If there was no other evidence to prove the overt act, General Wilkinson's affidavit goes for nothing, for so the supreme court have already decided; and by that decision he should consider himself bound, even if he had dissented from it. Why, then, introduce this affidavit?

After some further discussion by counsel, the CHIEF JUSTICE said that unless there was a fact to be proved, he was of opinion that no testimony ought to be produced. The question before the court was not whether there had been a treasonable intent, but an overt act. That fact must be proved before there can be any treason, or any commitment for treason.

Mr. Hay then called Peter Taylor, who was Mr. Blennerhassett's gardener, and Jacob Allbright, a laborer, who had worked on his island, who gave their testimony. [This testimony is more fully detailed hereafter, and, in consequence, is omitted here.]

[After these witnesses were examined, the affidavit of Jacob Dunbaugh was offered. The argument on the motion to exclude it, which took up the balance of the day, and the opinion of the court excluding the affidavit, delivered the following day, are reported as Case No. 14,692c.]

Mr. Hay observed that as the examination of Colonel Burr for treason had already taken up much time without any progress in the business, and, from the disposition manifested by his counsel, it might last not only ten days, but even ten years longer, he considered it his duty, from information which he had received that morning, to suggest to the court the propriety of binding Colonel Burr in a further recognizance from day to day till the examination could be ended. He stated, on the authority of a letter just come to hand from the secretary at war, that General Wilkinson, with several other witnesses, might be expected here between the 28th and 30th of this month. This circumstance, said he, renders it essential that he should be considered in custody until he gives security that his person shall be forthcoming to answer the charge of treason against the United States. The gentlemen who appear as counsel for Colonel Burr may be, and no doubt are sincere, in the opinion they have expressed, that he will not shrink from the charges exhibited against him, and will not, in any conjuncture of circumstances which may occur, fly from a trial; but those gentlemen must pardon me for saying that I entertain a very different opinion. I must believe that his regard for the safety of his own life, would, if he perceived it in danger, prevail over his regard for the interest of his securities. I give notice, therefore, that I consider him as being already in custody to answer the motion I have made for his commitment, and that he cannot be permitted to go at large without giving security for his appearance from day to day. His situation now is the same as that when he was first apprehended and brought before a single judge for the purpose of examination. Your honor at that time considered him as in custody, and bound him over from day to day; and I only contend that the same course should be pursued at this time.

Mr. Wickham.—The gentleman thinks he has obtained the effect of his motion merely by having made it. I cannot perceive the propriety of a motion to compel Colonel Burr to give bail in any sum before the probable cause to believe him guilty of treason has

been shown. When he was brought before your honor for examination, you conceived the sum of $5,000 sufficient security for his daily appearance. But a recognizance has already been given in double that sum, binding him not to depart without the leave of this court. Yet now, although no probable proof of treason has been exhibited, Mr. Hay requires the court to demand of Colonel Burr additional security! I trust that such a motion will not prevail.

Mr. Martin.—It has already been decided by the supreme court of the United States, that not a single expression in Wilkinson's affidavit amounts to any proof of the charge of treason. The motion of the gentleman amounts to this: "We have no evidence of treason, and are not ready to go to trial for the purpose of proving it; we therefore move the court to increase the bail."

Mr. Randolph. — The first motion of the counsel for the United States was to commit Colonel Burr on the ground of probable cause only. This goes a step farther, and wishes the same thing to be done on the ground of a probable cause of a probable cause; but we trust that we shall not be deprived of our liberty or held to bail on a mere uncertain expectation of evidence.

Some further remarks were made by Mr. MacRae, Mr. Wirt, Mr. Botts, and Mr. Hay.

The CHIEF JUSTICE delivered the opinion of the court, the substance of which was as follows: It is certainly necessary that a person accused should be retained in custody, or required to give security for his appearance while his examination is depending. The amount of the security to be required must depend, however, upon the weight of the testimony against him. On a former occasion, Colonel Burr was held to bail for his daily appearance in the sum of five thousand dollars only, because there was no evidence before the judge to prove the probability of his having been guilty of treason. When the examination was completed, the sum of ten thousand dollars was considered sufficient to bind him to answer the charge of a misdemeanor only, because the constitution requires that excessive bail should not be taken; but that recognizance had no application to the charge of treason. Yet, whether additional security ought to be required in the present stage of this business, before any evidence has appeared to make the charge of treason probable, is a question of some difficulty. It would seem that evidence sufficient to furnish probable cause must first be examined before the accused can be deprived of his liberty or any security can be required of him. Yet, before this could be done, he might escape and defeat the very end of the examination. In common cases, where a person charged with a crime is arrested and brought before a magistrate, the arrest itself is preceded by an affidavit, which furnishes grounds of probable cause. The prisoner therefore is continued in custody, or bailed until the examination is finished: but here there has been no arrest for treason, and Colonel Burr is not in custody for that offence. The evidence then must be heard, to determine whether he ought to be taken into custody; but as the present public and solemn examination is very different from that before a single magistrate; as very improper effects on the public mind may be produced by it, I wish that the court could be relieved from the embarrassing situation in which it is placed, and exempted from the necessity of giving any opinion upon the case, previously to its being acted upon by the grand jury. It is the wish of the court, that the personal appearance of Colonel Burr could be secured without the necessity of proceeding in this inquiry.

Colonel Burr rose and observed, that he denied the right of the court to hold him to bail in this stage of the proceedings; that the constitution of the United States was against it—declaring that no person shall be arrested without probable cause made out by oath or affirmation. But if the court were embarrassed, he would relieve them by consenting to give bail; provided it should be understood that no opinion on the question even of probable cause was pronounced by the court by the circumstance of his giving bail.

The CHIEF JUSTICE said, that such was the meaning of the court.

Mr. Martin said, for his part, he should prefer that all the evidence should be fully gone into. Instead of fearing that public prejudice would thereby be excited against Colonel Burr, he believed it would remove all the prejudices of that sort which now prevailed.

The CHIEF JUSTICE.—As a bill would probably be sent up to the grand jury, the court wishes to declare no opinion either way.

Some conversation then occurred relative to the quantum of bail; and Colonel Burr mentioned, that he would propose that the sum should be ten thousand dollars, if he should be able to find security to that amount, of which he expressed himself to be doubtful. Mr. Hay contended that fifty thousand dollars would not be too much. But the court finally accepted of the offer, made by Colonel Burr, who, after a short interval, entered into a recognizance with four sureties, to wit: Messrs. Wm. Langburn, Thomas Taylor, John G. Gamble, and Luther Martin; himself in the sum of ten thousand dollars, and each surety in the sum of two thousand five hundred dollars, conditioned, that he would not depart without leave of the court.

Mr. Martin, when offered as surety for Colonel Burr, said, that he had lands in the district of Virginia, the value of which was more than double the sum; and that he was happy to have this opportunity to give a public proof of his confidence in the honor of Colonel Burr, and of his conviction that he

was innocent. All further proceedings in the case were thereupon postponed until the next day.

On Friday, the 29th of May, and on Monday, Tuesday, and Wednesday, the 1st, 2d, and 3d of June, the court met and adjourned without taking up the case, on account of the non-arrival of General Wilkinson. On the last mentioned day the district attorney stated that he did not think it probable that General Wilkinson would arrive for ten or twelve days, and suggested an adjournment of the grand jury for that length of time. Finally, they were adjourned to Tuesday, the 9th of June.

Tuesday, June 9, 1807.

The court met pursuant to adjournment, and all the grand jurors appeared. General Wilkinson not having yet arrived, after some conversation between the court and bar as to the probable time of his arrival, the grand jury were further adjourned to Thursday following.

[Immediately upon the adjournment of the grand jury a question arose as to the production of certain papers by the government, and was followed by a motion for a subpœna duces tecum directed to the president of the United States, which will be found reported as Case No. 14,692d. The argument consumed several days, and an opinion was delivered Saturday, June 13, 1807. After which]

Mr. Burr called up the motion for a supplemental charge to the grand jury, in support of which he had, on yesterday, submitted a series of propositions, with citations of authorities.

The CHIEF JUSTICE stated that he had drawn up a supplemental charge, which he had submitted to the attorney for the United States, with a request that it should also be put into the hands of Colonel Burr's counsel; that Mr. Hay had, however, informed him that he had been too much occupied to inspect the charge with attention, and deliver it to the opposite counsel; but another reason was, that there was one point in the charge which he did not fully approve. He should not, therefore, deliver his charge at present, but should reserve it until Monday. In the meantime, Colonel Burr's counsel could have an opportunity of inspecting it, and an argument might be held on the points which had produced an objection from the attorney for the United States.

(After some conversation between the court and bar, as to whether the arguments on the supplemental charge should be submitted in writing or orally, the subject was passed over, and it appears never to have been again called up.)

At the instance of the district attorney, four witnesses, viz. Thomas Truxton, William Eaton, Benjamin Stoddert, and Stephen Decatur, were sworn to testify before the grand jury. The clerk then proceeded to call four other witnesses to the book, but when Erick Bollman appeared, Mr. Hay addressed the court to the following effect: Before Mr. Bollman is sworn I must inform the court of a particular, and not an immaterial circumstance. He, sir, has made a full communication to the government of the plans, the designs, and views of Aaron Burr. As these communications might criminate Dr. Bollman before the grand jury, the president of the United States has communicated to me this pardon (holding it in his hands) which I have already offered to Dr. Bollman. He received it in a very hesitating manner, and I think informed me that he knew not whether he should or should not accept it. He took it from me, however, as he informed me, to take the advice of counsel. He returned it in the same hesitating manner; he would neither positively accept nor refuse it. My own opinion is that Dr. Bollman, under these circumstances, cannot possibly criminate himself. This pardon will completely exonerate him from all the penalties of the law. I believe his evidence to be extremely material. In the presence of this court I offer this pardon to him, and if he refuses, I shall deposit it with the clerk for his use. Will you (addressing himself to Dr. Bollman) accept this pardon?

Dr. Bollman.—No, I will not, sir.

Mr. Hay then observed that Dr. Bollman must be carried up to the grand jury with an intimation that he had been pardoned.

Mr. Martin.—It has always been Dr. Bollman's intention to refuse this pardon; but he has not positively refused it before, because he wished to have this opportunity of publicly rejecting it.

Several other witnesses were sworn.

Mr. Martin did not suppose that the pardon was real or effectual; if he made any confessions before the grand jury, they might find an indictment against him, which would be valid, notwithstanding the pardon; that the pardon could not be effectual before it was pleaded to an indictment in open court.

Mr. Hay inquired whether Dr. Bollman might not go to the grand jury.

The CHIEF JUSTICE suggested that it would be better to settle the question about the validity of the pardon before he was sent to the grand jury.

Mr. Hay.—I am anxious to introduce the evidence before the grand jury in a chronological order, and the suspension of Dr. Bollman's testimony will make a chasm in my arrangement. He added that, however, it was not very important whether he was sent now or some time hence to the grand jury.

Mr. Martin.—Dr. Bollman is not pardoned, and no man is bound to criminate himself.

The CHIEF JUSTICE required his authorities.

Mr. Martin.—I am prepared to show that a party even possessed of a pardon is still indictable by the grand jury, unless he has pleaded it in court.

The other witnesses were sent to the grand jury, and Dr. Bollman was suspended. Four other witnesses were then sworn.

Mr. Hay.—I again propose to send Dr. Bollman to the grand jury.

At this time the marshal entered, and Mr. Hay informed the court that the grand jury had sent for the article of the constitution and the laws of congress relating to treason, and the law relating to the misdemeanor.

Jacob Dunbaugh was sworn and sent to the grand jury.

Some desultory conversation here ensued between the bar and the court respecting Dr. Bollman, when Mr. Hay addressed the opposite counsel: Are you then willing to have Dr. Bollman indicted? Take care in what an awful condition you are placing this gentleman.

Mr. Martin.—Doctor Bollman, sir, has lived too long to be alarmed by such menaces. He is a man of too much honor to trust his reputation to the course which you prescribe for him.

The CHIEF JUSTICE.—There can be no question but Dr. Bollman can go up to the jury; but the question is, whether he is pardoned or not? If the executive should refuse to pardon him, he is certainly not pardoned.

Mr. Martin.—But there can be no doubt, if he chooses to decline his pardon, that he stands in the same situation with every other witness, who cannot be forced to criminate himself.

Some desultory conversation here ensued, when Mr. Hay observed that he should extremely regret the loss of Dr. Bollman's testimony. He believed it to be material. He trusted that he should obtain it, however reluctantly given. The court would perceive, that Dr. Bollman now possessed so much zeal as even to encounter the risk of an indictment for treason. Whether he should appear before the grand jury under the circumstances of a pardon being annexed to his name, might hereafter become the object of a distinct inquiry. In the meantime he might go up without any such notification. The counsel of Mr. Burr acquiesced.

The CHIEF JUSTICE.—Whether he be really pardoned or not, I cannot at present declare. I must take time to deliberate.

Mr. Hay.—Categorically then I ask you, Mr. Bollman, do you accept your pardon?

Mr. Bollman.—I have already answered that question several times. I say no. I repeat, that I would have refused it before, but that I wished this opportunity of publicly declaring it.

Mr. Hay.—If the grand jury have any doubts about the questions that they put to Dr. Bollman, they can apply to the court for instructions. I assert, sir, that Mr. Bollman is a pardoned man. I wish the opposite counsel to prove that he is not. I therefore move, sir, that he be sent up to the grand jury, certified by you, that he is pardoned. I make this motion that gentlemen who wish to discuss the question may have an opportunity of adducing their arguments.

Mr. Williams appeared as counsel for Dr. Bollman, and addressed the court in his behalf, insisting he was not bound to criminate or calumniate himself, although pardoned. He claimed, however, that the pardon having been refused, the court could take no notice of it. He also insisted that no pardon except by statute could protect a party against a criminal prosecution, as a pardon under the great seal was not effectual until it had been pleaded and allowed in court. He cited numerous authorities in support of his positions.

Mr. Martin supported the same positions. He said, another reason why Dr. Bollman had refused the pardon was, that it would be considered an admission of guilt. He did not consider a pardon necessary for an innocent man. Dr. Bollman, sir, knows what he has to fear from the prosecution of an angry government, but he will brave it all. The man who did so much to rescue the Marquis La Fayette from his imprisonment, and who has been known at so many courts, bears too great a regard for his reputation, to wish to have it sounded throughout Europe that he was compelled to abandon his honor through a fear of unjust prosecution.

After some remarks by Messrs. MacRae and Hay, Dr. Bollman was sent up to the grand jury without any particular notification; the questions as to the effect of the pardon tendered to him, and how far he could be compelled to testify, being reserved for future discussion and decision.

Mr. Hay requested leave to inform the grand jury that fatigue alone had prevented General Wilkinson from attending them on that day, but that he should appear before them on Monday. The court then adjourned to Monday.

Monday, June 15, 1807.

The court met pursuant to adjournment.

Gen. Wilkinson was sworn and sent to the grand jury, with a notification that it would facilitate their inquiries if they would examine him immediately.

Mr. Wickham reminded the court that the attorney for the United States had pledged himself to send up no papers to the grand jury which had not previously passed the inspection of the court; but it had since occurred to Col. Burr's counsel that the witnesses themselves might carry up improper papers. He submitted to the court whether they ought not to instruct the grand jury to receive no papers, except through the medium of the court.

Upon this motion a running debate of considerable length ensued.

Finally, the CHIEF JUSTICE remarked that he was not satisfied that a court ought to inspect the papers which form a part of a witness's testimony before he is sent to the grand jury. He had reduced to writing an opinion to be sent to the grand jury. It instructed them not to inspect any papers, but such as formed a part of the narrative of the witness, and proved to be the papers of the person against whom an indictment was exhibited.

At the instance of Mr. Hay, the instruction

was so amended as to submit such papers as tend to justify the witness, but not to bear upon the accused.

Mr. Hay informed the court that the grand jury had sent for Dr. Bollman; that they wanted him to decipher, if he could, a ciphered letter annexed to Mr. Willie's affidavit, and which he held in his hand; that Mr. Willie, the reputed secretary of Mr. Burr, would prove the identity of the paper, and Dr. Bollman, it was expected, would interpret it.

At the suggestion of Mr. Martin, the affidavit was severed from the letter.

Mr. Willie appearing in court, Mr. Hay produced the ciphered letter annexed to his affidavit, and said: This is the letter which I wish to transmit to the grand jury. It is addressed, I understand, to Dr. Bollman, under a fictitious name, and is all in the handwriting of Mr. Willie.

Mr. Botts objected to its being sent up to the grand jury until both its materiality and its authenticity had been proved.

Mr. Hay said that was a hard proposition, as it was written partly in ciphers and partly in German. He deemed it material, because he understood it was either dictated by the accused, or first written by him and afterwards written by his secretary, and at his request. It was addressed to Henry Wilbourn, alias Erick Bollman. He wished it to be sent up while Dr. Bollman was before the grand jury.

After considerable sparring between counsel, Mr. Willie was called to the stand.

[The argument of the question of the right to compel Willie to testify took up the balance of the day, and will be found reported in Case No. 14,692e.]

Tuesday, June 16, 1807.

As soon as the court met, Mr. Hay produced and read the following letter from the president of the United States, in answer to his letter on the subject of the subpœna duces tecum, observing, at the same time, that he read it to show the disposition of the government not to withhold any necessary papers, and that if gentlemen would specify what orders they wanted, they would be furnished without the necessity of expresses:

"Washington, June 12, 1807.

"Sir: Your letter of the 9th is this moment received. Reserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated, and to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require. But the letter of General Wilkinson, of October 21st, requested for the defence of Colonel Burr, with every other paper relating to the charges against him, which were in my possession when the attorney general went on to Richmond in March, I then delivered to him; and I have always taken for granted he left the whole with you. If he did, and the bundle retains the order in which I had arranged it, you will readily find the letter desired under the date of its receipt which was November 25th; but lest the attorney general should not have left those papers with you, I this day write to him to forward this one by post. An uncertainty whether he be at Philadelphia, Wilmington, or New Castle, may produce delay in his receiving my letter, of which it is proper you should be apprised. But as I do not recollect the whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion which it would be my right and duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice. With this application, which is specific, a prompt compliance is practicable; but when the request goes to copies of the orders issued in relation to Colonel Burr to the officers at Orleans and Natchez, and by the secretaries of the war and navy departments, it seems to cover a correspondence of many months, with such a variety of officers civil and military, all over the United States, as would amount to the laying open of the whole executive books. I have desired the secretary of war to examine his official communications, and on a view of these we may be able to judge what can and ought to be done towards a compliance with the request. If the defendant allege that there was any particular order which, as a cause, produced any particular act on his part, then he must know what this order was, can specify it, and a prompt answer can be given. If the object had been specified, we might then have had some guide for our conjectures, as to what part of the executive records might be useful to him. But with a perfect willingness to do what is right, we are without the indications which may enable us to do it. If the researches of the secretary at war should produce anything proper for communication, and pertinent to any point we can conceive in the defence before the court, it shall be forwarded to you. I salute you with esteem and respect

"Thomas Jefferson.

"George Hay, Esq."

Some conversation ensued about the specification of the papers wanted from the executive.

Mr. Hay stated that in his communication to the president, to which this letter was a reply, he had mentioned these papers in the terms by which he thought the opposite counsel would probably have described them. The president, however, did not deem this description sufficient.

Colonel Burr's counsel then stated that they had sent an express to Washington for these papers, with a subpœna to the president, and that it would appear on the return whether they could obtain them or not.

Here a desultory conversation ensued, in

which Mr. Hay insisted that Dr. Bollman was a pardoned man, and ought to communicate all he knew to the grand jury, which was denied by the other side; when Dr. Bollman, addressing himself to the court, said: I have answered every question that was put to me by the grand jury.

The CHIEF JUSTICE inquired if there was any objection to asking Dr. Bollman if he could decipher the letter.

Mr. Martin said it would be time enough to discuss that question after the letter shall have been before the grand jury.

Mr. MacRae.—I wish the question now put. I asked Willie whether he understood that part of the letter which is in cipher; he could not be criminal if he did not understand it. I wish the part which is written in German now to be explained, to show that there is nothing criminal in it. I wish Bollman to translate that part

The CHIEF JUSTICE said he would prefer to proceed with the other point; how far a witness may refuse to answer a question which he thinks would criminate himself.

Mr. Botts then addressed the court at some length on that point. In the course of his remarks he intimated that the letter in question had been obtained by the robbery of the post office, and referred to the mark "25" on its back, (which he said was the only post mark of many of the country post offices,) as evidence that it had been taken from the post office.

Mr. Williams, counsel for Mr. Willie, followed Mr. Botts in support of the position that the witness was not bound to answer any question, the answer to which he believed would tend to criminate himself.

Messrs. MacRae and Hay replied at some length, after which the court adjourned.

Wednesday, June 17, 1807.

At the meeting of the court Mr. Hay referred to the insinuations that had been thrown out yesterday, that the ciphered letter in question had been taken improperly if not feloniously from the post office; and said this was evidently done to affect the character of Gen. Wilkinson. He read a note which he had just received from Gen. Wilkinson, stating that the letter was delivered to him by Charles Patton, of the house of "Meeker, Williamson & Patton," New Orleans.

Mr. Martin then addressed the court on the question of the right of Mr. Willie to decline answering the questions propounded to him by the counsel for the prosecution. He contended that "a witness is not compelled to answer when it tends to criminate him, nor where it does not relate to the issue," and cited authorities in support of the proposition.

Mr. Wickham followed in an argument on the same side

After some further desultory conversation, the CHIEF JUSTICE asked whether there were any other questions before the court.

Mr. MacRae requested a decision on Dr. Bollman's case, as he wished to interrogate him about the ciphered letter.

Mr. Williams said he was ready to discuss the question.

Mr. Burr.—There will arise some very important questions, affecting the very source of the jurisdiction of this country. I have several affidavits to produce to show that improper means have been used to procure witnesses, and thereby contaminate the public justice. When these proofs have been duly exhibited, it will be the province of the court to decide whether they will not arrest the progress of such improper conduct, and prevent the introduction of such evidence.

Mr. Botts rose to apprise the opposite counsel that there were three or four questions of importance which the counsel for Mr. Burr should bring forward as soon as possible. Two or three days ago he had commented on the plunder of the post office, and he assured the counsel for the prosecution that he should probe that subject to the bottom, as no man could be more anxious than himself that the stigma which this transaction attaches to the inferior or superior officers of the government should be wiped off.

CHIEF JUSTICE.—Unless these allegations affected some testimony that was about to be delivered, how can you introduce this subject?

Mr. Burr.—The court has very properly demanded some proof of the relevancy of our proposition. Sir, we are ready to prove the violation of the post office. We are ready to fasten it on individuals now here, and we are ready to name the post offices if the court require it, which have been thus plundered. When it comes out that evidence has been thus improperly obtained, we shall say, sir, that it is contaminated by fraud. I will name three persons who have been guilty of improper conduct, in improperly obtaining letters from the post office to be evidence against me. These are Judge Toulmin, of the Mississippi territory, John G. Jackson, a member of congress, and General Wilkinson. Two of these persons are within the reach of this court. As well as the improper manner in which they have procured affidavits and witnesses against me, I mention these circumstances for two reasons: first, that the facts may be proved to the satisfaction of the court; and second, that the court may lay their hands on testimony thus procured.

Mr. Botts.—The circumstance of the post mark proves that the post office was robbed of that letter; therefore it is not evidence.

The CHIEF JUSTICE said, let the consequences be as they may, this court cannot take cognizance of any act which has not been committed within this district. That mark is not necessarily a post mark. The court can only know the fact, in a case to which it applies, except to commit and send for trial.

Mr. Hay.—Let some specific motion be

made, and the evidence procured; and if there have been any crime committed, let the offenders be prosecuted according to law. These gentlemen know the course, and I most solemnly promise to discharge the duties of my office, whether they bear against General Wilkinson, or the man at the bar. If the crime have been committed, it is not the province of the court to notice it till after an indictment has been found.

Mr. Botts.—We only wish to prove and prevent a repetition and continuance of this improper mode of proceeding. The proof will affect General Wilkinson.

CHIEF JUSTICE.—If it did affect General Wilkinson it could not prevent him from being a witness.

Some desultory conversation here ensued, when Mr. Burr observed that he was afraid he was not sufficiently understood, from mingling two distinct propositions together. As to the subject of the post offices, it might rest for the present; but as to the improper means employed in obtaining testimony, they were at this moment in actual operation. Some witnesses had been brought here by this practice, and it was one which ought immediately to be checked; he did not particularly level his observations against General Wilkinson. He did not say that the attorney for the United States ought to indict, or that such a crime, if committed out of this district, was cognizable by the court, unless it be going on while the court is in session, or the cause depending; in those cases improper practices relative to crimes committed out of the limits of this court may be examined, and the persons committing them attached. Such practices have been since I have been recognized here, and they ought to be punished by attachment.

Mr. Wirt.—I do not yet understand the gentlemen. What is the object of their motion?

Mr. Botts.—We shall hereafter make it; we have no other object by the present annunciation than to give gentlemen a timely notice of our intentions.

Mr. Burr.—We have sufficient evidence on which to found our motion.

What motion? demanded Mr. Hay.

Mr. Burr.—I thought, sir, I had sufficiently explained my intentions. I may either move for a rule to show cause why an attachment should not issue against Judge Toulmin, John G. Jackson, and General Wilkinson, or what is sometimes, though not so frequently practiced, I may directly move for an attachment itself.

Mr. MacRae.—At whose instance?

Mr. Burr.—At the public's.

Mr. MacRae.—A pretty proceeding, indeed! that the public prosecution should thus be taken out of the hands of the public prosecutor, and that the accused should supersede the attorney for the United States!

Mr. Burr.—A strange remark indeed! As if it were not the business of the injured person himself to institute the complaint.

Mr. Hay.—I wish for further explanation. Let the specific charge on which their motion is founded be clearly pointed out and reduced to writing.

Mr. Burr.—The motion will be for an attachment for the irregular examination of witnesses, practicing on their fears, forcing them to come to this place, and transporting them from New Orleans to Norfolk.

At this moment Mr. Randolph entered the court, and observed that if he had been present he would have himself opened this motion, which was intended to operate immediately upon General Wilkinson, and ultimately upon some other persons. Mr. Randolph here read the motion which he would have submitted to the court.

Mr. Hay protested against this proceeding, which, he said, was calculated to interrupt the course of the prosecution, and was levelled at General Wilkinson alone.

After some further remarks from Mr. Hay and from Messrs. Randolph and Martin—Mr. Hay said he should move to postpone the motion of the gentlemen till the prosecution was over, because it would necessarily interrupt the business before the court, because it was intended to impeach the credit of a witness, and because this inquiry could as well be conducted after as before the prosecution.

Mr. Wickham replied to Mr. Hay. He said, among other things, that General Wilkinson had brought witnesses with him from New Orleans by military force. He had taken their depositions entirely ex parte at the point of the bayonet, for the purpose of keeping their testimony straight. He would lay down the broad proposition that the man who goes about collecting affidavits upon affidavits in relation to a matter to be investigated in this court corrupts the fountains of justice. We have already seen a volume of such at this bar. He particularly referred to Mr. Jackson, who comes here with the depositions of witnesses who are thus bound hand and foot, thus tongue-tied, because their depositions had been taken. He had seen them in this very court examining witnesses with affidavits in their hands, and comparing the one with the other; depositions taken not by commissions, but ex parte. When an interested agent thus goes about collecting depositions, and with ignorant men shaping them just as he pleases, he acts contrary to law and to the spirit and genius of our government; and such acts are a contempt of this court, if done during the prosecution, by interfering with the purposes of justice. Such men are liable to attachment from the very moment that the government took possession of Colonel Burr's person; not from the moment of first arrest, but from the time when they ordered Perkins to conduct his prisoner from Fredericksburg to Richmond. It was necessary to institute this proceeding now to prevent the repetition of such practices during the progress of the trial. At the conclusion of Mr. Wickham's remarks

The CHIEF JUSTICE said that the pend-

ency of the prosecution was no objection to hearing the motion, but it was another question whether there were any grounds for it or not, and that the court would not say that a motion relating to the justice of the case ought not to be heard.

The court then adjourned.

[Thursday, June 18, 1807. As soon as the court met, the CHIEF JUSTICE delivered an opinion in the case of Willie. This will be found reported as Case No. 14,692e. After the delivery of such opinion]

Mr. Williams (counsel for Mr. Willie) stated that he had misunderstood him the other day in court, and in a subsequent conversation had obtained more accurate information. He does understand a part of that letter.

Mr. Hay requested that Mr. Willie should be called into court. When he appeared Mr. Hay interrogated him. Do you understand the contents of that letter? Answer. No. Mr. Willie afterwards said that he understood the part of the letter which is written in Dutch.

Mr. Hay.—Was this letter written by the hand or the direction of Aaron Burr?

Mr. Wickham objected to the question.

The CHIEF JUSTICE.—The witness and his counsel will consult.

Mr. Hay repeated the question. Mr. Willie. Yes. Mr. Hay. Which? by his hand or his direction? Mr. Willie. By his direction. It was copied from a paper written by himself.

Mr. Hay.—I wish this paper to be carried to the grand jury. I presume there can be no objection.

Mr. Botts.—No objection! We call upon you to show the materiality of that letter.

Mr. Hay.—I deny the necessity of any such thing. Until this letter be deciphered it will be perfectly unintelligible to me and to the grand jury. It is no more than a blank piece of paper.

Mr. Wickham.—I had always understood before that the testimony which is laid before a grand jury must not only be legal in itself, but proved to be material.

Mr. Williams begged leave to interrupt the gentleman. Mr. Willie is anxious to be particularly understood. He says that this ciphered letter was first written by Colonel Burr, and afterwards copied. But it is the cipher only which has been copied from Colonel Burr's original.

Mr. Hay.—It is quite sufficient, sir. If Colonel Burr wrote the ciphered part, he will be considered the author of the whole.

Mr. Wickham.—The gentleman has stated a curious proposition indeed! I had always understood before that the whole included the part; but it seems now that the part is to comprehend the whole.

After some further discussion, in which several of the counsel participated,

The CHIEF JUSTICE said he had in some measure anticipated this question, and had reflected upon it; his opinion was, that a paper to go before the grand or petit jury must be relevant to the case, even if its materiality were not proved. Why send this paper before the grand jury, if it cannot be deciphered? If it can be deciphered before the grand jury, why not before the court? Let it, then, be deciphered, and its relevancy may at once be established.

Mr. Hay then requested Dr. Bollman to be called, that he might be interrogated as to its contents; but before he appeared, Mr. John Randolph entered at the head of the grand jury, and addressed the court as follows: May it please the court: One of the witnesses under examination before the grand jury has answered certain questions touching a letter in ciphers. The grand jury understand that this letter is in the possession of the court, or of the counsel for the prosecution. They have thought proper to appear before you, to know whether the letter referred to by the witness be in the possession of the court?

The CHIEF JUSTICE then remarked that as the letter was wanted by the grand jury, a witness having referred to it, that was sufficient to establish its relevancy, and directed it to be delivered to them.

Mr. MacRae hoped that before the grand jury retired they would be informed that a witness had proved that this letter was originally written by Aaron Burr.

Mr. Wickham hoped that they would also be informed that the superscription on that letter has not been proved to have been written by Colonel Burr. The witness did not and would not say that he knew the superscription to have been written by him. The grand jury retired and the court adjourned.

Friday, June 19, 1807.

As soon as the court met, Mr. Burr addressed them. He stated that the express that he had sent on to Washington with the subpœna duces tecum had returned to this city on Wednesday last, but had received no other than a verbal reply from the president of the United States that the papers wanted would not be sent by him, from which I have inferred, said Mr. Burr, that he intends to send them in some other way. I did not mention this circumstance yesterday to the court, under an expectation that the last night's mail might give us further intelligence on the subject. I now rise to give notice that unless I receive a satisfactory intimation on this subject before the meeting of the court, I shall to-morrow move the court to enforce its process.

[Motion was then made for an attachment against General Wilkinson "for a contempt in obstructing the administration of the justice of this court," the argument on which occupied the balance of the day. Case No. 14,692f.]

Saturday, June 20, 1807.

The court met according to adjournment. Present, the same judges as yesterday.

Mr. Randolph rose to proceed with his motion, when he was interrupted by Mr. Hay, who spoke to this effect:

I have a communication to make to the court, and to the counsel of the accused. The court will recollect the answer which I received from the president, to my letter respecting certain papers. He stated in that letter that General Wilkinson's letter of the 21st October had been delivered to Mr. Rodney, the attorney general, from whom he would endeavor to obtain it. By the last mail I have received this letter from the president on the same subject.

"Washington, June 17, 1807.

"Sir: In answering your letter of the 9th, which desired a communication of one to me from General Wilkinson, specified by its date, I informed you in mine of the 12th that I had delivered it, with all other papers respecting the charges against Aaron Burr, to the attorney general when he went to Richmond; that I had supposed he had left them in your possession, but would immediately write to him, if he had not, to forward that particular letter without delay. I wrote to him accordingly on the same day, but having no answer I know not whether he has forwarded the letter. I stated in the same letter that I had desired the secretary of war to examine his office in order to comply with your further request to furnish copies of the orders which had been given respecting Aaron Burr and his property; and, in a subsequent letter of the same day, I forwarded you copies of two letters from the secretary at war, which appeared to be within the description expressed in your letter. The order from the secretary of the navy you said you were in possession of. The receipt of these papers has, I presume, so far anticipated, and others this day forwarded, will have substantially fulfilled the object of a subpœna from the district court of Richmond, requiring that those officers and myself should attend the court in Richmond, with the letter of General Wilkinson, the answer to that letter, and the orders of the department of war and the navy therein generally described. No answer to General Wilkinson's letter, other than a mere acknowledgement of its receipt in a letter written for a different purpose, was ever written by myself or any other. To these communications of papers I will add, that if the defendant suppose there are any facts within the knowledge of the heads of departments or of myself, which can be useful for his defence, from a desire of doing anything our situation will permit in furtherance of justice, we shall be ready to give him the benefit of it, by way of deposition through any persons whom the court shall authorize to take our testimony at this place. I know indeed that this cannot be done but by consent of parties, and I therefore authorize you to give consent on the part of the United States. Mr. Burr's consent will be given of course, if he suppose the testimony useful.

"As to our personal attendance at Richmond, I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case, as it would should we receive a similar one to attend the trials of Blennerhassett and others in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any co-ordinate authority.

"With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication. Hence, under our constitution, in requests of papers from the legislative to the executive branch, an exception is carefully expressed, 'as to those which he may deem the public welfare may require not to be disclosed,' as you will see in the inclosed resolution of the house of representatives, which produced the message of January 22d, respecting this case. The respect mutually due between the constituted authorities in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candor and integrity to which the nation has, in like manner, trusted in the disposal of its judiciary authorities. Considering you as the organ for communicating these sentiments to the court, I address them to you for that purpose, and salute you with esteem and respect. Thos. Jefferson."

Accompanying this letter is a copy of the resolution of the house of representatives containing the exception to which the president refers. I have also received a letter from Mr. Smith, the secretary of the navy, containing an authentic copy of the order which was wanted, precisely corresponding with the unauthenticated copy in my possession.

Mr. Wickham.—I presume that these must be considered and noted as the return to the "subpœna duces tecum."

Mr. Hay.—So far as they go. When we receive General Wilkinson's, the return will be complete. I have also received a letter

from the secretary of war, which contains all the orders of his department relative to Aaron Burr. All which papers I shall deposit with the clerk of this court.

The following is the order of the navy department:

"I certify that the annexed is a true copy from the records in the office of the department of the navy of the United States of the letter from the secretary of the navy to Captain John Shaw, dated 20th December, 1806. In faith whereof, I, Robert Smith, secretary of the navy of the United States of America, have signed these presents, and caused the seal of my office to be affixed hereto, at the city of Washington, this 17th day of June, Anno Domini 1807, and in the 31st year of the independence of the said sta'es.

"(Registered.) Rt. Smith."

"Secretary of the Navy.

"Ch. W. Goldsborough,

"Ch. Clk., N. D."

"(Copy.)

"Navy Department, 20th December, 1806.

"Sir: A military expedition formed on the western waters by Colonel Burr will soon proceed down the Mississippi, and by the time you receive this letter will probably be near New Orleans. You will, by all the means in your power, aid the army and militia in suppressing this enterprise. You will, with your boats, take the best position to intercept and to take, and, if necessary, to destroy, the boats descending under the command of Colonel Burr, or of any person holding an appointment under him. There is great reliance on your vigilance and exertions. I have the honor to be, sir, your most obedient,

"(Signed) Rt. Smith.

"Captain John Shaw, or the Commanding Naval Officer at New Orleans."

[Thereupon the motion for attachment was brought on and argued. The argument and opinion will be found reported as Case No. 14,692f.]

On Wednesday, the 24th of June, while Mr. Botts was speaking on the motion for an attachment, the grand jury entered, when Mr. John Randolph, their foreman, addressed the court, and stated that they had agreed upon several indictments, which he handed in at the clerk's table. The clerk then read the endorsements upon them as follows: "An indictment against Aaron Burr for treason. A true bill." "An indictment against Aaron Burr for a misdemeanor. A true bill." "An indictment against Herman Blannerhasset[4] for treason. A true bill." "An indictment against Herman Blannerhassett for a misdemeanor. A true bill." The foreman then stated that the grand jury had still other subjects for their consideration, and had adjourned themselves to meet to-morrow at ten o'clock.

[4] So in the indictment. The correct spelling is "Harman Blennerhassett."

After Mr. Botts had concluded his argument, Mr. Burr addressed the court, and observed that as bills had been found against him, it was probable the public prosecutors would move his commitment. He would, however, suggest two ideas for the consideration of the court: the one was, that it is within their discretion to bail in certain cases, even when the punishment was death; and the other was, that it was expedient for the court to exercise their discretion in this instance, as he should prove that the indictment against him had been obtained by perjury.

Mr. Hay moved for the commitment of Aaron Burr. He stated that if the court had power to bail by the 33d section of the judicial act, it was only to be exercised according to their sound discretion, and that the prisoner was not to demand bail as a matter of right.

Mr. Martin said the counsel for the prosecution had admitted the right of the court to give bail according to its discretion.

Mr. MacRae did not understand from the judicial act that the discretion was to be exercised at this stage of the business, but only at the time of making the arrest.

After some further remarks by Messrs. Martin, Wirt, and Wickham, the CHIEF JUSTICE said: Mr. Martin, have you any precedents where a court has bailed for treason, after the finding of a grand jury, on either of these grounds; that the testimony laid before the grand jury had been impeached for perjury, or that other testimony had been laid before the court, which had not been in possession of the grand jury?

Mr. Martin said that he had not anticipated this case, and had not, therefore, prepared his authorities; but he had no doubt that such existed.

Mr. Burr said, if the court have no discretion, it is unnecessary to produce evidence. That question ought, therefore, to be previously settled.

Some further discussion ensued, as to the question whether the court had any discretion, when Mr. Burr said, that if the court thought it had the power to bail in any case after bill found, it would then be necessary to show that it ought to exercise its discretion in this instance. That the finding of the jury was founded on the testimony of a perjured witness. That General Tupper would prove that there had been no such resistance of his authority as had been stated by that witness.

After same further conversation between counsel, Mr. Burr wished to know whether the court would go into testimony extrinsic to the indictment.

The CHIEF JUSTICE said he had never known a case similar to the present when such an examination had taken place.[5]

[5] The court will in no instance inquire into the character of the testimony which has influenced the grand jury in finding an indictment. State v. Boyd, 2 Hill (S. C.) 288.

Mr. Martin would produce authorities if he had time allowed him.

The CHIEF JUSTICE insisted upon the necessity of producing adjudged cases to prove that the court could bail a party against whom an indictment had been found.

Mr. Burr did not wish to protract the session of the court to suit his own personal convenience. There was no time at present to look for authorities.

The CHIEF JUSTICE observed that he was then under the necessity of committing Colonel Burr.

Mr. Burr stated that he was willing to be committed, but hoped that the court had not forestalled its opinion.

The CHIEF JUSTICE.—I have only stated my present impression. This subject is open for argument hereafter. Mr. Burr stands committed to the custody of the marshal.

He was accordingly committed to the gaol, and the court adjourned.

On Thursday, the 25th of June, while Mr. Hay was addressing the court on the motion for an attachment against General Wilkinson, the grand jury entered, and their foreman, Mr. John Randolph, addressed the court as follows: "May it please the court: The grand jury have been informed that there is in the possession of Aaron Burr a certain letter, with the post mark of May 13th, from James Wilkinson, in ciphers, which they deem to be material to certain inquiries now pending before them. The grand jury are perfectly aware that they have no right to demand any evidence from the prisoner under prosecution which may tend to criminate himself. But the grand jury have thought proper to appear in court to ask its assistance, if it think proper to grant it, to obtain the letter with his consent."

Mr. Burr rose and asked whether the court were about to give an opinion?

The CHIEF JUSTICE stated that the court was about to say that the grand jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself; he presumed that the grand jury wished also to know whether the person under prosecution could be examined on other questions not criminating himself?

Mr. Burr declared that it would be impossible for him, under certain circumstances, to expose any letter which had been communicated to him confidentially; how far the extremity of circumstances might compel him to such a conduct, he was not prepared to decide; but it was impossible for him even to deliberate on the proposition to deliver up anything which had been confided to his honor, unless it were extorted from him by law.

Mr. Randolph.—We will withdraw to our chamber, and when the court has decided upon the question it will announce it to the grand jury.

The CHIEF JUSTICE knew not that there was any objection to the grand jury calling before them and examining any man as a witness who laid under an indictment.

Mr. Martin said there could be no objection.

Mr. Randolph said he was afraid that the object of the grand jury had been misunderstood by the court. The grand jury had not appeared before the court to apply for the person of Aaron Burr, to obtain evidence from him, but for a certain paper which might or might not be in his possession; and upon that paper being or not being in his possession, and upon its being possible or not possible to identify that paper, it might depend whether Aaron Burr himself were or were not a material evidence before them; and then the grand jury withdrew.

When Mr. Hay had concluded his argument, Mr. MacRae addressed the court. He was solicitous he said, to lay a communication before it, on a circumstance which had lately transpired. The grand jury had asked for a certain letter in ciphers, which was supposed to have been addressed by General Wilkinson to the accused. The court had understood the ground on which the accused had refused to put it in their possession, to be an apprehension lest his honor should be wounded by his thus betraying matters of confidence. I have seen General Wilkinson, sir, since this declaration was made. I have informed him of the communication which has thus been made, and the general has expressed his wishes to me, and requested me to express those wishes, that the whole of the correspondence between Aaron Burr and himself may be exhibited before the court. The accused has now, therefore, a fair opportunity of producing this letter; he is absolved from all possible imputation; his honor is perfectly safe.

Mr. Burr.—The court will probably expect from me some reply. The communication which I made to the court, has led, it seems, to the present invitation. I have only to say, sir, that this letter will not be produced. The letter is not at this time in my possession, and General Wilkinson knows it.

Mr. MacRae hoped that notice of his communication would be sent to the grand jury.

Mr. Martin hoped that Colonel Burr's communication also would go along with it.

The CHIEF JUSTICE was unwilling to make the court the medium of such communications.

Mr. MacRae hoped the court would notify his communication to the grand jury, and for an obvious reason. When the grand jury came into court to ask for the paper, what did the accused say? Did he declare that it was not in his possession? No: he merely said that honor forbade him to disclose it. The inference undoubtedly was, that he had the paper, but could not persuade himself to disclose it. And what then must have been the impression of the grand

jury? A cloud of suspicions must have fastened itself upon their minds; suspicions unjustly injurious to the character of General Wilkinson and which the present communication may at once disperse. It is but justice, therefore, to General Wilkinson, to whom the inquiries of the grand jury may at present relate, to give them the benefit of this information.

Mr. Burr.—General Wilkinson, sir, is extremely welcome to all the eclat which he may expect to derive from this challenge; but as it is a challenge from him, it is a sufficient reason why I should not accept it. But as the remarks of the last gentleman seem to convey some reproach against me, (which no man who knows me can believe me to deserve) it may be proper to say, that I did voluntarily, and in the presence of a witness, put the letter out of my hands, with the express view that it should not be used improperly against any one. I wished, sir, to disable any person, even myself, from laying it before the grand jury. General Wilkinson knows this fact.

The CHIEF JUSTICE then reduced these communications to writing, and transmitted them to the grand jury.

Mr. Burr.—Let it be understood, that I did not put this letter out of my possession because I expected the grand jury would take up this subject but from a supposition that they might do so.

Mr. Wickham, about to speak, was interrupted by the entrance of the grand jury when Mr. Randolph, their foreman, informed the court that they had agreed upon some presentments, which he then delivered into the hands of the clerk. The clerk then read as follows:

"The grand inquest of the United States, for the district of Virginia, upon their oaths, present, that Jonathan Dayton, late a senator in the congress of the United States, from the state of New Jersey; John Smith, a senator in the congress of the United States, from the state of Ohio; Comfort Tyler, late of the state of New York; Israel Smith, late of the state of New York; and Davis Floyd, late of the territory of Indiana, are guilty of treason against the United States, in levying war against the same, to wit: at Blennerhassett's Island, in the county of Wood, and state of Virginia, on the 13th day of December, 1806."

Friday, June 26, 1807.

The court met about nine o'clock, and, about ten o'clock, the grand jury entered, and Mr. Randolph, their foreman, presented ten indictments, found true bills; that is, one indictment for treason, and another for a misdemeanor, against each of the following individuals, viz.: Jonathan Dayton, John Smith, Comfort Tyler, Israel Smith, and Davis Floyd.

The CHIEF JUSTICE then made a short address to the grand jury, in which he complimented them upon the great patience and cheerful attention with which they had performed the arduous and laborious duties in which they had been so long engaged, and concluded, by discharging them from all further attendance.

The court then adjourned till twelve o'clock. As soon as it met again, Mr. Botts requested the court to remove Mr. Burr from the public gaol, to some comfortable and convenient place of confinement. He depicted, in very strong terms, the miserable state of the prison where he was then confined. The grounds of this motion are to be found in the following affidavit made by some of Mr. Burr's counsel, and laid before the court:

"We, who are counsel in the defence of Colonel Burr, at the suit of the United States, beg leave to represent to the court, that in pursuance of our duty to him, we have visited him in his confinement in the city gaol: that we could not avoid remarking the danger, which will most probably result to his health, from the situation, inconveniences and circumstances attending the place of his confinement; but we cannot forbear to declare our conviction, that we ourselves cannot freely and fully perform what we have undertaken for his defence, if he remain in the gaol aforesaid, deprived, as he is, of a room to himself, it being scarcely possible for us to consult with him upon the various necessary occasions which must occur, from all which we believe that he will be deprived of that assistance from counsel, which is given to him by the constitution of the United States, unless he be removed. Edmund Randolph.

"John Wickham.

"Benjamin Botts.

"Sworn to in open court, by Edmund Randolph, John Wickham, and Benjamin Botts, Esquires. June 25th, 1807.

"William Marshall, Clerk."

The counsel for the prosecution were perfectly silent on the motion. After a long and desultory argument by Mr. Burr's counsel, the court determined that the prisoner should be removed to his former lodgings near the capitol, provided they could be made sufficiently strong for his safe keeping, being of opinion that the act of congress authorized it, on the foregoing affidavit, to make the order of removal.

Mr. Latrobe, surveyor of the public buildings of the United States, was requested to inspect them; and upon his report the court passed the following order: "Whereupon, it is ordered, that the marshal of this district do cause the front room of the house now occupied by Luther Martin, Esq., which room has been and is used as a dining room, to be prepared for the reception and safe keeping of Colonel Aaron Burr, by securing the shutters to the windows of the said room by bars, and the door by a strong bar or padlock. And that he employ a guard of seven men to be placed on the floor of the adjoining unfinished house, and on the same story with the before described front room, and also at the door

opening into the said front room; and upon the marshal's reporting to the court that the said room has been so fitted up and the guard employed, that then the said marshal be directed, and he is hereby directed, to remove to the said room, the body of the said Aaron Burr from the public gaol, there to be by him safely kept."

Mr. Hay.—My only wish is, that this prosecution should be regularly conducted. Is it not the usual practice to read the indictment first and then move for the venire?

Mr. Burr.—I have been furnished with a copy of the indictment; I have perused it and I am ready to plead not guilty to it.

Mr. Wirt.—The usual form requires the actual arraignment of the prisoner; however, the court may dispense with it, if it think proper.

Mr. Hay was indifferent about the form, if the law could be substantially executed. He supposed that a simple acknowledgment of the prisoner was sufficient, without the customary form of holding up his hand.

CHIEF JUSTICE.—It is enough, if he appear to the indictment, and plead not guilty.

The clerk then read the indictment against Aaron Burr, for treason against the United States; which specifies the place of the overt act, to be at Blennerhassett's Island; and the time, the 10th day of December, 1806.

When he had concluded, Mr. Burr addressed the court: I acknowledge myself to be the person named in the indictment. I plead not guilty; and put myself upon my country for trial.

Mr. Hay then addressed the court on the venire that was to try the issue between the prisoner and the United States. He expressed some doubt whether the 29th section of the act of congress called the judicial act [1 Stat. 88], was still in force, which required twelve jurors, at least, to be summoned from the county where the offence was committed. If this law was still in force, it would be necessary to summon twelve petit jurors from the county of Wood, which would render it impossible to have the trial at an early day.

The CHIEF JUSTICE said he had no doubt the law was still in force.

Mr. Burr said as this law was most probably intended for the benefit of the accused, he consented to waive the right.

Mr. Wirt suggested a doubt whether consent in such a case could take away error.

The CHIEF JUSTICE believed that the provision was not absolutely obligatory, if both parties would waive the right.

Mr. Hay said he felt no disposition to delay the trial; but he could not think of pledging himself to such a measure without due deliberation. He would consult the gentlemen associated with him, and inform the court of the result.

The counsel for the prosecution then retired to consult. On their return, Mr. Hay informed the court that they could not assume the responsibility of consenting to such a proposition, as the law seemed imperative. He must therefore request the court to direct a venire of twelve men, at least, to be summoned from Wood county.

A long conversation ensued as to the time that would be necessary to summon the venire from Wood county, as it would be necessary to postpone the trial accordingly; opinions varying from twenty to thirty-five days. The court made an order for a venire of forty-eight jurors, twelve of whom, at least, were to be summoned from Wood county. Without fixing the time for the trial, the court adjourned.

On Saturday, the 27th of June, an order was made postponing the trial to the third day of August, and for the return of the venire on that day.

Monday, June 29, 1807.

Mr. Hay laid the following order of the executive council before the court:

"In Council, June 29, 1807. The board being informed that an affidavit has been filed in the circuit court of the United States, for the Virginia district, which states that the gaol for the county of Henrico and city of Richmond is inconvenient and unhealthy, and so crowded with state offenders and debtors that there are no private apartments therein for the reception of persons charged with offences against the laws of the United States, it is therefore advised that the governor be requested to tender the said court, (through the federal attorney of the district of Virginia,) apartments in the third story of the public gaol and penitentiary house for the reception of such persons as shall be directed under the authority of the United States to be confined therein.

"Extract from the minutes.

"Daniel L. Hylton, Clerk of the Council."

The following was the order of the court on this subject: "Which tender the court doth accept for the purpose above mentioned."

The final decision of the motion to commit Aaron Burr to the penitentiary was postponed until to-morrow.

Tuesday, June 30, 1807.

After the court met the motion to commit Aaron Burr to the penitentiary was renewed. It was objected to by his counsel, on the ground (and an affidavit was made by them to the same effect) that in so important a case it was essentially necessary for the most uninterrupted intercourse to subsist between the prisoner and his counsel; but that the distance of the penitentiary, combined with their own professional avocations, would necessarily narrow and interrupt this intercourse. It was also said that, by particular regulations of the penitentiary, the custody of the prisoner would be transferred from the marshal to the superintendent, and that the communications of the prisoner with his counsel would be limited to the very same short period which was allowed to the other visitants: that is, from eleven to one o'clock.

The attorney for the United States replied to these objections.

The CHIEF JUSTICE said when there was a public gaol not unreasonable distant or unfit for the reception of the prisoner, and when the court was called upon on the part of the United States to commit a prisoner to its keeping, that he conceived himself bound to comply with the requisition; that when he had given the order for his removal from the gaol to his own lodgings, it was under an expectation that the trial would be prosecuted immediately, and that the intercourse between the prisoner and his counsel would be necessarily incessant; but as a postponement had taken place, such an intercourse would not be absolutely necessary: under such circumstances, therefore, he should direct the removal of the prisoner to the penitentiary, if he were still to continue in the possession of the marshal, and if his counsel were to have free and uninterrupted access to him.

Some difficulty having thus occurred on these points, the executive council was immediately convened. In a short time the following letter was submitted to the court:

"Council Chamber, June 30, 1807.

"Sir: In pursuance of an advice of the council of state, I beg leave, through you, to inform the circuit court of the United States, now sitting, that any persons who may be confined in the gaol and penitentiary house, on the part of the United States, will be considered as in the custody, and under the sole control of the marshal of the district; that he will have authority to admit any person or persons to visit the confined that he may think proper, and that he will be authorized to select for the purposes aforesaid, any apartment in the penitentiary now unoccupied, that he may deem most conducive to safety, health, and convenience. I am, with great respect, sir, your obedient servant,

"Wm. H. Cabell.

"George Hay, Esq."

The court then made the following order: "In consequence of the offer made by the executive of apartments in the third story of penitentiary and state prison, for persons who may be confined therein, under the authority of the United States, and of the foregoing letter from the governor of this commonwealth, it is ordered, on the motion of the attorney for the United States, that so soon as the apartments in the third story of the public gaol and penitentiary shall be fit for the reception and safe keeping of Aaron Burr, that he be removed thereto, and safely kept therein by the marshal, until the second day of August next, when he shall be brought back to the prison where he is now placed, there to be guarded in like manner as at present, until the further order of the court."

Monday, August 3, 1807.

On this day the circuit court of the United States for the Fifth circuit and district of Virginia, was held according to adjournment. Present: the CHIEF JUSTICE of the United States; George Hay, William Wirt, and Alexander MacRae, Esquires, counsel for the prosecution.

The prisoner was brought into court from his apartment, near the Swan Tavern, to which he had been removed on Saturday.

Edmund Randolph, John Wickham, Benjamin Botts, John Baker, and Luther Martin, Esquires, appeared as his counsel.

The court assembled at twelve o'clock. An immense concourse of citizens attended to witness the proceedings of this important trial.

Mr. Hay observed that he could take no steps in this business until he had ascertained whether the witnesses summoned on the part of the United States were present; he therefore requested that their names might be called over; they were more than one hundred in number. Their names were accordingly called.

Mr. Hay begged leave to mention that he had nothing more to submit to the court this day. There were many of the witnesses of whose places of residence he was ignorant; several had not appeared; many had been merely pointed out to him by the attorney general of the United States. He observed that, therefore, he had not yet been able to furnish Colonel Burr with a list of the witnesses, and a statement of the places of their residence, as the law requires; that, as many of those who had been summoned and recognized had failed to appear, he was not ready to proceed with the trial immediately. He also informed the court that a list of the venire had been delivered on Saturday to Colonel Burr, but had since been discovered to be inaccurate. It became, therefore, necessary (an act of congress having directed this to be done at least three days before the trial) to deliver a correct list on this day; and, of course, the trial would be postponed until the requisite time should have elapsed.

The CHIEF JUSTICE inquired, then, to what day it would be proper to adjourn the court.

Mr. Hay could not possibly state by what day he should be able to prepare his lists.

Mr. Burr observed that it was not probable that he should avail himself of any privileges to which he might be entitled from any delay in furnishing him with the list of jurors, or of any incorrectness in the list; and therefore the court might adjourn to any day which was convenient to the attorney for the United States. If the day of adjournment depended on his own consent, he should not object to any adjournment, provided it did not extend further than Wednesday.

Mr. Hay had no objection to that day.

At the instance of Mr. Hay the names of the jurors were called, when forty-six answered to their names, two only being absent.

Mr. Burr reminded the court of the motion which he had made, on a former occasion, for a subpœna duces tecum, addressed to the president of the United States. That mo-

tion had been partly complied with. He wished to know of the court whether it were not a matter of right for him to obtain a subpœna duces tecum. If it were not, he should then lay a specific motion before the court.

The CHIEF JUSTICE did not believe it to be the practice in Virginia to obtain such a subpœna upon a mere application to the clerk. The motion must be brought before the court itself.

Mr. Hay said that he would say nothing on this subject until he understood the object of the application: that if it were to obtain the letter which was not formerly furnished, he would inform the opposite counsel that he had it now among his papers, and was ready to produce it.

Mr. Burr.—That is one object of the application. Another is, to obtain a certain communication from General Eaton to the president of the United States, which is mentioned in his deposition.

Mr. Hay said that he was not certain whether he had that communication, but believed that it was among his papers. If it were there, he would certainly produce it.

Mr. Burr.—But if, after a search, the gentleman finds that he has not that paper, will he consent, out of court, to issue a subpœna to the president of the United States, under the qualification I have mentioned? I wish not, at the present exigency, to derange the affairs of the government, or to demand the presence of the executive officers at this place. All that I want are certain papers.

Mr. Hay said that he could not consent to it; he would rather that a regular application should be made for it to the court.

Mr. Burr.—Then, sir, I shall move for a subpœna duces tecum, to the president of the United States, directing him to attend with certain papers. This subpœna will issue as in the former instance. I shall furnish the clerk with the necessary specification of the paper which I require.

The court was then adjourned till Wednesday, twelve o'clock.

Wednesday, August 5, 1807.

The court met, according to adjournment. Present: JOHN MARSHALL, Chief Justice of the United States.

The names of the witnesses being called over, and many being still absent, Mr. Hay was not ready to proceed. He presumed all of the witnesses would be present in a few days.

After some conversation as to the time to which the court should adjourn, Mr. Hay proposed an arrangement as to the mode of conducting the trial, in respect to the order in which counsel should speak.

The CHIEF JUSTICE said the best mode appeared to him to be this: that the case should be opened fully by one of the gentlemen on the part of the United States; then opened fully by one of the counsel on the other side; that the evidence should be next gone through, and the whole commented upon by another of the gentlemen employed by the United States, who should be answered by the rest of the counsel for Colonel Burr; and one only of the counsel for the United States should conclude the argument.

Without coming to any arrangement, the court adjourned till Friday, twelve o'clock.

Friday, August 7, 1807.

The court met according to adjournment. Present: JOHN MARSHALL, Chief Justice of the United States, and CYRUS GRIFFIN, Judge of the District of Virginia.

The witnesses were again called over, and several who had not been present before, appeared, and were recognized to attend until discharged by the court. The counsel for the United States, however, not being as well prepared to go into the trial as they expected to be, (many of their witnesses being still absent,) the trial was farther postponed, and the court adjourned until Monday next, at twelve o'clock.

In the course of this day, a difficulty was suggested by Major Scott, the marshal of the Virginia district, as arising out of the order of the court, by virtue of which Colonel Burr had been removed from the penitentiary house to his present lodgings. He stated that he had been informed from good authority, that the secretary of the treasury had declared that he would not allow his charge of seven dollars per day, for the guards employed for the safe-keeping of the prisoner; and, therefore, he might lose that sum, which he had hitherto been advancing out of his own pocket.

The CHIEF JUSTICE declared the firm conviction of the court, that the order, heretofore made, was legal and proper; that the payments made in pursuance thereof would be sanctioned by the court, and ought to be allowed by the secretary of the treasury. He could not believe that the secretary would finally disallow those items in the marshal's account. But, as the officer of the court ought not to be subjected to any risk in obeying its directions, and if the secretary should refuse to allow him a credit for the money paid, the court had no power to compel him to do so, and the situation of the marshal was such that he dared not enter into a controversy with the secretary; the court was disposed to rescind the order, unless some arrangement could be made by Colonel Burr and his counsel, for the indemnification of the marshal.

Colonel Burr declared that an offer had already been made on his part to indemnify the marshal, and that he was still ready and willing to give him satisfactory security that the money should be paid him, in case the secretary of the treasury should refuse to allow the credit.

Some desultory conversation ensued, but nothing positive was agreed upon; but it ap-

peared to be understood that security was to be given to Major Scott, and that Colonel Burr was to remain in his apartment near the Swan Tavern.

Monday, August 10, 1807.

The court met pursuant to adjournment.

Harman Blennerhassett was brought into court, and Mr. Hay moved that he be arraigned for treason. Mr. Botts objected, on the ground that he had not been furnished with a copy of the indictment three days previously; and he was reconducted to his prison. Four of the venire were excused on account of indisposition. The clerk informed Mr. Burr that he was at liberty to challenge such of the venire as he might object to.

Mr. Burr begged leave to inform the jurors, who were within hearing, that a great number of them may have formed and expressed opinions about him which might disqualify them from serv'ng on this occasion. He expected that, as they came up, they would discharge the duties of conscientious men, and candidly answer the questions put to them, and state all their objections against him. The deputy marshal then summoned first, Hezekiah Bucky.

Mr. Botts.—We challenge you for cause. Have you ever formed and expressed an opinion about the guilt of Colonel Burr? Mr. Bucky. I have not, sir, since I have been subpœnæd. Question. Had you before? Answer. I had formed one before in my own mind.

Mr. Hay wished that the question of the opposite counsel could assume a more precise and definite form. If this question were proposed to this man, and to every other man of the panel, he would venture to predict that there could not be a jury selected in the state of Virginia, because he did not believe that there was a single man in the state, qualified to become a juryman, who had not, in some form or other, made up, and declared an opinion on the conduct of the prisoner. The transactions in the West had excited universal curiosity; and there was no man who had not seen and decided on the documents relative to them. Do gentlemen contend that in a case so peculiarly interesting to all, the mere declaration of an opinion is sufficient to disqualify a juryman? A doctrine of this sort would at once acquit the prisoner; for where is the jury that could try him? Such a doctrine amounts to this: that a man need only to do enough to draw down the public attention upon him, and he would immediately effect his discharge. Mr. Hay concluded with a hope that the question would assume a more definite form; he should not pretend to decide the form in which it should be proposed, for that was the province of the court; it was a privilege to which every court is entitled, and one which the court had exercised in the case of James T. Callender.

Mr. Botts considered it as a misfortune ever to be deplored, that in this country, and in this case, there had been too general an expression of the public sentiment, and that this generality of opinion would disqualify many, but he had never entertained a doubt, until the gentleman for the prosecution had avowed it, that twelve men might be found in Virginia, capable of deciding this question with the strictest impartiality. He still trusted that the attorney for the United States was mistaken, that the catastrophe was not completely fixed, and that every man in the state had not pledged himself to convict Colonel Burr whether right or wrong. He was not present at the trial of James T. Callender; but all America had heard the question which was then propounded to the juryman, and that was, whether he had made up and expressed an opinion respecting the guilt of the prisoner.

Mr. Hay said that he would put Mr. Botts right as to matter of fact. The court would recollect that on the trial of Callender, the question was, not whether the juryman had formed and expressed an opinion on that case generally, but on the subject-matter that was to be tried, and contained in the indictment. The question then in the present case should be, have you formed and expressed an opinion on the point at issue: that is, whether Aaron Burr be guilty of treason? On the trial of Callender, the court would particularly recollect that Mr. John Bassett having objected to himself, because he had read the libellous publication, was actually overruled, because it was not on the book itself, but on the subject-matter of the indictment, that he was called upon to say whether he had ever expressed an opinion?

Mr. Burr declared that there was a material distinction between that and the present case. Mr. Bassett's acknowledging that he had seen the book did not disqualify him from serving on the jury; in the same manner the person who had seen a murder committed would not be an incompetent juror in the prosecution for that crime. But if a man pretended to decide upon the guilt of a prisoner, upon mere rumor, he would manifest such a levity and bias of mind as would effectually disqualify him. Mr. Bucky, however, has not yet come out completely with his declarations. Let him be further interrogated.

Mr. Hay observed that the question would still be too general and vague, if it were even to be "Have you expressed any opinion on the treason of Aaron Burr?" for the case stated in the indictment was infinitely more specific. It was treason in levying war against the United States at Blennerhassett's Island. Unless this particular allegation be proved, it defeats all the other parts of the accusation; and it was probably on this point that the juror had never made up any opinion.

Mr. Martin contended that it was the duty of every juryman to come to the trial of any case with the most perfect impartiality, and

more particularly one where life and reputation were at stake; that it was a libel upon Virginia, a blot upon the whole state, to assert, that twelve men could not be found to decide such a case, with no other knowledge that what they had picked up from newspapers; that there was a material distinction between this and Callender's Case [Fed. Cas. No. 14,709]; the libel was a book in every man's hand, but does any juryman in the present case pretend to know the testimony on which this charge depends? The gentleman proposes to ask the juryman whether he has made up an opinion on Colonel Burr's treason? But it is expressly probable that most of them knew not what treason is; and though they may decide upon the guilt of Colonel Burr, they may be ignorant whether it come under the name and description of treason.

The CHIEF JUSTICE observed that it might save some altercation if the court were to deliver its opinion at the present time; that it was certainly one of the clearest principles of natural justice, that a juryman should come to a trial of a man for life with a perfect freedom from previous impressions, that it was clearly the duty of the court to obtain, if possible, men free from such bias; but that if it were not possible from the very circumstances of the case—if rumors had reached and prepossessed their judgments, still the court was bound to obtain as large a portion of impartiality as possible, that this was not more a principle of natural justice, than a maxim of the common law, which we have inherited from our forefathers, that the same right was secured by the constitution of the United States, which entitles every man under a criminal prosecution, to a fair trial by "an impartial jury." Can it be said however, that any man is an impartial juryman who has declared the prisoner to be guilty and to have deserved punishment? If it be said that he has made up this opinion, but has not heard the testimony, such an excuse only makes the case worse; for if the man has decided upon insufficient testimony, it manifests a bias that completely disqualifies himself from the functions of a juryman. It is too general a question to ask, whether he has any impressions about Colonel Burr. The impressions may be so light that they do not amount to an opinion of guilt, nor do they go to the extent of believing that the prisoner deserves capital punishment. With respect to Mr. Bassett's opinion, it was true he had read "The Prospect Before Us;" and he had declared that it was a libel, but Mr. Bassett had formed no opinion about James T. Callender's being the author. It was the same principle in the present case. If a juryman were to declare that the attempt to achieve the dismemberment of the Union, was treason, it would not be a complete objection or disqualification; but it would be the application of that crime to a particular individual; it would be the fixing it on Aaron Burr that would disable him from serving in this case. Let the counsel then proceed with the inquiry.

Mr. Botts.—Have you said that Colonel Burr was guilty of treason? Mr. Bucky.—No. I only declared that the man who acted as Colonel Burr was said to have done, deserves to be hung. Question. Did you believe that Colonel Burr was that man? Answer. I did, from what I had heard.

Mr. Hay.—I understand then, that the question proposed in Callender's Case is to be overruled?

The CHIEF JUSTICE.—My Brother, Judge GRIFFIN, does not recollect whether it particularly went to the indictment or not.

GRIFFIN, District Judge.—I think the question was "relative to the matter in issue."

Mr. Hay.—The very position that I have laid down.

The CHIEF JUSTICE.—The simple question is, whether the having formed an opinion, not upon the evidence in court, but upon common rumor, renders a man incompetent to decide upon the real testimony of the case?

Mr. Wirt (addressing Mr. Bucky).—Did I understand you to say that you concluded upon certain rumors you had heard, that Colonel Burr deserved to be hung? Mr. Bucky.—I did. Question. Did you believe these rumors? Answer. I did. Question. Would you, if you were a juryman, form your opinion upon such rumors? Answer. Certainly not.

Mr. MacRae.—Did you form and express your opinion upon the question, whether an overt act of treason had been committed at Blennerhassett's Island? Answer. It was upon other rumors, and not upon that, that I had formed an opinion.

Mr. Martin submitted it to the court, whether he could be considered an impartial juryman.

THE COURT decided that he ought not to be so considered, and he was accordingly rejected.

James G. Laidly stated that he had formed and expressed some opinions unfavorable to Colonel Burr; that he could not pretend to decide upon the charges in the indictment, which he had not heard; that he had principally taken his opinions from newspaper statements; and that he had not, as far as he recollected, expressed an opinion that Colonel Burr deserved hanging; but that his impression was, that he was guilty. He was therefore set aside.

James Compton being challenged for cause and sworn, stated that he had formed and expressed an opinion from hearsay that Colonel Burr was guilty of treason, and of that particular treason of which he stood charged, as far as he understood. He was rejected.

Mr. Burr observed, that as gentlemen on the part of the prosecution had expressed a willingness to have an impartial jury, they could not refuse that any juryman should state all his objections to himself; and that he had no doubt, in spite of the contrary asser-

tions which had been made, that they could get a jury from this panel.

Hamilton Morrison, upon being called, said that he had frequently thought and declared that Colonel Burr was guilty, if the statements which he had heard were true; that he did not know whether they were so, but only thought, from the great clamor which had been made, that it might be possible that they were true; that he had not passed any positive opinion, nor was he certain that he had always qualified it by saying, "if these things were true;" that he does not recollect to have said that Colonel Burr ought to be punished, without stating at the same time, "if he were guilty." Mr. Morrison was suspended for further examination.

Yates S. Conwell had formed and expressed an opinion, from the reports he had heard, that Colonel Burr must be guilty of high treason. He was accordingly set aside.

Jacob Beeson declared that he had for some time past formed an opinion, as well from newspaper publications as from the boats which had been built on the Ohio, that Colonel Burr was guilty; and that he himself had borne arms to suppress this insurrection. He was therefore set aside as incompetent.

William Prince declared he had nearly the same impressions as Mr. Beeson; that he too had borne arms, as well on Blennerhassett's Island as on descending the river in search of Blennerhassett. He was set aside in like manner.

Nimrod Saunders declared that he had expressed an opinion previously to his being summoned on the jury, that the prisoner had been guilty of treason. He was therefore set aside as incompetent.

Thomas Creel had no declaration to make, and he was challenged for cause. Upon being interrogated, he stated that he had never asserted that the prisoner ought to be punished; that he had said that he was a sensible man, and if there were any hole left he would creep out of it; that he had conceived that Colonel Burr had seduced Blennerhassett into some acts that were not right; that he had never positively said that Colonel Burr was guilty; that he had said that Blennerhassett was the most blamable, because he was in good circumstances and well off in life, whereas Colonel Burr's situation was desperate, and that he had little to lose; that he had not said that Colonel Burr had directly misled Mr. Blennerhassett, but through the medium of Mrs. Blennerhassett; in short, that there was no determinate impression on his mind respecting the guilt of the prisoner.

The CHIEF JUSTICE did not think that this was sufficient to set him aside, and suspended his case for further examination.

Anthony Buckner had freqnently said that the prisoner deserved to be hung. He was therefore set aside.

David Creel had formed an opinion from the statements in the newspapers, and if these were true the prisoner was certainly guilty. He had expressed a belief that he was guilty of the charges now brought against him, and that he ought to be hanged. He was therefore rejected.

The above named jurors were all from Wood county.

Jurors from the body of the district:

John Horace Upshaw declared that he conceived himself to stand there as an unprejudiced juryman, for he was ready to attend to the evidence; but that as he had formed opinions hostile to the prisoner, (if opinions they can be called which are formed from newspaper testimony,) and had, he believed, frequently expressed them, that he was unwilling to subject himself to the imputation of having prejudged the cause.

Mr. Burr.—We challenge Mr. Upshaw for cause.

Mr. Hay.—Then, sir, I most seriously apprehend that we shall have no jury at all. I solemnly believe Mr. Upshaw is an intelligent and upright man, and can give a correct verdict on the evidence; and I will venture to assert, (whatever credit my friends on the other side will allow to my assertion,) that I myself could do justice to the accused. I believe that any man can who is blessed with a sound judgment and integrity. We might as well enter at once a nolle prosequi, if he is to be rejected.

Mr. Wickham.—Then according to the gentleman's doctrine, any honest man, no matter what his impressions may be, is a competent juryman. Is this agreeable to the principles of law? Does the gentleman mean to insinuate that when we object to a juryman it is for his want of honesty? No, sir, every man is subject to partialities and aversions, which may unconsciously sway his judgment. Mr. Upshaw does no doubt deem himself an impartial juryman; but Mr. Upshaw may be deceived.

After some desultory argument between Messrs. Hay and Wickham, Mr. Wirt proceeded to ask Mr. Upshaw whether he had understood him to say that notwithstanding the hostile impressions he had taken up from newspaper reports, these impressions had not received that determinate character which might entitle them to the name of opinions? Answer. I have received impressions hostile to Colonel Burr, and have expressed them with some warmth, but my impressions have not been induced by anything like evidence They were predicated on the deposition of General Eaton and the communications of General Wilkinson, to the president of the United States. I had conceived that the prisoner had been guilty of some criminal act against the public, and ought to be punished; and I believe, also, that I went on further to vindicate the conduct of those gentlemen who would appear as the principal witnesses against him, and also of the government in the measures which it had taken to suppress his plans. After some further and animated discussion on this point, Mr. Upshaw's case was suspended for subsequent examination.

William Pope declared that his impressions

were nearly the same with those of the gentleman who had preceded him; that he had thought at first, from newspaper representations, that it was Colonel Burr's intention to make his fortune in the west by the settlement of lands; that when he had afterwards understood that he had formed a union with Wilkinson to proceed to Mexico, he had regarded the prisoner's conduct in such a light that, if he had proceeded to Mexico, he would have considered it as an excusable offence; but when he had afterwards understood that there was treason mixed with his projects, it was impossible for him to view his conduct without the deepest indignation. If these impressions could be called prejudices, he trusted that he should always retain them. What other sentiments could he feel against such a crime, perpetrated against the very best government on the surface of the earth? But Mr. Pope declared that from his heart he believed that he could divest himself of these unfavorable impressions, and give Colonel Burr a fair and honorable trial. He would add that, in pursuance of the spirit manifested by the constitution which required two witnesses to an overt act of treason, he should think it necessary that the evidence for the United States should be so strong as to make the scale preponderate.

Mr. Wickham.—You will not misunderstand me, Mr. Pope, when I ask you whether you have not been a candidate for your county, and whether you be not now a delegate? Answer. Yes. Question. In canvassing among the people, have you not declared that the government had acted properly in commencing this prosecution? Answer. Yes; I believe I have said generally that I thought Colonel Burr was guilty of high treason. Mr. Pope was therefore set aside.

Peyton Randolph declared that it had never been his wish or intention to shrink from the discharge of a public duty, but that he had peculiar objections to serve on this occasion, one of which only he should state. He had been enrolled and was qualified as a lawyer in this court; and he would submit it to the court whether this did not exempt, if not disqualify, him from serving?

The CHIEF JUSTICE admitted Mr. Randolph's privilege, unless there were an express interposition on the part of the prisoner to retain him and others of the venire who had privileges; for this would call a conflicting privilege into operation.

Mr. Burr said that he should be passive.

John Bowe did not recollect to have said that the prisoner was guilty of treason, but of something hostile to the peace and happiness of the United States. Upon being interrogated, he observed that he was a delegate from the county of Hanover, that there had been a competition at the last election, that he had had occasion to speak at that time of the views of the prisoner, but had always done it cautiously; had never asserted that he ought to be hung, but that he was guilty of something unfriendly to the peace of the United States.

Mr. Wickham.—You have said that the prisoner was guilty? Answer. Yes.

The CHIEF JUSTICE.—Did you ever make up an opinion about his levying troops and making war against the United States? Answer. Yes; but I have never expressed it.

Mr. Burr.—Take the whole together, and it amounts to an opinion of treason. Mr. Bowe has said that Colonel Burr was guilty; and of what? Of that which in Mr. Bowe's mind amounts to the definition of treason. He was therefore set aside.

John Roberts had thought and declared, from the reports in the public newspapers, that the prisoner was guilty of treason, though he had no doubt that his opinion might be changed by the production of other testimony. He was set aside as incompetent.

Joshua Chaffin excused from indisposition.

7. Jervis Storrs observed that the state of his mind was like that of the gentleman who had gone before him, (Mr. Bowe;) he was in the habit of reading newspapers, and could not but examine their statements relative to those transactions. If he could believe General Eaton's assertion, that the prisoner had threatened to turn congress out of doors, and assassinate the president, he had said, and would still say, that Colonel Burr was guilty of treason. If General Wilkinson's letter were true, he had surely been guilty of something in the West that was hostile to the interest of the United States. He did not know whether in the multifarious conversations he had had on this subject he had always expressed this opinion of his guilt with that reservation. He had very often communicated his impressions, that he was plotting some hostile designs against the United States. Mr. Storrs confessed that he might be prejudiced against the prisoner, and that he might be judging too highly of his own mind to entertain the belief that he could divest himself of all his impressions; and upon the whole, he expressed a wish not to serve. He was then rejected.

8. Miles Selden declared that it was impossible not to have entered into the frequent conversations which had occurred on this topic, and to have declared some opinion; that he had always said that Colonel Burr was guilty of something, and that if he was guilty of treason against such a government as that of the United States, he would deserve to be hung; that he could not assert that he had always accompanied his opinions with this reservation, but that he was not afraid to trust himself in the rendering of a verdict. Upon being interrogated, he said that he had frequently jested on this subject, and particularly recollected to have said in a sportive conversation with Colonel Mayo, that this was a Federal plot, and that Burr had been set on by the Federalists. Colonel Selden was therefore suspended for further consideration.

9. Lewis Truehart had said that if the reports were correct, Colonel Burr had been

guilty of something inimical to the country, and that he always qualified his opinions in that manner.

Colonel Tinsley was then called in as a witness, who stated that from a conversation with Mr. Truehart, he thought that he had discovered that he had a general prepossession against Colonel Burr. He did not expect to be called on, and had no very distinct recollection of the particulars; that this was before any of the proceedings of the trial; and when he heard that he was summoned as one of the venire, he then recollected their conversation and happened casually to mention it. Mr. Truehart suspended.

William Yancey had expressed an opinion on newspaper testimony that Colonel Burr was guilty; that he had frequently said that he would believe the statements of newspapers till the contrary was proved, but that he had no doubt he should entertain a different sentiment, if other testimony were produced. He was set aside.

Thomas Prosser was next called. He said that he had made numberless declarations about Colonel Burr; that he had believed him to be guilty of a treasonable intention, but not of the overt act; on this point he had suspended his opinion, but he was rather inclined to believe that he had not committed it.

Mr. Martin.—Can this gentleman be considered as an impartial juryman, when he thus comes with his mind made up on one half of the guilt? He was suspended for further consideration.

John Staples had been under the same impressions which had been described by others; that he dared to say that he had said Colonel Burr was guilty of levying troops and making war upon the United States. He was set aside.

Edward C. Stanard acknowledged that his prejudices against Colonel Burr had been deep-rooted; that he had no doubt of the criminality of his motives, but that he had doubts of the commission of an overt act; he regretted that a man of his talents and energetic mind should be lost to his country. Upon being interrogated, he observed that he had doubts as to the overt act, because he believed him to be a man of such deep intrigue as never to jeopardize his own life till thousands fell before him. He was rejected.

Richard B. Goode was then called. I have never seen, neither do I believe that I have heard correctly, the evidence in this prosecution. From common report and newspaper information I have formed an opinion unfavorable to Colonel Burr. That opinion has been strengthened by what I have heard from the lips of Colonel Burr in this court; but without arrogating to myself more virtue than belongs to other men, if I know myself, I have formed no opinion which cannot be altered by the evidence.

Mr. Baker.—Did you not endeavor to displace Mr. Heth as captain of the Manchester cavalry, for becoming the bail of Colonel Burr? Answer. I never did. (Here sundry witnesses were directed to be called.)

Mr. Goode.—I will state the circumstance to which you allude, unless you prefer to prove it.

THE COURT.—Do so, if you please.

Mr. Goode.—On the 4th of July, 1806, I was a member of a committee with Captain Heth, appointed to prepare toasts to be drunk on that day by the Manchester cavalry. I profess to be attached to the present administration of the general government, and wished to express such a sentiment. Captain Heth declared that he had not confidence in the executive, and rather than express such a sentiment he would resign his commission. At that time, I thought Captain Heth and myself differed only as to measures, and not as to principles; and that it was an honest opinion. But in a few months after, when I understood that Captain Heth had become bail for Colonel Burr, and was his zealous friend, with whom he was neither connected nor acquainted, but a stranger, who, three years ago, would have been consigned to the grave by Captain Heth, and those thinking with him upon political subjects, and when I recollected the charge preferred against Colonel Burr, I confess that the declaration and conduct of Captain Heth made such impressions upon my mind, that I refused to trust my person with him as a military commander, and I would do it again.

Colonel Burr.—Pray, sir, did you not write a letter to Captain Heth? Answer. I did; and I have reasons to believe that that letter is in your possession, or in the possession of your counsel. You are at liberty to show it to the court, or I will repeat that part of it which relates to Captain Heth and yourself.

THE COURT.—Do, sir.

Mr. Goode.—A few weeks past, I received a letter from Captain Heth, commanding me to appear at a certain time and place, in order to take my proper command in the troop. I wrote him, in answer, that my post as a soldier would never be abandoned, and that my duty as a citizen forbade that I should silently approve of the conduct of those who had extended a favor to a traitor, which the justice of my country denied to an unfortunate debtor, or words to that effect.

Mr. Goode was then rejected.

Nathaniel Selden stated he had formed an opinion, particularly from General Eaton's deposition, that the intentions of the prisoner were hostile to the United States, but that he had also said he had seen no evidence to satisfy him that he had been guilty of an overt act. He was suspended for further consideration.

16. Esme Smock declared that he had formed and expressed an opinion that Colonel Burr had treasonable designs.

CHIEF JUSTICE.—To what time did your opinion relate?

Mr. Smock.—I formed my opinion from newspaper publications and common report;

but I have constantly conceived that Colonel Burr's intentions were treasonable throughout. Mr. Wickham.—Have you ever formed an opinion that Colonel Burr was guilty of treason? Answer. I have in my own mind. He was set aside.

Richard E. Parker said that he had, like every other person, formed an opinion on that case, on newspaper statements, but he had heard very little of the evidence that may be adduced on this occasion. He had declared that if these newspaper statements were true, Colonel Burr had been guilty of some design contrary to the interest and laws of the United States. As to the doctrine of treason, he had not formed a conclusive opinion.

Mr. Burr.—I have no objection to Mr. Parker. He is therefore elected.

A desultory argument here ensued about the propriety of swearing one juryman at a time. The counsel for the prosecution opposed, the counsel for the prisoner advocated, the doctrine. The court decided that it would adhere to the practice of Virginia, and swear four jurymen at a time.

John W. Ellis said that he had no doubt the prisoner had been guilty of having treasonable designs. Whether he had proceeded to acts, he had doubt. He was suspended.

Thomas Starke, without any expectations of being summoned as a juryman, had stated his opinion to his neighbors, who had asked him questions on the subject, that Colonel Burr had been guilty of high treason. He was set aside.

William White stated that he had been in the western country in May last, and from Colonel Burr's character, and from the representations he had received of his conduct, he had been induced to say that he was guilty of treason, and that he ought to be hanged, or that hanging was too good for him. He was set aside.

William B. Chamberlaine stated that he stood in a very peculiar situation, if, as Mr. Wickham declared, any man were unfit to be a juryman who had asserted Colonel Burr to have been worthy of death. He was ready to confess that he himself came under this restriction. He had said uniformly that he had treasonable designs; but he did not now believe that Colonel Burr had committed an overt act of treason, though he believed him to be guilty of the intention. He, however, believed that he could do him justice, and that he could conscientiously pass between him and his country. He was rejected.

David Lambert wished to be excused on account of his indisposition, but the court rejected his plea. On being interrogated, he declared that he did not recollect to have formed an opinion for or against Colonel Burr. He was elected.

William Hoomes had no hesitation in saying that he had often declared his opinion that Colonel Burr was guilty of treasonable intentions, and, perhaps he might say, of treason itself. He had imbibed his impressions from everything he had seen, heard, or read. He had understood that Colonel Burr's counsel had made preparations to prove that he had disqualified himself by his own declarations. He should thank them to develop their objections.

Mr. Burr.—I assure you, sir, no such preparation has been made. He was set aside.

24. Overton Anderson said that he had often expressed an opinion that Colonel Burr's views were inimical to the United States. These opinions he had principally formed upon newspaper statements. He did not recollect that he had ever asserted him to be guilty of treason; but he had sometimes given credit to the representations which he had heard, without particularly defining the degree of guilt in which they might involve the prisoner, and thought him guilty of the charge against him, though he would not say it was treason. He was rejected.

Hugh Mercer, upon being called, said that it was his duty to state that an opinion which he had for some time past entertained of the character of Colonel Burr was unfriendly to a strictly impartial inquiry into his case; that he was entirely uninformed as to the testimony which would be introduced, and that he did not recollect to have ever expressed a positive opinion either as to his guilt or innocence. He was elected.

Jerman Baker had entertained opinions unfavorable to Aaron Burr, which he had repeatedly expressed. He had spoken them with warmth, for it was his nature to be warm. He had no doubt that the prisoner had formed very unfriendly designs against the United States, but, from his ignorance of the evidence, he could not venture to say that they had ripened into an overt act.

Mr. Burr.—What opinion have you formed of me? Answer. A very bad one, which I have expressed often when called upon, and often when not. He was set aside.

Edward Carrington, next called, said that he had formed an unfavorable opinion of the views of Colonel Burr, but these opinions were not definitive. Some had said that Colonel Burr's object was to invade the Spanish territories; others, that it was to dismember the Union. His own opinion had not been definitely fixed. There was another subject connected with this trial on which he had also expressed his opinions, and that related to the measures taken at New Orleans. His own opinion had been that it was impossible for any one at this remote scene to determine upon the state of affairs in that city; but if General Wilkinson did seriously believe what he said had been represented to him as the views of Colonel Burr, that he ought to consider it as an extreme case, and take extreme measures, and act somewhat in the manner that General Wilkinson had done. This has been the state of his mind for twelve months.

Mr. Burr.—Have you, Colonel, any prejudice of a more settled kind and ancient date

against me? Colonel Carrington.—None at all.

Mr. Burr.—He is elected.

Mr. Parker said that perhaps he had been misunderstood by the court and Colonel Burr. Perhaps he was disqualified, and he wished to be distinctly understood. He said that he had expressed no deliberate opinion on the subject, yet he had believed that Colonel Burr had some designs contrary to the interests of the United States; that he had formed no opinion of the truth of those depositions, but if they were true his designs were treasonable. Mr. Parker was retained as a juror.

The four jurymen that had been elected were then called to the Book and sworn, viz.: Messrs. Parker, Lambert, Mercer, and Carrington.

Robert Haskins had expressed an opinion that Colonel Burr was guilty, but does not recollect to what extent he went. He went so far as to say he was guilty of an intention of treason, but not of an overt act. He might have said that he deserved to be hung. He was set aside.

William R. Fleming had formed and frequently expressed an opinion that Colonel Burr was guilty of treasonable intentions, and might have made a general declaration, not only as to intentions but to acts. He was set aside.

George W. Smith suggested a right to the same exemption which had been granted to Mr. P. Randolph. The court said that this privilege would be incontestible unless the prisoner should urge his conflicting privilege. Mr. Burr then requested Mr. Smith to attend to-morrow. Mr. Smith wished to be excused, as he had some important business in another court to attend to. He should, however, attend on the trial to-morrow; but it might now be proper to state the general impressions which he had received from these transactions. He had generally been solicitous to avoid an expression of his opinions; and as in such cases, where the government commences a prosecution against an individual, there is always a preponderance of prejudice against him, he himself had not only been solicitous not to declare, but even not to form an opinion. No one can, however, avoid reading representations of these things in the public papers, and he had formed and declared his impressions that Colonel Burr had entertained designs offensive to the peace and laws of the United States. What was the species of guilt he had not pretended to define, but he had concluded from the newspaper reports and the testimony which he had heard in the other end of the capital that his designs were of a military nature, and that they might amount at least to a misdemeanor. He was suspended for further consideration.

31. Armistead T. Mason had formed no deliberate opinion in regard to the actual commission of treason. But it was his deliberate opinion that Colonel Burr had designed, if not to subvert the government, at least to divide the country. He was suspended for further consideration.

32. Dabney Minor had often said that Colonel Burr's intentions were unfriendly to the United States; he had said that if he were guilty of what was charged against him he ought to be hanged, but had heard no positive testimony. Some conversation here ensued between Mr. Minor and Mr. Botts, when Mr. Minor was suspended until to-morrow.

Thus, then, of the whole venire that appeared, four only were elected and sworn, and nine were suspended till arguments should be heard on the subject, in order to aid the court to form an opinion whether they were competent jurymen or not.

Here a discussion of considerable length took place on the propriety of confining or not confining, in the custody of the marshal, the jurors already sworn, till the other eight should be sworn.

THE COURT then decided that there was no necessity for delivering the jurymen who had been or should be sworn, into the custody of the marshal, until the whole number had been impaneled and sworn.

Adjourned till Tuesday, eleven o'clock.

Tuesday, August 11, 1807.

The court met according to adjournment.

Present: MARSHALL, Chief Justice, and GRIFFIN, District Judge.

The CHIEF JUSTICE informed the counsel engaged in the cause that the court was ready to hear any observations on the question before them yesterday, which they might think proper to make.

Mr. Martin.—We are ready to say something relative to the situation that a juryman ought to be in to enable him properly to pass upon the case of a prisoner.

Mr. George W. Smith was the first of the jurors suspended yesterday for subsequent examination who was called. He said that he supposed himself entitled to exemption, from his profession as a practicing lawyer in this court; that by the law of the land, as long as he behaved with respect to the court and diligence to his client, he ought not to be obstructed in the pursuit of his professional duties; that though there was no express statute exempting him, yet he was exempted by the reason of the law.

Mr. Burr observed that as some real or fictitious difficulty had occurred in the selection of jurymen, he should be extremely sorry if such as were impartial should object to themselves. If Mr. Smith, however, raised such objections, he himself should submit to the decision of the court, as he wished to be perfectly passive.

Mr. Smith did not know whether he deserved such an encomium on his impartiality; but as the arrangement of his professional business, in other courts, (though not

in this court at this particular time,) would not permit him to attend the trial with any convenience, he should claim the privilege of exemption, to which, in his opinion, he was entitled by law.

The CHIEF JUSTICE said that this privilege would certainly exempt Mr. Smith, unless his attendance was claimed by the prisoner; and as Colonel Burr waived his right, Mr. Smith was excused from attending.

James Henderson, of Wood county, who was absent yesterday, was next called; he was challenged for cause. On being examined by Mr. Botts, he admitted that he was not a freeholder, and was consequently set aside.

Mr. Hamilton Morrison was the next of the suspended jurymen who was called. He declared that it was with pain he should serve on the jury; that he did not wish to serve on it; that it was still more disagreeable to him, as the defendant seemed to have such imaginary thoughts against him; that he had not meddled with the prisoner's transactions, though perhaps he might have done so, had it been profitable to him. James Henderson and Mr. Neale were both examined as to what they might have heard him say on this subject, and both declared that they had heard him say nothing material.

Mr. Burr.—Have not these rumors excited a prejudice in your mind against me? Answer. I have no prejudice for or against you.

Mr. Botts.—Are you a freeholder? Answer. I have two patents for land. Question. Are you worth three hundred dollars? Answer. Yes; I have a horse here that is worth the half of it. Question. Have you another at home to make up the other half? Answer. Yes; four of them. (Here the court said that sufficient cause had not been shown against his being a proper juror.) I am surprised why they should be in so much terror of me. Perhaps my name may be a terror, for my first name is Hamilton.

Colonel Burr then observed that that remark was a sufficient cause for objecting to him, and challenged him. Mr. Morrison was therefore set aside. This was the first peremptory challenge which the prisoner made, of the thirty-five to which the law entitles him.

Thomas Creel, another of the suspended jurymen from Wood county, was next set aside by the court, because he said that he had both formed and expressed sentiments unfavorable to the prisoner.

John H. Upshaw was next called up. He stated, before he was interrogated, that he had received strong impressions against Colonel Burr, but that he believed he could find a verdict according to testimony.

The CHIEF JUSTICE wished to know whether those impressions related to the general charge of treason against the prisoner, or to what happened before, or to what circumstances?

Mr. Upshaw answered that they related to the transactions in the Western country, and added: "My opinions have changed as the lights of evidence seemed successively to appear. It was my first impression that he had nothing more in view than the settlement of the lands on the Waschita. I next supposed that he intended to attack Mexico, but that as a means of effecting that object he intended to attack New Orleans; and last of all, that his plans were of a more complicated nature, but that he never thought, till after his leaving the mouth of Cumberland, that Burr had treasonable designs, but that he could not recollect particularly the times when he formed or changed these opinions."

Mr. Wickham asked him whether, as the result of all these impressions, he did not consider Colonel Burr a dangerous man? He answered that that was his impression.

Mr. MacRae.—Have you formed or delivered an opinion that he has committed an overt act of reason, as charged in the indictment? Answer. I have not.

Mr. Martin said that he should state whether there was any bias on his mind, although he did not believe that an overt act had been committed, for if he had such bias, he was unfit for a juryman.

Mr. Baker.—Have you not, in your own county, argued in conversation, to show that Colonel Burr was guilty, and that there was strong presumptive evidence against him? Answer. I have done so, and not only supported such opinions, but have gone on to vindicate the propriety of the measures taken by the government.

Mr. Burr said that enough had appeared to show that Mr. Upshaw had taken up strong prejudices against him.

Mr. Hay asked whether such testimony as that could disqualify him as a juryman.

Mr. Upshaw said that he had been in the habit of impressing on others his prejudices, or opinions that Burr was a dangerous man to the community.

Mr. MacRae.—I beg leave to ask whether personally you have any prejudices against him? Have you any other prejudices against him, except that he has entertained treasonable designs? He answered explicitly that he had not.

Mr. Burr.—Had you not, anterior to those transactions rumored in the Western country, formed an unfavorable opinion of me?

Mr. Upshaw answered that he had before (with other persons) formed rather an unfavorable opinion against him during the presidential election, (of 1801,) though he had no positive evidence on that subject.

Here Mr. Upshaw was suspended till the general question on the doctrine of challenges should be argued.

Mr. Martin rose to proceed with his argument. He stated that it was one of the soundest principles of law that every man had a right to be tried by an impartial jury;

that this right extended to all cases, civil and criminal, but that in criminal cases it was secured by the constitution in a positive and sacred manner, so that all altercation as to the meaning of the terms was rendered unnecessary.

Mr. MacRae apologized for interrupting Mr. Martin, but suggested that it would be a saving of time, first, to know the objections to all the jurors, and then to have one general argument as to all, instead of having an argument on each particular case as it might occur; that he wished to economize time, and that the experience of yesterday showed the propriety of saving time as much as possible. Evidence is now heard as to this case, and if it be argued, the court must hear arguments in the case of every other juryman. He did not see the necessity of holding twelve arguments instead of one, where the cases were precisely similar. He did not wish to prescribe to gentlemen the course of proceeding, but he really supposed that one argument would suffice for all the cases. To this the CHIEF JUSTICE assented.

Mr. Martin.—I have been repeatedly interrupted by the gentlemen, and they have found out in their infinite wisdom that we are to hold twelve arguments on this point. They talk, sir, of economy of time. They have shown a happy instance of this economy of time, when I was here on a former occasion. I know what kind of economy they wish. They wish us to be silent. They would, if they could, deprive Colonel Burr's counsel of an opportunity of defending him, that they may hang him up as soon as possible, to gratify themselves and the government.

Mr. MacRae.—That is a most unprincipled and most unfounded assertion.

Mr. Burr said that he thought the gentlemen for the prosecution were not altogether so wrong. Generally the question was, whether those gentlemen who said that they were convinced that he had treasonable intentions were impartial and proper jurymen. They had avowed their convictions as to these intentions in court, that one argument would apply to all, and if the principle were once fixed it would not be necessary to renew it in the case of each gentleman; that they had entered into the argument because they wished the principle to be settled, and then it could be applied to the particular cases.

Mr. Hay.—We wish the argument to proceed without hearing ourselves grossly insulted; without making accusations against us that are malicious and groundless. We said nothing that could give offence to the feelings of any gentleman. The gentlemen cannot say with truth that we wish to deprive them of the right of defending their client. The charge is unjust. I wish him to have a fair trial, and justice to be done, with all my heart; but I feel myself hurt, and grossly insulted, when the gentleman on the other side charges me with feelings that are disgraceful to humanity. I trust, therefore, that the arguments will no longer be conducted with such indecorum.

The CHIEF JUSTICE had hoped that no such allusions would have been made, that the government ought to be treated with respect, and that there was a delicacy to be observed on that subject from which he hoped there would be no departure hereafter.

Mr. Burr.—I rose to stop the progress of such language when up before. I had made sufficient apologies, if any were necessary, for any expressions which had been used, and I had hoped that no allusions would have been made to the subject. It will be recollected that I have constantly manifested my displeasure at such expressions. I have carefully avoided such myself, and imposed similar restraints on my counsel, and urged that the government should be treated with the utmost delicacy, though there was great provocation from the gentlemen on the part of the prosecution, which would have justified harsh terms. I hope these things will cease. On the part of my counsel I am sure they will cease.

Mr. Martin.—I have no wish to hurt the feelings of a single individual, but they have no right to hurt our feelings, and when I am so often interrupted and charged with wasting the public time, and the gentlemen still persist in their observations, I cannot repress mine.

[Mr. Martin then addressed the court at length on the qualifications of jurors. His argument, and that of the other counsel, and the opinion of the court will be found reported as Case No. 14,692g.]

The suspended jurymen were then called. John H. Upshaw was asked by the court whether he conceived that the prisoner had pursued his treasonable designs to the time charged in the indictment. Mr. Upshaw answered in the affirmative and the CHIEF JUSTICE observed that he was not qualified to serve as a juryman.

J. Bowe, Miles Selden, Lewis Truehart, William Yancey, Thomas Prosser, Nathaniel Selden, John W. Ellis, Armistead T. Mason, and Dabney Minor were successively set aside, after having been further interrogated, because, having formed an opinion as to the criminal intentions of the accused, they came within the principle of exclusion just established by the court.

Mr. Hay moved the court to award a new venire, to consist of a sufficient number to secure a certainty of supplying the deficient jurymen. He thought the "tales" might exceed the number of the original panel, and referred to Hawkins in support of that opinion. He proposed one hundred and fifty. After some remarks by various counsel and

the CHIEF JUSTICE, the court awarded a panel of forty-eight, and adjourned till Thursday.

Thursday, August 13, 1807.

As soon as the court met, Mr. Burr observed that just before coming into court he had received a copy of the panel last awarded; that it was defective, in not having the places of residence annexed to the names of the jurors; that he should, perhaps, require till the day after to-morrow to examine it, which was a less time than the law allowed him for that purpose.

Some conversation ensued respecting the subpœna "duces tecum," when Mr. Hay stated that he had found General Eaton's letter among certain papers transmitted by Mr. Rodney, and had filed it with the clerk; that he had not found among them General Wilkinson's letter of the 21st October, but would seek for it.

Three of the jury summoned on the second venire, were discharged by the court, viz: General Pegram, because he was then necessarily engaged in military business, in giving the necessary orders to the officers of his brigade to get in readiness its due proportion of this state's quota of troops required by the president's proclamation, pursuant to the act of congress: Mr. Lewis, because he owned no freehold in the state of Virginia, and Mr. Moncure, on account of his indisposition. It was understood that the marshal should summon three substitutes, and that the prisoner should accept them. So that the venire was still to consist of forty-eight.

The court then adjourned till Saturday, eleven o'clock.

Saturday, August 15, 1807.

The court met pursuant to adjournment. The jurymen summoned by the marshal were called, and all except seven answered to their names. One juror answering was excused on account of ill health.

Mr. Burr then addressed the court, and observed that the panel was now reduced to forty; and as it would be exceedingly disagreeable for him to exercise the privilege of making peremptory challenges, to which he was entitled, he would lay a proposition before the opposite counsel which would prevent this necessity, and would save one or two hours that might be otherwise unpleasantly spent. He would select eight out of the whole venire, and they might be immediately sworn, and impaneled on the jury.

The CHIEF JUSTICE said that if no objection was made it might be done, and that they might be placed at the head of the panel.

Mr. Hay observed that there could be no utility in objecting to it, as the prisoner could challenge peremptorily, and that he had no objection to this arrangement, as it would be easy for him to examine the qualifications of the eight who were selected, when they were once known.

William S. Smith then requested to be excused on account of his indisposition.

Mr. Burr observed that Mr. Smith was one of those whom he had selected, but he would be sorry to impose such a burden upon any invalid. Mr. Smith was discharged.

When Christopher Anthony was called, he observed to the court that he had uttered some expressions since he came to town which he had been told would certainly disqualify him from serving, according to the rules said to have been laid down by the court. On being interrogated as to what words he had spoken,

Mr. Burr said, perhaps the words were used through levity. Do you think they would be sufficient to warp your judgment? Answer. No.

Mr. Burr.—Then, sir, you are not disqualified.

Mr. MacRae.—State the tenor of those expressions.

Mr. Anthony.—When I first arrived here I met with an intimate friend, to whom I observed that I had come to town with a hope of being placed on this jury, and if I were, I would hang Colonel Burr at once without further inquiry.

Mr. MacRae.—Did you say so, knowing that such expressions would disqualify you? Answer. I did not; for I never expected to be put on this panel. Question. Were you serious? Answer. Far from it. I spoke in the utmost spirit of levity. Question. Have you been in the habit of reading the newspapers? Answer. I have.

Mr. MacRae proceeded to make further inquiry of him. He asked him whether he had read the depositions of Generals Wilkinson and Eaton. He answered in the affirmative. He then asked him whether those depositions had made no impression upon his mind. Hereupon, both Colonel Burr and Mr. Martin objected to this inquiry as improper.

Mr. MacRae contended that this examination was in vindication of the rights of the United States, and perfectly proper and correct, and was no more than had been done repeatedly by the prisoner.

Mr. Martin.—You have no right to disqualify any juryman for us.

The CHIEF JUSTICE.—Certainly the counsel for the United States may challenge for cause.

Mr. Hay was willing to take the persons selected, for he entertained no doubt of the integrity of the gentlemen who were summoned. He was willing to take them, provided they should be asked by the bench whether they were conscious of any cause which should disqualify them from serving. If they themselves were satisfied, he should be also satisfied. No man on this panel who had definitely made up his mind would conscientiously think to lay his hand on the book, and solemnly avow himself an impartial and qualified juryman.

The CHIEF JUSTICE understoood, then,

that these selected eight were to pass without challenge, unless they challenged themselves. If the court were required to say, as seemed to be the wish of the prosecution, that any impressions, however slight, were sufficient cause for challenge, he would ask where they could obtain a jury? The United States had precisely the same rights as the prisoner had, and were entitled to make the same challenges for good cause. He then addressed those eight jurymen who were placed at the head of the panel, thus: "Gentlemen, if you have made up and expressed any opinion either for or against the accused you ought to express it."

Mr. Burr.—The law presumes every man to be innocent until he have been proved to be guilty. According to the rules of law, it is therefore the duty of every citizen who serves on this jury to hold himself completely unbiased. It is no disqualification, then, for a man to come forward and declare that he believes me to be innocent.

CHIEF JUSTICE.—The law certainly presumes every man to be innocent till the contrary be proved; but if a juryman give an opinion in favor of the prisoner he must be rejected.

When Christopher Anthony was called to the book, he stated that he was in court the other day when the first venire was investigated; that it would be extremely unpleasant to serve on the jury; and that his general opinions had been precisely the same that had disqualified (as he understood) several other gentlemen. Mr. Anthony's objections were overruled.

John M. Sheppard.—I, too, feel myself disqualified for passing impartially between the United States and Aaron Burr. From the documents that I have seen, particularly the depositions of Generals Wilkinson and Eaton, I have believed, and do still believe, that his intentions were hostile to the peace and safety of the United States; in short, that he had intended to subvert the government of the United States. It would be inflicting a wound on my own bosom to be compelled to serve under my present impressions. Mr. Sheppard observed that considerations of a private nature had also borne upon his mind, for he had a child at home extremely sick.

Mr. Burr.—Notwithstanding Mr. Sheppard's impressions, I could rely upon his integrity and impartiality As to his private considerations, I do not wish wantonly to wound his feelings. I must request him, therefore, to sit down for a moment, until we shall ascertain whetner we can make a jury without him.

Mr. Hay.—Has the court understood the extent of Mr. Sheppard's declarations?

The CHIEF JUSTICE.—If the prisoner's counsel waive the right of challenge, there is an end of it.

James Sheppard was then called, who made no further declarations.

Reuben Blakeley.—I have made up no opinions either way, positively, on this subject.

Doctor John Fitzgerald.—It is incumbent on me to state to the court that I have formed and delivered an opinion unfavorable to Colonel Burr. My opinion has been founded upon the depositions of Generals Eaton and Wilkinson, and other newspaper publications, and it is that Colonel Burr's intentions were hostile and treasonable against the United States. On which account I am very unwilling to serve, lest I should possess that bias upon my mind which is unbecoming a juryman. Mr. Fitzgerald was requested to sit down for a few moments.

Miles Bott.—From the affidavits of Generals Wilkinson and Eaton, my opinion has been completely made up for several months past.

Mr. Martin.—I suppose you have only taken up a prejudice on the supposition that the facts stated were true.

Mr. Bott.—I have gone as far as to declare that Colonel Burr ought to be hanged.

Mr. Burr.—Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion? Answer. Human nature is very frail. I know that the evidence ought, but it might or might not influence me. I have expressed myself in this manner perhaps within a fortnight, and I do not consider myself a proper juryman.

Mr. Burr.—It will be seen either that I am under the necessity of taking men in some degree prejudiced against me, or of having another venire. I am unwilling to submit to the further delay of other "tales," and I must therefore encounter the consequences. I will take Mr. Bott under the belief that he will do me justice.

Four jurymen then having been selected, three were sworn. Mr. C. Anthony affirmed.

When Henry E. Coleman was called, he stated that he had conceived and expressed an opinion that the designs of Colonel Burr were always enveloped in mystery, and inimical to the United States; and when informed by the public prints that he was descending the river with an armed force, he had felt as every friend of his country ought to feel.

Mr. Burr.—If, sir, you have completely prejudiced my case—

Mr. Coleman.—I have not. I have not seen the evidence.

Mr. Burr.—That is enough, sir. You are elected.

Mr. Hay then suggested to the court the propriety of not swearing all the jury this day, as it would subject them to the inconvenience of an unnecessary confinement in their own room to-morrow (Sunday). Would it not be better for Mr. Marshall (the clerk) to swear three only out of the remaining four? The court might then impanel the whole on Monday, and proceed immediately to business.

Mr. Burr had no objections to this measure, but hoped that the court would enjoin them not to hold any conversations on the subject of the trial.

John Curd, upon being called, stated that he had no prejudices for or against the prisoner, but that he was bound in candor to inform the court that he was afflicted by a disorder (a palpitation of the heart) which was irregular in its attacks, but was sometimes very sudden and violent, and rendered him entirely incapable of business, and if he were sworn on the jury, it might interrupt and delay the progress of the cause. He was excused.

Isham Godwin had formed and declared a uniform opinion of Colonel Burr's guilt. If he were impaneled he should be under a strong impression that Colonel Burr was guilty of treason. Suspended.

Samuel Allen had for several months made up an opinion unfavorable to the prisoner. Suspended.

Benjamin Graves had not formed an opinion, and gave a long history of his domestic and family engagements to excuse himself from serving. He was asked whether he could not make some arrangements of this business between this time and Monday, calculated to remove all the inconvenience of his serving. Mr. Graves could not positively say.

Mr. Burr then observed that the two jurors who had been selected might be sworn, The other two might be selected on Monday. And Messrs. Coleman and Graves were accordingly sworn.

Mr. Burr hoped that the marshal would direct all the necessary preparations to be made for the accommodation of the jury, who would be confined to their own chamber after Monday.

Colonel Thomas Branch was then excused from serving because he was engaged in military business.

The CHIEF JUSTICE requested the jury and the remaining members of the venire to attend on Monday, at twelve o'clock, and enjoined them to hold, in the mean time, no communication on this subject with any person.

Mr. Hay stated that he was satisfied, from some expressions which he had heard from Mr. Munford, of Powhatan, at the moment of his summons, that the prisoner would himself object to him.

Mr. Burr was satisfied with the attorney's word, and Mr. Munford was accordingly discharged.

Mr. Burr was sorry to be importunate, but he was under the necessity of mentioning once more the letter of the 21st October. He wished to know whether the attorney had yet found it amongst his papers, or whether he could point to any other means of obtaining it.

Mr. Hay had examined two bundles of papers transmitted to him by Mr. Rodney, but he had not found it. There were other papers which he had yet to examine. He had, however, a copy of the original letter.

Mr. Burr.—Where is this copy from? From Washington or from General Wilkinson?

Mr. Hay.—It is from General Wilkinson. He has, however, written it from the original.

Mr. Burr.—I shall not accept of his copy; but I will state this proposition to the attorney: If he do not find this letter by Monday, will he consent that I obtain a subpœna duces tecum?

Mr. Hay.—I have no objection.

The CHIEF JUSTICE.—I suppose an order may be made to issue a subpœna duces tecum addressed to the attorney general of the United States, in case the letter be not found.

Mr. Hay.—I have no objection.

The court then adjourned till Monday, twelve o'clock.

Monday, August 17, 1807.

The court met according to adjournment.

Charles Lee, appeared as counsel for the prisoner.

The names of the selected jurors and of the venire were then called over. After which, John M. Sheppard, and Richard Curd were selected to complete the panel, and sworn. The following is, therefore, a complete list of the petit jury: Edward Carrington, David Lambert, Richard E. Parker, Hugh Mercer, Christopher Anthony, James Sheppard, Reuben Blakey, Benjamin Graves, Miles Bott, Henry E. Coleman, John M. Sheppard, Richard Curd.

Proclamation then having been made in due form, the prisoner standing up, the clerk addressed the jury in the usual form, and read the indictment in the words following:

"Virginia District. In the Circuit Court of the United States of America in and for the Fifth Circuit and Virginia District. The grand inquest of the United States of America, for the Virginia district, upon their oath, do present, that Aaron Burr, late of the city of New York, and state of New York, attorney at law, being an inhabitant of, and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the same United States to disturb and to stir, move, and excite insurrection, rebellion and war against the said United States, on the tenth day of December, in the year of Christ, one thousand eight hundred and six, at a certain place called and known by the name of 'Blannerhassett's Island,' in the county of Wood, and district of Virginia aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebel-

lion against the said United States, and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr, he, the said Aaron Burr, afterwards, to wit, on the said tenth day of December, in the year one thousand eight hundred and six, aforesaid, at the said island called 'Blennerhassett's Island' as aforesaid, in the county of Wood aforesaid, in the district of Virginia aforesaid, and within the jurisdiction of this court, with a great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit: to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, that is to say, on the day and in the year aforesaid, at the island aforesaid, commonly called 'Blannerhassett's Island,' in the county aforesaid of Wood, within the Virginia district and the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Aaron Burr, with the said persons so as aforesaid, traitorously assembled and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States, contrary to the duty of their said allegiance and fidelity, against the constitution, peace and dignity of the said United States, and against the form of the act of the congress of the said United States in such case made and provided. And the grand inquest of the United States of America, for the Virginia district, upon their oaths aforesaid, do further present that the said Aaron Burr, late of the city of New York, and state of New York, attorney at law, being an inhabitant of, and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the said United States to disturb, and to stir, move and excite insurrection, rebellion and war against the said United States, on the eleventh day of December, in the year of our Lord one thousand eight hundred and six, at a certain place called and known by the name of 'Blannerhassett's Island,' in the county of Wood and district of Virginia aforesaid, and within the jurisdiction of this court, with force and arms unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him, the said Aaron Burr, he, the said Aaron Burr, afterwards, to wit: on the said last mentioned day of December, in the year one thousand eight hundred and six aforesaid, at a certain place commonly called and known by the name of 'Blannerhassett's Island,' in the said county of Wood, in the district of Virginia aforesaid, and within the jurisdiction of this court, with one other great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit: to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, that is to say, on the day and in the year last mentioned, at the island aforesaid, in the county of Wood aforesaid, in the Virginia district, and within the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Aaron Burr, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States, and further to fulfil and carry into effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr, against the said United States, and to carry on the war thus levied as aforesaid against the said United States, the said Aaron Burr, with the multitude last mentioned, at the island aforesaid, in the said county of Wood, within the Virginia district aforesaid, and within the jurisdiction of this court, did array themselves in a warlike manner, with guns and other weapons, offensive and defensive, and did proceed from the said island down the river Ohio in the county aforesaid, within the Virginia district and within the jurisdiction of this court, on the said eleventh day of December, in the year one thousand eight hundred and six aforesaid, with the wicked and traitorous intention to descend the said river and the river Mississippi, and by force and arms traitorously to take possession of a city commonly called New Orleans, in the territory of Orleans, belonging to the United States, contrary to the duty of their said allegiance and fidelity, against

the constitution, peace and dignity of the said United States, and against the form of the act of the congress of the United States in such case made and provided.

"Hay, Attorney of the United States,
for the Virginia District.

"Indorsed: A true bill. John Randolph.

"A copy. Teste, William Marshall, Clerk."

After the indictment was read, Mr. Hay requested that the jury should be furnished with implements necessary to enable them to take notes on the evidence, and also on the arguments if they should think proper; that as the cause was important, and would require all their attention, it would be proper to afford them this assistance. This was accordingly done.

Mr. Hay then opened the case to the jury.

After some introductory remarks exculpating himself and his associates from charges which he said had been thrown out, that they had indulged in an intemperate zeal against the prisoner, and some general observations on the obligations and duties of jurors, he proceeded to give at length his views of the law of treason, as applicable to this case. He said that in Great Britain there are no less than ten different species of treason, but in this country, where the principle is established by the constitution, there are only two descriptions of treason, and the number never can be increased by the legislature. The constitution declares that, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." With respect to the latter description, there was no occasion to say anything, as the offence charged in the indictment was "levying war against the United States." The constitution also provided that, "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." The only question, therefore, which would present itself to their view at this stage of the proceeding, was, what shall constitute an overt act of levying war against the United States? What is in law an overt act of levying war? It is obvious that the interval between the first movement towards a conspiracy and actual hostilities is immense. There may be a conspiracy to "levy war;" but this is not treason. Individuals may meet together and traitorously determine to make dispositions to bring forces into the field, and levy war against their country; this is a conspiracy, but not treason. The conspirators may go a step further; they may not only project a plan for "levying war," but they may enlist troops for the purpose of prosecuting their traitorous designs; but this is not an overt act. It has been decided by the supreme court of the United States that the persons concerned in this conspiracy may yet take one step further, and be on the safe side of the line which separates conspiracy from treason. It has been adjudged that the individuals engaged in the treason may proceed to a place of rendezvous. But common sense and principles founded on considerations of national safety certainly require that the crime of treason should be completed before the actual commission of hostilities against the government. Actual force is not necessary to constitute the crime of treason. An assemblage of men convened for the purpose of effecting by force a treasonable design, which force is intended to be employed before their dispersion, is treasonable, and the persons engaged in it are traitors. He claimed that this was the principle settled by the supreme court in the Cases of Bollman and Swartwout [4 Cranch (8 U. S.) 75], in which the following words occur: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, are to be considered as traitors; but there must be an actual assembling of men to constitute a levying of war."

He further insisted, that it was not only not necessary that the persons so assembled should proceed to hostilities, but it was not necessary that they should be armed, or appear in military array. Permit me, said he, to examine the question on principles of common sense; for in legal discussions we do not always carry common sense along with us, from the beginning to the end. Suppose a number of men were assembled on Blennerhassett's Island—suppose (which I believe was not the fact) that they had no arms, but that they meet there for the purpose of descending the Ohio and the Mississippi for the purpose of seizing upon New Orleans. They calculate upon meeting their leader at the mouth of the Cumberland river; and they are told that either there or at Baton Rouge they are to get arms. They have no arms on the Island, or on the river; but would it not be an absurdity, and a violation of the principles of common sense, to say that they are not traitors because of this simple circumstance? The supreme court, he said, in giving a definition of treason, had not said a single word about the necessity of arms; but if he had read the decision right, had said that arms were not necessary. He referred to English authorities to show that in Great Britain, under the statute of 25 Edw. III. in which treason by levying war is defined in the very same words used in our constitution, the crime may be committed without arms. Fost. Crown Law, 208; 1 East, Crown Law, 67. He then discussed at length the proposition, that no actual hostility, no force or violence whatever, was necessary to the consummation of an overt act of levying war. The act was complete, he contended, the moment that a number of persons assembled together with a traitorous design to attain an object, the attain-

ment of which would be treason. He admitted that there were some expressions used by Judge Chase in the trial of Fries from which it might be inferred force was necessary to make the treason. But he thought the subject was not distinctly before the court, and therefore his opinion was extra-judicial. At all events, he was only a single judge, and his opinion could not prevail against that of the supreme court in session; and he contended that the doctrine that force or military array was necessary was not warranted by the decision of that court. He claimed that his position on this point was consistent with the English adjudications, and cited Fost. Crown Law, 211–218; 1 East, Crown Law, 67; 1 Hale, P. C. 146. He argued that there was no "constructive treason" involved in this doctrine. He then reviewed the facts as he expected them to be disclosed by the evidence, and claimed that they would show, first, that there was a treasonable design in the transactions about to be examined: secondly, that there was an assemblage of men for the purpose of effecting that object. He concluded by invoking the jury to enter upon the examination with calmness and impartiality, to do justice, and decide the case according to the evidence which would be brought before them.

On the conclusion of Mr. Hay's speech the question how long the court ought to be occupied each day was introduced, when Mr. Burr expressed a wish that the court should meet at as early and adjourn at as late an hour as possible. He referred to trials in England, in which the court sat twelve and sixteen hours every day, and proposed that the court should sit ten or twelve hours each day. This was opposed as too long, fatiguing and oppressive, in such warm weather.

The CHIEF JUSTICE said the court had no wish on the subject, but was willing to consult the convenience of the gentlemen of the bar, and the accommodation of the jury.

It was finally determined that the court should meet at nine o'clock in the morning, and sit till four in the afternoon.

Mr. Hay proceeded to the examination of the evidence on the part of the United States. General William Eaton was sworn, when Mr. Burr objected to this order of examining the witnesses.

[The argument on the question consumed the balance of the day. The chief justice rendered an opinion on the following day (Tuesday August 18, 1807), which will be found reported as Case No. 14,692h.]

General William Eaton was then called to give his evidence. He inquired whether he might be permitted to have a recurrence to his notes.

The CHIEF JUSTICE.—Were they written by yourself?

Mr. Eaton. They were taken and copied by me from others, which are at my lodgings.

Mr. Burr's counsel objected, unless he had the original notes.

Mr. Wickham.—At what time were they taken?

Mr. Eaton. At different times.

Mr. Burr.—What is the nature of them? Answer. They are nothing but memoranda, taken from notes which I made of the conversations between you and myself at the times when they passed.

THE COURT decided that they were not admissible.

Mr. Eaton. May I ask one further indulgence from the court? I have been long before the public. Much stricture and some severity have passed upon me. May I, in stating my evidence, be permitted to make some explanation about the motives of my own conduct?

The CHIEF JUSTICE.—Perhaps it would be more correct for the court to decide upon the propriety of the explanation when the particular case occurs. Some cases may require it; and if any objection be made to your explanation, then the court will decide upon it.

Mr. Eaton. Concerning an overt act which goes to prove Aaron Burr guilty of treason, I know nothing.

Mr. Hay.—I wish you to state to the court and jury the different conversations you have had with the prisoner.

Mr. Eaton. Concerning certain transactions which are said to have happened at Blennerhassett's Island, or any agency which Aaron Burr may be supposed to have had in them, I know nothing. But concerning Colonel Burr's expressions of treasonable intentions I know much, and it is to these that my evidence relates.

Mr. Martin.—I know not how far the court's opinion extends.

The CHIEF JUSTICE.—It is this: that any proof of intention formed before the act itself, if relevant to the act, may be admitted. One witness may prove the intention at one time, and another may prove it at another, so as to prove the continuance of the intention throughout the whole transaction, and therefore the proof of very remote intentions may be relevant to this particular act.

Mr. Martin.—I trust that when he speaks of a treasonable intention not applicable to this act the court will stop him.

Mr. Wickham.—If I understand the opinion of the court correctly, it relates to treason charged to be committed in Virginia, and evidence of acts out of it is inadmissible.

The CHIEF JUSTICE.—The intention to commit this crime, to erect an empire in the West, and seize New Orleans, may be shown by subsequent events to have been continued; and facts out of the district may be proved, after the overt act, as corroborative testimony.

Mr. Eaton. During the winter of 1805–6, (I cannot be positive as to the distinct point of time, yet during that winter,) at the city of Washington, Aaron Burr signified to me that he was organizing a military expedition to be moved against the Spanish provinces on the southwestern frontiers of the United States; I understood under the authority of the general

government. From our existing controversies with Spain, and from the tenor of the president's communications to both houses of congress, a conclusion was naturally drawn that war with that power was inevitable. I had just then returned from the coast of Africa, and having been for many years employed on your frontier, or a coast more barbarous and obscure, I was ignorant of the estimation in which Colonel Burr was held by his country. The distinguished rank he held in society, and the strong marks of confidence which he had received from his fellow citizens, did not permit me to doubt of his patriotism. As a military character, I had been made acquainted with none within the United States under whose direction a soldier might with greater security confide his honor than Colonel Burr. In case of my country's being involved in a war, I should have thought it my duty to obey so honorable a call as was proposed to me. Under impressions like these I did engage to embark myself in the enterprise, and pledged myself to Colonel Burr's confidence. At several interviews it appeared to be his intention to convince me, by maps and other documents, of the feasibility of penetrating to Mexico. At length, from certain indistinct expressions and innuendoes, I admitted a suspicion that Colonel Burr had other projects. He used strong expressions of reproach against the administration of the government; accused them of want of character, want of energy, and want of gratitude. He seemed desirous of irritating my resentment by dilating on certain injurious strictures I had received on the floor of congress on account of certain transactions on the coast of Tripoli, and also on the delays in adjusting my accounts for advances of money on account of the United States, and talked of pointing out to me modes of honorable indemnity. I will not conceal here that Colonel Burr had good reasons for supposing me disaffected towards the government; I had indeed suffered much from delays in adjusting my accounts for cash advanced to the government whilst I was consul at Tunis, and for the expense of supporting the war with Tripoli. I had but a short time before been compelled ingloriously to strike the flag of my country on the ramparts of a defeated enemy, where it had flown for forty-five days. I had been compelled to abandon my comrades in war on the fields, where they had fought our battles. I had seen cash offered to the half-vanquished chief of Tripoli, (as he had himself acknowledged,) as the consideration of pacification.

Mr. Wickham.—By whom?

Answer. By our negotiator, when as yet no exertion had been made by our naval squadron to coerce that enemy. I had seen the conduct of the author of these blemishes on our then proud national character, if not commended—not censured; whilst my own inadequate efforts to support that character were attempted to be thrown into shade. To feelings naturally arising out of circumstances like these, I did give strong expression. Here I beg leave to observe, in justice to myself, that however strong those expressions, however harsh the language I employed, they would not justify the inference that I was preparing to dip my sabre in the blood of my countrymen, much less of their children, which I believe would have been the case had this conspiracy been carried into effect.

Mr. Martin objected to this language.

I listened to Colonel Burr's mode of indemnity; and as I had by this time begun to suspect that the military expedition he had on foot was unlawful, I permitted him to believe myself resigned to his influence that I might understand the extent and motive of his arrangements. Colonel Burr now laid open his project of revolutionizing the territory west of the Allegany, establishing an independent empire there; New Orleans to be the capital, and he himself to be the chief; organizing a military force on the waters of the Mississippi, and carrying conquest to Mexico. After much conversation which I do not particularly recollect respecting the feasibility of the project, as was natural, I stated impediments to his operations; such as the republican habits of the citizens of that country, their attachment to the present administration of the government, the want of funds, the opposition he would experience from the regular army of the United States stationed on that frontier, and the resistance to be expected from Miranda, in case he should succeed in republicanizing the Mexicans. Colonel Burr appeared to have no difficulty in removing these obstacles. He stated to me that he had in person, (I think the preceding season,) made a tour through that country, that he had secured to his interests and attached to his person, (I do not recollect the exact expression, but the meaning, and I believe the words were,) the most distinguished citizens of Tennessee, Kentucky, and the territory of Orleans; that he had inexhaustible resources and funds; that the army of the United States would act with him; that it would be reinforced by ten or twelve thousand men from the above mentioned states and territory; that he had powerful agents in the Spanish territory, and "as for Miranda," said Mr. Burr, facetiously, "we must hang Miranda." In the course of several conversations on this subject, he proposed to give me a distinguished command in his army; I understood him to say the second command. I asked him who would command in chief. He said, General Wilkinson. I observed that it was singular he should count upon General Wilkinson; the distinguished command and high trust he held under government, as the commander-in-chief of our army, and as governor of a province, he would not be apt to put at hazard for any prospect of precarious aggrandizement. Colonel Burr stated that General Wilkinson balanced in the confidence of his country; that it was doubtful whether he would much longer retain the distinction and confidence he now enjoyed; and that he

was prepared to secure to himself a permanency. I asked Colonel Burr if he knew General Wilkinson. He said, yes; and echoed the question. I told him that twelve years ago I was at the same time a captain in the wing of the legion of the United States which General Wilkinson commanded, his acting brigade-major, and aide-de-camp, and that I thought I knew him well. He asked me what I knew of General Wilkinson? I said I knew General Wilkinson would act as lieutenant to no man in existence. "You are in an error," said Mr. Burr, "Wilkinson will act as lieutenant to me." From the tenor of much conversation on this subject, I was prevailed on to believe that the plan of revolution meditated by Colonel Burr, and communicated to me, had been concerted with General Wilkinson, and would have his co-operation; for Colonel Burr repeatedly and very confidently expressed his belief that the influence of General Wilkinson with his army, the promise of double pay and rations, the ambition of his officers, and the prospect of plunder and military achievements, would bring the army generally into the measure. I pass over here a conversation which took place between Colonel Burr and myself respecting a central revolution, as it is decided to be irrelevant by the opinion of the bench.

Mr. Hay.—You allude to a revolution for overthrowing the government at Washington, and of revolutionizing the Eastern states.

I was passing over that, to come down to the period when I supposed he had relinquished that design, and adhered to the project of revolutionizing the West.

Mr. Wickham.—What project do you mean?

Answer. A central general revolution. I was thoroughly convinced myself that such a project was already so far organized as to be dangerous, and that it would require an effort to suppress it. For in addition to positive assurances that Colonel Burr had of assistance and co-operation, he said that the vast extent of territory of the United States west of the Allegany Mountains, which offered to adventurers, with a view on the mines of Mexico, would bring volunteers to his standard from all quarters of the Union. The situation which these communications, and the impressions they made upon me, placed me in, was peculiarly delicate. I had no overt act to produce against Colonel Burr. He had given me nothing upon paper; nor did I know of any person in the vicinity who had received similar communications, and whose testimony might support mine. He had mentioned to me no person as principally and decidedly engaged with him but General Wilkinson; a Mr. Alston, who, I afterwards learned, was his son-in-law; and a Mr. Ephraim Kibby, who, I learnt, was late a captain of rangers in Wayne's army. Of General Wilkinson, Burr said much, as I have stated; of Mr. Alston, very little, but enough to satisfy me that he was engaged in the project; and of Kibby, he said that he was brigade-major in the vicinity of Cincinnati, (whether Cincinnati in Ohio or in Kentucky I know not,) who had much influence with the militia, and had already engaged the majority of the brigade to which he belonged, who were ready to march at Mr. Burr's signal. Mr. Burr talked of this revolution as a matter of right, inherent in the people, and constitutional; a revolution which would rather be advantageous than detrimental to the Atlantic states; a revolution which must eventually take place, and for the operation of which the present crisis was peculiarly favorable. He said there was no energy to be dreaded in the general government, and his conversations denoted a confidence that his arrangements were so well made that he should meet with no opposition at New Orleans, for the army and chief citizens of that place were now ready to receive him. On the solitary ground upon which I stood, I was at a loss how to conduct myself, though at no loss as respected my duty. I durst not place my lonely testimony in the balance against the weight of Colonel Burr's character, for by turning the tables upon me, which I thought any man, capable of such a project, was very capable of doing, I should sink under the weight. I resolved therefore with myself to obtain the removal of Mr. Burr from this country, in a way honorable to him; and on this I did consult him, without his knowing my motive. Accordingly I waited on the president of the United States, and after a desultory conversation in which I aimed to draw his view to the westward, I took the liberty of suggesting to the president that I thought Colonel Burr ought to be removed from the country because I considered him dangerous in it. The president asked where we should send him? Other places might have been mentioned, but I believe that Paris, London and Madrid were the places which were particularly named. The president, without positive expression, (in such a matter of delicacy,) signified that the trust was too important, and expressed something like a doubt about the integrity of Mr. Burr. I frankly told the president that perhaps no person had stronger grounds to suspect that integrity than I had; but that I believed his pride of ambition had so predominated over his other passions, that when placed on an eminence, and put on his honor, a respect to himself would secure his fidelity. I perceived that the subject was disagreeable to the president, and to bring him to my point in the shortest mode, and at the same time point to the danger, I said to him that I expected that we should in eighteen months have an insurrection, if not a revolution, on the waters of he Mississippi. The president said he had too much confidence in the information, the integrity, and attachment to the Union of the citizens of that country, to admit any apprehensions of that kind. The circumstance of no interrogatories being made to me I thought imposed silence upon me at

that time and place. Here, sir, I beg indulgence to declare my motive for recommending that gentleman to a foreign mission at that time; and in the solemnity with which I stand here, I declare that Colonel Burr was neutral in my feelings; that it was through no attachment to him that I made that suggestion, but to avert a great national calamity which I saw approaching; to arrest a tempest which seemed lowering in the West, and to divert into a channel of usefulness those consummate talents which were to mount "the whirlwind and direct the storm." These, and these only, were my reasons for making that recommendation. About the time of my having waited on the president, or a little before, (I cannot, however, be positive whether before or after,) I determined at all events to have some evidence of the integrity of my intentions, and to fortify myself by the advice of two gentlemen, members of the house of representatives, whose friendship and confidence I had the honor long to retain, and in whose wisdom and integrity I had the utmost faith and reliance. I am at liberty to give their names if required. I do not distinctly recollect, but I believe that I had a conversation with a senator on the subject. I developed to them all Mr. Burr's plans. They did not seem much alarmed.

Mr. Martin objected to the witness stating any of the observations of other persons to himself.

After some desultory conversation between the counsel on both sides, the CHIEF JUSTICE said that though more time was wasted by stopping the witness than by letting him tell his story in his own way, yet if it were required he must be stopped when he gave improper testimony. He then told the witness, "You are at liberty to vindicate yourself, but declarations of other gentlemen are not to be mentioned, because that certainly would be improper."

Mr. Eaton.—I did ask indulgence of the court to make such explanations, because perversions of my conduct were before the public. But I waive this indulgence, contented with meeting these perversions at some other time and place.

The CHIEF JUSTICE.—You have used that indulgence.

Mr. Eaton.—Little more passed between Colonel Burr and myself relevant to this inquiry while I remained at Washington. Though I could perceive symptoms of distrust in him towards me, he was solicitous to engage me in his western plans. I returned to Massachusetts, to my own concerns, and thought no more of Colonel Burr, or his projects, or revolutions, until in October last a letter was put into my hands at Brumfield, from Mr. Belknap, of Marietta, to T. E. Danielson, of Brumfield, stating that Mr. Burr had contracted for boats, which were building on the Ohio.

Mr. Burr.—Have you that letter?

Mr. Eaton.—No.

Mr. Burr.—It is improper, then, to state it.

Mr. Hay.—It is immaterial. Mr. Belknap is here.

Mr. Eaton.—As to letters, I have had no correspondence with Colonel Burr. I was about to state that I had made a communication, through Mr. Granger, to the president of the United States, stating the views of Colonel Burr, and a copy of the letter from Belknap was transmitted to the department of state.

Questions by the Prosecution:

Mr. Wirt.—Was there any conversation between you and the prisoner in which you spoke of the odium attached to the name of usurper? Mr. Eaton.—That conversation was excluded by the opinion of the court, as relating to the central project.

Mr. Hay.—Did you mean to state that the honorable indemnity proposed to you by the prisoner was to be included in this plan? Mr. Eaton.—I understood it to be included in the perpetual rank and emolument to be assigned me. In his conversations he declared that he should erect a permanent government, of which he was to be the chief, and he repeated it so often that I could not have misunderstood him.

Cross-questioned:

Mr. Martin.—Do you recollect when you arrived in Washington? Mr. Eaton.—I said that I did not recollect particularly. But the principal part of these conversations must have been between the middle of February and the latter end of March, 1806. I arrived here in the latter end of November, 1805, at Philadelphia, and in December went to New England, and afterwards returned. These conversations happened after my return. Question. Did you go any remote distance till you came back? Were you as far as Baltimore? (To these questions no answers were made, or, if made, were not heard.) Question. Do you recollect any particular conduct of yours calculated to put an end to Colonel Burr's importunities? Answer. Yes. At some of our last interviews I laid on his table a paper containing the toast which I had given to the public, with an intention that he should see it, but I do not know that he did see it, but I believe it. "The United States: Palsy to the brain that should plot to dismember, and leprosy to the hand that will not draw to defend our Union." Question. Where was that toast drunk? Answer. I cannot say. This question was made to me from authority. It was sent, with other toasts I had corrected, to a paper at Springfield. I laid this paper on Colonel Burr's table. Question. Was it drunk at any distant place? At Philadelphia? Answer. I do not recollect. I thought at first it was at Philadelphia, but on reflection it could not have been there. But I had received many hospitalities throughout the Union; many of my toasts were published; and in the hurry of passing and repassing I have completely forgotten.

Mr. Burr.—Do you recollect when you left Washington? Answer. About the 5th or 6th

of April. Question. Can you not be certain where this toast was drunk? At Washington or Philadelphia? Answer. I am not certain when or where it was drunk, but I am certain it was not at Washington, because I gave another there when called upon. Question. Did you say that all these conversations happened between the middle of February and the last of March? Answer. No, I did not say so. I said the principal part of these conversations passed in that interval.

Mr. Burr.—Did you say the paper containing that toast was laid on my table in March? Answer. I cannot tell. It cannot be material. From that time our intercourse became less frequent. You expressed some solicitude to keep me at your house. Question. You say that this toast was printed at Springfield? Answer. I did. Question. Have you in your possession a paper containing that toast? Answer. I have not here.

Mr. Martin.—Did you transmit the toast for publication, and to what printer? Answer. I do not recollect distinctly. Question. You mentioned something about a communication which you made to the president, through the postmaster general. Look at that paper. Is that your signature? Answer. It is; and I must give a short account of that paper. I went to Springfield, about twenty-five miles distant from my place of residence. Mr. Granger was there. I went to see him. On my arrival there, in the evening, I understood that he had gone out of town to his seat in the country, but that he had taken notes concerning those transactions. Next morning I went to his house. He put into my hands notes which he had got from Mr. Ely. Question. Whom were the notes written by? Answer. By Mr. Granger. They were subscribed by him, if I have a correct recollection. Mr. Eaton then mentioned that the notes on the two first pages were drawn up by Mr. Granger, from conversations which had passed between Mr. Granger and Mr. Ely, on certain communications made to Mr. Ely by Mr. Eaton, respecting Colonel Burr's plans; that he had seen Mr. Ely at Northampton, at the session of the court of common pleas, at the time when they had first heard of the building of boats on the Ohio. The notes on the last page, in Mr. Granger's writing, and subscribed by himself, were from subsequent conversations between him and Mr. Granger. Question. How many days' travelling is it by the stage from Springfield to Washington? Answer. Not more than five.

Mr. Burr.—You spoke of accounts with the government. Did you or the government demand money? Answer. They had no demand on me. I demanded money of them. Question. Did they state in account a balance against you? Answer. I expended money for the service of the United States when employed as consul at Tunis, an account of which being presented to the accounting officers of the treasury, they, I was told, had no legal discretion to settle it. As there was no law to authorize this adjustment, I did refer to the congress of 1803–4. A committee had reported on my claims, favorably, as I supposed. Then my accounts were left. When I went, however, to the coast of Barbary, and when I returned, after eighteen months, I renewed my claim to the congress. I found that new difficulties had occurred to prevent an adjustment. Leaving out the sums I had advanced, the government had a considerable balance against me. Some comments were made by a member from New York which I thought derogatory to my character, but the balance was in my favor. The last session of congress left them to the accounting officers to settle according to equity. It has been since settled and paid.

Mr. Martin.—Did not Colonel Burr confine his plans to attack the Spanish provinces, for the most considerable part of the time, to the event of a war with Spain? Answer. Not for the most considerable part of the time, but for some time.

Mr. Martin asked him some questions relative to his having seen him, accompanied by his step-daughter and another lady and a gentleman, at Georgetown and Alexandria, about the time he had spoken of, and whether he had given the toast then, when together in the same room. He admitted that he had seen him when so accompanied, but was not positive when or where the toast was given.

Mr. Martin.—What balance did you receive? Answer. That is my concern, sir.

Mr. Burr.—What was the balance against you?

Mr. Eaton (to the court).—Is that a proper question?

Mr. Burr.—My object is manifest; I wish to show the bias which has existed on the mind of the witness.

The CHIEF JUSTICE saw no objections to the question.

Mr. Eaton. I cannot say to a cent or a dollar, but I have received about 10,000 dollars.

Mr. Burr.—When was the money received? Answer. About March last. Question. You mentioned Miranda. Where did you understand he was gone to? Answer. On the benevolent project of revolutionizing the Spanish provinces. Question. What part of them? Answer. Caraccas. I had some reason, too, to know something of that project, because I too was invited to join in that. He, too, was to have been an emperor; he might have been troublesome to us; and of course when I asked you what was to be done with him, you observed, "hang him." Question. Did you understand that I was to do all at once, to execute the central project too as well as that in the West? Answer. I have no objection to answering that, but it will be nothing in your favor. When Colonel Burr was speaking of a central revolution, not much was said about his revolution in the West. Had the other been effected I doubt much whether you would have been willing to have separated that part. Question. You spoke of

a command? Answer. You stated what I have already mentioned, that you were assured, from the arrangements which you had made, that an army would be ready to appear when you went to the waters of the western country. I recollect particularly the name of Ephraim Kibby, who had been a ranger in General Wayne's army. You asked me about his spirit. You gave me to understand that his brigade was ready to join you, and that the people also in that country were ready to engage with you in the enterprise. You spoke of your riflemen, your infantry, your cavalry. It was with the same view you mentioned to me that that man (pointing to General Wilkinson, just behind him) was to have been the first to aid you, and from the same views you have perhaps mentioned me.

Mr. Martin objected to the witness interposing his own opinions in this manner.

Mr. Hay.—Some allowance is to be made for the feelings of a man of honor.

Mr. Eaton, bowing, apologized to the court for the warmth of his manner.

Mr. Burr.—You spoke of my revolutionizing the western states. How did you understand that the Union was to be separated? Answer. Your principal line was to be drawn by the Alleghany mountains. You were persuaded that you had secured to you the most considerable citizens of Kentucky and Tennessee, but expressed some doubts about Ohio; I well recollect that on account of the reason which you gave: that they were too much of a plodding, industrious people to engage in your enterprise. Question. How was the business to be effected? Answer. I understood that your agents were in the western country; that the army and the commander-in-chief were ready to act at your signal; and that these, with the adventurers that would join you, would compel the states to agree to a separation. Indeed, you seemed to consider New Orleans as already yours, and that from this point you would send expeditions into the other provinces, make conquests, and consolidate your empire. Question. Was it after all this that you recommended me to the president for an embassy? Answer. Yes; to remove you, as you were a dangerous man, because I thought it the only way to avert a civil war. Question. Did you communicate this to me, and what did I say? Answer. Yes; you seemed to assent to the proposition. Question. What had become of your command? Answer. That I had disposed of myself. Question. Did you understand that you had given me a definite answer? Answer. No; after you had developed yourself, I determined to use you until I got everything out of you; and on the principle that, "when innocence is in danger, to break faith with a bad man is not fraud, but virtue." Question. Did you think that your proposition, as to a foreign embassy, which was so incompatible with my own plans, would be received by me with indifference had I abandoned the project? Answer. You seemed to me to want some distinguished place; as to the mode, you were indifferent; and you seemed to acquiesce in the plan of a foreign embassy.

Mr. Hay.—You said that you received about $10.000 from the government in consequence of a law passed for the purpose. The act of congress did not give you a definitive sum? Answer. The act of congress gave the accounting officers the power of settling with me on equitable principles under the inspection of the secretary of state; under whose department I had served, and the settlement was accordingly made.

Commodore Truxton was then sworn.

Mr. Hay.—Were you present when the court delivered its opinion? Answer. I was. I know nothing of overt acts, treasonable designs or conversations on the part of Colonel Burr.

Here Mr. Hay, the attorney for the United States, seemed to doubt whether the evidence of the commodore applied to this charge, and to be indisposed to examine him.

Mr. Wickham then observed that he would put two questions to him. 1st, Whether he had not frequent and considerable conversations with Colonel Burr concerning the Mexican expedition. 2d, Whether in any of those conversations he ever heard him say anything of a treasonable design.

Mr. Hay objected to his examination at this time, and Mr. Wickham insisted on it.

Mr. Wirt contended that the attorney had the right to examine the witness or not at this time, as he thought proper; that the court would recollect that there were two indictments against the prisoner: the one for high treason, now in discussion before the court, and the other for a misdemeanor (under the act of congress) for preparing an expedition against the Spanish provinces; that the witnesses were summoned promiscuously to support both charges; that the attorney could not ascertain what witnesses supported each indictment without inquiring of themselves; and what he now asked the witness, ought to be considered merely as an inquiry to which of the two indictments his evidence related; and that his evidence was deemed very material on the second indictment, though not on the first.

Mr. Hay said that on reflection he had no doubt the testimony of Commodore Truxton would have a direct bearing on the subject now before the court, when connected with the other evidence in the cause; that it would appear that there was an intimate connection between the two projects, the seizure of New Orleans and the attack on Mexico; he would therefore examine him now and propound this question. Have you not had several conversations with the accused concerning the Mexican expedition?

The commodore proceeded thus: About the beginning of the winter 1805–6, Colonel Burr returned from the western country to Phila-

delphia. He frequently, in conversation with me, mentioned the subject of speculations in western lands, opening a canal and building a bridge. Those things were not interesting to me in the least, and I did not pay much attention to them. Colonel Burr mentioned to me that the government was weak, and he wished me to get the navy of the United States out of my head; that it would dwindle to nothing; and that he had something to propose to me that was both honorable and profitable, but I considered this as nothing more than an interest in his land speculations. His conversations were repeated frequently. Some time in July, 1806, he told me that he wished to see me unwedded from the navy of the United States, and not to think more of those men at Washington; that he wished to see or make me (I do not recollect which of those two terms he used) an admiral; that he contemplated an expedition to Mexico, in the event of a war with Spain, which he thought inevitable. He asked me if the Havana could be easily taken in the event of a war? I told him that it would require the co-operation of a naval force. Mr. Burr observed to me that that might be obtained. He asked me if I had any personal knowledge of Carthagena and La Vera Cruz, and what would be the best mode of attacking them by sea and land. I gave him my opinion very freely. Mr. Burr then asked me if I would take the command of a naval expedition. I asked him if the executive of the United States was privy to or concerned in the project. He answered emphatically that he was not. I asked that question, because the executive had been charged with a knowledge of Miranda's expedition; I told Mr. Burr that I would have nothing to do with it; that Miranda's project had been intimated to me, but I declined to have anything to do with such affairs. He observed to me that in the event of a war he intended to establish an independent government in Mexico; that Wilkinson, the army, and many officers of the navy would join. I told Mr. Burr that I could not see how any officer of the United States could join. He said that General Wilkinson had projected the expedition, and he had matured it; that many greater men than Wilkinson would join, and that thousands to the westward would join.

Question by Mr. Hay.—Do you recollect having asked him whether General Wilkinson had previously engaged in it? Answer. He said yes, and many greater men than Wilkinson.

Question by Mr. Hay.—I will ask you whether at that time you were in the service of the United States? Answer. I am declared not to be.

Mr. Hay.—I do not wish to hurt your feelings, but merely to show to the jury the state you were in.

Commodore Truxton then proceeded: Colonel Burr again wished me to take a part, and asked me to write a letter to General Wilkinson; that he was about to dispatch two couriers to him. I told him that I had no subject to write about, and declined writing. Mr. Burr said that several officers would be pleased at being put under my command. He spoke highly of Lieutenant Jones, and asked me if he had sailed with me. I told him that he had not, and that I could give him no account of Mr. Jones, having never seen him to my knowledge. He observed that the expedition could not fail; that the Mexicans were ripe for revolt; that he was incapable of anything chimerical, or that would lead his friends into a dilemma. He showed me the draught of a periauger or kind of boat that plies between Paulus-Hook and New York, and asked my opinion of those boats, and whether they were calculated for the river Mississippi and the waters thereof; and I gave him my opinion that they were. He asked me whether I could get a naval constructor to make several copies of the draught. I told him I would. I spoke to a naval constructor and delivered it to him, but as he could not finish them as soon as Colonel Burr wished, the draught was returned to him. Mr. Burr told me that he intended those boats for the conveyance of agricultural products to market at New Orleans, and, in the event of a war, for transports. I knew and informed him that they were not calculated for transports by sea, nor for the carrying of guns; but having determined to have nothing to do with the Mexican expedition, I said very little more to him about those boats; but I very well recollect what I said to him in our last conversation towards the end of July. I told him that there would be no war. He was sanguine there would be war. He said, however, that if he was disappointed as to the event of war, he was about to complete a contract for a large quantity of land on the Washita; that he intended to invite his friends to settle it; that in one year he would have a thousand families of respectable and fashionable people, and some of them of considerable property; that it was a fine country, and that they would have a charming society, and in two years he would have double the number of settlers; and being on the frontier, he would be ready to move whenever a war took place. I have thus endeavored to relate the substance of the conversation which passed between us, as well as I can recollect; though it is very possible that I have not stated them after such a lapse of time verbatim.

Question by Mr. MacRae.—Was it in your first conversation that he told you that you should think no more of those men at Washington? Answer. It was in several.

Question by the same counsel.—Was it not in July that he told you that he wished to see you unwedded from the navy of the United States, and to make you an admiral? Answer. That conversation happened in July.

He wished to see or make me an admiral; I cannot recollect which.

Question by Mr. Hay.—Did those conversations take place after it was declared that you were no longer in the service of the United States? Answer. They did.

In answer to a question by Colonel Carrington, one of the jury, he again stated that the latter conversation was in July.

Question by Mr. Martin.—Was it not to the event of a war with Spain that these conversations related? Answer. All his conversations respecting military and naval subjects, and the Mexican expedition, were in the event of a war with Spain. I told him my opinion was there would be no war, and he seemed to be confident that there would be war.

Mr. MacRae.—Did he mention General Eaton in any of those conversations? Answer. He mentioned no person but General Wilkinson and Lieutenant Jones.

Mr. Hay.—Had you not expressed your dissatisfaction at the declaration of your not being in the service of the United States? Answer. I had. The misunderstanding between the secretary of the navy of the United States and myself took place in March, 1802.

On cross-examination, the commodore further stated that he had had several (he did not know how many) conversations with Mr. Burr; and that as well as he could recollect, it was about the latter end of July that he informed him that he was about concluding a bargain for the Washita lands, and wished also to see him unwedded from the navy of the United States. He added, Colonel Burr said that after the Mexican expedition he intended to provide a formidable navy, at the head of which he intended to place me; that he intended to establish an independent government, and give liberty to an enslaved world. I declined his propositions to me at first, because the president was not privy to the project. He asked me the best mode of attacking the Havana, Carthagena, and La Vera Cruz, but spoke of no particular force.

Question by Colonel Burr.—Do you not recollect my telling you the propriety of private expeditions, undertaken by individuals in the case of war; and that there had been such in the late war, and that there is no legal restraint on such expeditions?

Mr. Hay objected to this question as improper.

Colonel Burr insisted on its propriety, and that the gentleman for the prosecution had set an example far beyond it.

Commodore Truxton answered: You said that Wilkinson, the army, and many officers of the navy would join, and you spoke highly of Lieutenant Jones.

Colonel Burr.—Had I not frequently told you, and for years, that the government had no serious intention of employing you, and that you were duped by the Smiths? and do you not think that I was perfectly correct in that opinion? Answer. Yes; I know very well I was.

Colonel Burr.—Were we not on terms of intimacy? Was there any reserve on my part in our frequent conversations; and did you ever hear me express any intention or sentiment respecting a division of the Union? Answer. We were very intimate. There seemed to be no reserve on your part. I never heard you speak of a division of the Union.

Colonel Burr.—Did I not state to you that the Mexican expedition would be very beneficial to this country? Answer. You did.

Colonel Burr.—Had you any serious doubt as to my intentions to settle those lands? Answer. So far from that, I was astonished at the intelligence of your having different views, contained in newspapers received from the western country after you went thither. Question. Would you not have joined in the expedition if sanctioned by the government? Answer. I would most readily get out of my bed at twelve o'clock at night to go in defence of my country at her call, against England, France, Spain, or any other country.

Mr. Hay.—Did the prisoner speak of commercial speculations? Answer. He said they might be carried on to advantage. Question. Did he in his conversations speak of commercial establishments, in which he or his friends were to have an interest? Answer. He spoke of settling that country, and sending produce therefrom to different parts of the world, New Orleans particularly.

Mr. Wirt.—Did he speak of an independent empire in Mexico, having an advantageous connection with this country? Answer. I understood him so.

Mr. MacRae.—Did he wish to fill your mind with resentment against the government? Answer. I was pretty full of it myself, and he joined me in opinion.

Mr. Wirt.—On what subject did Burr wish you to write to General Wilkinson? Answer. General Wilkinson and myself were on good terms, and he wished me to correspond with him; but I had no subject for a letter to him, and therefore did not write to him.

Mr. Hay.—Suppose we were to have a war with Spain, would not New Orleans be a proper place from whence to send an expedition against the Spanish provinces? Is it not more proper for that purpose than any other place in the western parts of the country? Answer. Certainly it is; but large ships cannot come up to New Orleans; small craft or vessels must take the expedition down the river.

Question by Mr. Parker, one of the jury. Did you understand for what purpose the couriers spoken of were to be sent by Mr. Burr to General Wilkinson? Answer. I understood from him that there was an understanding between himself and General Wilkinson about the Mexican expedition.

Mr. Parker.—Was this expedition only to be

in the event of a war with Spain? Answer. Yes; in all his conversations with me, he said that this expedition was to take place only in the event of a war with Spain.

Mr. Parker.—Was there no proposition made to you for such an expedition, whether there was war or not? Answer. There was not.

Colonel Burr said that enterprises by individuals are lawful and customary in cases of war, and asked whether there were not preparations making in Philadelphia now for that purpose. Answer. Preparations are making at New York as to gunboats and fortifications. The merchants of Liverpool, in expectation of war, build ships for privateers, and if there be no war they convert them into Guineamen.

Question by Mr. MacRae.—Are not the preparations going on openly at New York? Has any commander been appointed independent of the government? Answer. No.

Question by Colonel Burr.—Did I not say that I had never seen Lieutenant Jones? Answer. I do not recollect that, but you spoke highly of him.

Question by Mr. Hay.—When he proposed to make you an admiral, did not the thought strike you how he was to accomplish this?

Mr. Botts denied that Commodore Truxton had said that Mr. Burr had promised to make him an admiral.

Commodore Truxton.—Mr. Burr told me he wished to make or see me one; I do not particularly recollect which was his expression.

Question by Mr. Hay.—From what quarter of the world was the expedition by sea to go? Answer. I do not know. I did not ask him where it was to go from.

Question by the same.—Did you not understand that you were to command the expedition by sea? Answer. I declined the offer, and asked no questions particularly on the subject.

Mr. Botts.—Can ships be built secretly in a corner? Answer. No.

Peter Taylor was next sworn.

Mr. Hay asked him to state everything he knew concerning the assemblage on Blennerhassett's Island.

Mr. Botts objected to this mode of examination; and though he was willing to accommodate Mr. Hay so far as to let the witness tell his story in his own way, yet he would not consent to his introducing completely illegal testimony. He had no objection to the witness stating what Colonel Burr had said, or the facts which happened on the island, though both were, strictly speaking, improper evidence; but he would not agree to his speaking of the declarations of Mr. and Mrs. Blennerhassett.

Colonel Burr said he waived the objection at present.

Mr. Hay.—This witness will directly prove the connection of Burr with Blennerhassett, and with the assemblage on the island.

Peter Taylor.—The first information I had upon this subject was from Mrs. Blennerhassett, when Mr. Blennerhassett and Mr. Alston were gone down the river. The people got much alarmed concerning this business, and Mrs. Blennerhassett sent me to Lexington after Mr. Blennerhassett, with a letter to prevent Colonel Burr from coming back with him to the island. I went to Chillicothe, but I did not find Mr. Blennerhassett there, and I then went on to Cincinnati. I was directed to call at Cincinnati, at Mr. John Smith's, where I would find Mr. Blennerhassett. I called at Mr. Smith's store, where I saw his son. I asked if Mr. Smith was at home. He said yes. I said I wanted to speak to him. His son went and told him a man wanted to see him. When Mr. Smith came out I inquired for Colonel Burr and Blennerhassett, to see whether he could give any account of them. He allowed he knew nothing of either of them. He allowed I was much mistaken in the place. I said no, this was the right place, "Mr. John Smith, Storekeeper, Cincinnati." Says I, "Don't you recollect a young man who came here some time ago for Colonel Burr's topcoat? (great coat.)" I said, "Sir, I have lived with Mr. Blennerhassett for three years." When Mr. Smith heard me talk so, he knew me, and took me up stairs to talk with me. He wanted to know the news up our way. I told him the people had got alarmed. I told him that everything was in agitation; that they talked about new settlements of lands, as they told me. He seemed surprised. He asked what was said about General Wilkinson? I said I knew nothing about it. He asked me if I would carry a letter from him to Blennerhassett. I told him I would carry anything, so as it was not too burthensome; so he sat down and wrote a letter. He asked whether I wished to drink, for he charged me not to go to any tavern, lest they should be asking me questions. He gave me liquor, and I drank; and then he showed me a stable, and told me to go and get my horse fed by the ostler, but not to go into the tavern. I asked him where I should find Colonel Burr and Blennerhassett. He said he expected they were at Lexington. I told him I supposed at Mr. Jourdan's. He said that was the very house. When I got to Lexington it was Saturday, about 1 o'clock. Mr. Jourdan happened to be in the street, and knew me. He said, "Peter, your old master, as you call him, is not in town." But he said, before I asked him, he expected him either that night or tomorrow early. He asked me, what news in our parts, and I told him. I asked him what I was to do with my horse. He said that he was to be put at the livery stable. He then went up stairs, and he opened a door and made a motion with his hand. I suppose to Colonel Burr. I went in, and there was Colonel Burr. Colonel Burr wanted to know the news in our parts. I began to tell him that my business was to prevent Colonel Burr from going back to the island. Question. Did you know Colonel Burr at that time? Answer. I did not. He had been on the island three

times, but I did not see him. When I told Colonel Burr that, says he, "I am the very man involved in this piece of business, and you ought to tell me all you know." I said, "If you come up our way the people will shoot you." I told him it was my sincere opinion that it was not safe for him to come up our way. I told him that I had heard several declare that they had rather shoot him than let it alone, if they had a good chance. He seemed surprised that they should have such a thing in their heads. I told him I could not tell why, and then I told him about the land settlement, but the people said all that was a fib, and that he had something else in view. Then Colonel Burr asked me what letters I had. I said two; one was from Mrs. Blennerhassett and the other from John Smith, of Cincinnati. He asked me if he might open the letter from John Smith to Blennerhassett, for he expected it was for him. I told him I supposed it made no difference between him and Blennerhassett, and he might. He broke the seal open, and showed me there was a letter inclosed for himself. He asked me about my wife. I asked him whether I might not go about the town. He said I might, and then I went down stairs and left the opened letter with him. I then went to Mr. Jourdan and asked him whether I was to stay at his house or go to a tavern? He said I was to go to a tavern, and he would pay for me. Mr. Jourdan wished me to go next day to Millersburg, after the saddle-bags left there by Mr. Blennerhassett. I told him I would, and I did go. I left Mrs. Blennerhassett's letter with Mr. Jourdan, expecting Blennerhassett to get there before me. I got back on Monday, by 1 o'clock, and then Mr. Blennerhassett was come and preparing to go home. We started, and came ten miles that night. We stopped at a tavern. I went to see after the horses, and he went into the house. There were people in the house who wanted to know his name. He told them his name was Tom Jones. He came out and told me the people in the house had asked, and he had told them his name was Tom Jones, and I must mind and not make no mistake, but call him Tom Jones too. So he passed by that name till we got to the Mudlicks. He then told me he was known there, and I must call him by his own name. Question. When did these things happen? Answer. All this was in October, 1806, I believe. He then began to inquire for young men that had rifles—good, orderly men, that would be conformable to order and discipline. He allowed that Colonel Burr and he and a few of his friends had bought eight hundred thousand acres of land, and they wanted young men to settle it. He said he would give any young man who would go down the river one hundred acres of land, plenty of grog and victuals while going down the river, and three months' provisions after they had got to the end. Every young man must have his rifle and blanket. I agreed to go myself, if I could carry my wife and family, but he said he must have further consultation upon that. When I got home I began to think, and asked him what kind of seeds we should carry with us. He said we did not want any; the people had seeds where we were going.

Mr. Wirt.—Of what occupation were you on the island? Answer. A gardener.

Mr. Wirt.—I put this question that the jury might understand his last observation.

I urged that subject to him several times. At last he made a sudden pause, and said, "I will tell you what, Peter, we are going to take Mexico, one of the finest and richest places in the whole world." He said that Colonel Burr would be the king of Mexico, and Mrs. Alston, daughter of Colonel Burr, was to be the queen of Mexico whenever Colonel Burr died. He said that Colonel Burr had made fortunes for many in his time, but none for himself; but now he was going to make something for himself. He said that he had a great many friends in the Spanish territory. No less than two thousand Roman Catholic priests were engaged, and that all their friends, too, would join, if once he could get to them; that the Spaniards, like the French, had got dissatisfied with their government, and wanted to swap it. He told me that the British, also, were friends in this piece of business, and that he should go to England on this piece of business, for Colonel Burr. He asked me if I would not like to go to England. I said I should certainly like to see my friends there, but would wish to go for nothing else. I then asked him what was to become of the men who were going to settle the lands he talked about. Were they to stop at the Red river, or to go on? He said, "Oh, by God, I tell you, Peter, every man that will not conform to order and discipline I will stab; you'll see how I'll fix them;" that when he got them far enough down the river, if they did not conform to order and discipline, he swore by God he'd stab them. I was astonished. I told him I was no soldier, and could not fight. He said it made no odds; he did not want me to fight; he wanted me to go and live with Mrs. Blennerhassett and the children, either at Natchez or some other place, while he went on the expedition. I talked to him again, and told him the people had got it into their heads that he wanted to divide the Union. He said Colonel Burr and he could not do it themselves; all they could do was to tell the people the consequence of it. He said the people there paid the government upwards of four hundred thousand dollars a year, and never received any benefit from it. He allowed it would be a very fine thing if they could keep that money among themselves on this side of the mountains, and make locks, and build bridges, and cut roads. About two weeks after I got home he sent me to Doctor Bennett's, of Mason county, with a letter. He wanted to know if Doctor Bennett wouldn't sell him the arms belonging to the United States which were in his charge

If he could sell them and keep himself out of danger, he'd give him a draft upon his friend in Kentucky for payment. If he could not sell them without bringing himself into a hobble, he must send him word where they were kept, and he would come and steal them away in the night. I delivered the letter. He gave me directions to get it back and burn it, for it contained high treason. I was not to give the letter to Doctor Bennett until the doctor promised to deliver it back, for me to burn it, for that it contained high treason. I did burn it. The doctor was present. The doctor read the letter, and said he was unacquainted with the plot, and couldn't join in it.

Mr. Hay.—Were you not on the island when the people were there? Answer. Yes. Question. When did the boats leave the island? Answer. It was contemplated to sail on the 6th of December, but the boats were not ready; they did not come till the 10th (Sunday). Mr. Knox and several other men were with him, and they sailed on the Wednesday night following. Question. How many boats were there? Answer. Four. Question. How many men from the boats came ashore? Answer. About thirty. Question. What did the men do who did not belong to the boats? Answer. Some were packing meat, and some were packing other things.

Mr. MacRae.—Who went off on Wednesday night? Answer. Mr. Blennerhassett and Mr. Tyler, and the whole of the party. Question. At what time in the night? Answer. About one o'clock. Question. Did all that came down to the island go away? Answer. All but one, who was sick.

Mr. Hay.—Had they any guns? Answer. Some of them had; some of the people went a shooting. But I do not know how many there were.

Mr. J. M. Sheppard (a juryman).—What kind of guns, rifles or muskets? Answer. I can't tell whether rifles or muskets. I saw no pistols but what belonged to Blennerhassett himself. Question. Was there any powder or lead? Answer. They had powder, and they had lead both; I saw some powder in a long small barrel like a churn, but I was so employed I could not notice particularly. Some of the men were engaged in running bullets, but I do not know how many.

Mr. MacRae.—What induced them to leave the island at that hour of the night? Answer. Because they were informed that the Kenawah militia were coming down there. Question. Did you carry some boxes to the boats? Answer. I carried half a bushel of candles and some brandy; several boxes were carried, but I knew not what they contained, and a great many things besides, of which I knew nothing.

Mr. Hay.—Were you on the island when they went off? Answer. Yes. They held a council at the foot of the pier, to determine which was the best way to go. Mr. Blennerhassett said that they had better go together; if he went in a canoe he would be an easy prey. I said to them, "best stick together;" and so they determined to stick together. They went off in great haste. Question. Why did they go in a body? Answer. I suppose for security.

Mr. Wickham.—You saw General Tupper and Mr. Woodbridge that night? Answer. Yes. Question. Was Colonel Burr there? Answer. No. I did not see him. Question. Did you understand whether he was in that part of the country at that time? Answer. I understood not; never saw him on the island.

The court then adjourned till to-morrow.

Wednesday, August 19, 1807.

The court met, according to adjournment, at the usual hour.

General John Morgan was then sworn, and gave the following testimony:

Some time in August last, about this time twelvemonth, my father put a letter into my hands, signed Aaron Burr, in which he said that himself and Colonel Dupiester would dine with him the following day. My father requested me and my brother to go and meet Colonel Burr, which we did about seven miles distant. After a few words of general conversation, Colonel Burr observed to me that the union of the states could not possibly last; and that a separation of the states must ensue as a natural consequence in four or five years. Colonel Burr made many inquiries of me relative to the county of Washington; particularly the state of its militia, its strength, arms, accoutrements, and the character of its officers These conversations continued some time, besides other things, which I cannot recollect because I did not expect to be called upon in this way. After traveling some miles we met one of my workmen, a well-looking young man. Colonel Burr said he wished he had ten thousand such fellows. At my father's table, during dinner, Colonel Burr again observed that the separation of the Union must take place inevitably in less than five years. Shall I give the answers that were made?

Mr. Wirt.—Perhaps it may serve to connect your narrative better.

I recollect that it was my father who answered him, God forbid! Colonel Burr, in the course of conversation at the dinner table, observed that with two hundred men he could drive the president and congress into the Potomac, and with four or five hundred he could take possession of the city of New York. After dinner he walked with me to my brother's, about one mile distant, and in the course of the walk spoke of military men, and asked me if either of my brothers had a military turn? He said he should like to see my brother George at the head of a corps of grenadiers; he was a fine, stout-looking fellow. These circumstances induced me to speak to my father; I warned him to beware of Colonel Burr, and told him that in the course of

that night Colonel Burr would attempt to have an interview with him, and would make a requisition of my brother Tom to go with him, and that I suspected something was going on, but what I did not know. The next morning I rode with Colonel Burr to the town of Washington, about nine or ten miles. We had a good deal of conversation; principally on military affairs, on the state of the militia, the necessity of attending to military discipline. He told me the effect it had in New York; that in New York the militia were in good order, which was brought about by the influence and exertions of a single individual (Colonel Swartwout). Colonel Burr asked me if I thought I could raise a regiment in Washington county, or whether I could raise one with more facility in New Jersey.

Mr. Wirt.—You have lived in New Jersey? Answer. Yes. At Washington we took a walk, Colonel Burr, Colonel Dupiester and myself, down the town; and I pointed out to him the house where Mr. Bradford lived, who had been at the head of the western insurrection. He inquired about Mr. Bradford. (He was at Baton Rouge.) I told him his son was in town, and Colonel Burr expressed a wish to see him. Colonel Burr mentioned to me that he had met with several who had been concerned in the western insurrection, and particularly a major in the Northwestern Territory, (whose name I do not recollect,) who had told him that if he was ever engaged in another business of the kind, he pledged himself it should not end without bloodshed. He said that he was a fine fellow. It was on these circumstances that I advised my father to apprise the president of the United States that something was going on.

Mr. Hay.—Which way did he go? Answer. I saw him leave Washington for Wheeling.

Mr. Wirt.—Were the separation of the Union and military affairs the predominant subject of his conversations? Answer. Our conversation was very general and mixed, never very long; but these seemed to be the leading subjects.

Mr. Hay.—Do you recollect anything he said about Bradford's qualifications for conducting such an enterprise? Answer. I recollect it well. He said that Bradford was very incompetent to such an undertaking; and that in such a case there ought to be the utmost confidence in the leader.

Mr. Wirt.—At what time in the month of August was this visit? Answer. Somewhere between the 20th and 25th.

Mr. Hay.—Perhaps the date of this letter (from the prisoner to your father) may show. This letter is dated on the 21st.

Mr. Parker (one of the jury.) Did he approve or condemn that sentiment of the major's which you have just quoted? Answer. I do not recollect. Question. Did he make any further remarks respecting him? Answer. He only said that he was a fine fellow, or words to that effect; that he was very fit for business of that kind.

Mr. Burr.—You spoke of a letter from me to your father. Do you know whether he wrote me, some time before, a letter of invitation to his house? Answer. Yes; he had written about a year before to you to Pittsburg. That letter is yet unsealed, in my brother Tom's bureau.

Question by the same. Do you remember that it was communicated to me and that that was the cause of my coming to visit him? Answer. Not by myself or my brother, in my hearing.

Question by the same. Do you remember the manner in which I introduced the subject you allude to? Was it in the course of a lively conversation? Was there anything very serious in it? Answer. You only mentioned it in a lively or careless manner. Question. Did your father communicate to you, next morning, our night's conversation? Answer. Yes. Question. Before we rode? Answer. No. Question. Do you recollect of my having made several inquiries, also, about the seminaries of learning, and of one that was projected in your neighborhood, and of my suggesting the necessity of encouraging it? Answer. You spoke much, too, on that subject. Question. Did I seem to know anything of Bradford before you told me? Answer. You seemed to know a good deal about the insurrection. Question. Did you not tell me that Bradford was a noisy fellow? Answer. I did not. I have no objections to give my opinion of Mr. Bradford. I mentioned him to you as a mere lawyer. Question. Did I seem to know that Bradford lived at Washington before you mentioned it and pointed out his house? Answer. You did not seem to know it. Question. Who were at dinner at your father's? Answer. My father, mother, wife, sister, Colonel Dupiester, Mr. T. Ewell, and my brother Tom.

Colonel George Morgan was then sworn, and was proceeding, when

Mr. Burr remonstrated against this kind of evidence, consisting of conversations and previous declarations. He did not mean to interrupt the inquiry, but to prevent the time of the court from being wasted. Some desultory conversation ensued upon this point, when

The CHIEF JUSTICE said that he understood the same objections would hereafter apply as well to the consideration as to the introduction of testimony; that these objections might be hereafter urged; and that it was impossible for the court to know the nature of the evidence before it was introduced.

Mr. Hay.—If the gentlemen will only have a little patience they will find that other circumstances will come out to prove the materiality of this testimony, and will also prove the most perfect connection between the different parts of the conspiracy. This

witness will prove what was the state of the prisoner's mind in August last.

Mr. Lee.—I hope, then, the jury will distinctly understand that they are not to infer from the court's declining to interfere on the present occasion that everything which drops from the witness is to pass without objection, which may be made at any time.

Colonel Morgan (the father of the last witness).—There has been a long acquaintance between Colonel Burr and myself. He had introduced to my notice two of his nephews by the name of Pollock, and a third by the name of Edwards, Pierrepont Edward's son. I had received many civilities from Colonel Burr, and many civil letters from him, from New York, in consequence of my civilities to those gentlemen. After these things had passed I had formed such an attachment to him that I never should have forgotten it had not this late business taken place. About three years ago Colonel Burr was under considerable, and, as I thought, unjust persecution. I had then a younger son (who is now here) studying law at Pittsburg. I wished to make him known to Colonel Burr, and in consequence of my friendship for him, and of the great rage of persecution against him, I invited him in that letter to come and see me at Morganza. In all probability I should have done the same thing from the attachment which I had conceived for him. Colonel Burr, however, had left Pittsburg before my letter reached it, and it remains now in my son's bureau at Pittsburg. On the 24th of last August I received a letter from Colonel Burr dated at Pittsburg, informing me that he should dine with me next day.

Here Mr. Hay handed the letter to Colonel Morgan, who said that the letter was dated on the 21st, and that he had not for some time seen it, as he had enclosed it to the president of the United States as introductory to his communication to him. This letter was handed to me by a man who called himself Count Willie, one of his attendants. I believe my son did not call on me that evening, but next morning I informed him that from my great affection for Colonel Burr, if I was able, I should certainly go and meet Colonel Burr; and I requested him and his brother to do it, with a letter of introduction, explanatory of their names and their intention. What conversation took place between him and my son I know not. Colonel Burr mentioned to me in conversation Colonel Dupiester as one of the first military characters of the age. I shall pass over the conversation and incidents during dinner. After dinner I spoke of our fine country. I observed that when I first went there, there was not a single family between the Allegany mountains and the Ohio; and that by and by we should have congress sitting in this neighborhood or at Pittsburg. We were allowed to sport these things over a glass of wine: "No, never," said Colonel Burr, "for in less than five years you will be totally divided from the Atlantic states." The colonel entered into some arguments to prove why it should and must be so. The first reason was, the produce of the sale of the western lands being carried to the Atlantic states, and that the people to the west should not be tributary to them. He said that our taxes were very heavy, and demanded why we should pay them to the Atlantic parts of the country? By this time I took an opportunity to observe, God forbid! I hoped that no such things would ever happen, at least in my time. This observation terminated the conversation as to that particular point. It then turned upon the weakness and imbecility of the federal government.

Mr. Wirt.—Who started that subject?

Answer. Colonel Burr started it. I don't recollect saying anything on the subject, but began to think that all was not right. He said that with two hundred men he could drive congress, with the president at its head, into the river Potomac, or that it might be done; and he said with five hundred men he could take possession of New York. He appealed to Colonel Dupiester if it could not be done; he nodded assent. There was a reply made to this by one of my sons, that he would be damned if they could take our little town of Cannonsburg with that force. Some short time after this Colonel Burr went out from the dining-room to the passage, and beckoned to my son Thomas. What their conversation was I cannot say. Soon after a walk was proposed to my son's mill, and the company went. When they returned, one (or both of my sons) came to caution me, and said, "You may depend upon it Colonel Burr will this night open himself to you. He wants Tom to go with him." After the usual conversation Colonel Burr went up stairs, and, as I thought, to go to bed. Mrs. Morgan was reading to me, (as is usual when the family have retired,) when about eleven o'clock, and after I had supposed he had been an hour in bed, she told me that Colonel Burr was coming down, and as she had heard my son's conversation, she added, "You'll have it now." Colonel Burr came down with a candle in his hand. Mrs. Morgan immediately retired. The colonel took his seat by me. He drew from his pocket a book. I suppose it was a memorandum book. After looking at it he asked me if I knew a Mr. Vigo, of Fort Vincent, a Spaniard. I replied, yes, I knew him; I had reasons to know him. One was, that I had reasons to believe that he was deeply involved in the British conspiracy in 1788, as I supposed, the object of which was to separate the states, and which General Neville and myself had suppressed. I called it a nefarious thing to aim at the division of the states. I was careful to put great emphasis on the word "nefarious." Colonel Burr,

finding what kind of men he had to deal with, suddenly stopped, thrust into his pocket the book, which I saw had blank leaves in it, and retired to bed. I believe I was pretty well understood. The next morning Colonel Burr and Colonel Dupiester went off before breakfast, without my expecting it, in company with my son, and from that time to this I have not seen him but in this place. I well remember some explanatory circumstances. My son agreed with me that I should apprise the president of our impressions, and point out a mode by which Colonel Burr might be followed, step by step.

Mr. MacRae.—After your son's observation about the town of Cannonsburg and the subsequent conversation, did the prisoner draw any comparison between the people of the eastern and western country? Answer. He said, "keep yourself on this side of the mountain, and you'll never be disturbed;" by which I understood that there was an attempt to be made to effect a disunion. There is one more circumstance which I must state to the court. The Sunday after, the judge of our circuit court dined with me. I requested him to mention the circumstances to General Neville, and invited him to come the following Sunday to dinner with Judges Tilghman and Roberts, for I had business of the first importance to communicate. The court being longer engaged than was expected, they did not dine with me on that day; but they did on the following Sunday. These gentlemen wrote a joint letter to the president, informing him of my communications to them.

Mr. Burr.—What sort of a book was the one I had in my hand? Answer. It was a small book like this. (A pocket-book.) Question. Was it bound? Answer. It was not so large as this; I do not recollect whether it was bound, as it would not be very polite in me to take particular notice of such things when gentlemen are at my own house. Question. When you spoke of a nefarious plan, to what transaction did you allude? Answer. To Vigo's plan, which I conceived was intended to dissever the Union. Question. Who were present when Judge Tilghman saw you? Answer. General Neville, and Judge Roberts and my son. Question. Was there any other from Pittsburg? Answer. None. Question. Your conversation at dinner, then, was jocular about the moving of congress to Pittsburg. Was not part of the conversation jocular? Answer. My manner might have been jocular, but not my meaning. Question. Did you not once live on the Mississippi, or go to that country with a design to settle there? Answer. I did, with the approbation of my country, in order to take up and distribute lands to all my countrymen to the west of the Mississippi. Question. Did you acquire any lands there? Answer. I am told I have a right to some lands there. Question. Where was it that you lived on the Mississippi? Answer. At New Madrid. Question. On which side of the Mississippi? Answer. The west. Question. In the Spanish territories? Answer. With the approbation of the Spanish government. Question. How long did you live there? Answer. About forty days. I went from that place to New Orleans, where I detected a British spy. Question. In what year? Answer. In 1788.

General Morgan was then called in at the request of the prisoner.

Mr. Burr.—In what state of mind was your father when General Neville and Judge Tilghman were there? Answer. He had lately had a fall, which had done him considerable injury. Question. I mean as to his capacity. Did you not make some apology to Judge Tilghman for the state of his mind? Answer. I did tell Judge Tilghman that my father was old and infirm, and like other old men, told long stories, and was apt to forget his repetitions.

Mr. MacRae.—What was your reply to the prisoner's remark about two hundred men to attack congress, and five hundred men to take New York? Answer. When Colonel Burr said that with two hundred men he could drive the president and congress into the Potomac, I must confess that I felt myself hurt, and replied with some warmth, "I'll be damned, sir, if you could take the little town of Cannonsburg with that force." Colonel Burr replied, "Confine yourself to this side of the mountain, and it is another thing." Question. Do you recollect whether anything was said concerning the people on the eastern and western sides of the Allegany? Answer. He answered, "Confine yourselves on this side of the mountain, and it is another thing."

Mr. Baker objected to this examination by Mr. MacRae, as improper.

Question by Mr. Burr.—Do you recollect that the probability of a Spanish war was mentioned? Answer. It was a general subject of conversation between Colonel Burr and myself.

Thomas Morgan was next sworn. His evidence was as follows: On the evening of the 21st of August, my father received a letter from Pittsburg by the hands of some person, the signature of which was Aaron Burr. In that letter the writer communicated his intention of dining with my father on the following day; he also mentioned that he should take the liberty of introducing a friend. My father requested my brother and myself to meet him, which we accordingly did. Nothing of importance occurred during our ride in my presence. Colonel Burr rode generally with my brother; Colonel Dupiester was often with myself, and sometimes we were promiscuously together. Whilst we were at and after dinner Colonel Burr emphatically, as I thought confidently, and with great earnestness, said that we (meaning the people of the West) would be separated in five years from the Atlantic states, the Allegany

mountains to be the line of division. He said that great numbers were not necessary to execute great military deeds; all that was wanting was a leader in whom they could place confidence, and who they believed could carry them through. This conversation occurred during dinner. He said that with five hundred men New York could be taken, and that with two hundred congress could be driven into the Potomac river. To the last observation, my brother, I think, indignantly replied, "By God! sir, with that force you cannot take our little town of Cannonsburg." Colonel Burr's reply to this observation was, "Confine yourself to this side of the mountain, and I'll not contradict you," or words to that effect. Colonel Burr withdrew from the room where we dined, and on reaching the door leading into the entry invited me, by a nod, to go with him. When we had arrived at the back door of the entry, out of hearing of any other person, Colonel Burr inquired what my pursuits were. I informed him that I was studying the law. He then said he was sure I could not find employment for either body or mind, but he did not further explain himself. He said that there were, or asked if there were not, a number of young men in Pittsburg similarly situated. He said that under our government there was no encouragement for talents; that John Randolph had declared on the floor of congress that men of talents were dangerous to the government. He asked me how or whether I would like a military expedition or enterprise. (I cannot recollect which, but it was some such expression.) My answer was, "It would entirely depend upon the object or cause for which I was to fight." I think previously, or certainly soon after, he said, "I wish you were on your way with me." After asking Colonel Burr concerning a young man (Mr. Duer) living at New Orleans, with whom I had a slight acquaintance, he said he was doing well; and he then spoke of Duer's brother, of whom I knew nothing, who was also doing well as a lawyer, but he had much rather be at the head of a military corps. Mr. Morgan then proposed to state the steps which his father had taken to defeat A. Burr's projects, when he was stopped by the court.

Mr. Burr.—Had you ever spoken to me before? Answer. Never. Question. Did you not mention, with some complaints, the neglect which your education had received? Answer. No. Question. Did you not complain about wasting your time? Answer. I recollect nothing on that subject, but your remark that I could not surely find employment for either body or mind.

Mr. Wirt.—Do you recollect your answer to Colonel Burr's observation that he would like to see you on your way with him? Answer. I do not recollect except what I have stated already. Here our conversation ended.

Mr. Hay.—Do you recollect, when you said that your liking a military life would depend on the object or cause in which you were engaged, whether anything more was said by Colonel Burr? Answer. No.

Examination of Jacob Allbright:

Mr. Hay.—Our object is to prove by his testimony the actual assemblage of men on Blennerhassett's Island, and it goes, of course, to prove directly the overt act.

Jacob Allbright. The first I knew of this business was, I was hired on the island to help to build a kiln for drying corn; and after working some time, Mrs. Blennerhassett told me that Mr. Blennerhassett and Colonel Burr were going to lay in provisions for an army for a year. I went to the mill where I carried the corn to be ground after it had been dried. I worked four weeks on that business on the island. Last fall, (or in September,) after Blennerhassett had come home, (he had been promising me cash for some time,) I stepped up to him. He had no money at the time, but would pay me next day, or soon. Says he, "Mr. Allbright, you are a Dutchman." But he asked me first and foremost, whether I would not join with him and go down the river. I told him I did not know what they were upon; and he said, "Mr. Allbright, we are going to settle a new country." And I gave him an answer that I would not like to leave my family. He said he did not want any families to go along with him. Then he said to me, "You are a Dutchman, and a common man; and as the Dutch are apt to be scared by high men, if you'll go to New Lancaster, where the Dutch live, and get me twenty or thirty to go with us, I will give you as many dollars." New Lancaster was some distance off. I went home then, and gave him no answer upon that. In a few days after the boats came and landed at the island. The snow was about two or three inches deep, and I went out a hunting. I was on the Ohio side; I met two men; I knew they belonged to the boats, but I wanted to find out; and they asked me whether I had not given my consent to go along with Blennerhassett down the river. As we got into a conversation together they named themselves Colonel Burr's men, belonging to the boats landed at the island. When they asked me whether I had not consented to go down with Blennerhassett, I put a question to them. I told them i did not know what they were about; and one of the gentlemen told me they were going to take a silver mine from the Spanish. I asked the gentlemen whether they would not allow that this would raise war with America. They replied, no. These were only a few men, and if they went with a good army they would give up the country and nothing more said about it. I had all this conversation with the two men. These men showed me what fine rifles they had, going down the river with them. Then I went to the island and Blennerhassett paid me off in Kentucky notes. People, however, did not

like these notes very well, and I went over to the bank at Kanawha to change them. I got two of the notes changed, and one, a ten dollar note, was returned to my hand, for which I wished to get silver from Blennerhassett. I went to the island the day the proclamation came out. But before I went to Blennerhassett's house I heard he was not at home, but at Marietta. I went on the Virginia side, where I met three other men belonging to the boats, with three complete rifles. They made a call upon me to take them to the island in my canoe, and I accepted (excepted or refused) to it, but afterwards I carried the third man, who stood close by my canoe, over to the island. After being some time on the island, I went down to the four boats. Blennerhassett was not at home yet, and I met some of the boat people shooting at a mark. They had a fire between the bank and boats. I saw this in the daytime.

Mr. Hay.—How many boats were there? Answer. Four.

I waited at the house till Blennerhassett came home. He appeared very much scared. One of the boatmen came up to him for something, and he told him, "Don't trouble me, I have trouble enough already." He went up to his chamber and I saw no more of him. I asked an old gentlemen who was there, and with whom I was well acquainted, to go up to his chamber and change my note for silver. He did go, and brought me silver. By and by I heard that they were going to start that night. Thinks I, "I'll see the end of it." This was the night of the very day that Blennerhassett got back from Marietta. He got back before night. When night came on I was among the men, and also in the kitchen, and saw the boatmen running bullets. One of them spoke out to the others, "Boys, let's mould as many bullets as we can fire twelve rounds." After that I saw no more till after twelve o'clock at night. Then Blennerhassett came down from the chamber and called up some of his servants; he had four or five trunks. They were not trusty hands enough to carry them to the boats, and some person called after my name, and asked me to help them, and I carried one of the trunks and moved along with them. When we got down, some person, I don't particularly know who, but think it was Blennerhassett himself, asked me to stand by the trunks till they were put in the boats. When the last of them went off I saw men standing in a circle on the shore. I went up to them; perhaps they were five or six rods from me. The first thing that I noticed was their laying plans, and consulting how Blennerhassett and Comfort Tyler should get safe by Gallipolis. One Nahum Bent was called forward, and when he came Blennerhassett asked him whether he had not two smart horses. Nahum Bent answered, no; he had but one. Then Blennerhassett told him to go to Captain Dana and get his sorrel horse; and Nahum Bent told him that the sorrel horse had no shoes on; and Blennerhassett said the roads were soft and would not hurt the horse. Blennerhassett told Nahum Bent to meet him and Comfort Tyler with the horses somewhere about Gallipolis. Bent inquired how he was to find him out; should he inquire for him? "No." "Have you no friends there?" "No." Mrs. Blennerhassett then came forward, and she told Blennerhassett and Comfort Tyler that they must take a canoe and get into it before they got to Gallipolis, and sail down the stream of the Ohio, for nobody would mind a couple of men going down the stream. She said "she'd" pay for the canoe. Blennerhassett told Nahum Bent to take the two horses and pass around Gallipolis before day, and then they might surround [go around] Gallipolis. After that a man by the name of Tupper laid his hands upon Blennerhassett, and said, "Your body is in my hands in the name of the commonwealth." Some such words as that he mentioned. When Tupper made that motion there were seven or eight muskets levelled at him. Tupper looked about him and said, "Gentlemen, I hope you will not do the like." One of the gentlemen who was nearest, about two yards off, said, "I'd as lieve as not." Tupper then changed his speech, and said he wished him to escape safe down the river, and wished him luck. Tupper before told Blennerhassett he should stay and stand his trial. But Blennerhassett said no; that the people in the neighborhood were coming down next day to take him, and he would go. Next day after I saw the Wood county militia going down. The people went off in boats that night about one. Question. All? Answer. All but one, who was a doctor. All belonging to the boats had some kind of arms. Some of the boats were on the shore and some not.

Mr. Hay.—How many men were there in all? Answer. About twenty or thirty; I did not, however, count them. Every man belonging to the boats that I took notice of had arms.

Mr. Coleman (one of the jury.) What day, month, or year, was this? Answer. In the fall of the year. I don't recollect the month or particular time, but there was snow on the ground.

Mr. Hay.—Do you recollect whether it snows in September? Answer. I do not know.

Mr. Sheppard (one of the jury.) Was Tupper a magistrate or officer? Answer. I know not. Question. Where had Blennerhassett been? Answer. In Kentucky.

Mr. Wirt.—Had you seen Colonel Burr on the island? Answer. Yes. Question. Was he there before Blennerhassett went to Kentucky? Answer. He was. Question. Did you speak of the boats under the command of Tyler? Answer. I did. Question. Did the boats quit the island at the time of hearing about the proclamation? Answer. Yes. Ques-

tion. Did the Wood county militia go there next day? Answer. Yes.

Question by Mr. Parker (one of the jury.) Did you hear Peter Taylor give advice? Answer. I did not.

Question by Mr. Parker. Did you see Peter Taylor converse with Blennerhassett that night? Answer. I do not recollect; I was busy about the boats.

Question by the same. How long did Aaron Burr remain on the island? Answer. I do not recollect.

Question by the same. How long had he been there before the departure of the boats? To this question he first answered that he did not know, and that Mr. Burr never returned back to the island; but after some reflection he said that he had been there about six weeks before the departure of the boats.

Mr. Sheppard (one of the jury.) How long was Blennerhassett absent? Answer. I don't know. I did not live on the island.

Mr. Burr.—Was that Mr. Tupper called General Tupper? Answer. He was. Question. Did you know General Tupper? Answer. Yes. Question. Is that the gentleman? (pointing to General Tupper, who was present in court.) Answer. Yes. Question. When the muskets were levelled at him, did they seem to have a mind to hurt him? Answer. Yes. A gentleman near me said, "I'd as lieve shoot as not."

Mr. Burr.—You said differently on a former occasion. Don't you recollect making a statement in which nothing was said about levelling guns at him, and that it looked like exercising? Answer. I do not.

A desultory conversation here ensued between the opposite counsel.

Mr. Burr professed that it was his intention to degrade the witness by invalidating his credibility.

Mr. Hay said that it was very probable if this man had at different times stated what seemed to be contradictory, he did it through ignorance; and Mr. Burr insisted that an error through ignorance might be as injurious to him as an error through immorality; he cared not which; that the consequences to him were in both cases the same.

Mr. Burr.—Have you not been examined before? Answer. Yes. Question. By whom? Answer. By Mr. Jackson. Question. Had he not printed questions in his hand? Answer. He had a paper in his hand. Question. Did he set down your answers? Answer. Yes. Question. How long after the guns were pointed at General Tupper before the men went to their boats? Answer. I do not recollect. Anything I am not certain of I cannot speak to. Question. Was Mrs. Blennerhassett there when the guns were pointed? Answer. Yes. Question. Was Tupper inside of the circle? Answer. Yes. Question. Was she too? Answer. I don't recollect. Question. Did you see Mr. Woodbridge there? Answer. I don't know him. He lived in the state of Ohio. Question. How long did you work with Blennerhassett? Answer. Six weeks. Question. At what time was it you saw me there? Answer. I do not recollect.

Mr. Burr.—The counsel for the United States know, I presume, this circumstance, and have testimony to ascertain it.

Mr. Hay.—We have not, as far as I am informed.

Mr. Burr.—If they have no objection, I will state when I was on the island.

Mr. Hay said he had not.

Mr. Burr then said that it was on the last day of August and the first of September that he was on the island.

Question. Were the boats in the stream, or close to the land, when General Tupper wished them good luck? Answer. In shore.

Mr. Anthony (one of the jury.) Did you see any powder? Answer. No.

Mr. Hay.—Were you in the boats? Answer. I was not.

Mr. Burr.—Where does General Tupper live? Answer. In Marietta. Question. Does he not belong to the state of Ohio? Answer. Yes. Question. When did you first know him? Answer. Last fall.

Question by Mr. Parker. Where did you live before you went to work on the island? Answer. About a mile from the island.

Mr. Burr then asked the clerk for the statement which he had taken of Allbright's testimony, when it was submitted to the court on a former occasion, on the motion for binding himself in a higher bail. The clerk handed him the copy, and the prisoner proceeded with the examination.

Question. You said before that the men who raised their muskets against General Tupper were not in earnest? Answer. That was a piece of my opinion. I did not know whether they were in earnest, as there was no quarrel among them, and no firing afterwards.

Mr. Carrington, (one of the jury,) reminded him of an expression of one of the party, "I had as lieve as not shoot," which showed that they were in earnest.

Mr. Burr.—I beg the court to call on the prosecution for the deposition of this witness, taken before John G. Jackson.

Mr. Hay said that he would not let gentlemen have access to his portfolio when they pleased; that he must be satisfied by reasons assigned or required by the order of the court, before he produced it.

The CHIEF JUSTICE was not satisfied that the court had a right to call for the affidavit.

Mr. Hay observed that Mr. Jackson might not have taken down the testimony of the witness in his language, but couched it in his own; hence there might be an apparent variation between the present evidence and the affidavit, but that there was no real variance; that the object of Mr. Jackson's taking his affidavit was merely to ascertain whether he ought to be summoned as a witness or not; that this was the object in taking all the testimony which had been collected; that his affidavit was therefore general; but that the

man, after finding that he was to be summoned as a witness, had revolved the subject in his own mind, and recollected many circumstances which had not before occurred to him.

Mr. Burr.—We have a right to coerce this paper. If gentlemen will not surrender it, I may at all events avail myself of their refusal. My object is to prove such a diversity between the statements of the witness at different times as may destroy all faith in his recollection.

Mr. Hay.—Then, sir, although I might retain this paper, the gentlemen are welcome to make all the use of it they can. Take it.

Mr. Burr then proceeded. When you said that all had guns, did you mean to say that all in the circle, or all of them together without exception had arms? Answer. There were seven or eight who had guns, and there were other arms; but there might be more men than guns. Question. How many were in the circle? Answer. I did not count them. Qustion. What kind of guns had they? Answer. Rifles and shot guns. Question. Did you see any guns with bayonets? Answer. I saw none.

Mr. MacRae.—When did you see most arms? in the day, or in the night? Answer. I saw more arms in the day; but it was in the night that I saw most armed men.

Mr. Parker (one of the jury.) Why did you think that all of them had arms? Answer. Because I was with them almost all night. In the day I saw some of them shooting at marks, and I saw other arms at that time lying upon the beach.

Mr. Wickham.—Did you see them all with arms at once? Answer. No.

Question by the same. How many arms did you see in the whole, or at any one time and place together? Answer. I cannot tell.

Question by the same. Did you know the men who had arms? Answer. I did not.

Question by the same. Did you know the names of the other men? Answer. No.

Question by the same. Would you know any of them if you saw them? Answer. I would not. They are all strangers to me.

Question by the same. How could you distinguish the arms seen in the daytime from those seen late in the evening, or at night? Answer. I cannot answer.

Question. How, then, are you certain that you did not see the same arms at different times, in the hands of different persons? To this question he made no answer.

Peter Taylor was then called, and Mr. Hay asked him whether he had not seen Mr. Burr on the island. He answered he had not.

Mr. Burr.—If the gentlemen have done with the overt act, or when they have done, I will thank them to inform me, for then we shall have some considerations to offer to the court.

Mr. Hay.—We have other additional testimony to offer on this very point: the assemblage of men on the island.

Maurice P. Belknap was called, but did not answer.

William Love was then sworn.

Mr. Hay.—Were you on Blennerhassett's Island? Answer. Yes; but I was not there at the time when Colonel Tyler's boats arrived there. I was then at Marietta; and it was on Sunday that I went down in a skiff with two barrels of salt. Question. How many boats were at the island? Answer. Four. Question. How many men? Answer. I cannot tell you, but I suppose about betwixt twenty and twenty-five belonging to Colonel Tyler's boats. When I arrived on the island, Blennerhassett met me. Question. Did you see any arms? Answer. I saw the men and rifles. I know that Mr. Blennerhassett took away with him one brace of horse pistols, a brace of pocket pistols, and a dirk. Some fusees were put in the boat, but not more than three or four, all belonging to him. Question. And what arms had Tyler's men? Answer. Pistols, dirks and rifles, they brought there, but all were not armed with rifles. I know not whether they were armed with different things. Some of the men had guns, some had dirks. Being, as how, Mr. Blennerhassett's servant, that is, his groom, I went down the river with him. Question. Did you see Taylor and Allbright there? Answer. I knew Peter Taylor very well. I saw him there the morning of the day I went away, and I saw Allbright also. I saw Mr. Woodbridge, too. Question. What time did you set sail? Answer. We were the last to embark, and we started between twelve and one, as well as I can recollect. We parted with General Tupper in the greatest friendship, so I understood from others. I do not know that I saw him. I was the last man who went into the boat. Question. Did you see the prisoner on the island? Answer. I never saw Colonel Burr on the island. I first saw him at Natchez about two and a half years ago. Question. What took place after you left the island? Answer. That night was very cold. The next morning we stopped and made fires. Mr. Blennerhassett and Colonel Tyler went ashore and called the company together; and the best I could make out was, I understood that the governor of Ohio had uttered state warrants against Mr. Blennerhassett and Tyler, and that they wanted to make their escape as fast as possible. I went down with the party to Bayou Pierre, where——

Mr. Burr expressed a wish that the attention of the witness should be at present confined to the transactions on the island. He said that gentlemen ought to confine themselves to evidence of the overt act; that they would submit the question to the court; that it would be too late to discuss the question whether the evidence ought to be submitted to the jury, after it should have been all heard.

Mr. Martin.—Gentlemen had better confine themselves to facts within the district of Virginia. When they travel beyond the district,

we shall have some important questions to bring forward. We shall object to the production of such evidence.

Mr. Hay acquiesced for the present in this arrangement.

Mr. Burr.—Were not some of Mr. Blennerhassett's clothes put up in the boats? Answer. Yes. Question. Did you not insist in putting those things in the boats? Answer. Yes. Question. Were not his books put in boxes and trunks? Answer. None that I ever saw. Question. How long had you lived with Blennerhassett? Answer. Ten or twelve days before we started. Question. How many guns had the party? Answer. I do not know; many of the young men that came down with Tyler were out a gunning. Question. Did you see anything like military appearance? Answer. The men were in a state of preparation to defend themselves, because they expected people from the mouth of Kenahwa, to attack Blennerhassett and the island. And to the best of my opinion, they did not mean to be killed without some return of the shot. It was said at Marietta that the people of Kentucky were to attack them, and I suppose they would have done their best to defend themselves. I should be sorry if a man slapped me on my face without returning the blow. Question. Was there no disturbance among the party on the island? Answer. None; I did not part with my friends in England more comfortably than in parting with the people on the island. Question. Were they in fear of being attacked when they first met together? Answer. Not till Tyler's boats came down. I do not recollect to have seen General Tupper there.

Mr. Parker (one of the jury.) Did you ever see all the men with arms? Answer. I cannot say. When I got to the mouth of Cumberland river, I saw a chest of arms opened.

Mr. MacRae.—Were any chests of arms put into the boats when you left the island? Answer. Not that I know. They might or might not have been put on board without my seeing them. Many things were put into the boats before I got in.

Mr. Parker (one of the jury.) Had you no conversation with Blennerhassett about the expedition? Answer. Only that if I did not choose to go with him, he would recommend me to some travelling gentleman as a servant, or if I went to the Washita, he would make me a present of a piece of land.

Mr. Burr.—Did you see any arms but those belonging to Blennerhassett? Answer. I did not.

Question by the same. Did you see any guns presented? Answer. I did not. Question. Were they mostly young gentlemen who came in the boats? Answer. They looked like young gentlemen in that country.

Mr. Wirt.—Why did they go away in the night? Answer. They were afraid of being taken by warrants issued by the governor of Ohio.

Mr. MacRae.—Was the chest which you saw opened at the mouth of Cumberland the same as those that you saw go from the island? Answer. No. Question. What did you think of this business? Answer. I understood the object of the expedition was to settle Washita lands.

Mr. Hay.—What kind of looking men were they? Answer. They looked like gentlemen, such as live upon their own property. Question. Did they look like men used to work? Answer. They did not. Question. When did you see Mr. Blennerhassett that night down at the beach? Answer. Late that night; it was a very cold night, raining and freezing; it was generally expected that the people would come and destroy Blennerhassett's house.

Mr. Parker (one of the jurymen.) Did you see any bullets run? Answer. Yes; but I do not know how many. I was a servant in the house, but could not mind my own business and other people's too.

Dudley Woodbridge was next sworn.

Mr. Hay.—Were you on the island when the boats left it? Answer. I slept there that night.

Mr. Wirt.—What party do you mean? Answer. I allude to the four boats with Comfort Tyler, Mr. Smith, and others. Question. Were you at the boats? Answer. I passed them about dusk. Question. Did you see any of the men? Answer. I came to the island about dusk. I saw five or six standing about the boats. I went directly up from the landing to the house, and saw fifteen or twenty men in one of the rooms of Mr. Blennerhassett's house. Question. Had they any arms in their hands when you saw them? Answer. I recollect to have seen no arms but two pairs of pistols on the bureau of the room where I slept, which were gone in the morning.

Mr. Hay.—Had you no communication with Mr. Burr or Mr. Blennerhassett about this expedition? Will you inform us what you know on this subject? Answer. About the beginning of September or last of August, Mr. Blennerhassett, (with whom I had been connected in commercial business for six or eight years past, under the firm of Dudley Woodbridge and Company,) called with Colonel Burr at our counting-house at Marietta. Mr. Blennerhassett observed that Colonel Burr wished us to purchase a quantity of provisions. I am not positive that Mr. Burr was present when he first mentioned the subject, but I think he was. Colonel Burr then went into an inquiry about the prices of different kinds of provisions, and the expense of boats best calculated to carry provisions up and down the river. After his making a number of inquiries and receiving such information as I could give him, he left a memorandum of such provisions as he wanted, and of the boats which he wished to have built. They were to be on the Schenectady model, such as are used on the Mohawk river. The number ordered was fifteen; only eleven were com-

pleted. Question. What were their dimensions? Answer. Principally ten feet wide and forty feet long; five were to be ten feet longer. Question. What provisions were ordered? Answer. Pork, flour, whisky, bacon, and kiln-dried meal; but no article was purchased but pork, the prices in our market being much higher than those limited in the memorandum. I immediately made a contract with Colonel Barker to build the boats, and proceeded to make arrangements for purchasing provisions. The boats were built up the Muskingum, about seven miles above Marietta, and were to be delivered on the 9th of December. On that morning, when they were to be brought down, (the 9th of December,) I saw six or eight armed men of the militia going to take possession of the boats. I set off for Blennerhassett's Island, but met Mr. Blennerhassett, Comfort Tyler, Mr. Smith, and some young men from Belpre, going up to take down the boats. I informed them of the proceedings at Marietta, and advised Mr. Blennerhassett not to go up. After some consultation, he determined not to go up, and returned to the island. I went back to Marietta to get some money and papers, and returned that evening to the island, after getting the papers.

Mr. Hay.—On what terms was the contract for the boats made? Answer. I made the contract for the boats with Colonel Burr, and agreed to take a draft on New York. When Mr. Blennerhassett handed me the draft, I expressed my dissatisfaction at the long sight at which it was drawn, (being ninety days,) observing that it would not become due until after the time in which the boats and provisions were to be delivered, and that I wished to run no hazard. Mr. Blennerhassett, with some warmth, asked me if I doubted Colonel Burr's honor. When I repeated that I wished to run no risk, he said that he would guarantee the draft, and be answerable himself, and that in the event of its not being paid I might charge it to him. The draft was drawn by Mr. Burr on Mr. Ogden, of New York. These were the boats which Smith, Tyler, Blennerhassett, and the young men, were going up to receive.

Mr. Hay.—Do you recollect where the boats were to be delivered by the contract? Answer. Colonel Barker undertook to bring them, but there was no contract to deliver them at any particular place.

Mr. Parker. Did you say that it was the 9th day of December that the boats were to go away? Answer. The boats were to be delivered on the 9th, but those that were at the island went away on the 10th. When Colonel Barker was bringing them to Marietta they were taken by General Buel, as I understood, by order of the governor of Ohio.

Mr. MacRae.—State what occurrences took place on the island. Answer. I arrived about dusk, and immediately inquired about Mr. Blennerhassett. I stated to him that I was ready to adjust our partnership concerns, and that I had brought down the money and papers for that purpose. We went up stairs. We were two hours engaged in the business, after settling which I set off to go across the river home, and met Mr. Belknap at the shore. He asked me to go back with him—that he had business to do. I returned with him. We went both to bed at nine o'clock at night, where I remained, and did not, as the witness Peter Taylor states, go to the shore with the party when they went off. His saying that I was there then is a mistake, as this gentleman (Mr. Belknap) can prove.

Mr. Hay.—State to the court and jury for whom the boats were built. Was the contract made for the company? Answer. Yes; it may be so considered, but it was not particularly specified. Mr. Blennerhassett first introduced the subject, and Mr. Burr then spoke. As to the use for which these boats were intended, Mr. Blennerhassett made some communications to me respecting it. Shall I now state to the court these communications? (He was requested to proceed.) Late in August, or early in September, Mr. Blennerhassett mentioned to me that he had embarked in an enterprise with Colonel Burr; that General Eaton and some others were engaged in it, and that the prospects were flattering. Our first conversation lasted but a few minutes. The next week I was at the island, when he went into further particulars. From what he stated, the inference I drew was that his object was Mexico. He did not positively say so, but I inferred it from several circumstances, particularly from a map of that country which he showed me. He spoke highly of the country—stated its advantages, wealth, fertility, and healthiness. He asked me if I had a disposition to join. I evaded his question, but could not forbear telling him that I preferred my situation to an uncertainty, (which was the same as declining it.) On the way up to Marietta, he observed that he did not wish me to say anything about his conversation on this subject. This is the substance of my testimony.

Mr. Hay.—Do you recollect any further detail of the plan or object of the expedition? Answer. I do not.

Mr. Hay.—What became of the boats and the pork you purchased? Answer. The pork was taken and sold by order of the president or government; it was sold, as I understood, by General Buel. The boats, or a part of them, were afterwards fitted out by the government for transports, to convey troops from Marietta to St. Louis.

Colonel Burr.—Do you recollect that I told you that I wanted the description of boats used in the Mohawk river; and were they not made for shoal water, and to go up the stream? Answer. You did. The boats were to be calculated for shallow water.

Colonel Burr.—You know Mr. Blennerhassett well. Was it not ridiculous for him to be engaged in a military enterprise? How far can he distinguish a man from a horse?

Ten steps? Answer. He is very near-sighted. He cannot know you from any of us, at the distance we are now from one another. He knows nothing of military affairs. I never understood that he was a military man.

Question by the same. What became of his library? Answer. Part of it was carried down by Mrs. Blennerhassett; the residue was left behind and has been since sold.

Question by the same. Do you recollect when I was at Marietta? Was it not about the last of August or first of September? Answer. I left Philadelphia about the middle of August, and on my return I saw you about the time you mention. I have never heard that you have been there since. Question. What became of the draft on Mr. Ogden for two thousand dollars? Answer. It was paid. Question. What quantity of pork did you purchase for me? Answer. About one hundred barrels. Question. At what price? Answer. It cost about twelve, and was charged at thirteen dollars per barrel. Question. What became of it? Answer. I stored it in Mr. Green's cellar, adjoining our store. It was taken and sold by General Buel, by order of the government, as already mentioned; that is, as I understood. Question. Did you demand it of Mr. Green? (The answer to this question was not heard.) Question. To whom did you consider the pork as belonging when seized? Whose loss was it, yours or mine? Answer. It may hereafter become a dispute. Question. What were the boats estimated to be worth? Answer. Colonel Barker's bill for the eleven boats amounted to twelve or thirteen hundred dollars.

Mr. Martin.—Were you at any time that evening on the water's side with Mr. or Mrs. Blennerhassett? Answer. I was not.

Mr. Wirt.—You were asked, sir, about Mr. Blennerhassett's military talents. Permit me to ask you what were his pecuniary resources? What was the state of his money matters? Answer. I believe they are not as great as was generally imagined. I gave him six thousand dollars for one-half of his profits of our business. He had about three thousand dollars in stock in our company's concern. His fortune is much less than is generally understood. He had not over five or six thousand dollars in the hands of his agent at Philadelphia. His island and improvements cost about forty or fifty thousand dollars. It would not, however, sell for near that sum, except to a person of the same cast with Mr. Blennerhassett. After building his house, his property, exclusive of the island and five negroes, amounted probably to seventeen thousand dollars.

Question by Mr. Coleman, (the juror.) Explain again, if you please. In what did that property consist, and how much money could he command? Answer. He had nine thousand dollars in my hands in stock and profits already stated, and about one thousand dollars on another account, and the money in his agent's hands, besides his island and negroes. Question. Had he no foreign funds? Answer. I think he had none. They were vested in American stock some years before. Question. What was the amount of property he had in these funds? Answer. I believe the property left him by his father amounted to twenty thousand pounds sterling, which he vested in British three per cent. stock.

Mr. Wirt.—Is he esteemed a man of vigorous talents? Answer. He is; and a man of literature. But it was mentioned among the people in the country that he had every kind of sense but common sense; at least he had the reputation of having more of other than of common sense. Question. What are his favorite pursuits? Answer. Chemistry and music.

Mr. Hay.—Was Colonel Burr to have returned to the island? Answer. I believe so; I expected him to have returned in about two months—the time for the delivery of the boats.

Mr. Hay.—Had you received any money from Burr before the presentation of the draft by Blennerhassett? Answer. The draft was at so long a sight that I objected to letting the property out of my hands till I was secured by the responsibility of Mr. Blennerhassett. The balance over the two thousand dollars (the amount of the draft on Ogden) was to be paid by Mr. Burr on his return. He was to return in two months, and to complete the payment when the property was delivered.

Mr. Hay.—Did Mr. Blennerhassett bring you the draft? Answer. He did; but Burr made the contract with me.

Mr. Hay.—Do I understand you correctly in supposing that Mr. Burr contracted to pay two thousand dollars in one draft, and the balance on his return? Answer. You do.

Mr. Lee.—How many acres of land are in the island? Answer. Mr. Blennerhassett owned about one hundred and eighty acres, which was about half of the island, and cost him about five thousand dollars; but with the house and all, cost him forty or fifty thousand dollars, as already observed.

Mr. Hay.—Was not one of the boats fitted up for Mrs. Blennerhassett and family? Answer. One of the large boats was. Mr. Blennerhassett had taken a keel boat belonging to the firm up to Colonel Barker's to be fitted up for his family; but, by Colonel Barker's advice, he concluded to have one of the large boats prepared for that purpose, on account of its superior accommodation. This was accordingly done.

Mr. Hay.—Had not the delivery of the boats been interrupted by the armed men, would they not have been delivered to Blennerhassett? Answer. I suppose they would have been delivered at Marietta, where he would have received them.

Mr. Martin.—Was not the contract made by

Colonel Burr with your firm? Answer. It was.

Question by the same. Do you understand that Colonel Burr has received any consideration for this sum of two thousand dollars thus paid? Answer. I do not know.

Mr. Wirt.—If the delivery of these boats had not been prevented, would they not have been delivered to Blennerhassett or Burr? Answer. They would have been delivered to either. The company contracted for them.

Mr. Hay.—If delivered to Mr. Blennerhassett, would you not have considered yourself as delivering them to one of Burr's associates? Answer. I cannot say what I should have thought.

Colonel Burr.—How came you to suppose yourself authorized to deliver the boats to Blennerhassett, since I gave the draft? Answer. I should in any event have considered myself justified in delivering the boats to him, as he guaranteed the payment for them, and he had property to a larger amount in my hands; and besides these considerations, early in September Blennerhassett had mentioned to me his having joined Colonel Burr.

Mr. Baker.—Did you make any stay upon the beach, on the night of their departure? Answer. I did not, for I returned immediately to the house with Mr. Belknap.

Mr. Botts.—Were the people peaceable on that night? Answer. Yes.

Question by the same. Did you hear any noise like that of war, the roaring of cannon, or the rattling of small-arms? Answer. None.

Mr. Wirt.—Did you hear any alarm in the evening about the militia from the Ohio side? Answer. There was some alarm in the evening.

Mr. Parker. Did Mr. Burr leave the island before Mr. Blennerhassett communicated to you his being joined with him? Answer. I do not precisely recollect the time of the communication; but I knew that Blennerhassett had connected himself with him in the same enterprise, and I would therefore have delivered the boats to him.

Mr. Coleman. Was Mr. Blennerhassett's determination to go away the effect of your having told him of the armed men going to take the boats? Answer. That information might have operated with other circumstances.

Mr. Parker. Did you see the president's proclamation on that day? Answer. No; that was Wednesday, and it came next Friday by the mail. It was handed to me by the postmaster. I did not hear of its being sent otherwise. I might have heard of it before, but I am not absolutely certain.

Mr. MacRae.—Did you hear anything of it before? Answer. I do not recollect distinctly. I believe that the printer at Marietta, who had been to Pittsburg, had brought some information about a proclamation; I have some idea that he might have mentioned that he had seen it.

Mr. Hay.—Did you hear anything of a state warrant? Answer. No. I did hear that the legislature of the state of Ohio were sitting with closed doors, in consequence of something communicated by Mr. Graham, and that it was probable that the boats would be stopped, and that they would suppress the enterprise.

Mr. Wickham.—Did you understand that Blennerhassett's boats, or the people on the island, would be taken? Answer. I did not suppose that they would go to Virginia, but that they would only stop the boats that were built pursuant to his contract up the Muskingum.

Mr. Hay.—What was the cause of his precipitate flight? Did you hear any particular observations from any of the party on the island? Answer. Mr. Blennerhassett told me that he would go off in three or four hours; and I heard Comfort Tyler say that he would not resist the constituted authorities, but that he would not be stopped by a mob.

Mr. Wirt.—At the time he said so was the legislature of Ohio understood to be in session with closed doors? Answer. It was; and I saw the militia of Wood county assembled the next day or the day after.

Mr. Burr.—Was there not some danger of being stopped by the ice if they had not gone off as soon they did? Answer. I thought so; and that it was also hazardous for Mrs. Blennerhassett to go. Tyler was detained two days by Blennerhassett.

Mr. MacRae.—Did Blennerhassett that night communicate his apprehensions to you? Answer. He did not.

Mr. Burr.—Were Tyler's party disorderly? Answer. They were not. Question. Did they do any mischeif? Were they guilty of any misconduct? Answer. None.

The court then adjourned till the next day at the usual hour.

Thursday, August 20, 1807.

The court met at the usual hour, when a desultory discussion took place, in which

Colonel Burr and his counsel insisted that the counsel for the prosecution should produce all the evidence which they had relative to the overt act, before they attempted to offer any collateral testimony; and again reminded them that as soon as all their testimony on that point was introduced they had certain propositions to submit to the court.

The counsel for the prosecution said that they had some more evidence to introduce on this point, and Simeon Poole was then sworn.

Mr. Hay.—Be so obliging as to say what you know with respect to the men on Blennerhassett's Island.

Simeon Poole. I never was on the island at that time, but was opposite to it. I saw boats and men there, if I mistake not, on the 10th of December. I arrived opposite the island about dusk, at the distance of about

one hundred and fifty or two hundred yards from it. I do not know how many boats there were. I saw people walking about in the evening, and in the course of the night they kindled a fire, and I saw some persons by the light that appeared to be armed, as if they were sentinels.

Mr. Hay.—Why did you think they were so? Answer. I don't know that they were, but they appeared so to my view. I don't know positively what they were, but they appeared to have guns, and looked like sentinels. I did not go over that night, nor did I offer to go. Boats were passing and repassing during the night, from the island to the main land. Question. To whom did these boats belong? Answer. I do not know, but I presume to the island. There were large boats at the landing, but these were small boats. I did not speak to them. I stood as much undiscovered as possible, as I was authorized by the governor of Ohio to apprehend Blennerhassett. I went for that purpose.

Mr. Hay.—Do you recollect any indications of arrangements about a watch-word? Answer. Yes. In the course of the evening I found that some boats crossed, and when a particular word was given I observed there were some that did not cross. I heard others that were hailed across and a word given. They would hail for a boat. The people on the island would ask, "What boat?" If the answer was "I's boat," the boat immediately put off.

Mr. Parker. On what occasion was the watch-word used? Answer. When the people on the Ohio side wanted to go across, they would hail or call for a boat. The people on the island would ask, "What boat?" and if the answer were, "I's boat," the boat would immediately put off.

Mr. Burr.—Till what hour did you stay out that night? Answer. I imagine it was as late as 10 o'clock. Question. Was it not cold enough to render a fire pleasant? Answer. It was. Question. Is it not usual for boats to build fires on the bank when it is so cold? Answer. It is. There seemed to be a considerable number of men on the island that evening, going up and down, to and from the house. The witness further observed that lanterns were passing during the night between the house and boats, as if there were business between them; that he could not say whether the persons whom he had called sentinels were not merely loitering around the fire; that he thought it likely that if he, too, had used the watch-word the boats would have put off for him; that he lived on the Ohio side; that he could not distinguish well, but he apprehended that some of them had guns, but most of the people were without guns.

Mr. Burr.—Do you not commonly hail boats when you wish to cross the river? Answer. It is not common to give a word. There were several boats hailed by people who did not use that word, and these people were not sent for; but there was no instance where the boat was not sent for the party hailing where that watch-word was used.

Maurice P. Belknap was then sworn.

Mr. Hay.—Will you tell us, sir, what you saw on the island? Mr. Belknap. On the evening of the 10th of December, I was at the island of Mr. Blennerhassett. I arrived there between 8 and 9 o'clock in the evening. I hailed a boat, and they asked my name. Having given it, a skiff was immediately sent over with two of Blennerhassett's servants. Having crossed, I met with Mr. Woodbridge, who returned to the house with me. When I went into the house, I observed in the room, when I first entered, a number of men, who, from the promiscuous view I had of them, might have been about twenty.

Mr. Hay.—What were they doing? Answer. The two or three I noticed near the door had rifles, and appeared to be cleaning them. These were all the arms I saw, for I merely passed through the room where they were. Near the place where I landed there appeared to be two or three boats, and people about them. It was a dark evening, and the lights in the boats was the only circumstance which made me notice them.

Mr. Burr.—Did you give a watch-word when they brought you over? Answer. I gave no watch-word; I only gave my name; but they brought me over.

Edmund P. Dana was next sworn.

Mr. Dana. I never saw Colonel Burr on the island.

Mr. Hay.—Will you state what you know about their number and arms? Answer. On the evening of the 10th of December I understood that the boats were to start with Comfort Tyler and his men down the river. Two other young men and myself were determined to cross over from Belpré, where I live, to the island. We went down to the landing opposite the island about dusk, took a skiff, and landed at the upper part of the landing. We then went up to the house. Tyler's boats lay below our own about seven or eight rods. I heard some person talking on board, but it was dark, and I could not distinguish any one. We went into the hall, a large room, where there were a number of men. I remained but a short time, and did not count them. I cannot say how many there were, but I should judge there were about fifteen or sixteen. One of them was running some bullets, and there was nothing but hubbub and confusion about the large fire. I was then introduced into a chamber, where there were Colonel Tyler, Blennerhassett, Mr. Smith, of New York, as they said, and three or four other gentlemen. I was introduced to Mr. Smith and Dr. McCassley, (or McCastle,) who had his lady, if I mistake not, there. I had been introduced to Colonel Tyler the day before.

Mr. Randolph.—Were you a perfect stranger to the people in the hall? Answer. I was.

Question by the same. Was there any alarm on your going in? Answer. They did not appear to be alarmed.

Mr. Coleman (one of the jury) addressed the court. Is it proper to ask any questions about the conversations which took place with those gentlemen?

The CHIEF JUSTICE.—It is left to the consent of the accused.

Mr. Burr.—If any of the jury think proper, I have no objection. The inquiry was not pressed.

Before the examination of Mr. Belknap and Mr. Dana, an interesting and animated discussion took place.

Mr. Burr said: Before the gentleman proceeds with his evidence, I will suggest that it has appeared to me that there would be great advantage and propriety in establishing a certain principle founded upon the facts which have been presented to the court. He said the facts which had been presented were to be taken for granted; and yet they utterly failed to prove that any overt act of war had been committed; and it was admitted that he was more than one hundred miles distant from the place where the overt act is charged to have been committed. He denied that any evidence was admissible to connect him with other persons, in acts done by them in his absence, and even done without his knowledge; or that facts brought from distant places could be connected with those done at Blennerhassett's Island, to give to the acts done there the name of treason, when no overt act of war was committed at that place. He commented upon the opinion of the supreme court in the Case of Bollman and Swartwout, and said that it had been totally misunderstood by the counsel for the prosecution. The defence had the right here to call upon the attorney for the United States to say whether an assemblage of men merely can be called, or in any way tortured into an act of "levying war." This point must be inevitably determined at some stage of the examination, and therefore they had the right to require of the prosecutor to show that every witness will give testimony tending to prove an overt act of war, or his testimony would be irrelevant and immaterial. Another point was, whether a person not present, remote, in another district, can be considered, in any possible legal construction, to be present, and concerned in the transaction, so as to make him a principal in the guilt of it. If not, then the necessity of examining the remainder of these 135 witnesses is done away, because their testimony can have no bearing on the case. If, said he, the gentlemen mean or expect to prove an overt act; if they mean to prove that I am the source of the whole transaction, and that there was anything like an act of violence on Blennerhassett's Island, and that there was actual war waged, actual exertion of force used, a collision of arms, or the like, then to be sure the case will have a right to go on to that point; but even then there would be an absurdity, because of my being absent at that time, at a distance where I could not take a part in it. The gentlemen who are engaged with me as my counsel will enlarge on these points, and, if I am not mistaken, they will prove that this is the moment when the argument and decision will be most applicable, because upon the result will rest the future fate of the case.

Now, if my ideas are right, the gentlemen mean to argue that a bare assemblage of men, coupled with previous treasonable declarations, is treason. I understand that they mean to contend further, that a person not being present, but absent from the place where the treason is laid, he having counseled and advised the operations, should be denominated a principal in the treason. But this, I shall contend, is a species of constructive treason. Again: I shall ask what an accessory means, and prove that if it means what they think it does, resort must be had to the exploded common law of England. These questions, sir, will demand some attention from the court, and will be extremely interesting to the country at large, because every man might be affected by them. Gentlemen ought to come forward and say that they mean to charge me upon the common law: that though there was no force used in reality, yet by construction there was force used; that though I was not personally present, yet that by construction I was present; that though there really was no military array, yet by construction there was military array. Now, sir, we totally deny all these things, upon the soundest principles, and it is full time that it should be known what is, and what is not, the law on the subject.

Mr. Hay said he had no objection to any fair inquiry into these principles; but the motion was premature. He believed testimony would be introduced, and that presently, which would give a very different aspect to the transactions on Blennerhassett's Island to what had appeared. Although there was not on that island what Mr. Lee had called "open war," no "collision of arms," or "hard knocks," they would prove that there was "military array"; that the men were collected for military purposes, and that a military object was in view. It was impossible then to tell in what precise light the transactions on Blennerhassett's Island would ultimately appear, because new light was every moment coming in. He asked if the court after all that had been exposed, and with the uncertainty as to what might be brought to view, would undertake to say that an overt act of treason had not been proved. That was a fact to be ascertained by the jury. It was their province, and theirs only, to say whether the act has or has not been committed. The object of the motion was not to save time, but it was to prevent the public from seeing what they ought to see. He denied that there was any privilege or authority in this court, or in

the courts of Great Britain, to arrest inquiry and tell the jury that the act had not been proved, and therefore there was an end to the case. When the whole of the testimony should be laid before the court, it would then be in the power of the accused to address to the court a motion to instruct the jury on any point of law which the circumstances of the case might require. It would then become the duty of the court to take up the subject and say what is the law upon the case; and the jury would take the facts under their views, and regulate their verdict agreeably to the law and the facts that may appear.

He did not understand what the common law had to do with any inquiry before our courts, except it was any part of it adopted by statute. He was willing to steer clear of the common law, and go entirely upon the principles of statutory law and common sense. The case was a charge for an overt act of treason in levying war. Would common sense say, or would our statutes or constitution require that the person who had produced all this commotion should be present when the battle was fought, or even when the troops were collected for the enterprise? He conceived the question to be, whether the accused was principally concerned with it—whether he did project and carry it on with a design to complete it? And how could this be ascertained, unless the prosecution were permitted to go on with the evidence?

Mr. Wickham, in answer to the allegation that it was not a proper time to bring forward such a motion, denied that, during the whole three days that had been occupied in the examination of witnesses, there had been a single word, by any one witness, that could tend in the least to support the indictment. It is proved, (said he,) and the attorney for the United States declares, that Colonel Burr was not present at the time and place charged. Now we declare that it is absolutely necessary to prove the fact of presence at once: we say the indictment must inevitably fail without it. The counsel for the accused propose now to go into this question, and I trust the court will hear them. He would give an intimation to the counsel for the prosecution, that they should take a wide and extensive range on the subject, and by which they were convinced there would be a stop put to the case at once.

Mr. Burr added: The gentlemen were about to proceed to connect me with the act. I deny, sir, that they can do so. They admit that I was not there, and therefore let the nature of the transaction be what it may, it cannot affect me. Again: I deny that there was war, at all, and no testimony can be brought to prove that there was war; and surely the article war is of imperious necessity in the charge of treason. Now, if this be true, will the court go on week after week, discovering nothing that can affect me? I was desirous that the court, the jury, and the country should know what was charged against me; this has been done, and it has been found that I cannot be connected with the facts. I demand the opinion of the court on these points.

Mr. Martin spoke of the great length of time that the trial would probably last, if the prosecutor was permitted to go on in his own way. It was a very sickly season, and the probability of sickness among some of the jury or the court was very great, which would prevent the case going on. If one of the jurors should die, however far the case may have progressed, the trial must begin anew.

The CHIEF JUSTICE said that there was no doubt that the court must hear the objections to the admissibility of the evidence; it was a right, and gentlemen might insist on it. But as some of the transactions on Blennerhassett's Island remained yet to be gone into, he suggested whether it would not be as well to postpone the motion till that evidence was gone through.

Mr. Burr.—I have no objection to that, if they do confine themselves to Blennerhassett's Island, and strictly to transactions on that island; if so, we will hear it.

Mr. Hay said that the connection was meant to be proved; that the prisoner was not only connected, but principal in it, although absent.

(Belknap and Dana were then introduced, and testified as hereinbefore stated.)

Mr. Botts moved the court to direct the marshal to make payment daily of their allowance to about twenty witnesses, summoned for the accused, most of whom were so poor that they could not subsist without it. He had hoped the marshal would have paid them without this application. Colonel Burr thought them material, and summoned them from the best information he could obtain; and when the United States even imprisoned witnesses to compel their attendance, those of the accused ought at least to be supplied with the means of subsistence.

The marshal said that as the number of witnesses was so great, and many of them were said to know nothing of the subject in controversy, he was cautioned by the attorney for the United States not to pay them till their materiality was ascertained, or till the court ordered him.

Mr. Hay said that the expenses were so enormous, that they would be felt by the national treasury, though it was full. This justified the caution alluded to; and the laws contemplated to pay the witnesses as soon as they gave their evidence.

Colonel Burr said that when the attorney cautioned the marshal, it was supposed that he had summoned between two and three hundred witnesses, whereas the truth was that they did not exceed twenty; that they were material; that some of them were summoned to repel what might be said by the witnesses for the United States; that the United States had many advantages in com-

manding the attendance of their witnesses, which he had not; that he would not acquiesce in the establishment of a principle that might prove injurious to others; that the witnesses ought to be paid, and he hoped that there would be no more difficulty made on the subject.

After some more desultory observations, as the witnesses were stated and considered to be material, the court directed the payment to be made by the marshal.

Mr. Wickham then renewed the subject of objecting to the evidence, and again urged the gentlemen who prosecuted to adduce, if they could, any more testimony in support of what they deemed the overt acts.

Mr. Hay objected to their course of proceeding, but added that he had only one or two more witnesses on that point, who were then absent, and if gentlemen were determined to make their motion, they might proceed.

(Subsequently, on Friday, the 21st of August, after Mr. Wickham had concluded the opening argument on the motion to arrest the evidence, the prosecution introduced the following additional testimony, which they admitted to be all they had relating to the transactions on Blennerhassett's Island:)

Israel Miller was then sworn.

Question by Mr. Hay.—Were you on the island, Mr. Miller, with Blennerhassett and his party, at the time charged in the indictment, the 10th of December last? Answer. I arrived on the island between the 7th and 10th of December last, in company with Colonel Tyler, who had four boats.

Question by the same. How many men had he with him? Answer. About thirty-two men.

Question by the same. What proportion of arms had they? Answer. Five rifles and about three or four pairs of pistols are all that I know of. I joined them at Beaver, and went down with them to Blennerhassett's Island, and there I saw one blunderbuss, two pairs of pistols, and one fusee. I do not know that there were any more.

Question by Colonel Burr.—How many bullets did you see run? Answer. I only saw one man run bullets.

Pearley Howe was then sworn.

Mr. Hay.—Will you be pleased to say what you know of the party on the island, their arms and conduct? Answer. I was not on the island during their stay on it. I was applied to by Mr. Blennerhassett to make about forty boat poles. On the evening of the 10th day of December I went to the landing (on the Ohio side) to deliver them, being called upon to do so, and Blennerhassett sent his flat to receive them. In this flat were two sentinels, being two young men, each of them armed with a rifle.

Mr. Hay.—State what you know of their arms on the island.

Mr. Howe. I flung the poles down the bank and offered them assistance, but they said they had men enough. One of my neighbors, Mr. Allan Wood, wished to go over in the flat, but they refused to take him, saying they had orders not to let any person go with them from the Ohio side.

Question by Mr. Hay.—Did you see any arms but the two rifles? Answer. None but those in the hands of these two young men. One of them laid down his rifle in the bow of the flat, and stowed away the poles as they were handed in, while the other sat on the bow and held his rifle across his thighs. I saw men on the island for three or four days, who were said to be Tyler's or Blennerhassett's men.

Question by Mr. MacRae.—Did you see those two men who were guards leave the boats? Answer. I did not; they stayed there constantly.

Question by Mr. MacRae.—Did you know these men? Were they not all strangers to you except Peter Taylor? Answer. They were.

Question by Mr. Burr to Mr. Miller.—Did you see General Tupper there? Answer. I did not see him, but I understood that he was there.

Question by the same. Did you see any disturbance there? Answer. No.

Question by the same. Were you with the boats all the time? Answer. I was.

Mr. Wirt.—Did you join this party there, or come with them? Answer. I came from Beaver with them.

The argument of this important motion, which finally put an end to the case, was commenced on Thursday, the 20th, and concluded on Saturday, the 29th of August, having occupied the attention of the court for eight days, during a session of seven hours each day. It was conducted on both sides with great ability, and elicited from Chief Justice MARSHALL, when he came to deliver his masterly opinion, the following high compliment: "A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research, by which the court has been greatly aided in forming the opinion it is about to deliver."

The order in which the arguments were delivered was as follows: Mr. Wickham commenced the opening argument in support of the motion on Thursday, the 20th, and concluded on Friday the 21st; on which day Mr. Randolph followed on the same side. The court then, at the request of the counsel for the prosecution, adjourned till Monday, the 24th, to enable them to make preparation for answering the arguments which had been adduced. On Monday, Mr. MacRae made the opening argument on behalf of the prosecution. On Tuesday, the 25th, Mr. Wirt delivered his celebrated speech; after which Mr. Botts commenced an argument which he concluded on Wednesday, the 26th. On the same day Mr. Hay commenced an address, which he concluded on Thursday, the 27th. Mr. Lee followed in a comparatively brief but very lucid argument. Mr. Martin occupied the

whole of Friday, the 28th, and the greater portion of Saturday, the 29th, in delivering the learned and searching, but ill-arranged and ungraceful argument, which, next to Mr. Wirt's, has probably obtained more celebrity than any other delivered in the case. Mr. Randolph then closed the discussion by a short address.

In giving abstracts and extracts of some of these arguments in the following pages, and omitting others altogether, no invidious distinction is intended to be made between them. But where so many counsel addressed the court at great length on the same question, as a matter of course the same ground was repeatedly travelled over; and to give abstracts of all would neither be consistent with the prescribed limits of this work, nor entertaining to the majority of readers.

Mr. Wickham, in opening the argument in support of the motion, laid down and elaborately discussed four propositions, in substance as follows:

1. That under the constitution of the United States no person can be guilty of treason, by levying war, unless he was personally present when and where an overt act of war was committed, and participated therein.

2. Even admitting this construction of the constitution to be wrong, and that a person who was not present at the committing of the overt act may be guilty of the crime of treason by relation, still the facts must be specially charged in the indictment, and proved as laid. And inasmuch as the indictment charges Mr. Burr with personally levying war with others on Blennerhassett's Island, no evidence to charge him with the act by relation, he being absent at the time it was committed, is relevant to the indictment. He should not only be charged specially with the assessorial acts imputed to him, but charged and tried in the district where said acts were committed.

3. That if aiders, abettors, and procurers in treason be considered as principals, yet their guilt is derivative, and can only be established by legal proof that the persons whose acts they are answerable for have committed treason; which legal proof can consist of nothing less than a record of their conviction.

4. That the evidence wholly failed to prove that an overt act of levying war had been committed on Blennerhassett's Island; and hence no evidence could be received to charge Col. Burr, by relation, with an act which had not been proved to have been committed.

In support of the first proposition, Mr. W. contended that the clauses of the constitution which declare that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted, unless on the testimony of two witnesses to the same overt act," must be construed according to the plain, natural import of the words. The constitution is a new and orginal compact between the people of the United States, and is to be construed, not by the rules of art belonging to a particular science or profession, but like a treaty or national compact, in which words are to be taken according to their natural import, unless such a construction would lead to a plain absurdity. It being new and original, and having no reference to any former act or instrument, forbids a resort to any other rules of construction than such as are furnished by the constitution itself, or the nature of the subject. Hence, artificial rules of construction, drawn from the common law and the usages of courts in construing statutes, cannot be resorted to, to prove that these words of the constitution are to be construed, not according to their natural import, but that an artificial meaning, drawn from the statute and common law of England, is to be affixed to them, entirely different.

But even if these words of the constitution are to have an artificial meaning, such as it is contended has been given them in the courts of England, he denied that even in that country the rule had practically obtained that all persons aiding and abetting others in the act of levying war against the government are guilty of treason, though not personally present, notwithstanding some dicta of the law writers to that effect.

He admitted that Lord Coke, and after him some other writers who are deservedly revered, had laid down the general proposition that there are no accessories in treason, either before or after the fact, but that all are principals. But no adjudications in the case of an accomplice in the nature of an accessory before the fact bear them out in it, except that of Sir Nicholas Throgmorton, reported in 1 State Tr. pp. 63-76; and the conduct of the court on that occasion was so obviously contrary, not only to the rules of law and justice, but even to those of decency, that he persuaded himself the counsel on the other side would not rely on it as an authority. He read an account of this trial, from 4 Tuck. Bl. Comm. note B, p. 44.

He found in Tremaine's Pleas of the Crown (page 3) an indictment against Mary Speke for treason, in aiding the duke of Monmouth and others in levying war, with provisions; neither before nor after, but at the time when the treason was committed by the principals. She was not an accessory in fact, but an "aider" in the commission of the treason, and the case comes within the definition of "an aider or procurer," and belongs to the class of accessories before the fact. But neither history nor any report of the decision of the court (as far as he had been able to discover) informs us how the case was decided. It was in the fourth year of the reign of James II., when the spirit of persecution was very high, and was probably one of the cases decided by the execrable Jeffries, on the occasion of Monmouth's rebellion. Whether he carried this doctrine to the utmost length or

not, he could not say, but presumed the counsel for the United States would not rely on it as a precedent, even if it applied.

He had been unable to find any other decisions that go to this point with respect to accomplices, in the nature of accessories before the fact, to treason in "levying war." As to the other great class of treasons in England, that of compassing the death of the king, the crime does not admit of an accessory before the fact, as distinguished from a principal; because the crime consists in the intention, and every person concerned is a party to the agreement, and therefore, from the nature of things, a principal.

In the lesser treasons, such as counterfeiting the coin, he had not met with any instance of a conviction of an accomplice before the fact.

He admitted that there were to be found in England a number of convictions of receivers of traitors and other aiders in the nature of accessories after the fact; and he admitted the correctness of the inference, that if these decisions were proper to be considered as precedents, the principle would apply to aiders and abettors before the fact. But before they ought to be regarded as precedents worthy of imitation, we should inquire in what times and under what circumstances these cases were decided. He had not found any of them since the revolution of 1688, when the principles of liberty and enlightened jurisprudence began to be better understood than before; and most of those previous to that event were decided by Jeffries; such as the case of Lady Lisle, 4 Whart. St. Tr. 106; John Fernley's Case, Id. 131; and Elizabeth Gaunt's Case, Id. 142. He read from Hume an account of the "atrocious legal murder" committed in the trial and conviction of Lady Lisle; also in the case of Mrs. Gaunt. He admitted that these cases and Throgmorton's were precedents, if the counsel for the prosecution chose to rely on them. They could find no other.

Since the revolution of 1688, though the doctrine has been admitted by the writers, yet all the decisions of the courts that bear upon the subject lead to a directly different conclusion. The greatest number of prosecutions for treason in levying war since that time grew out of the rebellion of 1745. We all know the history of those times, and what cruelties the late duke of Cumberland committed after the victory of Culloden. Yet there was not a single instance of a conviction for assisting or harboring traitors. History mentions the wonderful escape of the Pretender, and his concealment and protection by the unexampled courage and fidelity of Miss McDonald. Yet no attempt was made to convict her of treason, or others who aided him, or even to prosecute them.

He went into a review of the cases to show that in every instance the overt act was laid in the particular county where the accused had been present, participating in the rebellion, and that proof of his presence at the place where the overt act was charged was held to be necessary to sustain the indictment. Deacon's Case, Fost. Crown Law, 9, 10; Sir John Wedderburn's Case, Id. 22; and Lord Balmarino's Case, 9 Tr. 605,—were referred to and relied upon as sustaining this position. He read from Judge Tucker's treatise on the subject, to show how the erroneous doctrine laid down by the elementary writers, that "in treason all are principals," originated. 4 Tuck. Bl. Comm. Append. 40–47. But, (said Mr. W.,) admitting that both the theory and practice in the English courts concur in establishing the doctrine which the gentlemen contend for, and that any man connected in any manner with traitors is himself a traitor, yet I contend that it cannot be law in this country, where the constitution of the United States has pointed out and established a different rule. The statute in England, on which all the indictments are founded, is well known to be that of 25 Edw. III. It does not create any new treasons of which the punishments are pointed out, or enlarge the doctrine of treason; but on the contrary was intended to narrow the legal definition of this crime, which was punishable at common law.

In construing the statute, therefore, the judges considered it as made in affirmance of the common law, except, where the restraining clauses were permitted to operate; it was construed according to the course of the common law, and the doctrine that all are principals in treason, if it rests on any foundation, can have no other than the common law. 1 Hale, P. C., pp. 76–87, proves that this statute, 25 Edw. III., was made to confine and limit the crime of treason, "which was, before that statute, arbitrary and uncertain." In page 85 he calls it "the great boundary of treason," and shows that its object was to prevent constructive treasons. This salutary statute is also spoken of by Hume as a very popular act passed to narrow, define, and limit treasons known at common law.

Under the federal constitution, I presume, it will hardly be contended by the counsel for the prosecution that we have any common law belonging to the United States at large. I always did believe, and still believe, that we have no common law for the United States, especially in criminal cases. The only ground on which the common law becomes a rule of decision in the federal courts, is under that clause in the judiciary law (1 Stat. c. 20, § 34, p. 92), which makes the laws of the several states a rule of decision, as far as they respectively apply. The common law is part of the law of Virginia, and the act of congress has adopted the laws of Virginia as the rule of decision in cases where they apply.

With respect to crimes and offences against the United States, which must be punished in a uniform manner throughout the Union, it seems clear, for the reason already given,

that none such can exist at common law, as the United States have in that character no common law, and that they must be created by statute. Unquestionably the gentlemen will not deny this uniformity; they will not contend that what is treason in Maryland is not treason in Virginia, or vice versa. If it exist at all, it must be uniform, embracing the whole of the United States. That the United States have no common law, and that offences against them must be created and prohibited by statute, is the opinion of the learned Judge Chase; and I believe that this opinion received the unqualified approbation of those who thought most unfavorably of his opinions and judicial conduct on other occasions.

Now, as there is no general common law of the United States, the act of congress must be construed without any reference to any common law, and treason is to be considered as a newly created offence, against a newly created government. In England treason and felony are classes or descriptions of offences at common law; they are generic terms; aiders and abettors are punished in the former, if you will, as principals, in the latter as accessories. It is a rule of law there that, when a statute is made in affirmance of the common law or to supply the defects of the common law, it should be expounded according to the common law. See McDaniel's Case, 10 How. State Tr. 436; Hob. 98.

It has therefore been held, that if an act, criminal at common law, be declared by a statute to be felony or treason, it being made to supply the defects of the common law, its prototype, the same consequences follow as if it were felony or treason by common law. It becomes therefore unnecessary to mention accessories, or even to define the punishment; and accordingly there are acts of parliament which go no further than to declare that the offences mentioned in them shall be felony, without even mentioning the punishment. This rule may be questioned on this ground, that penal statutes should be construed strictly; but it is generally considered as law in England, that when a felony is created by statute, accessories to it, though not named in the statute, are punishable; and that all legal consequences of felony are attached to it by the common law, except in cases where the special nature of the act leads to a different conclusion. This rule is illustrated by the decisions on the 28 Hen. VIII. c. 15, which makes piracy, an offence not punishable by common law, felony. It has been solemnly adjudged, that as this was not a common law offence, it worked no corruption of blood; that accessories to it were not punishable; in short, that the statute not being made in imitation or supply of the common law, shall not be construed according to the course of the common law.

If, therefore, I be right in my postulatum, that there is no common law of the United States, as such, it follows as a necessary consequence, that no persons can be punished for treason, or any other offence under an act of congress creating such offence, unless they come within the description of the act; that no person can be said to have levied war against the United States, where it had not been levied by himself, but by others; and that no overt act of others can, under the statute, be made his overt act. That such was the opinion of the framers of the act of congress (Laws U. S. 1 Stat. p. 100), for the punishment of treason and other offences is manifest. In sections 10 and 11 of the act, the punishment of accessories before and after the fact is defined; that of the former is death, as in the case of a principal; that of the latter, fine and imprisonment. If the English rule concerning accessories to felonies, were thought to obtain, to what purpose was the 10th section enacted? By the 10th section, the person who advises the piracy is declared to be an accessory and made punishable. If it were implied why was this provided? In section 16th, persons stealing military stores, their counsellors, aiders, and abettors are mentioned; why were they expressly mentioned if they would have been necessarily implied? In the 10th section some offences are enumerated, the accessories to which, before the fact, are expressly made punishable with death; and in the 11th section the accessories to the same crimes, after the fact, are in express terms made punishable with imprisonment not exceedings three years, and with fine not exceeding five hundred dollars; but even in this enumeration, treason is not included. In both sections the offences of murder, robbery, or other piracy, are mentioned, and in the latter felony is added. The obvious conclusion resulting from this provision in these sections is, that without it, accessories to those offences, neither before nor after, would have been punishable; and that as treason is omitted, accessories to that offence, whether before or after its commission, are not subject to be punished. The 23d section affords an argument still more directly applicable to the present question. It provides that "whoever shall by force set at liberty or rescue any person who shall be found guilty of treason, murder, or any other capital crime, or rescue any person convicted of any of the said crimes, going to execution, or during execution, every person so offending, and being thereof convicted, shall suffer death." "And if any person shall by force set at liberty or rescue any person who before conviction shall stand committed for any of the capital offences aforesaid, or if any person or persons shall by force set at liberty or rescue any person committed for or convicted of any other offence against the United States, every person so offending shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceeding one year." This provision punishes those who rescue persons guilty of these crimes after conviction with

death, but after commitment and before conviction, with fine and imprisonment only.

Now, according to the gentlemen's arguments, all are principals, as well the mere receivers after as the procurers, or the actual perpetrator of the offence. There is no distinction in the books. The English writers consider persons who rescue or set at liberty traitors as accessories after the fact; and they are said to be indictable as traitors. Why, then, was this clause inserted? A receiver of a traitor is as much a principal, according to the doctrine laid down in the English books, as a person aiding before the fact. Will the counsel for the United States contend that such a receiver is punishable as a traitor, while the person who forces open the doors of the prison, and rescues the principal out of the hands of the marshal, shall be punishable only by a fine of five hundred dollars, and by one year's imprisonment? If so, a man might rescue a traitor before conviction, and conduct him to another, who receives him. The receiver who, like Lady Lisle, only entertains him but for one night, would be punishable with death, while the rescuer and conductor, whose crime has the additional ingredient of force, and that force directly employed in opposing the administration of justice, would be only fined and imprisoned! It is so absurd and contrary to the rules of equal justice, that it is impossible that the legislature could have intended it. It proves that congress were of opinion that aiders and abettors were not, according to the constitutional definition of treason, traitors and principals. If this were an English statute, made with reference to the common law, I might with propriety contend that it was the intention of the legislature that when counsellors, aiders, and abettors of some offences are named and not those of others, those not mentioned should be considered as not within the meaning of the act according to the maxims of law. If this were not their intention, why did they mention these terms in one and not in the other?

But it will be said that in high treason it is unnecessary to mention counsellors, aiders, &c., because in treason there are no accessories; all are principals. Now this argument is founded on a total misapplication of terms. If they can be punished at all, it is as principals; but in point of fact, there may as well be aiders and abettors in treason as in other offences. Indeed, there are many instances to be found in the statute-books of these very words "aiders, counsellors, and abettors" being used and applied to treason. The statutory treasons between 25 Edw. III. and 1 Mary are collected by Lord Hale in the 24th chapter of his Pleas of the Crown, p. 258, and among others I would refer the court to 20 Hen. VI. c. 3, mentioned by him in page 270; 26 Hen. VIII. c. 13, and 27 Hen. VIII. c. 2, in page 275; 35 Hen. VIII. c. 1, in page 280; all of which, and I doubt not many more, expressly mention counsellors, aiders, and abettors. If it be not necessary to mention aiders and abettors to make them punishable, why are they inserted in these statutes? In page 275 "maliciously to wish, will, or desire, by word or writing, or by craft, to imagine, invent, practice, or attempt, any bodily harm to the king, queen, heir apparent, &c., to detain his castles," &c., is "enacted to be treason in the offenders, their aiders, counsellors, consenters, and abettors." "Counterfeiting the privy seal, privy signet, or sign manual, is made treason, and the offenders, their counsellors, aiders, and abettors, to suffer as in case of treason," &c. The statutes which are made with a reference to this law, mention aiders, counsellors, and abettors in some clauses, and not in others. Is not the inference fair that where they are not mentioned they are not intended to be subjected to punishment? And when congress took up the doctrine of treason with reference to the constitution, and did mention the aiders and abettors in some cases, but not in others, is not the conclusion equally fair that they did not intend that they should be involved in the guilt or punishment of treason, except where they are expressly mentioned? But a still better reason may be given why congress did not mean to include aiders, counsellors, &c., in the guilt or punishment of treason. It was prohibited by the constitution of the United States to enlarge the doctrine of the commission of treason, and they knew that such a provision would be void. This brings me to the consideration of the constitution itself. I have before endeavored to demonstrate that this instrument is not to be explained by the same narrow, technical rules that apply to a statute made for altering some provision of the common law; but that such a construction should be given as is consistent not only with the letter but the spirit in which the great palladium of our liberties was formed.

The object of the American constitution was to perpetuate the liberties of the people of this country. The framers of the instrument well knew the dreadful punishments inflicted, and the grievous oppressions produced, by constructive treasons in other countries, as well where the primary object was the security of the throne as where the public good was the pretext. Those gentlemen well knew from history, ancient as well as modern, that, in every age and climate, where the people enjoyed even the semblance of liberty, and where factions or parties existed, an accusation of treason, or a design to overturn the government, had been occasionally resorted to by those in power as the most convenient means of destroying those individuals whom they had marked out for victims; and that the best mode of insuring a man's conviction was to hunt him down as dangerous to the state. They knew that mankind are always the same, and that

the same passions and vices must exist, though sometimes under different modifications, until the human race itself be extinct. That a repetition of the same scenes which have deluged other countries with their best blood might take place here they well knew, and endeavored as far as possible to guard against the evil by a constitutional sanction. They knew that when a state is divided into parties, what horrible cruelties may be committed even in the name and under the assumed authority of a majority of the people, and therefore endeavored to prevent them. The events which have since occurred in another country, and the sufferings under Robespierre, show how well human nature was understood by those who framed our constitution.

The language which they have used for this purpose is plain, simple, and perspicuous. There is no occasion to resort to the rules of construction to fix its meaning. It explains itself. Treason is to consist in levying war against the United States, and it must be public or open war; two witnesses must prove that there has been an overt act. The spirit and object of this constitutional provision are equally clear. The framers of the constitution, with the great volume of human nature before them, knew that perjury could easily be enlisted on the side of oppression; that any man might become the victim of private accusation; that declarations might be proved which were never made; and therefore they meant, as they have said, that no man should be the victim of such secret crimination; but that the punishment of this offence should only be incurred by those whose crimes are plain and apparent, against whom an open deed is proved.

Now let me ask the opposite counsel what security is afforded by the constitution, to the best or meanest man in this country, if the construction on which they insist be correct? and whether, instead of a safeguard to the citizen, they do not reduce it to an unmeaning phrase? According to the construction on which they must insist or abandon the prosecution, all that is wanted to fix the guilt of treason on any individual is, that an insurrection shall have existed somewhere in the United States, no matter where. Observe, sir, that I am arguing on abstract principles, and not with a particular application. But suppose the government wished to destroy any man; they find him in Georgia; an insurrection happens in New Hampshire. This will suffice for the purpose, and if this cause go on they will be obliged to contend that less will suffice; that an insurrection is not necessary; but that even a peaceable assemblage going down the Ohio is sufficient for the purpose. They merely undertake to prove the existence of an insurrection; that a number of people have committed an act of insurrection; the man who is selected to be a victim is dragged from one end of the continent to the other, before a judge who is the creature of the government, appointed at the pleasure of the government, liable to be thrown out of office if he offend the government; the cause comes on to trial; they prove an insurrection; and when once this insurrection or assemblage can be proved by two witnesses, nothing remains but to connect with it the individual thus marked for destruction; and as this may be done by evidence of his secret acts or even his declarations, he may be seized and hurried by force from New Hampshire to Georgia, or to any part of the United States which his accusers may choose as best fitted for their purpose; it is in vain that he may prove he was not present when the offence of which he is accused was committed; that he never at any period of his life had been there; that the actors and the scene were alike unknown to him; wretches who, from views of interest or revenge, are ready to further the views of his oppressors, will present themselves, and he may be convicted of treason in levying open war against the government, with people whom he never saw, and at a place where he never was. Gentlemen may say that this only shows that the citizen may be equally the victim of false accusations of other offences; that it proves nothing but that the innocent may be condemned on the testimony of perjured witnesses. In no other crime can a man be punished except in the county or district where he committed the act. Let gentlemen mention for what other offence an individual may be tried in a different district from the one in which he did the act which constitutes the essence of the crime; and admitting their principle in its full force, what becomes of the constitutional provision on this subject? where is the constitutional tribunal to try him, "an impartial jury of the state wherein the offence has been committed?" It is reduced to a mere nullity. The constitution meant something; but according to this construction it means nothing, and deceives instead of affording any security. It may be objected that treasonable conspiracies might thus go unpunished. To this it is a sufficient answer that they may be prosecuted and charged according to the truth of the case.

In support of the second proposition, Mr. Wickham said that the position of the counsel for the prosecution was, that in treason all are principals, and therefore, in construction of law, the accessory was present aiding and abetting at the time and place where the act was committed, and might be so charged, although in fact hundreds of miles away. But this was evidently a misapplication of the rule, as aiders and abettors after the fact are as much, in construction of law, principals, as those before the fact. And all the precedents show that they must be tried, not in the county where the war was levied, but where they did the accesso-

rial acts which made them principal traitors by relation; and that they must be charged specially, in accordance with the facts. This rule of law was not founded on arbitrary principles, but on maxims of immutable justice and reason. The indictment should specially state the offence which is intended to be proved against the accused. He cannot otherwise be prepared to defend himself. An offence different from that which is charged against him, and which alone he can be expected to meet with his defence, is never allowed to be given in evidence. Does this indictment inform us that it is meant to be proven that Colonel Burr was not present when the overt act was committed, but that he was guilty of treason by being connected with those who perpetrated the overt act? On the contrary, the plain import of the indictment was that Colonel Burr himself committed and levied war against the United States in person. It charges that he committed the act on Blennerhassett's Island, with divers persons unknown. And it was attempted to prove this charge by holding him responsible for the acts of other persons, done in his absence, without even informing him who those other persons were who had committed the acts. He referred to the constitutional provision, that "in all criminal prosecutions, the party accused shall have a speedy and public trial by an impartial jury of the state or district where the crime was committed;" and said this was meant to be a substantial provision, securing a trial by the vicinage; and yet according to the construction contended for it is merely illusory, and a native of Virginia, who was never out of the limits of the state,[6] may be hurried off to New Hampshire, and tried there for an offence which he never did commit, and which it is impossible he should have committed.

It must be admitted that an aider and abettor after the fact must be tried in the county and district where he committed the offence; and what sufficient reason can be assigned for a different rule in the case of an aider and abettor before the fact? The only precedent that could be found of the trial of an aider or abettor before the fact showed that the rule was the same. Sir Nicholas Throgmorton was indicted for levying war against the queen, and the evidence was a connection with Sir Thomas Wiatt, who raised an insurrection in Kent, and marched towards London, but did not enter the jurisdiction of the city, which begins at Temple Bar. Yet Throgmorton was tried within the jurisdiction of the city, and the lord mayor presided at the trial, and he was acquitted. In the indictment against Mary Speke (in Tremaine's P. C.) for aiding the Duke of Monmouth and others in the act of levying war against the king, the charge is special, that she, "knowing the said James Scott (the Duke of Monmouth) to be a false traitor, and that he, with many other false traitors, to the number of four thousand, had assembled and collected, and had traitorously prepared and levied and raised war, insurrection, and rebellion against the king, &c., did cause to be conveyed and carried to the said James Scott, &c., cart loads of bread and cheese," &c. In a case of felony such an accomplice would be an accessory before the fact. There are in law but two species of accessories: one before and the other after. In the Case of Somervile, And. C. P. 106, it appears to have been settled, on great consideration, "that aiders and other procurers of the treason should be indicted specially for the procurement."

Mr. W. argued that if it is proper to charge an aider and abettor who was not present at the committing of the overt act, generally, as if he were present, in one case, it must be proper in all cases. The rule must be general, applying alike to all kinds of treason. To show the absurdity of such a rule, he referred to a statute of 28 Hen. VIII. c. 18, by which "marrying any of the king's children, or reputed children, or his sisters, or aunts of the father's part, or children of the king's brethren or sisters, without the king's license under his great seal, or deflowering any of them," is enacted to be treason. Now, said he, we may suppose a very probable case, that of a female accomplice in one of these treasons; for instance, one of the maids of honor, should be prosecuted for aiding and abetting the principal traitor; would she be indicted by her name, as a female, with the addition of spinster, for marrying the king's aunt, or deflowering his daughter? or would she be charged specially with aiding or abetting the male person who did the act? By another act of parliament of the same reign it is made treason in any woman the king shall intend to marry, thinking her to be a true maid, to marry him if she be not so. Now it is a very possible case that the paramour of such a woman (I will suppose her to be one of the maids of honor and him a lord of the bed-chamber) should aid her in imposing upon the king. She is tried, found guilty, and executed. How is he to be charged? Would he be indicted by the name of A B, gentleman, or by his title of lord, for marrying the king, not being an unspotted virgin, or to use the language of the act, a "pure and clean maid?" Mr. W. cited and commented upon other authorities in support of the position that the indictment must charge the facts specially, and that they must be proved as laid.

In support of the third proposition, Mr. W. contended that even admitting the doctrine to be true in this country, that all are principals in treason, and whatever would make a man an accessory in felony will make him a

[6] The trial and conviction of a man in a state which he never was in until after the commission of the crime is no anomaly. See People v. Adams, 3 Denio, 190, 1 Const. [1 N. Y.] 173. See, also, note A at the end of Chief Justice Marshall's opinion in this case.

principal in treason, it is nevertheless true that the crime of a person who advises or procures an overt act of treason to be committed by others, must be accessorial in its character; and the rule that those who actually committed the deed must first be convicted, still holds good. The reason of the rule, that a man is not to be charged, by relation, with the criminal acts of others until said acts are proved in the only legal way, that is to say, by a record of the conviction of those who committed them, applied with equal force to treason as to any other crime, whether the aider, adviser, or procurer was held to be a principal or an accessory. If Blennerhassett and Tyler were not guilty of treason, then it was impossible that Colonel Burr could be guilty of treason in aiding, advising, or procuring them to commit the crime. But if this indictment can be sustained, then the guilt of Blennerhassett and Tyler may be established in a trial to which they are not parties. But, he said, it was unnecessary to rely on general reasoning, however conclusive, as express authorities may be adduced. He then cited 1 Hale, P. C. p. 613, where it is said that "as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason should be first tried, before those that are principals in the second degree, because otherwise this inconvenience might follow, viz.: That the principals in the second degree might be convicted, and yet the principals in the first degree might be acquitted, which would be absurd." He also cited other authorities to the same effect, viz: 2 Hale, P. C. 223; Somerville's Case, And. C. P. 106, 26 Eliz.; Fost. Crown Law, 341–347, and East, Crown Law, c. 2, § 29, p. 100. He admitted that a different rule was laid down by Sergeant Hawkins, in Hawk. P. C. (Leach's Ed.) bk. 2, c. 27, § 2, pp. 439, 440. But he gives only a general expression of the rule, goes into no detail, and does not pretend to argue the question. And Mr. Leach, his able and accurate commentator, has a note on this very passage, in which he corrects the generality of the expression, and confines it to treason in compassing the death of the king.

Mr. W. said it was possible that an objection might be made, that "the accomplice may waive the benefit of the law, and submit to a trial," and that as the accused has done so in the present instance, the objection now comes too late. A reference to the authorities and a moment's consideration will satisfy the court that there can be no force in this objection. The indictment gives us no information of the nature of the charge; it is against Col. Burr himself, who had no reason to doubt that it was meant to be proved, that he in person committed the overt act of treason in levying war as principal in the first degree. The charge that the act was committed by him, in conjunction with persons unknown, excludes the idea of a derivative treason or a responsibility for the act of any particular individual or set of men. But if it were specially charged, and the person whose acts the accused was to answer for were named in the indictment with every necessary description of time, place, and circumstances, the party going to trial according to the course of the court without a special prayer to be tried before the principal, and an express waiver of his right entered on record, could not be concluded from making this exception. The words "waive the benefit of the law," mean an express renunciation of a right, and none such certainly has been made in the present instance.

In support of the fourth proposition, Mr. W. went into an examination of the question, "What properly constitutes the crime of levying war?" He contended that force and military array were essential ingredients; neither of which had been proved at Blennerhassett's Island. He did not claim that actual force was absolutely necessary when there was a sufficient display of men and means to effect the object by intimidation. If a body of men, sufficient in number and means to take the capital, and all the property in it, should march into the city, and find no opposition, they would accomplish their object by terror of numbers and warlike appearance. This is denominated potential force; the object is accomplished without the actual exertion of force, though force sufficient to accomplish it is employed. He referred to the trial of Fries [Case No. 5,126], to show that even Mr. Rawle and Mr. Sitgreaves, the counsel for the prosecution, admitted that force of this character, at least, was necessary. He also referred to many English authorities to prove that force and military array are necessary ingredients, under the statute of 25 Edw. III, of the crime of levying war. He insisted that in so far as any expressions were to be found in the opinion of the supreme court in the Case of Bollman and Swartwout [supra], which might seem to imply that force was not necessary, they were obiter and extra-judicial. He cited other authorities which are here omitted, and insisted that the evidence wholly failed to show that there had been anything like force, or violence, or military array displayed on Blennerhassett's Island.

Mr. Wirt, after some introductory remarks, said:

This motion is a bold and original stroke in the noble science of defence. It marks the genius and hand of a master. For it gives to the prisoner every possible advantage, while it gives him the full benefit of his legal defence: the sole defence which he would be able to make to the jury, if the evidence were all introduced before them. It cuts off from the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island, to explain the destination and objects of the assemblage, and to stamp beyond controversy the character of treason

upon it. Connect this motion with that which was made the other day to compel us to begin with the proof of the overt act, in which from their zeal gentlemen were equally sanguine, and observe what would have been the effect of success in both motions. We should have been reduced to the single fact, the individual fact, of the assemblage on the island, without any of the evidence which explains the intention and object of that assemblage. Thus gentlemen would have cut off all the evidence which carries up the plot almost to its conception, which at all events describes the first motion which quickened it into life and follows its progress until it attained such strength and maturity as to throw the whole western country into consternation. Thus of the world of evidence which we have, we should have been reduced to the speck, the atom which relates to Blennerhassett's Island. General Eaton's deposition, (hitherto so much and so justly revered as to its subject,) standing by itself, would have been without the powerful fortification derived from the corroborative evidence of Commodore Truxton, and the still stronger and most extraordinary coincidence of the Morgans. Standing alone, gentlemen would have still proceeded to speak of that affidavit as they have heretofore done; not declaring that what General Eaton had sworn was not the truth, but that it was a most marvelous story! a most wonderful tale! and thus would they have continued to seek in the bold and wild extravagance of the project itself an argument against its existence, and a refuge from public indignation. But that refuge is taken away. General Eaton's narration stands confirmed beyond the possibility of rational doubt. But I ask what inference is to be drawn from these repeated attempts to stifle the prosecution and smother the evidence? If the views of the prisoner were, as they have been so often represented by one of his counsel, highly honorable to himself and glorious to his country, why not permit the evidence to disclose these views? Accused as he is of high treason, he would certainly stand acquitted, not only in reason and justice, but by the maxims of the most squeamish modesty, in showing us by evidence all this honor and this glory which his scheme contained. No, sir, it is not squeamish modesty; it is no fastidious delicacy that prompts these repeated efforts to keep back the evidence; it is apprehension; it is alarm; it is fear; or rather it is the certainty that the evidence, whenever it shall come forward, will fix the charge; and if such shall appear to the court to be the motive of this motion, your honors, I well know, will not be disposed to sacrifice public justice committed to your charge, by aiding this stratagem to elude the sentence of the law; you will yield to the motion no further than the rigor of legal rules shall imperiously constrain you.

I shall proceed now to examine the merits of the motion itself, and to answer the argument of the gentleman (Mr. Wickham) who opened it. I will treat that gentleman with candor. If I misrepresent him it will not be intentionally. I will not follow the example which he has set me on a very recent occasion. I will not complain of flowers and graces where none exist. I will not, like him, in reply to an argument as naked as a sleeping Venus, but certainly not half so beautiful, complain of the painful necessity I am under, in the weakness and decrepitude of logical vigor, of lifting first this flounce and then that furbelow before I can reach the wished-for point of attack.[7] I keep no flounces or furbelows ready manufactured or hung up for use in the millinery of my fancy, and if I did I think I should not be so indiscreetly impatient to get rid of my wares as to put them off on improper occasions. I cannot promise to interest you by any classical and elegant allusions to the pure pages of Tristram Shandy. I cannot give you a squib or a rocket in every period. For my own part, I have always thought these flashes of wit, (if they deserve that name,) I have always thought these meteors of the brain which spring up with such exuberant abundance in the speeches of that gentleman, which play on each side of the path of reason, or, sporting across it with fantastic motion, decoy the mind from the true point in debate, no better evidence of the soundness of the argument with which they are connected, nor, give me leave to add, the vigor of the brain from which they spring, than those vapors which start from our marshes and blaze with a momentary combustion, and which, floating on the undulations of the atmosphere, beguile the traveller into bogs and brambles, are evidences of the firmness and solidity of the earth from which they proceed. I will endeavor to meet the gentleman's propositions in their full force, and to answer them fairly. I will not, as I am advancing towards them with my mind's eye, measure the heighth, breadth, and power of the proposition; if I find it beyond my strength, halve it; if still beyond my strength, quarter it; if still necessary, subdivide it into eighths; and when, by this process, I have reduced it to the proper standard, take one of these sections and toss it with an air of elephantine strength and superiority. If I find myself capable of conducting, by a fair course of reasoning, any one

[7] This was in allusion to the following passage in a speech delivered by Mr. Wickham in an earlier stage of the trial, which is omitted in this work: "I heard the gentleman with pleasure, and felt extremely obliged to him for scattering over the barrenness of law such a variety of flowers. His profuse embellishments reminded me of a Roman epigram on a lady who was so completely enveloped in decorations that she was really the smallest part of herself. It was precisely so with the gentleman's argument. It was so ornamented and covered up with figures and graces that it constituted the least part of itself, and it was only by lifting a flounce here and a furbelow there that you could get a glimpse of the argument."

of his propositions to an absurd conclusion, I will not begin by stating that absurd conclusion as the proposition itself which I am going to encounter.

Mr. Wirt then proceeded to discuss, seriatim, the four propositions laid down by Mr. Wickham, and to reply to his arguments in support of them. In many of that gentleman's general propositions he concurred: that the constitution was intended to guard against arbitrary and constructive treasons; that the principles of sound reason and liberty require their exclusion; and that the constitution is to be interpreted by the rules of reason and moral right. He found it difficult to reconcile some of the positions of Mr. Randolph with the rules of Mr. Wickham, for while one tells us to interpret the constitution by sound reason, the other exclaims, "Save us from the deductions of common sense!" Mr. Wickham having read the constitutional definition of treason, and given the rule by which it was to be interpreted, it was natural to expect that he would have proceeded directly to apply that rule to the definition, and give us the result. But while we were expecting this, even while we have our eyes on the gentleman, he vanishes like a spirit from American ground, and we see him no more until we see him in England, resurging, by a kind of intellectual magic, in the middle of the sixteenth century, complaining most dolefully of my Lord Coke's bowels. Before we follow him in this excursion, it may be well to inquire what it was that induced him to leave the regular track of his argument. I will tell you what it was. It was, sir, the decision of the supreme court in the Case of Bollman and Swartwout. It was the judicial exposition of the constitution by the highest court in the nation, upon the very point which the gentleman was considering, which made him take this flight to England, because it stared him in the face and contradicted his position. Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry in which he was led him directly to it. Interpreting the American constitution, he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it, under the action of his genius, appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point for which he was laboring. Hence it was that the decision was kept so sedulously out of view, until, from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States. The inquiry is whether the presence at the overt act be necessary to make a man a traitor. The gentlemen say that it is necessary—that he cannot be a principal in the treason without actual presence. What says the supreme court in the Case of Bollman and Swartwout? "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." He insisted that this decision of the supreme court had settled the principle that actual presence was not necessary, and that the passage upon which he relied was not a mere obiter dictum, and not extra judicial; that in the Case of Bollman and Swartwout the question whether actual presence at the place where the overt act was committed was necessary to constitute the crime of treason was a material question to be considered by the court.

That a law should be so construed as to advance the remedy and repress the mischief is not more a rule of common law than a principle of reason; it applies to penal as well as to remedial laws. So also the maxim of the common law, that a law as well as a covenant should be so construed that its object may rather prevail than perish, is one of the plainest dictates of common sense. Apply these principles to the constitution. Gentlemen have said that its object was to prevent the people from being harassed by arbitrary and constructive treason. But its object, I presume, was not to declare that there was no such crime. It certainly did not mean to encourage treason. It meant to recognize the existence of the crime and provide for its punishment. The liberties of the people, which require that the offence should be defined, circumscribed, and limited, required also that it should be certainly and adequately punished. The framers of the constitution, informed by the examples of Greece and Rome, and foreseeing that the liberties of this republic might one day or other be seized by the daring ambition of some domestic usurper, have given peculiar importance and solemnity to the crime, by ingrafting it upon the constitution. But they have done this in vain if the construction contended for on

the other side is to prevail. If it require actual presence at the scene of the assemblage to involve a man in the guilt of treason, how easy will it be for the principal traitor to avoid this guilt and escape punishment forever? He may go into distant states, from one state to another. He may secretly wander like a demon of darkness from one end of the continent to the other. He may enter into the confidence of the simple and unsuspecting. He may pour his poison into the minds of those who were before innocent. He may seduce them into a love of his person, offer them advantages, pretend that his measures are honorable and beneficial, connect them in his plot and attach them to his glory. He may prepare the whole mechanism of the stupendous and destructive engine and put it in motion. Let the rest be done by his agents. He may then go a hundred miles from the scene of action. Let him keep himself only from the scene of the assemblage and the immediate spot of battle, and he is innocent in law, while those whom he has deluded are to suffer the death of traitors! Who is the most guilty of this treason, the poor, weak, deluded instruments, or the artful and ambitious man who corrupted and misled them? There is no comparison between his guilt and theirs, and yet you secure impunity to him, while they are to suffer death! Is this according to the rules of reason? Is this moral right? Is this a means of preventing treason? Or rather, is it not in truth a direct invitation to it? Sir, it is obvious that neither reason nor moral right requires actual presence at the overt act to constitute the crime of treason. Put this case to any common man, whether the absence of a corruptor should exempt him from punishment for the crime which he has excited his deluded agents to commit, and he will instantly tell you that he deserves infinitely more severe punishment than his misguided instruments. There is a moral sense much more unerring in questions of this sort than the frigid deductions of jurists or philosophers; and no man of a sound mind and heart can doubt for a moment between the comparative guilt of Aaron Burr (the prime mover of the whole mischief) and of the poor men on Blennerhassett's Island who called themselves Burr's men. In the case of murder, who is the most guilty, the ignorant, deluded perpetrator or the abominable instigator? The decision of the supreme court, sir, is so far from being impracticable on the ground of reason and moral right, that it is supported by their most obvious and palpable dictates. Give to the constitution the construction contended for on the other side, and you might as well expunge the crime from the criminal code; nay, you had better do it, for by this construction you hold out the lure of impunity to the most dangerous men in the community, men of ambition and talents, while you loose the vengeance of the law on the comparatively innocent. If treason ought to be repressed, I ask you who is the most dangerous and the most likely to commit it? The mere instrument who applies the force, or the daring, aspiring, elevated genius who devises the whole plot, but acts behind the scenes?

Mr. Wirt then argued that the decision of the supreme court was supported by the law of England. He cited Lord Coke, 3 Inst. p. 9, where, commenting on the words in the statute of Edward III. which make our constitutional definition of treason, he says: "If many conspire to levy war, and some do levy the same according to the conspiracy, this is treason in all, for in treason all are principals, and war is levied." He also referred to similar passages in pages 16 and 21, Id. He also cited Hale, P. C. 214, where the same doctrine is laid down in terms equally distinct and emphatic: "But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally, for in such case in treason all are principals." The same doctrine is in effect laid down in pages 323, 328, 339. Hawkins and Foster support the same doctrine. "Also, there can be no doubt but that he who by command or persuasion induces another to commit treason, is himself a traitor, (for without question, by such means he would be accessory to a felony,) and it is an uncontroverted rule that whatever will make a man an accessory in felony will make him a principal in treason." 1 Hawk. P. C. c. 17, § 39. Foster (page 341) says: "It is well known that, in the language of the law, there are no accessories in treason. All are principals." "Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in the treason, unless the case be otherwise provided for by the statute creating the same," &c. Mr. Wirt referred to Judge Tucker's argument to prove that the doctrine that in treason all are principals is not the established law of England, and after passing a high encomium upon the learning, ability, and virtue of the author, said: "However sincerely I revere him, yet, certainly, when the question is, 'What is the law of England?' it cannot be considered as disrespectful to our learned and virtuous countryman to prefer the authority of such men as Coke, Hale, Hawkins, and Foster, to his." Mr. Wirt then adverted to the assertion of Mr. Wickham, that but two cases can be found in the books of accessories before the fact having been adjudged guilty as principals. But he admits (said Mr. Wirt) that there are several cases of accessories after the fact being so adjudged. The gentleman had inverted the order of the guilt. He apprehended no case could be found which will show that acces-

sories after the fact are as criminal as those before the fact. It was for a long time doubted in England whether accessories after the fact were principals; but it was never doubted that accessories before the fact were principals. 2 Hawk. P. C. c. 29, § 3. The gentleman had read the case of Sir Nicholas Throgmorton's sufferings, as they are presented as a Gorgon's head by Judge Tucker—not as an illustration of the law, but by way of exciting our horror against a corrupt judge. The prosecution did not rely upon the authority of that case. What could be the gentleman's motives in reading this case with a countenance and cadence of such peculiar pathos? Was it to excite our sympathies, under the hope that our apprehensions and feelings, when once set afloat, might, for the want of some other living object, be graciously transferred to his client? It was with the same view, he presumed, that the gentleman gave us the pathetic and affecting story of Lady Lisle, as it is touched by the elegant, chaste, and delicate pencil of Hume. It was with the same views, also, that he recited from the same author the deep, perfidious, and bloody horrors of a Kirk and a Jeffries. Sensible that there was nothing in the virtues of his client or in this case to interest us, he borrowed the sufferings and the virtues of a Throgmorton and a Lady Lisle to enlist our affections and set our hearts a bleeding, hoping that our pity, thus excited, might be transferred and attached to his client. He hoped that the counsel for the prosecution felt as much horror at the infernal depravity of Judge Bromley, and the sanguinary and execrable tyranny of Judge Jeffries, as they or any other gentleman can feel. But these cases do not apply to merciful and immaculate judges. He did not think it very respectful to this court to adduce such cases. They seem to be held up in terrorem, from an apprehension that their authority would be admitted here, but we apprehend no such consequence.

In answer to Mr. Wickham's argument that since the revolution of 1688 the British decisions have leaned the other way, and go to show that accessorial acts do not make a principal in treason, Mr. Wirt said that the conclusion was based on no adjudged case, nor even upon any obiter dictum of any judge. It has no other foundation than the impunity of those who aided the Pretender—who fought his battles or aided him in his fight. This was the mere policy of the house of Hanover. The pretensions of the Stuarts had divided the British nation. Their adherents were many and zealous. Their pretensions were crushed in battle. Two courses were open to the reigning monarch—either by clemency and forbearance to assuage the animosity of his enemies and brace his throne with the affections of his people, or to pursue his enemies with vengeance and wanton cruelty, and unsettle and float his throne in the blood of his subjects. He chose the former course; and because, either from magnanimity or policy, or both, he spared them, the gentleman supposes the law of treason was changed, and that they could not be punished.

Mr. Wirt adverted to the doctrine advanced by Mr. Wickham, that "a statute made in aid or affirmance of the common law carries with it all common law consequences," but "if a new felony be created by statute no common law consequences follow;" and contended that the authorities cited by Mr. Wickham in support of this position do not sustain it. He claimed that from the authorities cited these two positions were fairly deducible: First: That when a statute creates a new felony, unknown to the common law, although the statute says nothing about accessories to that felony, yet they exist and are punishable under the act; unless the peculiar wording of the statute precludes it, as in the statute of 28 Hen. VIII. c. 15. Secondly: That accessories are not the mere creatures of the common law; they may derive their existence from a statute solely, and that by mere implication under that statute. Since, then, accessories are not the creatures merely and solely of the common law, it makes no difference whether the common law exist here or not; accessories may nevertheless exist. Since a statute creating an offence impliedly embraces accessories, not by the operation of common law, but by the reason and nature of things, an American statute may impliedly embrace accessories, since whatever we may think of the existence of the common law in this country, no American, I hope, will doubt that reason and its deductions exist here. The only fair inference from Mr. Wickham's positions and authorities is, that if a statute of the United States were to adopt a common law phrase, in the creation of an offence, no common law consequences would follow, because we have no common law. But this is a moot point, because while the constitution and act of congress adopt the word "treason," they define in what it shall consist. I see no benefit that the gentleman could derive from these positions if they were admitted. If he meant to say that accessories are the mere creatures of the common law, and therefore cannot exist in this country, where there is no common law, I answer, First: That if the position were true, it would not affect this case, because within the reason of the doctrine touching principal and accessories, the part which the prisoner bore in this transaction would constitute him a principal. Secondly: If his conduct were of such a nature as to make him an accessory, I hold that we have a right to look to the common law to ascertain whether he be not a principal in this case.

First, I contend that the part which the prisoner bore in this transaction would constitute him a principal. Gentlemen say that

all are accessories who are not present at the commission of the offence. We, on the contrary, contend that even in inferior felonies, a man may be a principal without actual presence. Let us examine this question. The law recognizes a legal as well as an actual presence. Before I refer to the books to explain this distinction, I beg leave to make one remark, that in order to determine the degree of proximity which should be between the principal and accessory, it is necessary to look into their acts and consider the nature of the crime and the extent of the theatre which it requires for its perpetration. A man may be legally present, although actually absent; even in felony legal presence makes a man as much a principal as actual presence. I beg leave to introduce a series of cases which go to unfold and establish this distinction, most of which my friend Mr. MacRae has already mentioned. You will find in the progress of these cases, the sphere of legal presence perpetually extending itself in proportion to the nature of the crime and the extent of theatre necessary for its commission. You will observe that as the theatre widens the scale of proximity is extended. The first case is in Hale, P. C. 439, "If divers persons come to make an affray, and are of the same party, and come into the same house, and one be killed in one of the rooms, those that are of that party, and that came for that purpose, though in other rooms of the same house, shall be said to be present." Here the house is the theatre, and it is required that those who are to be implicated as principals shall be in the other rooms of the same house. The next is the case of the Lord Dacre. Here, as the park was the theatre of the meditated crime, the scale of proximity is enlarged, and it was enough that the Lord Dacre and his associates were in the same park to implicate them in the guilt. The next is Pudsey's Case, which is thus stated in 1 Hale, P. C. 534: "Pudsey and two others, viz., A. and B, assault C, to rob him, in the highway, but C escapes by flight, and as they were assaulting him, A rides from Pudsey and B and assaults D, out of the view of Pudsey and B, and takes from him a dagger by robbery, and came back to Pudsey and B, and for this Pudsey was indicted and convicted of robbery—though he assented not to the robbery of D, neither was it done in his view—because they were all three assembled to commit a robbery, and this taking of the dagger was in the mean time." Here, as the highway and the whole forest was the scene of action, a still less degree of proximity was required than in either of the preceding cases; and, indeed, no limit of proximity is stated at all. But this case of Pudsey is irresistibly strong in another point of view, and contains a principle which covers the case at bar completely. He and his colleagues were leagued for the general purpose of robbing; they went out upon this purpose, and although Pudsey was not only absent at the particular act of robbing D, but gave no assent to that particular act, yet he was involved in the guilt of it, and suffered accordingly. The same author (page 537) contains a case which is, if possible, still stronger to the same purpose. It is the case of two men who go out for the purpose of robbing on the highway or committing a burglary. Although one only commits the offence, and the other, so far from being present, is actually engaged in the perpetration of a different offence, at a different place, yet this other is equally involved in the offence committed by the first. Hence, it is not actual presence which makes a principal in felony. It is merely their going forth leagued in the same general design, and their readiness to co-operate for effecting the common purpose. Suppose two men in the county of Bedford or Campbell should concert the murder of a man who had removed from thence to this place, and should set off together to effect this purpose, but that not knowing whether he had fixed his residence in Richmond or Manchester, they should on their arrival separate—one should enter Richmond and the other Manchester. They both agree and determine that he who had the first chance should kill him, and they also agree to return together and to assist and protect each other. He who enters Richmond commits the murder. Would not the other who went into Manchester be a principal in the murder? They were both engaged in the same unlawful design of murdering the same individual. They set off together and intend to return together. There was a concert between them, and each was ready to co-operate with the other in carrying this murderous design into effect. Here, then, is a case of a legal presence, though the person is actually absent, involving him in the guilt of actual presence. Foster, 349, 350, thus treats the subject: "When the law requires the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a strict, actual, immediate presence," &c. The reason of the law is the soul of the law. What is the reason, then, which, according to Foster, constitutes this legal presence? It is that the cause is a common cause; that each man operates in his station towards the same common end; that the part each man takes tends to give countenance, encouragement, and protection to the whole gang, and to insure the success of their whole enterprise. Whoever, in any crime, performs a part within this description, is legally present, and a principal in that crime. Foster (in pages 353, 354), after stating that general resolutions against all opposers, whether explicitly entered into or to be collected from their numbers, arms, or behavior at the scene of action, had always been considered as strong ingredients in cases of constructive presence, concludes

thus: "In cases of homicide, committed in consequence of them, every person present in the sense of the law when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow. The offences that Lord Dacre and Pudsey stood charged with, as principals, were committed far out of their sight and hearing; and yet both were holden to be present. It was sufficient that at the instant the facts were committed they were of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence and support, with those who did the facts."

Let us apply the reasoning and principles of those cases to the case of Aaron Burr. In order to do this with propriety, we must consider the nature of the crime charged upon the prisoner, the theatre required for its perpetration, and the various parts to be performed in promotion of the general purpose. We must consider the difference between treason and felony; that treason occupies a much wider space; that if there have been an act of treason in this case it may be said to have covered the United States; and, therefore, you will not require the same degree of proximity between the accessory and principal as you would in a common felony. I proceed, then, to make this application. The charge in the indictment is treason, in levying war against the United States. The objects imputed to the prisoner are the seizure of Orleans and the separation of the states. Was not Aaron Burr of the same party, with the same design, and upon the same pursuit? Did he not first create the party? Did he not enlist the men and engage them in his project? And did they not all call themselves his men? Were they not all under the same agreement and expectation of mutual defence and support? Was it not a common cause with them? Did he not place each man to operate at his station, at one and the same instant, towards the same common end? Did not the part which each man took tend to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise? Was not the prisoner within every reason and principle assigned for the constitution of legal presence, and therefore a principal in the treason? If it be urged that the prisoner gave no express assent to the particular meeting on the island, it may be answered that neither did Pudsey, in the case cited, assent to the particular robbery of D by A; but Pudsey and A had the same common purpose, which involved them in the same common guilt. So the purpose of the prisoner and the men upon the island was a common purpose; and therefore their guilt is the same. But an error seems to have arisen in considering the overt act as the treason; the overt act is only the evidence of it. The moral guilt is in their intention. The overt act or assemblage on the island was not the object, the end, the consummation of the treason; it was a mere transient effect of it, an incidental evolution of the design. We must not, therefore, apply the doctrines just investigated to the act on Blennerhassett's Island. We must consider the prisoner's local position, not in reference to the assemblage, but to the general and grand object of the treason; not in reference to the island, but to the great theatre which the treason required, and on which it was acting, from New York to Orleans. For the object was not Blennerhassett's Island, but the empire of the West, formed in the North; the splendid purpose of seizing Orleans and rending the whole Union forcibly asunder. The whole country from Beaver to New Orleans was the scope of action. Burr, therefore, was not only legally but actually present on this theatre of action. In those cases of felony, the proximity between the accessories and principal actors was measured according to what was intended to be done. Here, the object was not an island but a kingdom; the theatre of action was much more extensive, and the proximity between the parties engaged in it must be proportionably enlarged. The part which the prisoner took in this transaction is such as in the case of felony would make him a principal and not an accessory, as the gentlemen contend; and consequently, according not only to the reasoning of all those cases, but to their own arguments, the prisoner must be considered as a principal in the treason.

Secondly: Let me inquire whether we have not a right to look at the common law, to show that the prisoner is a principal. Let us admit, for the sake of argument, (what is certainly disproved,) that accessories are the mere creatures of the common law; let us also admit that our constitution and act of congress do not embrace accessories; is it clear that we have no right to resort to the common law to implicate accessorial traitors? I do not know myself that this inquiry is necessary; nor do I pretend to say what may be the result of your reflections on the subject; it may appear to you necessary, and I would leave no subject untouched which the court may consider as involved in the debate. It would not be very bold in me, sir, to argue for the existence of the common law en masse, in this country. But let it not for a moment be understood that I mean to contend for this. I only say that it would not be very bold in me to do this, and I say so, because a majority of the federal judges, so far as their opinions have been made known, have held that opinion. In Worrel's Case, cited from Dallas, the court was divided; Judge Chase thought the common law not in force; Judge Peters thought otherwise. In a subsequent case, and that a criminal one, I mean the Case of Williams, Judge Ellsworth held the whole of the common law to be in force; and Judge Tucker informs us that Judge

Washington was also of opinion that the common law of England is in force here. These are all the opinions of which I have heard.[8] Having thus the majority of the federal judges, as far as their opinions are known, in favor of the opinion that the common law of England is in force here, I repeat that it would not be very bold in me, standing before a federal court, to insist on the full operation of the common law, with all its consequences and imputed offspring, accessories among the rest; but I will not avail myself of this "vantage ground." My own opinion is a different one. I take the principle with much greater restriction, and on this head submit these reflections to the consideration of the court. When a technical term is borrowed from any art or science, we look to that art or science to ascertain its import and signification. If a statute adopt phrases of the common law, we must look to the common law to ascertain their true signification. This is a rule of reason. It is the foundation of the principle cited by Sergeant Pengelly from Hobart, that when a statute adopts a common law term, you take that term in its common law meaning. It is the foundation, also, of a paragraph in one of the most luminous, elegant, and masterly state-papers that ever the world saw—I mean the celebrated report of the Virginia committee in 1799, 1800, from which I beg leave to read a short extract relative to our present inquiry: "Deeply impressed with these opinions, the general assembly of Virginia instruct the senators and request the representatives from this state in congress to use their best efforts to oppose the passing of any law founded on or recognizing the principle lately advanced, that the common law of England is in force under the government of the United States, excepting from such opposition, such particular parts of the common law as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and excepting, also, such other parts thereof as may be adopted by congress as necessary and proper for carrying into execution the powers expressly delegated." Here we find the recognition of the principle which takes common law phrases in the common law sense. Upon the same ground, Judge Iredell, in the Case of Fries [supra], states, in effect, that the constitutional terms of our definition of treason, being borrowed from the British statute, the framers of our constitution intended to adopt the meaning of those terms, as expounded in the parent country. Suppose an act of congress was passed, which said that a particular act should be felony, and said no more on the subject: where would you look for its true meaning? Would you not, by the adoption of that word, find it necessary to look at the source from which it was derived—that is, the common law—in order to ascertain its import? There is no other to which you can look for that purpose. Let us examine how these considerations bear on the point that we have a right to look at the common law to ascertain whether accessorial traitors be implicated. In applying these principles, we must inquire particularly into the nature of treason in levying war. Whence do we derive this particular treason? Sir Edward Coke, in his 3 Inst. 9, referring to the statute of Edward III., gives us a commentary on it, divides it into members, and expounds each of them as he goes along. He says that it has done nothing new, that it created no new offence which was not an offence at common law, but excluded some treasons and abolished and mitigated some of the punishments and penalties which existed at common law. When he comes to the words of the statute, "Si un home leve guerre encounter notre seigneur le roy,"—"if a man levy war against our lord the king,"—he says that "this was high treason by the common law." Although, then, the words of our definition are derived immediately from the statute of Edward, and though it received the sanction of parliament, this species of treason, levying war, was an offence at common law, and has been transplanted from the common law into our constitution. Have we not, then, a right to go to the fountain head, and ascertain there how much ground it covered, what was the nature of the treason, what its extent and limits? I do not speak of common law treasons at large, but this particular treason of levying war. Gentlemen will understand me. I do not mean to sanction any of the absurdities of the common law. I speak only of this single branch of treason, selected by the constitution. If, then, we have a right

[8] It has since been decided by the supreme court, that the federal courts have no common law jurisdiction in criminal cases. U. S. v. Hudson, 7 Cranch [11 U. S.] 32. But in U. S. v. Coolidge [Case No. 14,857], Mr. Justice Story says that recourse must be had to the principles of the common law to fix the definitions of crimes, as well as of other common law terms used in the constitution or statutes. "For instance," (he says) "congress has provided for the punishment of murder, manslaughter, and perjury, under certain circumstances, but has nowhere defined those crimes. Yet the common law must be resorted to for their definition," &c. This case has been relied upon to support the position that the common law rule, that whatever will make a man an accessory in felony will make him a principal in treason, is in full force in this country. 14 Boston Law Rep. 1851. It should be observed, however, that the constitution has defined the crime of treason; and this definition, as far as it goes, must be exclusive of all others. But in this definition itself certain common law terms are used, the meaning of which can only be ascertained by resorting to common law authorities. For instance, our courts have held that we must look to common law adjudications to ascertain the precise legal meaning of the term, "levying war." And the question seems to be reduced to this: Is it a common law principle, that those who successfully advise or incite others to levy war do actually levy war themselves, so as to come within the true definition of that term, or does the rule which makes them principals in the crime rest upon a mere arbitrary basis? Upon this question much more might be said than the limits of this note will allow.

to go to the common law for this purpose, we shall discover that it comprehended all who were leagued in the general conspiracy, whether they themselves actually levied the war or caused it to be levied by others. I submit this idea to the court, not as one which I have had time to weigh and digest, but one which it may perhaps find not unworthy of consideration. But without resorting to the aid of the common law, we show by the constitution, interpreted by the rules of reason and moral right, as expounded by judicial decision, as well as by the English law, to which we were invited, that presence at the scene of the overt act is not necessary to make a man a traitor.

Mr. Wirt remarked that whenever the acts of congress mention accessories to any crime, it is for the purpose of distinguishing between the guilt, and consequently the punishment, of accessories before and after the fact. Accessories before the fact in piracy are punished with death; those after, by fine and imprisonment. The same principles are observed with respect to accessories before and after in other cases. An inference very different from that drawn by Mr. Wickham ought to be deduced from the statute. According to his argument, even if the common law were in force here, accessories would not be liable. Congress knew that in treason all are principals, and that therefore it was unnecessary to implicate them in detail by a special act; but knowing that those who were the most innocent, who were the least concerned in that crime, were before then equally punishable with the most atrocious offenders, they intended to mitigate the fate of the least culpable as receivers and comforters after the fact, and rescuers of those who were not convicted. They felt that they were treading on ground that was previously occupied. They did not legislate on the subject as if they were creating an offence. They speak of it as an offence already existing. They distinguish between the degrees of guilt, and proportion the punishments accordingly. But according to Mr. Wickham's argument, accessories before the fact in treason, who are in general the greatest offenders, because the procurers and contrivers of the crimes, would escape altogether, whilst the least guilty are severely punished. Before you think that Mr. Wickham's idea is correct, you must believe that congress meant to punish the lesser, and leave entirely unpunished the greater offence. Was it possible that they should have intended that the dark, designing, flagitious offender, who intrigues and contrives, who plots and procures a deep conspiracy to subvert the government and destroy the liberties of his country, shall escape wholly unpunished, while the poor ignorant man, who is deluded by his artifices or those of his associates, shall be severely punished for rescuing from imprisonment another of the deluded victims of his ambition? Yet this result, as monstrous as it is absurd, may take place if Mr. Wickham's construction shall be adopted.

Mr. Wirt took up the second proposition of Mr. Wickham, that the indictment should charge the facts specially. He said the indictment was drawn from an authentic copy of the indictment in the Case of Fries, and was an exact transcript of that indictment, mutatis mutandis. He referred to a number of English precedents to show that to charge the prisoner generally with levying war had always been held sufficient.

Mr. Wickham here begged leave to interrupt Mr. Wirt in order to explain, as he said Mr. Wirt had misunderstood him. His argument, he said, was not that a special indictment was necessary in every case, but that whenever an absentee was charged and was to be made liable by relation for the acts of another, the manner of his being connected with that other should be stated in the indictment. For instance, I put the case of Blennerhassett. I never said that such an indictment as is now before the court would not be good against him, who was present at the time and place where the overt act is charged to have been committed.

Mr. Wirt, resuming, said he did not misunderstand the gentleman. His answer was, that if the accused have borne a part which constitutes treason, he is sufficiently and properly charged in the indictment. I have shown that in every case where a prisoner has acted a part which amounted to treason, whether he be absent or present, he may be indicted generally, because he is a principal in the treason; and whenever a person accused is a principal in a treason of levying war, it is sufficient to charge that he did levy war.

The CHIEF JUSTICE.—Do you mean to say that it is not necessary to state in the indictment in what manner the accused, who it is admitted was absent, became connected with the acts on Blennerhassett's Island?

Mr. Wirt.—I mean to say that the count is general in modern cases; that we are endeavoring to make the accused a traitor by connection, by stating the act which was done, and which act, from his conduct in the transaction, he made his own; that it is sufficient to make this charge generally, not only because it is authorized by the constitutional definition, but because it is conformable to modern cases, in which the indictments are pruned of all needless luxuriance.

Mr. Wirt referred to several cases, from which he drew inferences in favor of his position. He then took up the third proposition of Mr. Wickham. By this, he said, I understand the gentleman to advance, in other terms, the common law doctrine, that when a man is rendered a principal in treason by acts which would make him an accessory in felony, he cannot be tried before the principal in the first degree. I understand this to be the doctrine of the common law, as established by all the authorities; but when I concede this point, I insist that it can have

no effect in favor of the accused for two reasons: 1st. Because it is the mere creature of the common law. 2d. Because if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoner in this case is of an accessorial nature, or such as would make him an accessory in felony. If this position be the mere creature of the common law, no consequences can be deduced from it. It is sufficient to take Mr. Wickham's own declaration, that the common law does not exist in this country. If we examine the constitution and act of congress, we shall find that this idea of a distinction between principals in the first and second degree depends entirely on the common law. All who levy war against the United States, whether present or absent—all who are leagued in the conspiracy, whether on the spot of the assemblage or performing some minute and inconsiderable part in it a thousand miles from the scene of action—incur equally the sentence of the law. They are all equally traitors.

But to try this position to its utmost extent, let us not only put aside the constitution and act of congress and decision of the supreme court, but let us admit that the common law does not exist here. Still, before the principle could apply, it would remain to be proven that the conduct of the prisoner in this case has been accessorial; or in other words, that his acts in relation to this treason are of such a nature as would make him an accessory in felony. But is this the case? It is a mere petitio principii. It is denied that his acts are such as would make him an accessory in felony. I have already in another branch of this subject endeavored to show, on the grounds of authority and reason, that a man might be involved in the guilt of treason as a principal by being legally though not actually present; that treason occupied a much wider space than felony; that the scale of proximity between the accessory and principal must be extended in proportion to the extent of the theatre of the treason; and that as the prisoner must be considered as legally present, he could not be an accessory, but a principal. If I have succeeded in this, I have in fact proved that his conduct cannot be deemed accessorial. But an error has taken place from considering the scene of the overt act as the theatre of the treason, from mistaking the overt act for the treason itself, and consequently from referring the conduct of the prisoner to the acts on the island. The conduct of Aaron Burr has been considered in relation to the overt act on Blennerhassett's Island only; whereas it ought to be considered in connection with the grand design, the deep plot of seizing Orleans, separating the Union, and establishing an independent empire in the West, of which the prisoner was to be the chief. It ought to be recollected that these were his objects, and that the whole western country from Beaver to Orleans was the theatre of his treasonable operations. It is by this first reasoning that you are to consider whether he be a principal or an accessory, and not by limiting your inquiries to the circumscribed and narrow spot in the island where the acts charged happened to be performed. Having shown, I think, on the ground of law, that the prisoner cannot be considered as an accessory, let me press the inquiry whether on the ground of reason he be a principal or an accessory; and remember that his project was to seize New Orleans, separate the Union, and erect an independent empire in the West, of which he was to be the chief. This was the destination of the plot and the conclusion of the drama. Will any man say that Blennerhassett was the principal, and Burr but an accessory? Who will believe that Burr, the author and projector of the plot, who raised the forces, who enlisted the men, and who procured the funds for carrying it into execution, was made a cat's paw of? Will any man believe that Burr, who is a soldier, bold, ardent, restless and aspiring, the great actor whose brain conceived and whose hand brought the plot into operation, that he should sink down into an accessory, and that Blennerhassett should be elevated into a principal? He would startle at once at the thought. Aaron Burr, the contriver of the whole conspiracy, to everybody concerned in it was as the sun to the planets which surround him. Did he not bind them in their respective orbits, and give them their light, their heat and their motion? Yet he is to be considered an accessory, and Blennerhassett is to be the principal!

Let us put the case between Burr and Blennerhassett. Let us compare the two men, and settle this question of precedence between them. It may save a good deal of troublesome ceremony hereafter. Who Aaron Burr is we have seen in part already. I will add, that beginning his operations in New York, he associates with him men whose wealth is to supply the necessary funds. Possessed of the main-spring, his personal labor contrives all the machinery. Pervading the continent from New York to New Orleans, he draws into his plan, by every allurement which he can contrive, men of all ranks and descriptions. To youthful ardor he presents danger and glory; to ambition, rank and titles and honors; to avarice, the mines of Mexico. To each person whom he addresses he presents the object adapted to his taste. His recruiting officers are appointed. Men are engaged throughout the continent. Civil life is indeed quiet upon its surface, but in its bosom this man has contrived to deposit the materials which, with the slightest touch of his match, produce an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806, he goes forth for the last time to apply this match. On this occasion he meets with Blen-

nerhassett. Who is Blennerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. His history shows that war is not the natural element of his mind. If it had been, he never would have exchanged Ireland for America. So far is an army from furnishing the society natural and proper to Mr. Blennerhassett's character, that on his arrival in America, he retired even from the population of the Atlantic states, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste and science and wealth; and lo! the desert smiled. Possessing himself of a beautiful island in the Ohio, he rears upon it a palace, and decorates it with every romantic embellishment of fancy. A shrubbery, that Shenstone might have envied, blooms around him. Music that might have charmed Calypso and her nymphs, is his. An extensive library spreads its treasures before him. A philosophical apparatus offers to him all the secrets and mysteries of nature. Peace, tranquility, and innocence shed their mingled delights around him. And to crown the enchantment of the scene, a wife who is said to be lovely even beyond her sex and graced with every accomplishment that can render it irresistible, had blessed him with her love, and made him the father of several children. The evidence would convince you that this is but a faint picture of the real life. In the midst of all this peace, this innocent simplicity and this tranquility, this feast of the mind, this pure banquet of the heart, the destroyer comes; he comes to change this paradise into a hell. Yet the flowers do not wither at his approach. No monitory shuddering through the bosom of their unfortunate possessor warns him of the ruin that is coming upon him. A stranger presents himself. Introduced to their civilities by the high rank which he had lately held in his country, he soon finds his way to their hearts, by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address. The conquest was not difficult. Innocence is ever simple and credulous. Conscious of no design itself, it suspects none in others. It wears no guard before its breast. Every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden when the serpent entered its bowers. The prisoner, in a more engaging form, winding himself into the open and unpracticed heart of the unfortunate Blennerhassett, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees he infuses into it the poison of his own ambition. He breathes into it the fire of his own courage; a daring and desperate thirst for glory; an ardor panting for great enterprises, for all the storm and bustle and hurricane of life. In a short time the whole man is changed; and every object of his former delight is relinquished. No more he enjoys the tranquil scene; it has become flat and insipid to his taste. His books are abandoned. His retort and crucible are thrown aside. His shrubbery blooms and breathes its fragrance upon the air in vain; he likes it not. His ear no longer drinks the rich melody of music; it longs for the trumpet's clangor and the cannon's roar. Even the prattle of his babes, once so sweet, no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstasy so unspeakable, is now unseen and unfelt. Greater objects have taken possession of his soul. His imagination has been dazzled by visions of diadems, of stars and garters and titles of nobility. He has been taught to burn with restless emulation at the names of great heroes and conquerors. His enchanted island is destined soon to relapse into a wilderness; and in a few months we find the beautiful and tender partner of his bosom, whom he lately "permitted not the winds of" summer "to visit too roughly," we find her shivering at midnight, on the winter banks of the Ohio, and mingling her tears with the torrents, that froze as they fell. Yet this unfortunate man, thus deluded from his interest and his happiness, thus seduced from the paths of innocence and peace, thus confounded in the toils that were deliberately spread for him and overwhelmed by the mastering spirit and genius of another—this man, thus ruined and undone and made to play a subordinate part in this grand drama of guilt and treason, this man is to be called the principal offender, while he by whom he was thus plunged in misery is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd! so shocking to the soul! so revolting to reason! Let Aaron Burr, then, not shrink from the high destination which he has courted, and having already ruined Blennerhassett in fortune, character and happiness forever, let him not attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.

Upon the whole, sir, reason declares Aaron Burr the principal in this crime, and confirms herein the sentence of the law; and the gentleman, in saying that his offence is of a derivative and accessorial nature, begs the question, and draws his conclusions from what, instead of being conceded, is denied. It is clear from what has been said that Burr did not derive his guilt from the men on the island, but imparted his own guilt to them; that he is not an accessory but a principal; and, therefore, that there is nothing in the objection which demands a record of their conviction before we shall go on with our proof against him.

Upon the fourth and last proposition laid

down by Mr. Wickham, viz: That no evidence could be received to connect Col. Burr with the transactions on Blennerhassett's Island, because the evidence failed to prove that any overt act of levying war had been committed there, Mr. Wirt said:

The question which the court is here called on to decide is, whether the assemblage on Blennerhassett's Island were an overt act of levying war. As the overt act is compounded of fact and intention, they must yield to us the intention, because we are ready to prove their intention to be traitorous. Were they not to admit it we could not be debarred from proving it. They must admit that the individuals who composed the assemblage on Blennerhassett's Island, were enlisted by Aaron Burr or his subaltern officers; that they had marched by individuals to the mouth of Beaver, a place of partial rendezvous; that when collected there, they proceeded to Blennerhassett's Island, another place of rendezvous, where they were to receive an accession of boats, men, provisions, arms and ammunition under the command of Blennerhassett himself; that from the island they proceeded by the mouth of Cumberland to Baton Rouge, a place of general rendezvous for the expected forces from the West and from the states of Virginia, Kentucky, Ohio, and Tennessee; and that at this place he headed them with a considerable addition of men and arms. They must admit that he attempted the seduction of the officers and men at the several forts and garrisons of the United States as they passed; which forts and garrisons were too weak to have resisted with effect. They must admit that their destination was New Orleans, where they expected the co-operation of the United States troops and the commander-in-chief. They must admit that New Orleans was to be taken, together with its bank, shipping and military stores, &c., that the standard of treason was to be planted in that city, which was to be made the seat of his empire. All the country west of the Allegany was to be annexed to his empire. All this they must admit; for this and more we are prepared to prove; and they must insist that the assemblage on the island, connected with all these facts, does not amount to treason.

The question, then, is whether, all these things admitted, the assemblage on the island were an overt act of levying war. Here, sir, are we forced most reluctantly to argue to the court, on only a part of the evidence, in presence of the jury, before they have heard the rest of the evidence, which might go a great way to explain or alter its effect. But unpleasant as the question is in this way, we must meet it. What is an open act of levying war? To which we are obliged to answer that it must be decided by the constitution and act of congress. Gentlemen on the other side, speaking on this subject, have asked us for battles, bloody battles, hard knocks, the noise of cannon. "Show us your open acts of war," they exclaim. Hard knocks, says one, are things we can all feel and understand. Where was the open deed of war, this bloody battle, this bloody war? cries another. Nowhere gentlemen. There was no bloody battle. There was no bloody war. The energy of a despised and traduced government prevented that tragical consequence. In reply to all this blustering and clamor for blood and havoc, let me ask calmly and temperately, does our constitution and act of congress require them? Can treason be committed by nothing short of actual battle? Mr. Wickham, shrinking from a position so bold and indefensible, has said that if there be not actual force, there must be, at least, potential force, such as terror and intimidation struck by the treasonable assemblage. We will examine this idea presently. Let us at this moment recur to the constitutional definition of treason, or to so much thereof as relates to this case. "Treason against the United States shall consist only in levying war against them," not in making war, but in levying it. The whole question then turns on the meaning of that word, "levying." This word, however, the gentlemen on the other side have artfully dropped; as if conscious of its operation against them, they have entirely omitted to use it. We know that ours is a motley language, variegated and enriched by the plunder of many foreign stores. When we derive a word from the Greek, the Latin, or any other foreign language, living or dead, philologists have always thought it most safe and correct to go to the original language for the purpose of ascertaining the precise meaning of such word. "Levy," we are told by all our lexicographers, is a word of French origin. It is proper, therefore, that we should turn to the dictionary of that language to ascertain its true and real meaning; and I believe we shall not find that, when applied to war, it ever means to fight, as the gentlemen on the other side would have us to believe. Boyer's Dictionary is before me, sir, and I am the more encouraged to appeal to him, because in the Case of Bollman and Swartwout, your honor, in estimating the import of this very word, thought it not improper to refer to the authority of Doctor Johnson. "Lever," the verb active, signifies, according to Boyer, "to lift, heave, hold, or raise up." Under the verb he has no phrase applicable to our purpose; but under the substantive "levee," he has several. I will give you them all. "Levee d' un siege," the raising of a siege. "Levee des fruits," gathering of fruits, crop, harvest. "La levee du parlement Britannique," the rising or recess of the British parliament. "Levee, (collecte dê deniers,)" a levy-raising or gathering. "Levee de gens de guerre," levying, levy, or raising of soldiers. "Faire de levees de soldats," to levy or raise soldiers. So that when applied to fruits or taxes, it means gathering as well as raising. When applied to soldiers it means raising only, not gathering, assembling, or even bringing them together, but merely raising. Johnson takes both these meanings, as you mentioned in the

Case of Bollman and Swartwout; but in the original language, we see that levying, when applied to soldiers, means simply the raising them, without anything further. In military matters, "levying" and "raising," if Boyer may be trusted, are synonymous. But to ascertain still more satisfactorily the meaning of this word "levy," let us look to the source from which we have borrowed the whole definition of treason, the statute of 25 Edw. III. The statute is in Norman French, and in describing the treason of levying war, uses these words: "Si home leve de guerre, contre nostre seigneur le roy en son royalme." In a subsequent reign, I mean the factious and turbulent reign of Richard II., when the statute of Edward, although unrepealed, was forgotten, lost and buried under the billows of party rage and vengeance, it became at length necessary for parliament to interfere and break in pieces the engine of destructive treason; and in the 21st year of Richard II., a statute was passed which may be considered as a parliamentary construction of that of Edward III. In that statute, the treason of levying war is thus explained, "Celuy gue levy le people, and chevache en counter le roy à fair guerre deins son realme." Here the French verb, "leve," is the same as that used in the statute of Edward, with an unimportant orthographic variation; and here it is clearly contradistinguished from the actual war. The levy is of men and horses, for the purpose of making war; and the levy would have been complete, although the purpose had never been executed. I consider, therefore, the statute of Richard, as not only adding another authority to Boyer, to prove that the extent of the French verb "leve" when applied to soldiers goes no farther than the raising them; but I consider that statute, also, as a parliamentary exposition or glossary of the phrase "levy de guerre," in the statute of Edward. In this latter opinion I am supported by 1 Hale, P. C. 85, who, speaking of the statute of Richard, says: "These four points of treason" (settled by the parliament of Richard) "seem to be included within the St. 25 Edw. III. as to the matter of them, with these differences, viz: The forfeiture is extended further than it was formerly, namely to the forfeiture of estates tail and uses. 2. Whereas the ancient way of proceeding against commoners was by indictment and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. 3. But that wherein the principal inconvenience of this act lay was this: that whereas the statute of Edward the Third required an overt act to be laid in the indictment and proved in evidence, this act hath no such provision." These are all the differences that he makes between them. Hence it is clearly the opinion of Hale that the treason of levying war is materially the same in both statutes. For if the statute of Edward required actual war, hard knocks, bloody battle, to constitute treason, while that of Richard made the mere preparation for those purposes treason, would it have escaped such a mind as Hale's, more particularly when he was especially employed in discriminating between the two statutes, and marking the points of difference to the disadvantage of the statute of Richard? If nothing short of actual war will satisfy the statute of Edward, while that of Richard covers so much more ground as to comprehend the first act of recruiting, and to make it the treason, how can the former be said to include the latter? It might, with as much propriety, be said that a field of battle includes the country or kingdom within which it lies, or that the less includes the greater. Yet of this absurdity Hale hath been guilty, unless it be conceded that the statutes of Richard and of Edward are materially the same. If, in conformity of the opinion of Hale, this point be conceded, then it is indisputably clear and certain that the statute of Richard makes levying of war to consist in the preparations for that war, in the raising of men, horses, &c., for the purpose of making war; so, also, under the statute of Edward, levying war means the preparations for that war. And if this construction of the statute of Edward be admitted, we have but to remember that our definition of treason is borrowed from this statute, and to ask whether the same words, "levying war," in the English and American statutes mean the same thing.

Confiding in the candor of this investigation and the truth of the conclusion to which it has led me, I should myself have thought the mere enlistment of soldiers of itself an overt act of levying war. I should think such enlistment, too, sufficient to satisfy the reason of the statute of Edward, and consequently of our constitution and act of congress, in requiring an overt act to be proven.

Gentlemen may say that the statute of Richard II., by this construction, proves too much for my purpose; that it must be evident that the parliament were dissatisfied with the generality of the statute of Edward, and intended by that of Richard to restrain that generality and narrow the ground of constructive treason, but that this construction would extend it, and instead of producing the intended salutary effects, would augment the dangers which it was intended to avert. But the language of the act, which is plain and most explicit, affords a satisfactory answer to this argument. It is exclusive of all possible doubts, by making the act of war consist in visible external preparation. The term "levy" in some lexicons means simply "to raise;" and if this plain sense and most natural meaning were to be adopted, there could, then, be no doubt, the prevention of which is certainly one of the benefits intended by the act. But it appears to me that it is, also, a reasonable construction; that it is all that reason can require. What is the reason avowed by all the books for requiring proof of an overt act to constitute treason? Every man knows that the moral turpitude consists

in the mind and intention. Why, then, do we require proof of an act? It is because we cannot otherwise discover the intention. It is because the secret intentions of the mind lie beyond the ken of mortal sight. They can be known only to the man himself and to that Being whose eye can pierce the gloom of midnight and the still deeper gloom that shrouds the traitor's heart. To his fellow men, those intentions can be manifested only by some external or overt act. I consider the phrase "overt act" as intended to be in contrast with "secret intention;" but whenever this secret intention ripens and breaks out into an act of which the human senses can take cognizance, I consider the reason of the law as being satisfied. We are, then, relieved from the necessity of prying into and guessing at the secrets of the heart. It is not pretended that any case ever occurred to contradict this idea, until the case which is reported by Ventris, which hath been said by some modern English writer, and pronounced by your honor, to settle the principle that the mere enlistment of soldiers is not sufficient to constitute the levying of war. Permit me, with the utmost deference and respect for your honor, to examine that case, and see whether it justify a conclusion so broad. That case, it is to be observed, is adjudged under the statute of 25 Edw. III. Now it requires but to adopt for a moment the idea which I have shown to be sanctioned by Lord Hale, that the statute of Richard explains by a periphrasis the more condensed definition of that of Edward, to perceive the reasoning and whole scope of the case in Ventris. "If a man," says the statute of Edward, "shall levy war against our lord the king in his realm;" "or he," says the statute of Richard, "who levies men and horses against the king, to make war in his realm." The levy, then, is a totally different thing from the war. The levy is the preparation; the war is the purpose; but it is "to make war in his realm." Wheresoever, then, the levy is made, the purpose must be to make war in the realm. Hence it is very clear that though the levying should be within the realm, the statute would not be satisfied, unless the purpose, also, were to make war within the realm. It is upon this latter point alone, upon the destination, that the case in Ventris turns, and not upon the scene of enlistment, nor upon the insufficiency of the fact of enlistment. The case in Ventris is that of Patrick Harding (volume 2, pp. 315, 316). The charge in the indictment is conspiring the death of the king and queen, William and Mary; and the overt act laid is "levying war by raising divers soldiers and men, armed and to be armed, (armatos et armaturos,) et milites sic ut præfertur levatos extra hoc regnum Angliæ misit, et iter secum suscipere procuravit ad sese jungendos aliis hostibus," &c. The special verdict finds that the prisoner did list, hire, raise and procure sixteen men, subjects of this kingdom, at the time, &c., and those sixteen men so listed, hired, raised and procured, did send out of this kingdom into the kingdom of France to assist and aid the French king, &c. Upon this special verdict found, the lord chief justice, Justice Gregory, and Justice Ventris, who were then present at the sessions, conceived some doubt; for they were of opinion that it did not come within the clause of Edw. III. of levying war; for that clause is, if a man levy war against our sovereign lord the king in his realm, and by the matter found in the special verdict it appears that these men were listed and sent beyond sea to aid the French king. In the original report, the words "in his realm" are printed in italics, as marking the particular part of the statute on which the opinion rested. But suppose the purposed war had been within the realm; is not the implication from the reasoning of the court irresistible, that the enlistment would have been a sufficient overt act of levying? Is it not clear that the court in this case considered the statute of Edward as explained by that of Richard II.? that it distinguished between the levy and the war, and required, according to the express letter of the second statute, that not only the preparation but the proposed war should be within the realm? But it has been said that if the enlistment had been a sufficient overt act of levying war, then war had been levied within the realm. But this is confounding the levy with the war, the means with the end, the preparation with the purpose. It is losing sight of the requisition of the statute, that not the levying merely, but the intended war shall be within the realm. Besides, when the court avows the reason of its opinion; when it declares it to consist, not in the insufficiency of the fact of preparation, but in the fact that the proposed war was to be out of the realm with what propriety can it be argued that its opinion rested not on the reason which it does itself avow, but on one which it does not avow, and which it disapproves as far as it can do it by implication? If it were immaterial where the war was to be, if the enlistment of men were in itself insufficient as an overt act of levying war, why did not the court take this ground at once, and say that the mere enlistment of men was not an overt act of levying war? The answer is obvious; it was because it considered the statute as requiring that the proposed war should be within the realm; whereas the war, as found by the jury, was intended to be out of the realm; and to my judgment the inference is equally obvious, that if the war had been found to be intended within the realm, the court would have had no doubt that the war had been levied by the enlistment. The case in Ventris, therefore, is so far from warranting the conclusion that the mere enlistment is not a sufficient overt act of levying war, that in my conception it warrants the conclusion that it is a sufficient act. And if the case in Ventris do not jus-

tify the doctrine that enlistment is insufficient as an overt act, I defy the gentlemen to produce a case not dependent on that which does warrant it.

Mr. Wirt then went into a critical examination of the authorities cited on the other side to prove that force and military array are necessary to constitute the act of levying war, and insisted that they did not sustain the position assumed by counsel for the defence. He dwelt upon the decision of the supreme court in the Case of Bollman and Swartwout, and maintained that the evidence proved such a treasonable assemblage on Blennerhassett's Island, as, according to that opinion, clearly amounted to levying war. He also insisted on the position, that whether an overt act had been proved was a question of fact which must be submitted to the jury, and decided by them under the instructions of the court.

Mr. Hay. A large portion of Mr. Hay's argument was devoted to the question, whether the motion to arrest the evidence was one which, on principle and precedent, could be entertained by the court. He contended that no precedent could be found to justify such practice, either English or American. He insisted that the motion called upon the court to usurp powers belonging exclusively to the jury, by deciding upon the facts of the case. To wrest from the jury the decision of facts in a criminal prosecution, he said, was a most dangerous proposition, replete with incalculable mischief. He felt infinitely more solicitude about the preservation of this principle in all its purity, than for the correct construction of constitutional treason, as contradistinguished from constructive or oppressive treason.

In answer to arguments on the other side, Mr. Hay said the counsel all call aloud for an open deed of war. But neither the constitution nor the law speak of an overt act of war. They speak of levying war. There was a real, essential difference between an open deed of war and an overt act of levying war. An open deed of levying war is an assemblage of troops. If you go beyond that line, if these troops employ force or fight a battle, it is folly to call it an overt act of levying war; it is an open act of war previously levied. Is not this distinction, he asked, plain to the mind of every man of common sense? and is it not according to the obvious meaning of the constitution? Why, then, should counsel call so loudly and vehemently for open deeds of war, when they must have known that the overt act of treason consisted in levying war against the United States, and not in making it?

In reference to the position that before the accused could be held answerable for acts of an accessorial nature, the guilt of the principals must be proved by a record of their conviction, Mr. Hay said there was no law to warrant the application of the rule to this case. The real doctrine was, that if a man be indicted as an accessory, he is at liberty to state before his trial, when the indictment is called, that he does not choose to be tried till the principal be convicted. The judge knows that his objection is valid, and he suspends the prosecution till the principal be convicted; either confining him in prison or bailing him till his trial, according to the circumstances of the case. The accused may choose to be tried, and waive the right of suspending the trial. It never was in the power of the accessory, after he had been arraigned and plead not guilty to the indictment without objection, when he found that the testimony bore heavily upon him, then to call for the record of his principal's conviction as a preliminary point. He cited 1 Hale, P. C. 623. He contended that this right to call for the record of the conviction of the principal only existed in case of an accessory indicted as an accessory; and could not exist in this case, because the accused was not charged as an accessory, but as a principal.

In reply to the position that inasmuch as Col. Burr was not present when and where the pretended overt act was charged to have been committed, he could be guilty, if at all, only in an accessorial capacity, Mr. Hay said: Mr. Wickham says that his proposition, that Burr is an accessory and not a principal, is deduced from the constitution of the United States, their laws, and the laws of England. His first position was, that there is no treason in the United States but that which is defined by the constitution. Agreed. This is sound doctrine.

His next position was, that no man can be punished but he who does the act thus defined. This is conceded also. But when he says that this act of levying war against the United States cannot be performed but by a person present on the spot where the offence is alleged to be committed, I deny the correctness of the position, and aver that it is not founded in sound sense, or in the law of this country or of Great Britain. A man may levy war without being present with the troops where the offence is alleged to be committed, or even without making actual war at all. It is unnecessary to press the distinction between levying war and war itself. The common sense of mankind has decided this question. The man who levies war is he who projects the plan, provides the means, causes soldiers to be enlisted, and arms and other necessaries to be prepared, and directs and superintends the whole operation. He may sometimes be also master of means sufficient for the subversion of the liberty and happiness of a whole people. What would be the course of conduct which a man, at the head of a conspiracy to subvert the government of his country, and to raise himself on its ruins, would pursue, you may easily judge. Supposing him to be a man whose understanding was equal to his ambition, he would proportion the means to the end. He would use activity

and enterprise. He would be confined to no particular scene of operations. He would be here and there and at every place, where and when it would be necessary to prepare for the accomplishment of his great object. He might give directions to different bodies of troops to meet him at given times and places, while in the intermediate time he might make arrangements at different places to prevent disappointment, and to secure final and ample success. Is it necessary, according to common sense, that a leader should be present at the very moment when an assemblage of part of his soldiers is to meet at a particular place in consequence of his previous orders? There may be twenty different assemblages. If he be a man of talents, intelligence, and activity, he may have formed his designs so wisely and concerted his measures so skilfully, as to have fifty, or five hundred, or even a thousand different assemblages and subordinate plans conducing to one common end, all going on at the same time without his actual presence. He is not present at any one place, but he directs and commands everywhere, and vigilantly waits for a favorable moment till he can strike a final and decisive blow. On principles of common sense it is not essential, therefore, that the commander should be present at any preconcerted assemblage of his troops. I repeat, that the common understanding of mankind has decided this question. We find (and every expression used here may be soon verified) that George III. levies war against the United States three thousand miles from us. It is he who declares the war, by whose directions the troops are raised and employed. It is he who levies the war, and not his subjects, who fight the battles; his generals and soldiers, who come hither for slaughter and murder, they make the war upon us, but they do not levy it. If the subjects of the king of Great Britain were to levy war upon this country, they would not be entitled to be considered as public enemies, but robbers, pirates, and murderers, according to the acts which they would commit; and, therefore, instead of being treated as public enemies, they would be regarded as individual offenders who had perpetrated those crimes, and proceeded against as such. But as he levies the war, they become public enemies in consequence thereof. A man may, on principles of common sense, not only levy war, but make war without being present at the place where a battle is fought. Bonaparte was not actually on the field at the battle of Austerlitz. I do not know that he was in view of the line of battle. He was in the rear with the body of reserve; yet the victory gained on that memorable day was gained by him, because he stationed the troops, directed their movements, and stood ready to give assistance; and the glory of that victory, so decisive of the destiny of Europe, was his. He not only levied but made war, without being personally present.

Such is the case here: admit it to be true that Burr was not on the island, yet the men who went, met there by his procurement and direction; they leave it by his direction; and he afterwards joins them, and takes the command. So that in coming to, remaining on, and quitting the island, they act in exact obedience to his command. If the assemblage on Blennerhassett's Island were an overt act of levying war, the person who procured that assemblage, by whom its movements to and from the island were directed, is emphatically guilty of levying war against the United States. Let us pursue this argument a little further; suppose that Burr had never been at the spot at all, but he knows that his troops are there. He apprehends that an attack is to be made on them; and to repel it, he dispatches more men, arms, ammunition, provisions, and everything necessary for their defence, with orders to resist, and instructions how to conduct the battle which is actually fought. The attack is made and repelled. Thousands fall in the battle. Would he not, then, levy war? Would it be contended by gentlemen that by the constitution of the United States, Aaron Burr, not having been personally present when this overt act of his procurement was committed, was not a principal but an accessory? that his soldiers are principals in the treason, but that he is not guilty? that the constitution requires the actual presence of the commander-in-chief whenever a battle is fought by any part of his army, or wherever an attack is made or repelled? If he would be guilty of levying war, what becomes of the doctrine which requires his presence? The constitution requires his presence nowhere.

To prove, however, the fallacy of this doctrine, let us examine the result. He is innocent and safe. They are guilty and punished. Is it possible that the human mind can be so perplexed by learning and so misled by ingenuity, so totally bereaved of all its powers, as to adopt a conclusion like this? to pronounce that the great projector, the prime mover of the whole conspiracy and plot, is constitutionally safe, while his deluded followers are to be hanged? Yet this is the language and this the doctrine of Mr. Wickham. He would make as little ceremony with Blennerhassett as Burr said he would use to Miranda. As to Miranda, said he, "We will hang Miranda." It appears to me, sir, that that construction of the constitution which leads to such a conclusion, which shall exculpate Burr and hang Blennerhassett, which leaves the principal to destroy the agent, is not only repugnant to common sense but to every dictate of feeling and humanity. There is sufficient reason to deplore the misconduct and crime of Blennerhassett. He has certainly done wrong and offended against the laws of his country grievously; but I hope to be excused for

declaring that there is no more comparison between Blennerhassett and Burr, as to criminality, than there is between the breeze which gently shakes the leaves and the storm which desolates the earth. If this construction be not founded in reason, let us call for the law which sanctions the doctrine for which he contends. If we look at home we shall find that this question has been decided already by our own judges. The supreme court of the United States has solemnly decided it, in direct opposition to what gentlemen have insisted to be the law. But they say that it ought not to be regarded, because it was an extra-judicial decision. Mr. Wickham, finding it inconvenient to prove it, pretends to anticipate our admission of it, and with his usual dexterity takes it for granted that he has nothing to do but to follow up that supposed concession. Let us examine the subject and see whether it be extra-judicial or not. Bollman and Swartwout, who were never at Blennerhassett's Island or with the troops, were before the court on suspicion of high treason. A motion was made to commit them on this charge. Having been brought before the court on a writ of habeas corpus, a motion was made by their counsel to discharge them. Those cases came first before the circuit court for the county of Washington, and the records of that court, containing the orders by which they were committed on the charge of treason in levying war against the United States, and the testimony on which the commitment was made, were brought before the supreme court. I do not know by whom they were defended in that court or in the circuit court. But I take it for granted when I turn my eyes to that part of the world that they were defended with ability and zeal. They were not present on Blennerhassett's Island, nor with any part of the forces of Colonel Burr; and though not present they were charged with treason. I certainly am at liberty to suppose, whoever may have been their counsel, that they were defended with great zeal and ability, and that they were defended on this ground. From the extreme zeal displayed in the course of this defence, we may infer what defence was made for those persons; and if so, the decision of the supreme court was on the very point, and must be conclusive authority in this case. But let us suppose that this was not the point immediately in discussion nor before the court, and that consequently the decision may, strictly speaking, be considered as extra-judicial. Still I am at liberty to say that this opinion of the supreme court is entitled to the highest degree of consideration and respect, and ought not to be departed from but for reasons very different in principle and effect from those used on the part of the counsel for the prisoner.

The law as expounded by the judges of this country not suiting Mr. Wickham, he goes to Great Britain for his law, and brings with him the common law of that country, to show that the accused is only an accessory, and therefore not guilty. Let us see what benefit he derives from this voyage and importation of the common law. The very instant he opens the law-book he finds that the common law declares, "in treason all are principals." The very system to which he resorts presents this doctrine at once to him: that in treason all persons in any manner concerned, whether present or absent, are principals. How is this dilemma removed? The gentleman will not rely on this doctrine, and he turns to us with an exulting countenance and exclaims, "the common law is not in force in this country under the government of the United States; you must be governed by the constitution only. The gentleman will not contradict me." He well knew that I would not controvert the position as to the non-existence of the common law. He knew that this was a point agreed. The common law is not in force in the United States. There is no treason in the United States but that defined by the constitution; and he who was not leagued in the conspiracy and performed a part in it, whatever else he may have done, cannot be punished. In what manner does he avail himself of this concession that we do not claim the aid of the common law? That very instant he takes it up for his own use. Because we have disclaimed and thrown it by, he takes it up for his own exclusive benefit. "After what you have said, you cannot resort to the common law which says that all are principals; but I will resort to some other parts of the common law, and avail myself of them." How does he avail himself of them? After having stated that it was not in force, he resorts to it and relies on the common law distinction of principals and accessories; a principal being the actor or person present aiding and abetting the offence; an accessory an absent person who procures and counsels or receives and comforts an offender. Is there not in this reasoning, which disclaims and uses the same authority at once, a temerity which defies reflection and amounts to desperation? Is it not a desperate construction of the case? Would a man of Mr. Wickham's talents contend in one breath that the common law is not in force in this country, and yet in the next make it the principal basis of his argument, unless it were a desperate case? Desperate cases require desperate efforts. He avails himself of the common law to borrow from it distinctions which he endeavors to fix without reason or propriety on the constitution, which he says we wish to render merely a dead letter. It is a distinction borrowed from the common law, which says that a principal is he who is the actor or is present at the perpetration of the act, aiding and abetting, and declares an accessory to be a person who is absent, but procures or com-

mands or counsels the act to be done. This is the distinction in Great Britain between principals and accessories founded on the common law. He insists that the prisoner, not having been present at the commission of the act, is merely an accessory; that an accessory is not punishable under the constitution of the United States; and therefore that the prisoner is not punishable at all.

If the common law be not in force, the gentleman has no more right to resort to it, or borrow any distinctions from it, than he has to borrow a distinction from the civil law, the Gentoo law, the Chinese law, or any other law in the world. I conceive that Mr. Wickham has himself furnished us with a conclusive reason why we should not resort to the common law for these definitions. Before I mention that reason, permit me to remark that there is something extraordinary and humiliating in this argument respecting the correct construction of the constitution. Those who framed it have used plain words, such as a man of the most ordinary capacity, as well as a man of the most enlightened mind can understand; and yet we are not to depend on plain construction, such as is obvious to every man of common understanding, but to go to England to resort to a system declared not to be in force, to find out the true meaning! It appears to me, sir, to be as degrading as it is absurd, to resort to a foreign system not in force in order to introduce a distinction which does not belong to it.

I have said that Mr. Wickham had himself furnished the reason why we should not resort to the common law. The constitution, he says, must be our guide; and its construction must be governed by rules of moral right, and not by artificial rules. The only reason he gives for this is, that the constitution is a compact and not a law. It does not fully justify his inference. It is both a compact and a law. It may be considered as a rule prescribed by a superior, or as founded in compact between parties. The fair construction is, that so far as it operates on states, it is a compact between those states, equally obligatory on them all; but as far as it applies to individuals it is a law prescribed by the supreme power in the state (the people in convention) which every citizen is bound to obey; and it is declared by the instrument itself to be the supreme law of the land. It is not very material in what light it is to be considered; whether as a compact or law, or both; but this shows the construction most consonant to common sense, and that when the question is put in that way there is no difficulty. But let us avail ourselves of Mr. Wickham's golden key for unlocking the door of the constitution. By rules of moral right, I suppose he means that exposition which will give us the intention, if the words used by its framers will bear it. Knowing the character, mental acuteness, talents, and intellectual powers of those who framed that constitution, it must be presumed not only that they intended to suppress the mischief and advance the remedy in every instance, but that they expressed their meaning in such a manner that if the constitution be fairly expounded that object will certainly be attained. I will ask whether it is to be supposed that their intention was that a traitor must be on the spot while his troops slaughtered their fellow-citizens, or else that he could not be punished. That the accessory should pass with impunity while the humble instruments of his ambition should be punished. Suppose the question put to the enlightened men who framed that constitution. Suppose they were asked at that time "whether it be your intention to exclude from punishment the prime mover and projector of a treasonable plot, who shall by himself or his agents enlist and assemble troops and procure everything conducive to the overt act, if he be not present when the overt act is performed. Do you intend that such a contriver and leader shall not be a principal traitor, or punished at all, but that the humble and deluded instruments of his ambition shall be punished?" They would all have unanimously answered. "This construction never will be adopted by any intelligent court. It will be the duty of the court to adopt the principle which will prevent the mischief; and if it be urged that such a projector and leader being absent does not levy war, is only an accessory, and not being expressly mentioned, as such is not punishable, the court will not be at all embarrassed by su h an argument, only calculated to mislead." They could not have answered otherwise. Whence could they derive a contrary idea? as they must have intended the suppression of the mischief. I very cordially agree with Mr. Wickham, that in the exposition of the constitution artificial rules ought not to be admitted. If we are to be governed by the rules of moral right and to exclude artificial rules, then we must be governed by the general principles of reason and justice, and not by rules borrowed from the most complicated of all artificial systems on the face of the earth, the common law, where the parts are artfully constructed to suit each other, and which have no sort of reference to this country. The force of this remark is illustrated very completely in this very case. In Great Britain the principal is the perpetrator or aider who is present. The accessory is he who, not being present, procures, counsels, &c. It is manifest that in Great Britain it is immaterial where you draw the line between the principal and the accessory before the fact, because no mischief can ensue, for all the ground not covered by the principal is occupied by the accessory; and what is not covered by the accessory is occupied by the principal. All persons concerned in the perpetration of the offence and in the acts which led to that perpetration are amenable

to the laws and justice of their country. The definition, therefore, of a principal is manifestly connected with that of an accessory: both together taking in the guilt of the transaction and the guilt that led to it.

But how does the introduction of the distinction operate in this country? The gentleman tells us that those only are principals who are present at the perpetration of an offence; that all others concerned are accessories; and that accessories are not punishable by the constitution; so that he circumscribes the guilt of a principal, and which only is punishable within very narrow limits. The result of his exposition is that the constitution does not operate on the very persons whom it was intended to affect, and the most atrocious and dangerous offenders escape unpunished. Can this be correct? In England the definition of principal depends on that of accessory, and that of an accessory on that of a principal. But Mr. Wickham wishes us to borrow the definition from Great Britain, in order to cut off one-half of the offenders. He who counsels, commands, or procures treason to be committed is to escape with impunity. It is very clear that if Mr. Wickham's doctrine be adopted here, to have its full operation, no man can be indicted as an accessory in this country. He cannot be charged as an accessory to levying war. He must levy it. If you take every person who is an accessory, that is, who is guilty of what is termed an accessorial treason in Great Britain, to be an accessory here, you trample on the constitution and exempt from punishment all except those who are present at the scene of action. These, though infinitely less guilty, the humble and deluded followers, are to be punished, while their absent leaders escape; and the gentleman is the very man by whose doctrines it is to be prostrated to the earth.

The doctrine for which I contend appears to me to be infinitely more reasonable. It will not produce the punishment of all who are guilty either as principals or accessories, using those words in the English acceptation. It will extend to those only who are leagued in the general conspiracy and take a part in it. It does not extend to him who only conspires, but takes no part; who avails himself of the locus pœnitentiæ and turns from the iniquity of those men with whom he was leagued, and is a mere traitor in design, because he has performed no act. Nor will it extend to him who does what is termed in Great Britain an accessorial act after the fact. So that doing an act only without being leagued in or a party to the design, or designing without an act, or giving food or lodgings to the conspirators, knowing their design, but being no party to it, would not be embraced by it. He who seeing this party going down to New Orleans, but had known nothing of them before, gave them half a dozen barrels of whisky, would not be a traitor; because though he did perform a minute act, he was not leagued in the general conspiracy, nor was the act done with a traitorous design. I place it precisely on the ground taken by the supreme court. Is not this reasonable? Is there any distinction between the guilt of the persons embraced by this construction of the constitution? Was not Aaron Burr as guilty as his associates on the island assembled by his direction? Is there any difference in England between the guilt of the principal and the accessory before the fact? They are equally punishable with death. The accessory in Great Britain is regarded as equally guilty with the principal.

By making the question presented by the constitution and the act of congress the only question to be submitted to the jury, (that is, did the accused levy war?) we get clear of all the subtilties and refinements of the common law, which require an understanding infinitely more acute than mine to state or even to comprehend them. I do not wish to be bewildered in this labyrinth of law. I have seen gentlemen, in merely attempting to argue, perfectly bewildered in a chaos which they themselves had created. I think it will be fortunate for this country if we expound the constitution by the rules of common sense, without the distinctions of the common law There is too much subtilty, too much refinement, too much complexity in it for a practical system. A man may devote twenty or thirty years to its study, and not be able to comprehend it completely. I will venture to say that he will misinterpret some parts of it, however learned he may be. Even the gentleman's argument was so abstruse from the subtilties and niceties derived from that system, that not more than half a dozen among us were able to understand the direct scope of it. Let us, then, have a system of our own, adapted to the situation, habits and feelings of the country, without the absurdities, the trash and rubbish of the common law.

I said that the common law was not in force. This may require some explanation. I should not deem it necessary to make it, if the gentlemen on the other side had rightly understood the extent of my admission on the subject. But I think it necessary to remove any doubts and prevent misconceptions. The court will observe that in civil cases congress has made a provision for this defect by the act of 1789. But this does not extend to criminal cases by its very terms. How far certain parts may have been adopted by the use of certain technical expressions is an important question requiring no decision now. Certain parts of it have been taken into use, by the use of certain technical phrases in the constitution and some acts of congress. It is the opinion of some very able men, who have combated the doctrine that the common law is in force, that some particular parts of it have a sanction from the constitution as far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government, and that certain other

parts thereof are and may be adopted by congress as necessary and proper for carrying into execution the powers expressly delegated. This idea is founded on the report of the committee of the Virginia assembly, in the session of 1799–1800, written by Mr. Madison, aided by some other able men. Beyond this limitation the common law has not been adopted under the government of the United States. I have said that certain parts of it have been adopted by the use of certain technical phrases in the constitution. For instance, it provides "that the trial of all crimes (except in cases of impeachment) shall be by jury." Every person indicted must be tried by a jury. The trial by jury is a technical phrase of the common law. By its insertion in the constitution, that part of the common law which prescribes the number, the unanimity of the jury and the right of challenge is adopted. The constitution does not say of what number a jury shall consist; whether of twelve, thirteen, or twenty-three, or any other number. But according to the practical construction of the constitution, we take it to mean twelve men; and that the jury must be unanimous in the opinion which they pronounce. And whence do we get this order but from the word "trial"? Whence does the accused get the right to a peremptory challenge or a challenge for cause? They spring from the word "jury" in the constitution. The act of congress does not give him the right of peremptorily challenging thirty-five. It says that if any person indicted of treason shall challenge peremptorily above the number of thirty-five of the jury, the court shall proceed to the trial of the person so challenging as if he had pleaded not guilty, and render judgment accordingly, from which the right of challenging thirty-five or a certain number is implied; and this act is itself founded on the words of the constitution, "trial by jury." There is in that law not one word on the subject of a challenge for cause; and yet it is deduced from the practical construction of the common law that he has a right to challenge for cause. The whole of this doctrine and all these rights are deduced from those words in the constitution.

I said that the question whether a man were principal or not was a question of law and fact which the jury must decide; and the question whether the accused be guilty in the first or second degree is a question of law and fact which the jury must also decide. The question, "who is a principal in the second degree?" is a question of law on which the court may instruct the jury. The court may decide that question with reference to any particular case coming before it; but the question, whether the person charged as a principal be so, is a question compounded of law and fact. The question here is, not who is a principal, but whether the accused, who stands charged as such, be so in his conduct. It is compounded of fact and law, and to be decided by the jury, subject to be informed by the court as to the law.

In the illustration of this doctrine the court may say that he is a principal in the first degree, or actor or principal in the second degree, present, aiding and abetting; but this presence need not be within sight or hearing; for if a party be engaged in the same enterprise with the actors, and stationed where he can give them aid or protection, he is a principal. Of all these circumstances the jury must judge according to the evidence, and apply the law as they find the facts proved. The whole evidence must, therefore, go before them; and they may decide on the law as well as the fact. Therefore, whether he contend that he is merely an accessory, and not punishable, or only a principal in the second degree, and therefore not punishable until after the conviction of the principal in the first degree, yet as we charge him with levying war, we have a right to introduce all our evidence, and to call on the jury to decide all the questions resulting from that evidence.

In reply to the argument that the indictment should charge the facts specially, as they were intended to be proved, Mr. Hay said: Let us ask in what situation we should be, if we had done what Mr. Wickham says we ought to have done? If we had stated in the indictment that he had levied war, but that he was absent at the time when he levied it? It would, indeed, be a strange and unprecedented indictment which should state that he levied war on Blennerhassett's Island, (which implies presence,) but that he was not present when he did the act on it. It would have been as much as to say that he was present, and yet not present, which would be an absurdity in terms. How could the fact have been stated? I believe it would puzzle the gentleman to draw such an indictment. I believe there never was an indictment, from the beginning of the world to this day, which stated that the accused was not present at the time of committing the act. We say that he was legally, or in the estimation of the law, present and concerned in the act of treason. If we had stated that he was absent, it would have excluded his legal as well as actual presence. How could we have got over this difficulty? If we had stated the fact as it appears, that though not actually, he was constructively present, we must have given a detail of the evidence, the most minute and difficult that could be conceived; which is utterly proscribed by practice and propriety, as several authorities which I have already referred to prove; and if we had so stated it, gentlemen would most probably have loudly complained of it as irregular and extraordinary. An indictment cannot be framed by the mind of mortal man charging the actor to be absent without involving the absurdities or inconveniences which I have stated. Such a detail of the evidence is extremely difficult to obtain and inconvenient to state, and has nev-

er been required. No more is requisite than what we have stated: that the accused and a number of men met together for the purpose of levying war against the United States, and did levy it on Blennerhassett's Island. These are the principles on which I contend that his third objection could not be sustained even in England. The idea that the indictment should state him to have been absent was not law. An accessory before the fact, who was never on the spot, may be convicted under an indictment charging him as the actual perpetrator of the offence. He cited 1 Hale, P. C. 214, where it is said that "if many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact, upon that counselling or conspiracy, it is treason in all; and they may be indicted for counterfeiting generally within this statute, for, in such case, in treason all are principals." Also, page 238: "Though the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessory, yet this much he partakes of an accessory, that his indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is a procurer, counsellor, or consenter." He also cited 1 East, P. C. 126, 127, where the same doctrine is laid down in nearly the same words.

Mr. Hay closed with the following remarks: It was said by Mr. Wickham that if the doctrine for which we contend could be sanctioned by the court, a precedent would be established which would be fatal to the liberty and happiness of the people of this country; that it would be more dangerous than any ever introduced in any country. He seems to be alarmed at our temerity, and endeavors to persuade us to desist from pursuing the object we have in view. He admonishes us that the principles and doctrine which we advocate to maintain the prosecution are totally subversive of public liberty. The pathetic and animated description which the gentleman gave us of anticipated calamities, and the fervor of his zeal in their deprecation, had a considerable effect on my mind, and induced me to examine minutely whether they would lead to those fatal consequences which he so eloquently depicted. He trembles for his country, for himself and his posterity, lest we should succeed. I have looked into the subject according to my best ability and judgment, and endeavored to discover whether any great evil or mischief would ensue from the principles which we have advocated, or the measures we have recommended. I, too, am a citizen of this country and the father of children, for whose happiness and welfare I feel a solicitude as lively and affectionate as any parent can feel. To the true happiness of my country, I hope, I know, that I am sincerely and ardently attached. But I see no danger. I apprehend none for myself or my posterity. I am perfectly willing to risk my own life, liberty, and happiness, and those of my posterity, on the propriety of the principles which we recommend. Let them avoid entering into traitorous conspiracies and designs fatal to the liberty and happiness of their fellow-citizens; let them avoid traitorous assemblies, overt acts of levying war, and they will be safe. They cannot be hurt. No individual need apprehend any danger from accusations of treason, either to himself or his posterity, if he and they be innocent. Before any man's life can be in jeopardy, he must not only be concerned in the unnatural and ungrateful scheme of subverting the government of his country, but he must take one active step to carry it into effect. It is unnecessary to mention the fate which any man deserves who attempts to destroy such a government as ours, or to destroy the tranquility and happiness of the people. Let every man pursue the path of integrity and patriotism; let him avoid schemes of unprincipled ambition; and he will not even be suspected. I hope and believe there is no danger on this score. The gentleman made another remark, to which I beg leave to call the attention of the court. I appeal to them whether the principles on which we have gone warranted his injurious anticipations. Without waiting to hear one word in support of the doctrines which we professed to maintain, he said that we must contend, before we could succeed in the prosecution, that the constitution was a dead letter. Have we done so? Have we not advocated the constitution in all its extent? Have we not maintained it in the most perfect purity? Have we not uniformly contended for its inviolability in every respect? Sir, we have contended for that construction which can alone save it from violation, and give it stability and permanence. Yet the gentleman said that we could not oppose his argument without contending that the constitution was a dead letter! The gentleman knows that he was incorrect. I would agree to die ten thousand times over before I would dare to advance so horrible a proposition. It was the language of zeal, mistaken zeal, uttered in the warmth of debate. It was a spark of momentary irritation which is common to that gentleman with most other men, but inconsistent with his usual sentiments of politeness and friendship, which, I hope, now have resumed their place in his breast. I do not wish to hurt his feelings; but I must add that he went still further. He stated that if we opposed him, we must adopt the doctrine established by the cruel Jeffries, and apply it against the accused, not the doctrine of the execrable Coke, but of the bloodthirsty Jeffries. Have we quoted his opinions, resorted to his authority, or advocated his principles? Sir, I never did, I never will, I never can advocate opinions and principles which I abhor; and I firmly and cordially

unite in handing down the name of Jeffries with my execration to all posterity. Let that name be consigned to merited and eternal infamy. No man holds it in greater detestation and abhorrence than I do. Jeffries, the disgrace of the English bench, whose name is not mentioned even in that country but to be despised, will never be spoken of in this country but in terms of the deepest reproach.

Sir, we have never gone one step out of the right path, as far as we could trace it. We have confined ourselves within the fair exposition of the constitution of our country, according to our several capacities. I may be mistaken; but I have heard nothing yet to induce me to think that my exposition of the constitution and laws is incorrect. I have not stated a single fact which I did not believe to be true, nor urged a single argument which has not operated conviction on my own mind. Nor have the great and persevering exertions of the counsel of the accused, with all the splendor of their talents and the depth of their researches, enabled them to advance a single principle of defence which, in my estimation, hath not been amply refuted.

With this view of the subject, and believing the liberty, prosperity, and happiness of the people to be strongly connected with the decision of this case, I cannot conclude without expressing my hope that the motion will be rejected; that according to the opinion of this court on a late occasion, they will not stop the prosecution, but permit us to introduce the rest of our witnesses, in order to enable the jury to decide upon the fact coupled with the intention.

The following is a brief extract from Mr. Lee's compact and vigorous address:

Charles Lee. The second position is, that the presence of the party accused at the scene of action is, by the constitution of the United States, indispensably necessary to make him guilty of the fact of levying war. In this case we lay down the broad doctrine: that in this country there is no treason but under the constitution; that consequently there is no common law treason. When there is no other than the constitutional treason, I should suppose that this could hardly be a question, because we read in the constitution the word "only," which excludes everything from being treason but what the constitution says is treason: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." To advise levying war is in its essence and nature different from levying war. The constitution says it shall consist only in levying it; the other branch, of adhering to their enemies, &c., not being at all in question. To advise or procure levying of war is clearly distinct from levying it. Every person who can read has only to open the book containing the constitution, and he reads that levying war shall be treason only. Of course, by the adoption of this strong negative word, "only," it says, that advising to levy war shall not be treason. But gentlemen tell us that at common law advising to levy war is treason, and that there are no accessories in treason. We answer, that our constitution is in derogation and abridgement of the common law, not in affirmance of it; that it excludes entirely all common law treasons; all treasons whatsoever except the two instances specified. The common law of England is not in force on any subject under the constitution of the United States. If advising to levy war be a common law treason, (that is, a treason created by the common law,) and the common law have no force in this country, how can the common law be said to have created this treason in any court of the United States? Gentlemen admit that the common law as a general system has no force here. According to the opinion of Judge Chase, there can be no crime of which any courts of the United States can take cognizance unless it be created by an act of congress, and expressly authorized by the constitution, and the constitution has never adopted that common law doctrine which says that accessories in treason shall be considered as traitors. If it can be shown, let it be shown that the constitution has adopted this doctrine of accessories. It is said that it is impliedly adopted. This doctrine of implication I trust will not be countenanced by this court. I hope to be excused for repeating, that the constitution, touching the crime of treason, is in abridgement, not in affirmance of the common law. It takes its ground independently of the common law. The statute of 25 Edw. III., from which the words of the constitution are taken, is different from it. There are many other treasons at common law which remain in force there, and which that statute recognizes; whereas there are adopted into our constitution only these two specific treasons, with negative words excluding the possibility of any other. An accessorial treason is a common law treason in its own nature. It exists in England because the common law exists there; but it does not exist here, because treason consists only in levying war. If by the common law doctrine accessories be traitors, the same consequence does not follow in this country that does in England. This crime, which is to consist only of levying war and adhering to the enemies of the country, is punishable by law according to the discretion of congress, who may punish it in whatever way they may think proper; but the powers of congress have not yet been exercised over it. Whether it be through inadvertence or otherwise, they have hitherto omitted to punish accessories, except in an inconsiderable degree, as to those after the fact, who are rescuers of persons convicted of or committed for treason. This court has nothing to do

with it. It would seem very strange to the ear of an American to hear that a man might be guilty at an after day; that after the cessation of a rebellion a man may be guilty of an act of war in that rebellion; that after the war has ceased there may be an act of levying war. Yet this part of the English law the constitution has completely excluded. By the common law this crime may be committed after the war has completely ceased, by receiving or giving comfort to a party who had been engaged in it. Treason might be committed on this day, in this place, in relation to some persons who had committed treason in person in the insurrection of 1793 or 1798. This common law doctrine I consider as being cut up by the constitution. If one common law treason be cut up, all are cut up; there is no common law treason. It is only by construction and deduction that any common law treason can be admitted. If one constructive treason be admitted, all may enter. If it be admitted that an accessory before the fact, an adviser or abettor, be constructively a traitor under the constitution, by the same common law rule of construction, an accessory after the fact, a mere receiver or comforter of a person deemed to have been a traitor, may be punished as a traitor long after the termination of a war, or the suppression of an insurrection. I know no difference between a procurer or aider before, and a receiver and comforter after the fact in treason. The same rules of decision apply to both. Either both exist or are cut up by the roots. Then, sir, if according to the English law accessorial treason be the creature of the common law, it has its existence only with the common law. The person who procures treason to be committed, who plots some project to subvert the government, who advises, who hires, who counsels, who commands, or who abets a project to subvert the government, is a traitor according to that common law. If all these be created by the common law of England, they exist only there. But if the common law have no existence here, the doctrine of accessorial treason has no force here.

Gentlemen say that the common law has no force here as a general system; but they say that certain parts of it have been adopted. They will look into authorities to see the meaning of particular expressions. They refer to the common law for the meaning of words. They say that crimes have been created by using such and such words in the constitution. What is levying war? It is said it consists of such and such facts, because it is so according to the English authorities, which are founded upon the common law. They still forget the distinction: that our constitution is in abridgment of the common law, and that it was intended to stand on its own feet independently of common law reasons. Let them only recollect this principle and it will prevent them from a repetition of errors. There are no words in the constitution which warrant their arguments. Was it intended by it that constructive treason should exist in this country in any case? Was it intended that a person absent at a great distance (perhaps out of the country, in another and very remote part of the world) should be construed to be present here? that such a person should, under the constitution, be considered as guilty of treason here by acts done by others? Can there be a more unnatural and tortured construction than to suppose a person present, committing acts of treason and violence in one state, when he was peaceably and innocently occupied in another? Sir, constructive treason is abrogated by the constitution. It exists in no case in this country. We are not to consider men present when they are absent. Such a construction is as unjust and oppressive as it is unnatural and unessential to the purposes of justice.

Mr. Luther Martin commenced his speech by the following introductory remarks:

May it please your honors: I shall now endeavor to close the important debate before the court, and to show that our motion ought to be granted. It involves certain great principles, on the correct settlement of which greatly depend the welfare and happiness of the people of this country. I shall therefore make no apology for any length of time I may occupy in the discussion of the question. When we are defending the life of a human being, and discussing principles of such vast importance to the interests of the community and posterity, time ought not to be regarded. A sufficient period ought to be devoted to the complete investigation of the subject, and entire development of truth. We contend that there is nothing to support the indictment before the jury, even admitting all those things to be true (and considering them as proved) which gentlemen say their testimony could establish. We call on the court to decide on the relevancy of the evidence which they offer. It is the duty of the court to prevent the introduction of any evidence in any case before it which is irrelevant to the issue. For this objection to illegal testimony, which it was our indispensable duty to make, we have been denounced throughout the United States as attempting to suppress the truth, and encroaching upon the exclusive rights of the jury. This subject shall be particularly discussed in the course of the argument. The exercise of this indisputable right has been held up to the public and to this jury as a conclusive proof of our guilt. It is alleged that we interrupt the due course of the testimony; that if we knew ourselves to be innocent, we would not have done so; and that it is sufficient to convince the jury of our criminality. We have been told that we are profoundly skilled in the science of defence, and are making the utmost efforts to save our client from merited punishment. Let us see what an immensity of time has been spent, and

what means have been used in the course of this prosecution against our client, what patience and forbearance he hath manifested, and then let it be determined whether we ought to forego any legal advantages or surrender any of our rights.

The grand jury were sworn on the 22d of May; and we waited patiently from that day to the 13th day of June, before the primum mobile General Wilkinson thought proper to appear in obedience to the process of the court, by which means our client has suffered much inconvenience; and a great number of witnesses have suffered still more inconvenience. From the time that the indictment was found to be a true bill, our client has been closely confined. The first panel did not contain a sufficient number of unexceptionable jurors. Only four of them could be admitted; and these were not sworn till the 10th of August. Another panel was to be summoned, out of which the rest of the jury were not selected and sworn till the 17th of August; although Colonel Burr did everything that he possibly could to expedite the trial, waiving considerable privileges, as the history of the proceedings thereon will show. It may be said that he objected to a jury being sworn from the first panel, and therefore retarded the proceedings; but surely, sir, no person will consider it as a crime that he did not consent to be sacrificed; or, what is the same thing, that gentlemen who had signed his doom in their own minds before hand should decide on his reputation and his life. When this motion was made, though so much time had elapsed, only twelve witnesses had been sworn out of about one hundred and forty on their side; and there are thirty or more to be examined on our side; it is not, therefore, unreasonable to suppose that to examine all the witnesses, and hear the whole testimony, irrelevant as well as relevant, would require a month, perhaps two months. And further, when the circumstance of this season of the year is considered, the admission of illegal testimony, and waste of time in its examination, became more improper. Jurymen cannot be certain of retaining their health. Is it not probable that before the trial would be brought to a close, some of the jury, from the confinement which they must endure, might be taken sick? What would be the result? Our situation, already unpleasant and distressing, would become much more so. The jury must be discharged, and the whole must be done anew; or if by consent a juror were to be substituted in the place of a juror taken sick, the whole testimony must be re-examined, and the same length of time consumed; and if so, the same cause might again produce the same effect; so that from the infirmity of witnesses produced on the present occasion, there is scarcely a probability of the cause being determined in any reasonable period. During all this time Col. Burr must remain in confinement; and yet this time would be totally useless to him. While it oppressed him, it would afford him no benefit.

These considerations must satisfy every person who is in court, that our conduct is justifiable in resisting all attempts to introduce illegal testimony, and preventing the time of the court from being wasted in improper and irrelevant discussion; and that we do not wish to evade justice. I was myself disposed to waive these obvious and undeniable rights, and to submit to the inconveniences of hearing all the evidence, however irrelevant, because I was convinced that it would remove all the prejudices which have been excited against Colonel Burr without having the least foundation, and demonstrate his innocence to be as pure as that of the unsullied snow. But on consultation with the able gentlemen associated with me, this course has been deemed more eligible on principles of law as well as convenience. That the artifices and persecution of his enemies should have so far succeeded as to place Colonel Burr in his present situation, is a matter of deep regret; but I shall ever feel the sincerest gratitude to Heaven that my life has been preserved to this time, and that I am enabled to appear before this court in his defence; and if the efforts of those highly respectable and eminent gentlemen with whom I have the honor to be associated, may, united with my feeble aid, be successful in rescuing a gentleman for whom I, with pleasure, avow my friendship and esteem, from the fangs of his persecutors—if our joint efforts shall be successful in wiping away the tears of filial piety, in healing the deep wounds inflicted on the breast of the child by the envenomed shafts of hatred and malice hurled at the heart of the father—if our efforts shall succeed in preserving youth, innocence, elegance and merit from a life of unutterable misery, from despair, from distraction—it will be to me the greatest pleasure. What dear delight will my heart enjoy! How ineffable, how supreme will be my bliss!

Nor is private friendship for the accused and his connections my only inducement to use my utmost efforts in his vidication. I am urged by a different but very powerful motive. I am thankful to Heaven that when a great question, so awfully important as that which respects the principles of treason, is to be decided—a question on the correct construction of which the happiness or misery of the present and future ages depends—it gives me infinite pleasure to have an opportunity of exerting to the utmost my feeble talents, in opposing principles which I consider so destructive as those which are advanced on the present occasion; and if we shall demonstrate contrary principles to be correct and proper, if we shall be able to satisfy the court that principles the reverse of those contended for on the part of the prosecution ought to be established, I shall think that I have not lived in vain.

In proceeding to the argument, Mr. Martin

laid down, in substance, the same four general propositions discussed by Mr. Wickham, and said there were no other points in the case, unless the counsel for the prosecution had some further testimony to prove that Colonel Burr was on Blennerhassett's Island when the pretended overt act was committed. He said he would observe by way of preliminary remark that there was no sort of question but what the principal and accessory may be brought to trial together, (or at the same time,) if both be before the court and the accessory waive all objections to a trial; but if he do not waive it, the antecedent conviction of the principal must be produced; and if he waive it, the court will direct the jury to acquit him if the guilt of the principal be not proved. Here, sir, I would beg to be understood that neither Colonel Burr nor his counsel admit or suggest that Blennerhassett or any other person was guilty of treason on Blennerhassett's Island. It is only a suspicion. We have not the most distant idea that he was guilty. Where, then, was the propriety of saying that we are willing to sacrifice Blennerhassett? and that he might be hanged without pity or remorse on our part? We deny it. We disavow and execrate such sentiments. We hold up to the public our sacred belief that Blennerhassett is as innocent as I am, or as the gentlemen on the other side; that no man on the island was guilty of treason; and that the party who were there were engaged in honest and honorable pursuits, without any other motive whatever. If even the intention to make war had been proved, yet throughout the whole Union the violence of actual war has never been known to take place. If such a war have taken place, it was a mighty strange kind of war, which neither man nor woman nor child has ever seen or heard. Though there was a great war in the United States from New Hampshire to New Orleans, and a great number of persons engaged in it, yet in this great war not a single act of violence can be proved by any human being to have happened.

Mr. Martin then proceeded to examine the question, who are accessories in murder and felony before and after the fact, and to apply the result to the doctrine of treason, in which the law of England declares persons to be principals who in those cases are accessorial agents. In order to understand the doctrine correctly, it was necessary to have a clear and distinct idea in what instances persons concerned in murder and felony can be considered as principals, and in what cases accessories. It seemed to be agreed that those who by hire, counsel, or conspiracy—and generally holden that those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, (but are so far absent when he commits it that he could not be encouraged by the hopes of any immediate help or assistance from them,) are accessories before the fact, both as to the felony intended and all other felonies which shall happen, in and by the execution of it, if they do not expressly retract and countermand their encouragement before it is actually committed. 2 Hawk. P. C. p. 445, c. 29, § 16. Whenever a person can be considered by law as constructively present, though not heard or seen, accessorial agency does not apply to him, but he must be considered as an immediate actor, and so indicted. He then went into an elaborate examination of the authorities to show how far the doctrine of constructive presence had been carried by the courts. He read and commented upon the authorities cited by Mr. Wirt on this point, Lord Dacre's Case, Pudsey's Case, and others, and claimed that they clearly settled the doctrine that no person can be considered constructively present, so as to make him a principal, who is not engaged in the general conspiracy, and so near that the person who does the fact is emboldened in it, from the hopes of present and immediate assistance of the abettor, whether he be in view of the fact or not. He then said:

On the present occasion the counsel have endeavored to distinguish between cases of constructive presence in treason and other crimes. They insist that to determine the degree of proximity between the immediate actor and his aiders or abettors, who are legally construed to be present, you must consider the theatre of action, and extend the degree of proximity according to the extent of that theatre; that the legal presence, which would not exist in murder or felony, may well exist in treason; that in treason all the whole United States are the theatre of action; the scale of proximity essential to legal presence should be in proportion, so that persons in Tennessee or Kentucky are to be considered as legally present on Blennerhassett's Island when the acts in question were committed. It is evident that the principles of legal constructive presence cannot be extended to this case, for the actors could have no hopes of immediate assistance from the others, who were hundreds of miles distant. But they insist that treason consists in the treasonable intention. It has been echoed and re-echoed that treason consists in the treasonable intention. We admit that there is in Great Britain one species of treason which consists in the intention, without any act consummating the guilt of treason. I mean the compassing the death of the king, where the crime is merely imagined; and nothing more is necessary than to write a letter to a man advising him to kill the king, and that fact being proved, he is guilty and liable to be punished for treason, though the king was not killed, and though the party advised took no steps to pursue it. Though this be correct when confined to the death of the king, queen, or eldest son of the king, and the treasonable intention constitutes the treason, yet the overt act is evidence of the intention only and not of the

actual commission of the crime, because writing a letter is not treason, but proof of the intention to commit it. But why is the intention to commit it treason in Great Britain? Because a special law is made for the safeguard of the life of the king, making it treason to conspire, compass, or imagine his death, when evidenced by some overt act such as I have just stated; a conspiracy against the life of the king, whether carried into execution or not, is made treason by special act of parliament. But in America we have no species of treason except two: levying war against the United States, and adhering to their enemies, giving them aid and comfort. What is the treason charged on us? Levying war. This overt act of levying war, which is said to have been committed, must be proved by two witnesses. According to the constitution, no person can be convicted unless on the testimony of two witnesses to the same overt act. If there be twenty overt acts and each of them proved by one witness, nay, if there be fifty overt acts committed at different places, and each proved only by one witness, it will not suffice; two witnesses must concur in proving the same act at some particular place or the accused cannot be convicted. The overt act of levying war is not the crime of levying war, which consists of intention and act together. But gentlemen must admit that the intention alone is not punishable. There must be an actual levying of war, and the overt act is proof of it. On an indictment for levying war they can give no evidence but of what is charged. They can adduce proof only of the overt act which they have laid. Proof of the intention alone would be inadmissible; just as in the case of murder, the prosecutor cannot prove the murder without proving that the party has been killed; and so in a prosecution for stealing a horse, the taking of the horse must be proved; the malicious intention to kill in the one case, and the felonious intended appropriation in the other, must be established; but the intention in either case will not do without the act.

Mr. Martin said it had been repeatedly declared in our courts that the decisions in Great Britain, however entitled to respect, are not binding authority in this country; and he thanked God that such was the case. The principles laid down in Great Britain respecting treason, as appears from the history of their jurisprudence, have been such that their judges have in the most arbitrary manner carried into execution the most wicked wishes of the persons who held the crown. Even after the revolution of 1688 this has been the case, though not so much as formerly; they have extended the rules of evidence with respect to treason so as to shock humane judges. The influence of the crown was such, that whatever endangered the life of their sovereign lord and master, from whom the judges derived their authority, was construed to be treason in imagining or compassing his death. As they were under this bias, their decisions ought not to be considered as binding precedents, but received with great caution. It is necessary for the clear investigation of this matter that mere general expressions relating to the crime of treason in Great Britain ought not to be construed as extending to treason in levying war, but to the other branch, the doctrines of which were adopted to guard the life of the sovereign. The reason why there are not so many cases in Great Britain of indictments against accessories before the fact as against those after, was, that most of the prosecutions for treason there are for compassing the death of the king; and in indictments for compassing his death, he who advises it by writing or otherwise is as much a principal traitor as he who aids or assists in actually killing him. A party who converses on the subject is deemed a traitor; and the overt act is laid against him for compassing and consulting about the death of the king. Every act which evinces an intent formed in the mind of the accused against the safety of the king, as meeting to consult, writing a letter, enlisting men, preparing other means, &c., is admissible evidence to support an indictment for compassing or imagining the death of the king. An overt act must be set forth in every indictment for treason, and proved in every instance. In the case of compassing the death of the king, the object of requiring it is to prove the intention. If the intention could be otherwise proved, whether any act were done or not, though the person of the king were never injured, yet the party would suffer death for it; because in that case the crime consists in the design formed in the mind. Levying war, itself, may be laid as an overt act of compassing the king's death; and when it is so laid, the accused need not be charged with anything more. When the indictment is for levying war as a specific treason, it must specify the overt act which is to support it. So says the act of parliament; so say all the authorities. This doctrine is fully confirmed in Vaughan's Case [2 Salk. 634], 5 State Tr. 17. Captain Vaughan went on board a vessel called the Loyal Clencartie, in the service of the French king, to cruise against the subjects of England. In that case there were two counts in the indictment: one for levying war and the other for adhering to the king's enemies. It was decided on argument that his cruising in this vessel, though he fought no battle, and committed no actual hostility, was an act of aiding, and supported the count for adhering to the king's enemies; but it was decided and admitted that it was not sufficient proof to support the other count for levying war; and "that there must be an actual war proved upon a person indicted for levying war." In Harding's Case, 2 Vent. 316, who was indicted of treason in the time of William and Mary for enlisting sixteen men and sending them to France to aid the king of that country against the English, it was decided that he was guilty of treason, but not of treason in levying war. The specific treason whereof he was guilty

was not that of levying war, but adhering to the king's enemies. The indictment charged that he compassed the death of the king and queen, and levied war against them, in enlisting those men and sending them out of the country to aid their enemies. It was determined that he was guilty of high treason within the clause of the statute for compassing the death of the king, it being found by special verdict that the prisoner did enlist those men with an intent to depose the king and queen, &c. It appears to have been an almost universal practice in former times, in prosecutions carried on by the attorney general, to state in every indictment a charge for compassing the death of the king—and for the plainest reason in the world: that this kind of indictment comprehended every kind of treason, and facilitated the conviction of those marked out for destruction. It was a comprehensive mode of prosecution which was more easy to be conducted and more successful in accomplishing the end proposed. If a person were to be indicted for aiding and assisting the king's enemies, or levying war against him, they would state in the indictment a charge for compassing the death of the king, because, according to the system adopted, this charge could be more easily supported by proof. Those who wished to destroy innocence preferred this mode of prosecution, because it would put the person accused more at their mercy. For in cases of compassing the king's death, the most wicked and arbitrary prosecutions were countenanced by the courts of justice. When the safety of the person of their king was in question, principles the most incompatible with justice were sanctioned. For this purpose, in every prosecution, when specific facts were proved, they would go into a history of the conspiracy against the king, because every conspiracy against the prince or his government was construed to be a plot intended against his life. And in the examination of these conspiracies, in order to establish their existence, they went into every kind of evidence—letters and verbal declarations, and words uttered by others, though not in the presence or hearing of the person accused; letters, written not to him but to any other person, and papers found in his possession. All these were jumbled together to establish the conspiracy, and the connection of the persons accused with it. To establish those conspiracies, and the connection of those who were accused of being concerned in them, every species of illegal and improper evidence was admitted by the most corrupt judges that ever sat in a court of justice. Not acts alone, but mere loose words, a hasty declaration, an assent inferred from an unguarded expression, nay, the declarations of other people and papers found in the possession of the party, by whomsoever written, were all admitted against the accused as proofs of a conspiracy and of compassing the death of the king. Transactions in themselves innocent were deemed sufficient to condemn to the scaffold. A mere declaration was sufficient to prove any act required to be established, because the death of the king was the cause of prosecution. An open, notorious act was not deemed necessary to establish guilt, but a story, a mere verbal assertion, without any positive proof of any real fact. This kind of evidence was admitted because it was the best calculated to destroy the victim of the government or of private revenge. They have on the present occasion proceeded on the principle that they could prove a conspiracy; but is there a particle of criminality proved? If some sort of connection between the person accused and those joined in the supposed conspiracy be proved, this is by no means sufficient on this indictment for levying war; but they must prove war actually levied—an act done. No person can be guilty of treason, though a thousand conspiracies to levy war were proved, without the existence of actual war. There must be an actual war proved. That is the proof which is introduced in all other cases except compassing the death of the king. In prosecutions for levying war, there must be acts of violence alleged and proved; an actual war must be proved to exist; or, at least, sufficient must be stated to show that the party were in a posture of war. When specific acts or particular circumstances, not amounting to the actual levying of war, or an adherence to the king's enemies, constitute treason, they can only support an indictment for compassing the death of the king. This may be safely laid down as a general rule, from which there is no exception whatever.

Let us see whether the principle that requires a specification of the offence of receiving a traitor after the fact do not equally apply to the case of advising and procuring treason before the fact. The cases already mentioned sufficiently prove that there is no difference between them in this respect. Why is a receiver after the fact considered as a traitor? Because the law says that he is a principal in the treason. But it is as necessary to distinguish or specify the crime of advising treason, or that a person said a thing before the fact, as it is to distinguish the doing a thing, as receiving a person guilty of treason after the fact. Is there any distinction between them? Is not notice as necessary in one case as the other? Each is considered as a principal in the treason. It is surely as necessary to lay the receiver in the indictment as having done the principal act himself, as he has done that which the law says makes him a principal, as it is to charge the adviser with having performed the act of war himself, because he has committed what makes him in law a principal. If he have done an act which the law says makes him a principal in treason, and it is sufficient in any case, however special the facts, to charge the accused generally according to the legal effect, then he may be charged generally in every case, and there will be no necessity of a specification in any case. I ask, if a man who

counsels the levying of war can be charged with levying war, because he is a principal in treason, cannot the receiver be generally charged, also, with levying war, since he has done what makes him guilty of treason? The reason is in both cases the same. If, notwithstanding his having done what makes him a principal in treason, a receiver of a traitor must be specially charged, there is no reason in the world why a person who advises the commission of treason should not be charged specially. But there is a direct reason, stated in Foster, Hale, and Hawkins, why the adviser of treason should be specially charged: that in all other cases, except compassing the king's death, those who are to be considered as accessories (as far as relates to the mode of prosecution) cannot be put on their trial, except the principal have been convicted; but they may be brought to trial together. Do not these authorities prove that the indictment must specially show who is charged as an accessorial agent, and who did the act? that if they be not tried together the indictment must show that the principal has been convicted, since till then he cannot be tried against his will? How is he to know, when indicted in this general mode, that they do not mean to charge him by their proof directly with levying war in person? How can he suppose from this indictment that they mean to make it appear that other persons levied the war, and that he was more than one hundred miles off? If the indictment charged, what is true, that he was not with the actors, that he was at a great distance, but he advised or persuaded them to act, then he would not be obliged to be tried till the principal should have been convicted. Does not this furnish a decisive argument to prove that the indictment must specially show that the accused is charged as an accessory, when the evidence is intended to prove it? Before the conviction of the principal, the accessory cannot be put on his trial, except together with the principal; in which case the jury are expressly to be directed that if they do not find the principal (the person charged with levying the war) guilty, they are not to inquire into the conduct of the person who advised the levying of the war, but to acquit him, of course, since his guilt, being only derivative in its nature, cannot exist, if the principal on whose guilt it would be founded be innocent. How else could he object to a trial? It would be impossible for the accessorial agent to make any objection, unless it were specially stated in the indictment that he was charged as an accessory. This is full and explicit to show why, in treason, an overt act is laid in the indictment; that the party charged may know what he is charged with.

I ask, how could Colonel Burr, charged with treason on Blennerhassett's Island, know the specific act meant to be proved against him? that he was meant to be charged with some act done there when he was two hundred miles off? that he was considered as having advised that act? and that this was the offence he was to answer for? But gentlemen say that a specification is unnecessary, because we know what the charge is against Colonel Burr. The law presumes that every person is innocent till the contrary appear; that the party charged has no knowledge at all of what is not specified; and, consequently, that any man who means to disprove that innocence should make a clear and distinct charge against him. Gentlemen say that he must know the charge, because he has summoned thirty or forty men to give testimony in his favor. We saw that we were charged with treason on Blennerhassett's Island; and we have summoned these witnesses to prove that we were not there, and to contradict the evidence of certain witnesses summoned against us—I might say to prove the character of that all-important witness who endeavored to excite an insurrection of the negroes. Of this, however, the proof is rendered unnecessary by his precipitate flight. As they have charged that we were on the island, and laid there what they deem an overt act of levying war, we could not but conclude that they meant to prove it. We could not conjecture that they meant to prove, not that we were on the island, but that others were there, and to connect us with them. Hawkins, Hale, and Foster all declare the reason why an overt act must be stated: that the accused may know how to defend himself against it. The constitution and laws have provided that persons accused of crimes shall be tried in the state and district where they were committed; and that a copy of the indictment should be given to the accused a certain number of days before his trial, in order that he might be prepared to make his defence. If, when the party accused comes to be tried, evidence proving a different charge from that which is stated in the indictment of which he had a copy were to be admitted against him, would it not be a mockery of the constitution and a denial of justice? It would, because though the form were complied with by delivering him a copy, it would give him no notice of what was to be proved against him. But gentlemen say that the indictment does not charge Colonel Burr with being on the island, and therefore it need not be proved. If the indictment say that he levied war on the island, does it not necessarily allege that he was there? When it charges that he committed an overt act there, is it not the legal and fair inference that he was at the place when he committed it? When a party is said to have done any act at any place, is it not naturally understood that he was at the place where he is thus said to have committed the act?

But the gentleman says that he has authority to show that he may be charged as present, though not there; and he cites in support of the assertion 1 Hale, P. C. pp. 214, 238, and 1 East, P. C. p. 127. Let us see whether any-

thing in Hale justify it. In page 214, his words are: "But if many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for, in such case, in treason all are principals." We must consider only as much of the precedents as from the reason of the case applies to the subject now in discussion. Now Hale has not said that those persons who, having conspired to counterfeit, become traitors by one of them having done the fact, upon that conspiracy, were not present. He says nothing of their being present or absent, but that if several conspire and only some of them act in pursuance of that conspiracy they are all equally guilty; that if two conspire to counterfeit the coin, and one do it according to the intention of that conspiracy, they are both equally guilty of treason. It is the nature of a conspiracy that what two conspire to do may be done by one, whether the other be absent or present. Hale says nothing as to their being together, or whether an absentee, or a person who only advises, can be charged as present and an actor. He leaves these questions just where they were, unexamined and undecided. If two persons conspire together for any unlawful purpose, as to write a letter to cheat a third person, and one of them write the letter, the other, being present, is considered as a conspirator, and as criminal as the writer of the letter, and they are indicted as joint conspirators. So in coining money: if two have joined in a conspiracy to counterfeit, and a part of the conspiracy be that one shall act upon that conspiracy, and he doth counterfeit or coin false money accordingly, they are equally guilty, and the act of one is thus the act of the other, under the law against coining false money in England. But he does not say that the party were absent. He refers to no authority. It is a mere inference, and can have no influence on this case. It can have no influence on accessorial agency. Here, though it does not strictly apply to this branch of my argument, I may draw a conclusion from the authority adduced by themselves, which operates against them. In this very page he had just said before that "there must be an actual counterfeiting; for a compassing, conspiracy, or attempt to counterfeit is not treason within this statute, without an actual counterfeiting." On the same principle, if the doctrine be applied to levying war, there must be an actual levying of war; and a conspiracy or attempt to levy war is not treason within the words and meaning of the constitution. So much for page 214.

Let us now turn to page 238, and see whether it can furnish any justification of the gentleman's argument: "Though the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessory, yet thus much he partakes of an accessory, that his indictment must be special of the receipt, and not generally that he did the thing, (which authority we have repeatedly urged against them,) which may be otherwise in case of one that is a procurer, counsellor, or consenter. Thus it was done in Conier's Case, Dyer, 296a." This authority he relies on to show that a procurer or an accessory before the fact need not be specially charged; that he may be indicted generally that he levied the war. The words, "which may be otherwise in the case of one that is a procurer," &c., are depended on. So it may be otherwise in that species of treason compassing the king's death. I have no doubt that in that species of treason any degree of accessorial agency before the fact, as counselling another person, writing a letter, &c., would be construed an overt act of compassing the death; and, therefore, the accessory before the fact might be indicted generally for having compassed the death of the king. But it would not be so in the case of levying war, or any other treason. If he mean anything else, there is not a shadow of authority for it. He cites a case in Dyer which does not justify the construction for which the gentleman contends. That case only shows that a receiver of a false coiner was indicted specially for the receipt, and it was deemed a misdemeanor. That was an indictment for receiving a coiner, knowing him to have counterfeited or coined false money; and it specified the receiving him particularly; but judgment was not rendered against him, because it was judged to be only a misdemeanor. It states nothing as to the manner in which an accessory before the fact ought to be indicted; but it may fairly be inferred from it that he ought to be charged specially, as the indictment in that case was special. 1 East, P. C. p. 127, merely refers to those passages of Hale which have been just commented on, but does not explain them; but he fully explains himself in pages 100, 101, of the same volume, which, though already referred to, I beg leave again to read: "In regard to all acts of approbation, incitement, advice, or procuring, to that species of treason, compassing the king's death, &c., there is no doubt that the party may be tried before the person who acted upon such indictment, because the bare advising or encouraging to such actions is in itself a complete overt act of compassing, and it is totally immaterial whether the attempt were ever made or not. The Case of Sommerville proves no more than this, (though the rule is there laid down in general terms,) that a person aiding or procuring a treason may be tried before the actor. But with regard to all other treasons within the 25 Edw. III., if one advise or encourage another to commit them, or furnish him means for that purpose, in consequence whereof the fact is committed, the adviser will indeed be a principal, for such advice or assistance would have made him an accessory before the fact in felony; but if the other forebore to commit the act thus advised, the adviser could not be a traitor, merely on ac-

count of his ineffectual advice and encouragement, though his conduct would be highly criminal; for it cannot be said that a person procured an offence which in truth never was committed. In these cases, therefore, the treason is of a derivative nature, and depends entirely upon the question whether the agent have or have not been guilty of such treason, the proof of which can only be legally established by his conviction, if he continue amenable to justice, or his attainder by outlawry if he abscond, unless the accessory choose to waive the benefit of the law and submit to a trial." Here East explains himself where he means that a man may be indicted generally, and shows that where a party is to be considered in an accessorial point of view, he cannot be brought to trial, except by his own choice, until the principal be convicted or outlawed. Here those persons who advised or procured a treason before, are placed on the same footing with those who receive a traitor after the fact. But any act of an accessorial nature may be a complete overt act of that species of treason which comes within that clause of the statute which is against compassing the death of the king, queen, &c. This is the most comprehensive treason, the most easily prosecuted, and the most liable to be abused for the purpose of tyranny and oppression. As Aaron's rod swallowed all other rods, so this treason for compassing the king's death swallows all other treasons. 2 Hale, P. C. p. 223 (which see before), shows that though in high treason all are to be considered as principals, yet accessories before and after the fact (who are both put on the same footing) are to be proceeded against only as accessorial agents; that the accessory shall not be put to answer of the receipt or procurement, till the principal be outlawed, (or attained, &c.)

But the gentleman has said that agreeably to our constitution they could not charge the accused otherwise than as they have done; that they must have charged him with levying war. I cannot see any difficulty in charging him according to the truth of the case. But however criminal or injurious his conduct may be, and however much he may deserve punishment, he ought not to be deprived of the benefit of law, or to be considered as guilty of treason, without legal proof of his having committed an overt act of levying war, or to be condemned unheard to subserve unworthy party purposes. If advising a man to levy war be treason and punishable under the constitution in the same manner as actually levying war, I ask why should not the indictment be so drawn as to correspond with the evidence, and give full notice to the accused of the charge intended to be proved against him? I ask why was not the indictment in this case so drawn as to embrace the real facts? Why did it not state that A, B, and C, (meaning those on the island,) did levy war against the United States, and that Colonel Burr did advise, incite, encourage and counsel them to levy it?

Gentlemen say that we have insisted that the accessory ought not to be brought to trial till the principal were convicted; but that there is a case where it is not necessary to produce this record. We did not mean to deny one exception from this general rule: that they may be tried together. We admit that the position was laid down in terms rather too broad; because if the principal and accessory were indicted in the same indictment together, the accessorial agent could not be found guilty till the guilt of the principal were found. In that case the record of the conviction would not be necessary, because it could not exist. The indictment in such case would specify distinct charges against both according to the real facts; which would enable each of them to be prepared for trial. But the court would direct the jury: "Gentlemen, you are first to decide whether the principal charged with having done the acts be guilty or not. If you do not find him guilty, you are to make no inquiry as to the accessorial agent, (whose guilt is connected with and founded alone on that of the principal,) but to find him not guilty and discharge him of course; but if you find the principal guilty, you are then to inquire into the conduct of the accessory." But gentlemen, unable to controvert this correct doctrine, endeavor to avoid it, and say that Colonel Burr might have declined a trial till some of the actors who were on the island had been convicted. They ask us, why did not Colonel Burr refuse to come to trial? and urge that by submitting to a trial, he has waived the benefit of every objection which he might have been entitled to make. That they should have mentioned Blennerhassett in terms of compassion and regret may be accounted for; they may have policy for doing so. For some think that the public indignation ought only to be excited against Colonel Burr, in order to press him down as much as possible. This indirect seems to be a favorite mode of attacking the accused. But Colonel Burr could not resist a trial. The prosecutor has thought proper to charge him as having levied war in person, as a principal actor; and being thus indicted, he could not avoid it. He could make no specific objection. He could only meet the accusation by the general defence of not guilty.

Having proved that under this indictment no evidence yet adduced is competent to convict the accused, I shall now make a few observations on one of the questions before your honors. There is one proposition laid down by us which is of the greatest importance, and requires the utmost deliberation. It is this: Admit that the acts on the island were done with an intention to subvert the government of the United States, (which I hold must be the motive to render them treasonable; for no person will controvert this position, that the acts of levying war, in order to be treasonable, must have been done with this design,) yet there was no act of

war, no violence done; there was no overt act of levying war, no treason committed. It involves a most important question: whether the most peaceable acts, acts innocent in their nature, though done with a design of subverting the government of the United States, can be considered as acts of levying war against the United States. The question is, whether violence be not necessary; whether some act of force must not be used to constitute a levying of war? We insist that no evidence can support an indictment for levying war without some act of violence. What is a levying of war? Why, gentlemen say that levying war is levying war—"lever la guerre"—leyying soldiers—that it consists in preparing the means of war. I should rather suppose that the framers of our constitution, who proceeded with so much caution, and endeavored in every part of that instrument to secure the rights and liberties of their felllow-citizens, and especially a speedy trial by an impartial jury of the district, did not intend, by the terms "levying war," an unnatural and dangerous construction, unknown in common parlance, and unusual in history or judicial proceedings. They could not have contemplated an extension of the doctrine of constructive treason, which has been always held so peculiarly hostile to civil liberty. They never could have intended that acts peaceable or innocent in themselves should constitute treason. If by "levying war" they meant enlisting of troops or raising an army, they would have said so in plain terms. They would have said that "treason against the United States shall consist in enlisting or levying troops, or raising an army, with intention to make war against them." If levying troops, embodying men, or enlisting soldiers, with intention to subvert the government of the United States, were intended as sufficient to constitute treason, why did not the framers of the constitution say so? Why did they not say that levying of troops or raising an army had the same idea or meant the same thing as levying of war?

In a constitution devised by men distinguished as much for their devotion to the public good as eminent by their talents, nothing unfavorable to liberty would have been intended. Precision of language must also have been attended to. Nothing, therefore, can justify the construction which gentlemen advocate but unavoidable necessity. But it is as unnecessary as it is dangerous. If they had intended that merely to enlist men, to raise and embody troops, to raise an army, without anything more, should constitute treason, they would have expressed it in such plain terms as to defy misconstruction. Levying of war implies force of some kind. The idea of violence of some kind is inseparable from that of war. But, sir, raising an army or levying troops is only a preparatory step towards levying war. You levy troops in preparation, in intention to levy war. But no act preparatory to levying war can be an actual levying of war. What is the technical meaning of "levying?" Whether derived from the French word "lever," or the Latin word "levare," to raise, (or, as applied to war, to make,) to levy war is to make it, according to its popular acceptation, as well as its meaning as used by some of the best writers. The meaning or true construction of both expressions, "to levy war," and "to make war," is precisely the same. Whatever is making war is levying it.

But, says the gentleman, "levying war and making war are different things; an overt act of levying war and an overt act of war are not the same; the king of England can levy war, but his troops make the war; that he levies, but his officers and soldiers fight the battles and make it." I did not know before, that in the United States, levying or raising troops was the same thing as levying war. Troops are often raised. One hundred thousand men have been authorized to be called out; but I did not know that we were levying war, however desirous some individuals may be that it were so. But gentlemen say that it is a common expression that the king levies war, and his officers and soldiers actually make it. Why is it said that the king levies war? It is a very uncouth expression; but he is said to levy war because he represents the nation. It is the nation in its national character that really makes war; and he is the person who is at the head of the nation, of which nation the officers and soldiers are only the constituent parts. He is said to levy war, because he is the representative of the nation in its national capacity. The United States also make war in their national capacity. They are composed of individuals, of whom the officers and soldiers, like the people of other countries, actually fight battles. It may as well be said that if I, Luther Martin, knock a man down with my hand, I do not knock him down, but my hand does; because my hand is a constituent part of my body. But there is no such distinction as gentlemen contend for between the king and his officers and soldiers. There is no such distinction as that the king levies, and his officers and soldiers make war. One king, as the representative of one nation, makes war on another as the representative of another nation; and thus the one nation makes war on the other. But there is no possible correctness in the distinction contended for. There is none in reason, in the decisions of courts, or in the practice of nations, which confines the making of war to those who actually fight battles; and until there shall be some decision establishing such a distinction, and thereby placing our country in a worse situation than the laws of Great Britain have placed that country, I cannot believe it to exist. I shall hold the true definition of levying war to be making war, and for the purpose of subverting the government of the United States. Sir, "making war," ex

vi termini, implies the use of force, violence, soldiers. I appeal to the authorities both in Great Britain and America, as far as prosecutions for levying war have taken place in this country, whether an act of violence has not always been deemed essential to levying war; and whether the indictments do not specify some act of force or violence.

Even in the constructive treasons of destroying meetinghouses, and pulling down bawdy houses, force or violence must be employed to constitute treason. In all cases of that kind, houses have been violently torn down and destroyed, and many persons greatly injured. In the cases of Messenger, Green, and others, those of Damaree and Purchase, and all other cases of the like kind in England, and that of Fries and other cases in this country, force and violence have been used, and invariably stated; and what is still more decisive as to the necessity of employing actual force or using violence on such occasions, it was determined by all the judges of England on the former cases, that as to Green and Bedel, the special verdicts were not full enough to judge it treason, because the verdicts only found that these two persons were present, but neither found any particular act of force committed by them, nor that they were aiding and assisting to the rest who did use violence. Force or violence has always been deemed essential to the existence of treasonable war in England; and I call on the gentlemen to show one instance to the contrary.

Mr. Martin argued that men assembling and marching in military array, without actual violence being committed, could not constitute an overt act of leving war. He went into a critical examination of Lord Balmarino's Case, (relied on by the other side,) and contended that although he was seen marching at the head of a large body of armed troops, yet the plain inference from the report of the case was, that the court never considered such marching in military array as a sufficient overt act; that it was his taking possession of and holding the city of Carlisle that constituted the overt act which, in the opinion of the court, justified his conviction; and without this, or some other act of violence, the mere marching in military array, as aforesaid, would not, in the opinion of the court, have been sufficient. He also commented upon Vaughan's Case, in which it had been contended by the prosecution that the mere cruising on the high seas, without any acts of violence, had been held to constitute an overt act of levying war. He said as that was an indictment for aiding the king's enemies, which was proved by his cruising against the English, it could not be considered an authority for the purpose of proving that force is unnecessary to constitute treason in levying war. On this point he cited and commented upon many other authorities. He then said:

I beg leave to make a few observations on that part of our inquiries which relates to the great constitutional question: whether a person who, in Great Britain, would only be guilty of accessorial agency, can be guilty of treason in the United States. Is an act of accessorial agency before or after the fact in treason, in the United States, treason or not? Here I beg leave to observe that we ought not to be misled by the argument of the gentlemen; that the most guilty might pass unpunished by the negative of this question. The question is not whether a person can, by procuring treason to be committed, or by receiving and comforting a traitor, be guilty of a crime. No person will doubt but the person who is guilty of advising treason is guilty of a great crime, and liable to punishment; but the question which I propose to examine into, is, whether that crime be treason or not. He who advises, procures, or persuades another to commit treason is highly criminal, and merits very severe punishment. The receiver of a traitor, knowing him to be such, is highly censurable and punishable. But we aver that neither of them is guilty of treason within the true interpretation of the constitution of the United States. Every preparation made for the purpose of making or levying of war is not an act of treason; because nothing but making war for the purpose of changing or subverting the government of the United States is treason. Every act of those who make those preparations to levy war is criminal; and the government has an undoubted right to use the force of the country and all the means which the laws allow for their suppression. The government has an unquestionable right to punish those persons, and prevent their acts from being ripened into acts of treason.[9] It is not the question whether the government be to look on passively, and see those preparations matured without opposition, which are intended for its destruction. No person doubts the right of the government to punish those persons, and prevent the maturity and success of their plans. So clearly was the congress of

[9] Here the question very naturally occurs, of what practical force is the constitutional limitation of the crime of treason, if congress has been left free to impose such penalties as it may see fit upon those treasons at common law which are excluded by the constitutional definition, by merely giving them another name? If congress has the power to prescribe any punishment at all for those offences in the nature of treason which do not come within the constitutional definition of that crime, we shall look in vain for any express limitation of that power in the constitution. There is, however, a very clearly implied limitation; and it is not to be presumed that congress would enact a law prescribing capital punishment for any offence in the nature of treason which cannot be punished as treason under the constitution. Such an act would certainly be a palpable violation of the spirit of the constitution, though not of its express letter. The late act of July 17, 1862, c. 195, § 2 [12 Stat. 589], provides for the punishment of many acts in the nature of treason, which would not, perhaps, amount to treason under the constitution; but the punishment it prescribes is fine and imprisonment only, with forfeiture of property in slaves, if the offender own any.

the United States of opinion that preparation to levy war was not treason, that, if I mistake not, there was an act passed last session expressly punishing such preparatory acts. It passed one branch of the legislature, and was sent forward to the other for its concurrence. I am not certain, but I believe it passed.

The CHIEF JUSTICE.—I believe it did not pass.[10]

Mr. Martin. It is immaterial whether it passed or not. It was in contemplation, and deemed necessary, whether the law passed or not. The only question is, whether a person who advised or procured treason to be committed be guilty of high treason or not. No person doubts that he is guilty of a great crime or a high misdemeanor; but is the offence of which he is guilty treason? But gentlemen ask what a deplorable situation the country is in if such an offence be not treason. As if the people and government were bound hand and foot, and could take no step to prevent the levying of war; as if, because he who only prepares to levy war cannot be punished as if he had actually levied it, he must escape entirely with impunity! as if, because preparation is not the same as consummation, there was no possibility of punishing it! This is begging the question entirely. There is no doubt that for so doing he would be guilty of treason in Great Britain; because it would be evidence to support an indictment for compassing the death of the king. But can a person who only advises war to be levied be said to have actually levied it? Gentlemen say that he had all the moral and intentional and therefore ought to be considered as having the actual guilt of it. Let it be so, that he has all the guilt of giving the advice, but not of the act of levying the war, because he never committed it. The court is to decide according to the constitution and laws. What prevented the framers of our constitution from providing that persons who should counsel, commend, or procure levying of war against the United States should be guilty of treason? As they made no such provision they did not intend it. There is another reason which prevents a mere counsellor or adviser of treason from being guilty of the treason of levying war. It is this: that levying war is of itself an open, public act. It is of such notoriety that everybody may see it going on. It is carried on publicly in the face of the world when the parties are levying it. It cannot, from its nature, be concealed from the public view. The word "public," we say, is material, though omitted in this indictment. It ought to be laid, because it ought to be proved. The authorities show that it ought to be so charged; and that levying of war must be an act of such notoriety that every one sees it. When troops are levied, and when they march through the country, &c., the people behold them, and the knowledge of the fact is universal.

We have had two insurrections in Pennsylvania: the one named the "Whisky Insurrection," and the other the "Hot Water Insurrection." If I were to name this I would call it the "Will-o'-the-Wisp Treason." For though it is said to be here and there and everywhere, yet it is nowhere. It exists only in the newspapers and in the mouths of the enemies of the gentleman for whom I appear, who get it put into the newspapers. But as acts of war must be open and public, if war exist at all it may be easily proved. If false, it may be easily proved to be so. If a man were to come forward and say that war was made, that armies marched and took towns and places, laid waste the country and took contributions from the inhabitants, if it were true it could be proved by everybody; if false, it could be disproved by everybody. Open and notorious facts are susceptible of easy proof or contradiction. But an advice previously given to commit treason is not in its nature susceptible of clear, explicit proof. It may be given in private and may be pretended to have been given when it was not. Innocent persons may be implicated. Communications or declarations may be feigned to have been secretly made which never were made. Persons having enmity against others and intent on their destruction may be brought forward in a court of justice as witnesses against them, and gratify their resentment by the disclosure of conspiracies which never existed but in their own malice, because they are secret crimes incapable in their nature of being directly refuted or disproved. If open deeds, notorious facts are not to be the only evidence, confessions must be received. The framers of the constitution wisely determined that no man should be guilty of treason in such a case. They would not expose the life of any man to the hazard of being destroyed by perjury, incapable from its nature of being disproved. They have secured a probability (if not a certainty) that the accused cannot be convicted unless he be guilty. They have not secured him from the resentment or hatred of private individuals, (for that is impossible,) but they have taken care that he is not to be charged with private acts incapable of disproof; with confessions and acknowledgments unsupported by probability; so that while there is a probability of the guilty being punished, the innocent is secured from being sacrificed to the malignant resentment of his enemies. These principles are such as ought to have directed and influenced (and no doubt did) the conduct of those who framed the constitution—men selected for their wisdom and patriotism to devise a system of government to secure and perpetuate the liberty and happiness of their country. No gentleman who

[10] The chief justice was right. No act was ever passed by congress to punish aiders, abettors, or procurers of rebellion or treason until July 17, 1862, c. 195, § 2 [12 Stat. 589], as to which see notes to the final opinion of the court by Chief Justice Marshall.

had read and considered ancient history and knew the various systems of oppression which had existed in different countries, and the necessity of protecting innocence as well as punishing guilt, would have subjected his country to such misery as that any man could be convicted on evidence impossible to be disproved; and of this nature are all acts of accessorial agency before the fact in treason, as advising, counselling, commanding, &c., as well as many acts of accessorial agency after the fact. I have made these observations to show the principles on which the convention might correctly have determined to exclude this doctrine of accessorial treason. Let me now make some observations on the constitution itself, abstractedly from the consideration of those principles which must have most probably actuated the convention.

The gentleman who so ably opened the debate (Mr. Wickham) correctly said that the constitution, which was made to perpetuate the liberties of the people of this country, is to be construed differently from a statute law; that it is a sacred compact made between the United States in their corporate capacity, and every individual belonging to the United States. The United States in their corporate aggregate capacity have pledged themselves to the people of America that this constitution shall be the safeguard of their liberties and a barrier against encroachments on their rights, and that it shall continue unaltered unless amended by a constitutional majority. As to all statutes to be enacted by any succeeding legislatures, it is a compact that they shall not impair the great principles of, or transcend the limits prescribed by the constitution. In this view it is a compact between the United States and individuals; but when any question arising under any part of it comes before a court of justice, when any part of it is to be considered judicially, it is to be considered as the supreme law of the land. It is to be construed by the very terms of the compact itself: "This constitution, and the laws of the United States which shall be made in pursuance thereof,"—"shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The judges are thereby rendered incapable of making any decision in support of any law contravening its provisions or principles; and if any law passed by the legislature be contrary to any of the provisions of this constitution, the judges who are to pronounce judgment on the rights of individuals affected by such unconstitutional law, shall consider it as void and null as far as it contravenes or violates the constitution.

The gentlemen also said that the framers of the constitution intended to guard against constructive treason. This principle is so self-evident that it cannot be controverted. It neither has been nor can be denied. They certainly intended to make the question, what shall be said to be treason, as clear as possible, so that there should be no doubt. I ask what constructive treason is but that treason which the constitution does not mention in plain and express terms, but is inferred from circumstances by implication and construction. The terms employed by its framers are admirably calculated to exclude all construction and implication. He who reads with an intention to understand cannot possibly mistake their meaning. They tell him in plain terms that treason against the United States shall consist but in two acts: "that it shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." He who levies war against the United States, and he who adheres to their enemies, giving them aid and comfort, are traitors, and none other, by the very positive and plain language of this compact. Does the constitution say that he who advises these acts, that he who receives or comforts any person who has done either of these acts, is guilty of treason? No person will say that he who counselled an act of war to be done is the person who actually did it. No person will say that he who advises another to adhere to the enemies of his country is the person who actually did adhere to them. He who advises, procures, or persuades, he who receives, comforts, or protects, or even he who has been active in aiding and assisting, but absent at a remote distance from the scene of action, is not the actor. The parts which these persons perform are all essentially different. Have the judges who judicially expound this constitution any authority to make the act of advising or comforting treasonable by construction? Is it not by construction that a man is made guilty of having levied war who only advised it? Is it not by construction that he is rendered guilty of levying war who only gave a night's lodging to a person who did assist in levying it? Is it not by construction that giving a dinner to a man in distress is tortured into levying of war? It is not by construction extravagantly extended that they make a party absent at a great distance constructively present and constructively guilty of the acts of others? Is the constitution of the United States to be taken by construction contrary to its own plain and explicit words? It is the same as if the constitution had expressly said that there should be no constructive treason, no constructive presence, no constructive agent.

The gentlemen went on to show that the common law could not be brought to aid them to make that treason which was not so before; to make an act of accessorial agency amount to treason, though not so without it. They have admitted fully that the common law cannot be received for the purpose of making that a crime which is not so by the constitution of the United States and

laws made in pursuance thereof. But they admit that the common law, by the adoption of certain technical phrases in the constitution, is so far in force as to direct the sense or meaning of certain crimes, and the mode of proceeding on trials for those crimes. For instance, if a statute say that "if a man commit murder he shall be punished so and so, and the constitution say that the trial of all crimes (except in cases of impeachment) shall be by jury," the common law must be resorted to for the meaning of the word "murder"; and as the party accused is to be tried by a jury, the common law must be resorted to for the purpose of ascertaining the meaning of the word "trial" and the word "jury." The common law informs how many men shall constitute a jury; that it shall consist of twelve. It says that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. The common law must be resorted to for the meaning of the word "convicted." It explains it to mean that the jury must be unanimous to find him guilty. But that beyond the effect of those technical phrases, which express the powers delegated to the government, the common law has not been adopted under the government of the United States. Does it not follow, as a necessary consequence, that no man can be guilty of an offence against the United States merely at common law? Is it not clear that the principles of the common law, as existing in Great Britain, cannot be applied here so as to make that an offence which is not so by the constitution and laws of the United States? Can the common law be resorted to in order to explain the constitution so as to make that a crime which would not be so without it? On that point I can readily declare to the gentlemen that I have always been of the same opinion which they declare themselves to hold. I never did consider that anything could be prosecuted as a crime against the United States, unless it were made so by the constitution, or some law enacted pursuant to it. I perfectly agree with the opinion of Judge Chase, declared in the case of U. S v. Worrall for an attempt to bribe Tench Coxe, the commissioner of the revenue, reported in 2 Dall. [2 U. S.] 384. He said that though this offence was highly injurious to morals and deserving the severest punishment, yet it was not punishable by the constitution or laws of the United States; and therefore, as it was an indictment at common law, it could not be maintained in the federal courts. He would not say whether the offence at that time were punishable in a state court. It has, however, been held that these sorts of offences may be punished in the state courts, and it is so held by the party in power.

One of the counsel for the prosecution (Mr. Wirt) had made some very illiberal animadversions upon a position stated by Mr. Wickham, that the rule "that when a felony is created by statute, accessories to it, though not named, are punishable, and that all legal consequences of felony are attached to it by the common law, except where the special nature of the act leads to a different conclusion," is illustrated by a decision on the 28 Hen. VIII. c. 15, which makes piracy, an offence not punishable at common law, felony; that it has been solemnly adjudged that as this was not a common law offence, and not made in imitation or supply of it, it should not be construed according to the rules of the common law; and therefore that accessories to it are not punishable. Hawkins (in volume 1, P. C. c. 37, §§ 6, 7, page 153), says that "in the exposition of this statute it has been holden, first, that it does not alter the nature of the offence so as to make that which was before a felony only by the civil law now become a felony by the common law; for it must be still alleged as done upon the sea, and is no way cognizable by the common law, but only by virtue of this statute." "From the same ground, also, it follows that no persons shall, in respect of the statute, be construed to be or punished as accessories to piracies before or after, as they might have been if it had been made a felony by the statute—that accessories to piracy being neither expressly named in the statute, nor by construction included in it, remain as before." This statute declares that "all felonies and robberies, &c., upon the sea, &c., where the admiralty have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm, in like form and condition as if such offence or offences had been committed or done in or upon the land." It proceeds further to state that the commissions to the admirals and others to be appointed should "authorize them to hear and determine such offences after the common course of the law of the land, used for felonies or robberies done and committed upon the same." It further provides that they shall be proceeded against as felons for felonies committed on the land; and that those that should be convicted of any such offence by verdict, confession, &c., "shall have and suffer such pains of death, losses of lands, goods, and chattels, as if they had been attainted and convicted of such offence done upon the land." Here is an act declaring that persons guilty of piracy shall suffer the same pains and forfeitures as if they had committed these acts of violence and robbery on the land; but it makes no mention of accessories before or after the fact; and therefore the courts of that country construed it not to extend to them. The constitution declares certain specific acts to be punishable: the making of actual war, and an actual adherence to the enemies of the country, giving them aid and comfort. But the constitution does not say that advising, procuring, &c., those acts to be com-

mitted shall be treason. The inference, therefore, is natural and inevitable, that such advisers and procurers are not traitors within the true meaning of the constitution, according to the maxim, "Expressio unius est exclusio alterius." But even if, as they have argued, common law principles were to be applied to expound the constitution, if I understand them rightly, they are a strong authority to show that accessories are not punishable, and that those persons only who do the acts of levying war and adherence to enemies are so. No principle of the common law is more clearly understood than that the expression of one thing is an exclusion of another, especially in penal laws.

Again, sir, a most powerful argument, to prove the legislative exposition of the constitution, is deducible from the act of congress referred to by the gentleman who introduced this subject. He observed that it was clear and evident, from a law passed soon after the adoption of the constitution, that the legislature did not consider that an accessory would be guilty as a traitor under the constitution as he would be in Great Britain; because they made a special provision that if any person should break gaol and rescue therefrom any person convicted of treason, he should be punished with death. Sir, in Great Britain the rescuing of a person convicted of treason is treason; and if the construction for which the counsel for the prosecution now contend had been deemed correct by the legislature, this provision would have been superfluous, and therefore would not have been made. But this act of congress goes still further, and provides that if any person shall by force set at liberty or rescue any person committed but not convicted for any of the offences aforesaid (treason being included,) every person so offending shall, on conviction, be punished in a small fine—only the sum of five hundred dollars, and imprisonment a year. Sir, in Great Britain the man who breaks open a gaol and lets out a person committed therein for treason is a traitor, provided the person let out or rescued be afterwards convicted of treason. If our legislature had considered a rescuer as guilty of treason and punishable with death, would they have passed a law inflicting on him only the trivial punishment of a year's imprisonment and a fine of five hundred dollars? and yet he cannot be punished twice for it. If in truth and reality the receiver and protector of a traitor were guilty of treason under the constitution, how came the legislature to provide so small a punishment for the person who breaks open gaol and rescues a traitor? How inconsistent and improper is the infliction of so moderate a punishment on the gaolbreaker and rescuer, if the mere receiver or comforter of a traitor before he is put in prison at all is punishable with death. He who forcibly opposes the laws and rescues a traitor from gaol is only punished with imprisonment not exceeding a year and a fine not exceeding five hundred dollars; while he who merely receives or comforts the traitor before he is committed for the crime or after he has made his escape is punishable with death! because in Great Britain he who receives or comforts persons guilty of treason is a traitor and punished with death, as the unfortunate Lady Lisle was. And if our constitution embraces no other acts as amounting to treason than what are expressly mentioned in it, it results of necessity that only the two offences of actually levying war against, and of adhering to the enemies of the United States, constitute treason. This is in my mind conclusive to show that our construction is correct, and that accessories before or after the fact were not contemplated by the constitution as traitors.

Mr. Martin replied at length to the arguments of counsel on the other side, that the pending motion was unprecedented, and called upon the court to usurp unwarranted powers, in derogation of the rights of the jury.[11] He concluded his argument on this point by the following remarks in reply to what Mr. Hay had said touching the fearful consequences that were to be apprehended from encroachments by the court on the rights and duties of the jury:

But the gentleman feels no solicitude for the fate of traitors. No more did the bloodthirsty Jeffreys. That sanguinary and cruel judge treated every man who came to be tried before him as a traitor. He thought none innocent, and condemned all he could. But the man must be lost to all humanity who would not drop the tear of pity whilst he wielded the sword of justice. But this inexorable tyrant had no feeling, and regarded no principle. Sir, does not the gentleman know that any man, however innocent, may be hunted down as a traitor? Does he not know that any man may be oppressed by a charge brought against him before a court and jury, without any knowledge of the facts of which he is accused? Is not the case of such a person sufficient to excite solicitude in the bosom of every person? Does he suppose that no man can be charged who is innocent? Does not the law presume him to be innocent till he be convicted by the court and jury? He ought not to be proceeded against if he be not a traitor but an innocent man. Ought not the court, therefore, to feel the utmost solicitude to prevent the oppression of innocence? He wishes to introduce all the evidence before the jury; and we wish to prevent it. I have no doubt but he wishes it; but if his wish be wrong, it is the sacred duty of your honors to prevent it from being gratified, and to reject im-

[11] As this is a mere question of practice, it has not been deemed important to give the arguments of counsel on either side upon it. It will be found briefly but satisfactorily disposed of in the concluding part of the final opinion pronounced by the chief justice.

pertinent and irrelevant testimony on a trial for life and death. The gentleman has himself recognized this principle. He did observe that when evidence is brought forward, the court will restrain it if impertinent to the issue tried before it. This is the very position for which we contend. It is too clear to admit of controversy, and decisive of the question before the court. The evidence of transactions out of this state does not establish what was done on Blennerhassett's Island; and therefore the testimony which they offer does not apply to the issue taken on the charge in the indictment.

I shall submit one observation on another point which I had like to have forgotten, and make a candid representation of what Mr. Wickham said about Blennerhassett. None of us said that we considered Blennerhassett to be guilty, as has been unjustly insinuated. He only stated what the law was. He denied that any person was guilty; alleged that no overt act was committed by any person; but still insisted on the legal consequences of the absence of Colonel Burr. I believe Blennerhassett to be as innocent as the books or instruments of music to which he is said to be so passionately addicted. But the gentleman expressed, with great zeal and pathos, that he pledged his own life and the lives of his children and posterity on the propriety of the doctrine which he advocated: that if they avoid conspiracies, that if they be innocent, they will be safe. Most delusive doctrine! It does not follow that because a man is innocent he will be safe. The experience of all ages forbids so extravagant an expectation. Without a rigid adherence to those rules which have been wisely established for the protection of innocence, there never can be safety. I pray God that neither his own life nor the lives of his children or posterity may depend on the propriety or permanency of his doctrines. He should reflect on the instability of human affairs, the vicissitudes of fortune, and the mutability of popular applause. Permanent security can only result from a wise system, calculated for all times, and to promote the happiness of all parties. If he be now "in the full tide of successful experiment," in the enjoyment of the approbation of his country and government, so was, not long ago, the gentleman whom I advocate. He was as highly distinguished by the kind favor of the people as he could be by their suffrages.[12] It was then incredible that their favor should so soon be changed by the calumny and rancor of party into the most malignant hatred. The gentleman may now think himself perfectly safe, by the prevalence of his party and principles; but the day very possibly may come, when he may find himself as obnoxious as the gentleman whom I defend. He may, possibly, by the same means, the malice, injustice, and violence of party spirit, like my client, not only find himself reviled and calumniated, but his dearest friends abused and persecuted. I should be sorry that such prediction should be realized with respect to any gentleman; but such are the natural consequences of his own pernicious doctrines; and these we oppose. It is for the security of innocence that we contend. If innocence had never been persecuted, if innocence were never in danger, why were so many checks provided in the constitution for its security? We know the summary and sanguinary proceedings of former times, as recorded in faithful history. In those times of oppression and cruelty, they never troubled courts or juries with their accusations, proofs and legal forms, but declared the intended victim guilty of treason, and proceeded to execution at once. We wish to prevent a repetition of those scenes of injustice and horror.

Mr. Martin closed his long and exhaustive argument by the following remarks:

Before concluding, let me observe that it has been my intention to argue the cause correctly, without hurting the feelings of any person in the world. We are unfortunately situated. We labor against great prejudices against my client, which tend to prevent him from having a fair trial. I have with pain heard it said that such are the public prejudices against Colonel Burr, that a jury, even should they be satisfied of his innocence, must have considerable firmness of mind to pronounce him not guilty. I have heard it not without horror. God of heaven! have we already under our form of government (which we have so often been told is best calculated of all governments to secure all our rights) arrived at a period when a trial in a court of justice, where life is at stake, shall be but a solemn mockery, a mere idle form and ceremony to transfer innocence from the gaol to the gibbet, to gratify popular indignation, excited by bloodthirsty enemies! But if it require in such a situation firmness in a jury, so does it equally require fortitude in judges to perform their duty. And here permit me again, most solemnly, and at the same time most respectfully, to observe that, in the case of life and death, where there remains one single doubt in the minds of the jury as to facts, or of the court as to law, it is their duty to decide in favor of life. If they do not, and the prisoner fall a victim, they are guilty of murder in foro cœli whatever their guilt may be in foro legis. When the sun mildly shines upon us, when the gentle zephyrs play around us, we can easily proceed forward in the straight path of our duty; but when bleak clouds enshroud the sky with darkness, when the tempest rages, the winds howl, and the waves break over us—when the thunders awfully roar over our heads and the lightnings of heaven blaze around us—it is then that all the energies of the human soul are called into

[12] Alluding to his having had an equal number of suffrages with Mr. Jefferson for the presidential chair; which rendered a choice between them by the house of representatives of the United States necessary.

action. It is then that the truly brave man stands firm at his post. It is then that, by an unshaken performance of his duty, man approaches the nearest possible to the Divinity. Nor is there any object in the creation on which the Supreme Being can look down with more delight and approbation than on a human being in such a situation and thus acting. May that God who now looks upon us, who has in his infinite wisdom called you into existence and placed you in that seat to dispense justice to your fellow citizens, to preserve and protect innocence against persecution—may that God so illuminate your understandings that you may know what is right; and may he nerve your souls with firmness and fortitude to act according to that knowledge.

(August 31, 1807.)

MARSHALL, Chief Justice, delivered the opinion of the court as follows:

The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them. A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver. The testimony adduced on the part of the United States to prove the overt act laid in the indictment having shown, and the attorney for the United States having admitted, that the prisoner was not present when that act, whatever may be its character, was committed, and there being no reason to doubt but that he was at a great distance, and in a different state, it is objected to the testimony offered on the part of the United States to connect him with those who committed the overt act, that such testimony is totally irrelevant, and must, therefore, be rejected. The arguments in support of this motion respect in part the merits of the case as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

On the first division of the subject two points are made: 1st. That, conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied. 2d. That if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others until those overt acts as laid in the indictment be proved to the satisfaction of the court. The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration. "Treason against the United States shall consist only in levying war against them." What is the natural import of the words "levying war?" and who may be said to levy it? Had their first application to treason been made by our constitution they would certainly have admitted of some latitude of construction. Taken most literally, they are, perhaps, of the same import with the words "raising or creating war"; but as those who join after the commencement are equally the objects of punishment, there would probably be a general admission that the term also comprehended making war or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term would be settled by a course of decisions; and it would be affirming boldly to say that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions, or, by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.[13]

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edw. III. from which it was borrowed. It is said that this meaning is to be collected only from adjudged cases. But this position cannot be

[13] See note A at the end of this opinion, (section 2).

conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted that they do not shed as much light on this part of the subject as is to be wished. Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection, he says, is a levying of war." In whom? Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed. Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason; but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each the guilt of levying it. Foster says: "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition or other necessaries will prima facie make a man a traitor." Foster does not say that he would be a traitor under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessory, nor that his treason is occasioned by that rule. In England this discrimination need not be made except for the purpose of framing the indictment; and, therefore, in the English books we do not perceive any effort to make it. Thus, surrendering a castle to rebels, being in confederacy with them, is said by Hale and Foster to be treason under the clause of levying war; but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point Blackstone is not more satisfactory. Although we find among the commentators upon treason enough to satisfy the inquiry, what is a state of internal war? yet no precise information can be acquired from them which would enable us to decide with clearness whether persons not in arms, but taking part in a rebellion, could be said to levy war, independently of that doctrine which attaches to the accessory the guilt of his principal. If in adjudged cases this question have been taken up and directly decided, the court has not seen those cases. The argument which may be drawn from the form of the indictment, though strong, is not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may correctly be argued that, had this act amounted to levying war, she would have been indicted for levying war; and the furnishing of provisions would have been laid as the overt act. The court felt this when the precedent was produced But the argument, though strong, is not conclusive, because, in England, the inquiry, whether she had become a traitor by levying war, or by giving aid and comfort to those who were levying war,[14] was unimportant; and because, too, it does not appear from the indictment that she was actually concerned in the rebellion—that she belonged to the rebel party, or was guilty of anything further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine, that in treason all are principals, to its source. Its origin is most probably stated correctly by Judge Tucker in a work, the merit of which is with pleasure acknowledged. But if a spurious doctrine have been introduced into the common law, and have for centuries been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists who seem to disapprove the principle declaring that it is now too firmly settled to be shaken. It is unnecessary to trace this doctrine to its source for another reason: the terms of the constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. Whether in England a person would be indicted in express terms for levying war or for assisting others in levying war, yet if in correct and legal language he can be said to have levied war, and if it have never been decided that the act would not amount to levying war, his case may, without violent construction, be brought within the letter and the plain meaning of the constitution. In examining these words, the argument which may be drawn from felonies, as, for example, from murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation, composed of many parts, co-operating with each other. No one man or body of men can perform them all if the war be of any continuance. Although, then, in correct and

[14] If she was indicted under that clause of the statute of Edw. III. which relates to adhering to the enemies of the king, giving them aid and comfort, the indictment was certainly bad, according to the settled construction of that clause by the English courts. The authorities are uniform, that no person can be guilty of treason under that clause for adhering and giving aid and comfort to British subjects in rebellion. In other words, the term "enemies" means foreign enemies, and not rebels.

in law language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war. Taking this view of the subject, it appears to the court that those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war—who counsels and advises it—or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded because that doctrine is inapplicable to the United States,' the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to conviction, is a question of vast importance, which it would be proper for the supreme court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine unless the case before them should require it.[15]

It may now be proper to notice the opinion of the supreme court in the case of the United States against Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory because it is extra-judicial and was delivered on a point not argued. This court is therefore required to depart from the principle there laid down. It is true that, in that case, after forming the opinion that no treason could be committed because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them. The court had employed some reasoning to show that without the actual embodying of men war could not be levied. It might have been inferred from this that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extra-judicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the supreme court for reconsideration, in a case in which it would directly occur and be fully argued. The court which gave this opinion was composed of four judges. At the time I thought them unanimous, but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who perhaps dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should, therefore, feel no objection, although I then thought and still think the opinion perfectly correct, to carry the point, if possible, again before the supreme court, if the case should depend upon it. In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason.[16] But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part," which will furnish the overt act; and they must be "leagued in conspiracy." The person who comes within this description in the opinion of the court levies war. The present motion, however, does not rest upon this point; for if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony, in its present stage.[17]

2d. The second point involves the char-

[15] See note A, § 1, at the end of this opinion.

[16] See note A, § 1.

[17] See note A, § 4.

acter of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question, what is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case, it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms nor the application of force or violence are indispensably necessary to constitute the fact of levying war. To illustrate these positions, several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable. Its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself. There was no necessity to rely upon information drawn from extrinsic sources, or, in order to understand the fact, to pursue a course of intricate reasoning, and to conjecture motives. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because although the cases put may establish the doctrine they are intended to support—may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects, may be supplied by other circumstances—yet they also serve to show that the mind requires those circumstances to be satisfied that war is levied. Their construction of the opinion of the supreme court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself; and which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and countermarch before it, should manœuvre in its face, and should then disperse from any cause whatever without firing a gun—I confess I could not, without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has, or, it is believed, can be produced from those books in which it has been laid down that war cannot be levied without the actual application of violence to external objects.[18] The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government, the most active and influential leaders are generally most actively engaged in the war; and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required to give to the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal. But Vaughan's Case is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan as an overt act of levying war. The opinions of the best elementary writers concur in declaring that where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's Case. This court is not inclined to controvert them. But although, in this respect, the opinion of the supreme court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others. The opinion, I am informed, has been construed to mean that any assemblage whatever for a treasonable purpose, whether in force or not in force, whether in a condition to use violence or not in that condition, is a levying of war. It is this construction, which has not, indeed, been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword; and he who makes the appeal evidences the fact

[18] See note B, § 1.

by the use of the means. His intention to go to war may be proved by words; but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force; and it would seem that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it. But the term, having been adopted by our constitution, must be understood in that sense in which it was universally received in this country when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term. Lord Coke says that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war, he adds, is no treason, for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs, in stating these cases, are such as indicate an impression on his mind that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say: "An actual rebellion or insurrection is a levying of war within this fact." "If any with strength and weapons invasive and defensive doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force; nor can "a castle or fort be defended with strength and weapons invasive and defensive" without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke that to levy war there must be an assemblage of men in a condition and with an intention to employ force. He certainly puts no case of a different description. Lord Hale says (1 Hale, P. C. p. 149, pl. 6:) "What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though de facto they commit the act they intend, that makes a levying of war; for then every riot would be treason, &c.," "but it must be such an assembly as carries with it speciem belli, the appearance of war; as if they ride or march vexillis explicatis, with colors flying, or if they be formed into companies or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war; which circumstances are so various that it is hard to describe them all particularly." "Only the general expressions in all the indictments of this nature that I have seen are more guerrino arraiati," arrayed in warlike manner. He afterwards adds: "If there be a war levied as is above declared, viz, an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is bellum levatum but not percussum." It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea, he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but, it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. Hawkins (chapter 17, § 23), says "that not only those who rebel against the king, and take up arms to dethrone him, but, also, in many other cases, those who, in a violent and forcible manner, withstand his lawful authority, are said to levy war against him, and therefore those that hold a fort or castle against the king's forces, or keep together armed numbers of men, against the king's express command, have been adjudged to levy war against him." The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king, and take up arms to dethrone him." In many other cases those "who, in a violent and forcible manner, withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command." These cases are obviously cases of force and violence. Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord Hale terms an interpretative or constructive levying of war; and it will be perceived that he puts no case in which actual force is dispensed with. "Those also, he says, who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative by attempting to do that by private authority which he, by public justice, ought to do; which manifestly tends to a downright rebellion. As where great numbers by force attempt to remove certain persons from the king," &c. The cases here put by Hawkins, of a constructive levying of war, do in terms require force as a constituent part of the description of the offence.

Judge Foster, in his valuable treatise on Treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colors, &c., what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of

levying war. In the Cases of Damaree and Purchase, he says: "The want of those circumstances weighed nothing with the court, although the prisoner's counsel insisted much on that matter." But he adds: "The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. Furor arma ministrat." It is apparent that Judge Foster here alludes to an assemblage in force, or, as Lord Hale terms it, "in a warlike posture;" that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the Cases of Damaree and Purchase from 8 State Trials; and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them. Judge Foster states (section 4) all insurrections to effect certain innovations of a public and general concern, by an armed force, to be, in construction of law, high treason within the clause of levying war. The cases put by Foster of constructive levying of war all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying war: that is, where the war is intended directly against the government. He says (section 9): "An assembly armed and arrayed in a warlike manner for a treasonable purpose is bellum levatum, though not bellum percussum. Listing and marching are sufficient overt acts, without coming to a battle or action. So cruising on the king's subjects under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved." "An assembly armed and arrayed in a warlike manner for any treasonable purpose" is certainly in a state of force: in a condition to execute the treason for which they assembled. The words, "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force; though that state is not expressed in terms; for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened; they are "without coming to a battle or action." "If men be enlisted and march," (that is, if they march prepared for battle or in a condition for action: for marching is a technical term applied to the movement of a military corps,) it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger by what seems to be put in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy without committing any other act of hostility. Cruising is the act of sailing in warlike form and in a condition to assail those of whom the cruiser is in quest. This exposition, which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in the State Trials from which the extracts are taken. The words used by the chief justice are: "When men form themselves into a body and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed: "Intending to levy war is not treason unless a war be actually levied." To this the chief justice answered: "Is it not actually levying of war if they actually provide arms and levy men, and in a warlike manner set out and cruise and come with a design to destroy our ships?" Mr. Phipps still insisted "it would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed," said the chief justice, "the going on board and being in a posture to attack the king's ships." Mr. Baron Powis added: "But for you to say that because they did not actually fight it is not a levying of war! Is it not plain what they did intend? that they came with that intention? that they came in that posture? that they came armed, and had guns and blunderbusses, and surrounded the ship twice? They came with an armed force; that is strong evidence of the design."

The point insisted on by counsel in the Case of Vaughan, as in this case, was, that war could not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war. Judge Foster proceeds to give other instances of levying war: "Attacking the king's forces in opposition to his authority upon a march or in quarters is levying war." "Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as, suppose, by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason." The whole doctrine of Judge Foster on this subject seems to demonstrate a clear opinion that a state of force or violence, a posture of war, must exist to constitute technically as well as really the fact of levying war.

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says: "This may be done by taking arms, not only to dethrone the king, but under pretense to reform religion or the laws, or to remove evil counsellors or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man or set of men to interfere forcibly in matters of such high importance." He proceeds to give examples of levying war, which show that he contemplated actual force as a necessary ingredient in the composition of this crime. It

would seem, then, from the English authorities, that the words "levying war" have not received a technical different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility.

Several judges of the United States have given opinions at their circuits on the subject, all of which deserve, and will receive the particular attention of this court.

In his charge to the grand jury, when John Fries was indicted in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said: "I think I am warranted in saying that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of an act of the congress of the United States altogether, any forcible opposition, calculated to carry that intention into effect, was a levying of war against the United States, and, of course, an act of treason." To levy war, then, according to this opinion of Judge Iredell, required the actual exertion of force. Judge Patterson, in his opinions delivered in two different cases, seems not to differ from Judge Iredell. He does not, indeed, precisely state the employment of force as necessary to constitute a levying war, but in giving his opinion, in cases in which force was actually employed, he considers the crime in one case as dependent on the intention; and in the other case he says: "Combining these facts and this design," (that is, combining actual force with a treasonable design,) "the crime is high treason." Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war. Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration, he says: "The court are of opinion that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons is wholly immaterial. The court are of opinion that a combination or conspiracy to levy war against the United States is not treason unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war." In various parts of the opinion delivered by Judge Chase, in the case of Fries, the same sentiments are to be found. It is to be observed that these judges are not content that troops should be assembled in a condition to employ force. According to them some degree of force must have been actually employed. The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because, in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law, such an assemblage as would be sufficient for the purpose would require the actual employment of force to render the object unequivocal.

But it is said all these authorities have been overruled by the decision of the supreme court in the case of U. S. v. Swartwout [4 Cranch (8 U. S.) 75]. If the supreme court have indeed extended the doctrine of treason further than it has heretofore been carried by the judges of England or of this country, their decision would be submitted to. At least this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the supreme court. The foundation on which this argument rests is the omission of the court to state that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court when the opinion was drawn; which passages are mingled with others which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war. Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the United States against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan in which those persons were charged with having participated. It was, therefore, sufficient for the court to say that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might

indeed have defined the species of assemblage which would amount to levying of war; but, as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself, and the mere omission to state that a particular circumstance was necessary to the consummation of the crime ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect. After these preliminary observations, the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, "To constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiracy to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed." Although it is not expressly stated that the assemblage of men for the purpose of carrying into operation the treasonable intent which will amount to levying war must be an assemblage in force, yet it is fairly to be inferred from the context; and nothing like dispensing with force appears in this paragraph. The expressions are, "to constitute the crime, war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country." Speaking in general terms of an assemblage of men for this or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force. In a subsequent paragraph the court says: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled in order to effect by force a treasonable purpose, all those who perform any part, however minute, &c., and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war." The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose. An assemblage to constitute an actual levying of war should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose. This explanation, which is believed to be the natural, certainly not a strained explanation of the words, derives some additional aid from the terms in which the paragraph last quoted commences: "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem intended to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate that in the mind of the court the assemblage stated in that paragraph was an assemblage in arms; that the individuals who composed it had appeared in arms against their country; that is, in other words, that the assemblage was a military, a warlike assemblage. The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said: "A design to overturn the government of the United States in New Orleans by force would have been unquestionably a design which if carried into execution would have been treason; and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States." Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans by force? Certainly an assemblage in force; an assemblage prepared, and intending to act with force; a military assemblage. The decisions theretofore made by the judges of the United States are, then, declared to be in conformity with the principles laid down by the supreme court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Patterson and Judge Iredell are said "to imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion in terms requires the employment of force. After stating the verbal communication said to have been made by Mr. Swartwout to General Wilkinson, the court says, "If these words

import that the government of New Orleans was to be revolutionized by force, although merely as a step to, or a means of, executing some greater projects, the design was unquestionably treasonable; and any assemblage of men for that purpose would amount to a levying of war." The words "any assemblage of men," if construed to affirm that any two or three of the conspirators who might be found together after this plan had been formed would be the act of levying war, would certainly be misconstrued. The sense of the expression, "any assemblage of men," is restricted by the words "for this purpose." Now, could it be in the contemplation of the court that a body of men would assemble for the purpose of revolutionizing New Orleans by force, who should not themselves be in force? After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to observe: "But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him." Could the court have conceived "an open assemblage" "for the purpose of overturning the government of New Orleans by force," to be only equivalent to a secret, furtive assemblage without the appearance of force? After quoting the words of Mr. Swartwout, from the affidavit, in which it was stated that Mr. Burr was levying an army of 7,000 men, and observing that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court says: "The question, then, is whether this evidence prove Colonel Burr to have advanced so far in levying an army as actually to have assembled them." Actually to assemble an army of 7,000 men is unquestionably to place those who are so assembled in a state of open force. But as the mode of expression used in this passage might be misconstrued so far as to countenance the opinion that it would be necessary to assemble the whole army in order to constitute the fact of levying war, the court proceeds to say: "It is argued that since it cannot be necessary that the whole 7,000 men should be assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime. This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and therefore this evidence should make the fact unequivocal. The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their march from places of partial to a place of general rendezvous, would be such an assemblage." The position here stated by the counsel for the prosecution is that the army "commencing its march by detachments to the place of rendezvous (that is, of the army) must be sufficient to constitute the crime." This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification? "The travelling of individuals to the place of rendezvous (and by this term is not to be understood one individual by himself, but several individuals, either separately or together, but not in military form) would perhaps not be sufficient." Why not sufficient? Because, says the court, "this would be an equivocal act and has no warlike appearance." The act, then, should be unequivocal and should have a warlike appearance. It must exhibit, in the words of Sir Matthew Hale, speciem belli, the appearance of war. This construction is rendered in some measure necessary when we observe that the court is qualifying the position, "that the army commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime." In qualifying this position they say, "the travelling of individuals would perhaps not be sufficient." Now, a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals travelling together, and the words being used in reference to the position they intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might, in correct language, be denominated "marching by detachments." The court then proceeded to say: "The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

It is obvious from the context that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated is that of distinct bodies of men assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done an assemblage is produced which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial at a place of general rendezvous. In describing the mode of coming to this assemblage the civil term "travelling" is dropped, and the military term "marching" is employed. If this were intended as a definition of an assemblage which

would amount to levying war, the definition requires an assemblage at a place of general rendezvous, composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition; for clearly if there should be no places of partial rendezvous, if troops should embody in the first instance in great force for the purpose of subverting the government by violence, the act would be unequivocal; it would have a warlike appearance; and it would, according to the opinion of the supreme court, properly construed, and according to English authorities, amount to levying war. But this, though not a definition, is put as an example, and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design, plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should march from those places to a place of general rendezvous, it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court in stating generally such a military assemblage as would amount to levying war, and having a case before it in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly it ought not to be so understood when it says in express terms that "it is more safe as well as more consonant to the principles of our constitution that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the supreme court, it will be observed that the direct question, whether an assemblage of men which might be construed to amount to a levying of war must appear in force or in military form, was not in argument or in fact before the court, and does not appear to have been in terms decided. The opinion seems to have been drawn without particularly adverting to this question; and, therefore, upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war, were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms force and violence are not employed as descriptive of the assemblage, such requisites are declared to be indispensable as can scarcely exist without the appearance of war and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the supreme court considered a secret, unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, it expresses itself so as to show that this idea was never discarded; and it uses terms which cannot be otherwise satisfied. The opinion of a single judge certainly weighs as nothing if opposed to that of the supreme court; but if he were one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh upon his mind he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself. To the judge before whom the charge against the prisoner at the bar was first brought the same testimony was offered with that which had been exhibited before the supreme court; and he was required to give an opinion in almost the same case. Upon this occasion he said "war can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war." Again he observed: "The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction; and numbers must witness it." It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions; and it is to be recollected that he had just returned from the supreme court, and was speaking on the very facts on which the opinion of that court was delivered. The same judge, in his charge to the grand jury who found this bill, observed: "To constitute the fact of levying war it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact, in the constitution of which force is an indispensable ingredient. Any combination to subvert by force the government of the United States, violently to dismember the Union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war; and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the

purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held that arms are not essential to levying war, provided the force assembled be sufficient to attain, or, perhaps, to justify attempting the object without them." This paragraph is immediately followed by a reference to the opinion of the supreme court.

It requires no commentary upon these words to show that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that he so understood the opinion of the supreme court. If in that opinion there may be found in some passages a want of precision, and an indefiniteness of expression, which has occasioned it to be differently understood by different persons, that may well be accounted for when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance: The court unquestionably did not consider arms as an indispensable requisite to levying war. An assemblage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object as at all times an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large, and to review the opinion of the supreme court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war were committed on Blennerhassett's Island to the jury, under this explanation of the law, and to instruct them that unless the assemblage on Blennerhassett's Island was an assemblage in force, was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the supreme court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat, and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? And ought not the supreme court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force? The definition of the attorney for the United States deserves notice in this respect. It is, "When there is an assemblage of men, convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason." To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men and then to effect the object by their combined force. Under this construction, it would be expected the appearance of the assemblage would bear some proportion to the object, and would indicate the intention; at any rate, that it would be an assemblage in force. This construction is most certainly not that which was intended; but it serves to show that general phrases must always be understood in reference to the subject-matter and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made: 1st. That this indictment, having charged the prisoner with levying war on Blennerhassett's Island, and containing no other overt act, cannot be supported by proof that war was levied at that place by other persons in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy. 2dly. That admitting such an indictment could be supported by such evidence, the previous conviction of some person, who committed the act which is said to amount to levying war, is indispensable to the conviction of a person who advised or procured that act.

As to the first point, the indictment contains two counts, one of which charges that the prisoner, with a number of persons unknown, levied war on Blennerhassett's Island, in the county of Wood, in the district of Virginia; and the other adds the circumstance of their proceeding from that island down the river for the purpose of seizing New Orleans by force. In point of fact, the prisoner was not on Blennerhassett's Island, nor in the county

of Wood, nor in the district of Virginia. In considering this point, the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance. The place in which a crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is, also, essential for the purpose of enabling the prisoner to make his defence. That at common law an indictment would have been defective which did not mention the place in which the crime was committed can scarcely be doubted. For this, it is sufficient to refer to Hawk. P. C. bk. 2, c. 25, § 84, and Id. chapter 23, § 91. This necessity is rendered the stronger by the constitutional provision that the offender "shall be tried in the state and district wherein the crime shall have been committed," and by the act of congress which requires that twelve petit jurors at least shall be summoned from the county where the offence was committed. A description of the particular manner in which the war was levied seems, also, essential to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster (Crown Law, p. 194), speaking of the treason of compassing the king's death, says: "From what has been said, it followeth that in every indictment for this species of treason, and, indeed, for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence." In page 220 Foster repeats this declaration. It is, also, laid down in Hawk. P. C. bk. 8, c. 17, § 29; 1 Hale, P. C. 121; 1 East, P. C. 116, and by the other authorities cited, especially Vaughan's Case. In corroboration of this opinion, it may be observed that treason can only be established by the proof of overt acts, and that by the common law as well as by the statute of 7 Wm. III. those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps, as corroborative testimony after the overt acts are proved. That clause in the constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defence. It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying what is termed an overt act of levying war. The law relative to an appeal as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid. All the authorities which require an overt act, require also that this overt act should be proved. The decision in Vaughan's Case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it. But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was, at that time, at a great distance, and in a different state, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact. It is, therefore, necessary to inquire whether in this case the doctrine of constructive presence can apply. It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy, and yet be legally as well as actually absent while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every state in the Union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire; if this chief should be there captured and sent to the other extremity for the purpose of trial; if his indictment, instead of alleging an overt act which was true in point of fact, should allege that he had assembled some small party which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia at a time when, in reality, he was fighting a battle in New Hampshire; if such evidence would support such an indictment by the fiction that he was legally present, though really absent, all would ask to what purpose are those provisions in the constitution, which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?[19] But that a man may be legally absent who has counselled or procured a treasonable act is proved by all those books which treat upon the subject, and which concur in declaring that such a person is a principal traitor, not because he was legally present, but

[19] Note A, § 6.

because in treason all are principals. Yet the indictment, speaking upon general principles, would charge him according to the truth of the case. Lord Coke says: "If many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? because all were legally present when the war was levied? No. "For in treason," continues Lord Coke, "all be principals, and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if by our constitution the doctrine that an accessory becomes a principal be not adopted, in consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers, and it is generally laid down in the English books that whatever will make a man an accessory in felony, will make him a principal in treason; but it is nowhere suggested that he is by construction to be considered as present when in point of fact he was absent. Foster has been particularly quoted, and certainly he is precisely in point. "It is well known," says Foster, "that in the language of the law there are no accessories in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason." The cases of incitement and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessory at common law will render him a principal in treason. In other passages the words "command" or "procure" are used to indicate the same state of things; that is, a treasonable assemblage produced by a man who is not himself in that assemblage. In point of law, then, the man who incites, aids, or procures a treasonable act, is not, merely in consequence of that incitement, aid, or procurement, legally present when that act is committed. If it do not result, from the nature of the crime, that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances; and to judge how far the circumstances of any case can make him legally present, who is in fact absent, the doctrine of constructive presence must be examined.

Hale in volume 1, p. 615, says: "Regularly no man can be a principal in felony unless he be present." In the same page he says: "An accessory before is he that, being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says: "He must be present at the perpetration, otherwise he can be no more than an accessory before the fact." These strong distinctions would be idle, at any rate they would be inapplicable to treason, if they were to be entirely lost in the doctrine of constructive presence. Foster adds (page 349): "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although from the nature of the thing no precise distance could be marked out. An inspection of the cases from which Foster drew this general principle will serve to illustrate it. Hale, P. C. p. 439. In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment; or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are, at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. Hale, in page 449, giving the reason for the decision in the case of the Lord Dacre, says: "They all came with an intent to steal the deer; and consequently the law supposes that they came all with the intent to oppose all that should hinder them in that design." The original case says this was their resolution. This opposition would be a personal opposition. This case, even as stated by Hale, would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way. In both these cases stated in Hale, P. C. p. 534, the persons actually set out together, and were near enough to assist in the commission of the fact. That in the Case of Pudsey the felony was, as stated by Hale, a different felony from that originally intended, is unimportant in regard to the particular principle now under consideration; so far as respected distance, as respected capacity to assist in case of resistance, it is the same as if the robbery had been that which was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. Foster (page 350) plainly supposes the same particular design, not a general design composed of many particular distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case

which is, perhaps, common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual; and each performs the part assigned to him. Some ride up to the individual, and demand his purse. Others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed. If murder or robbery actually take place, all are principals; and all in construction of law are present. But suppose they set out at the same time or at different times, by different roads, to attack and rob different individuals or different companies; to commit distinct acts of robbery. It has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do, indeed, belong to the general party; but they are not of the particular party which committed this fact. Foster concludes this subject by observing that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary:" that is, at the particular fact which is charged. He must be ready to render assistance to those who are committing that fact. He must, as is stated by Hawkins, be ready to give immediate and direct assistance. All the cases to be found in the books go to the same point. Let them be applied to that under consideration.

The whole treason laid in this indictment is the levying of war in Blennerhassett's Island; and the whole question to which the inquiry of the court is now directed is whether the prisoner was legally present at that fact. I say this is the whole question; because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. It is an evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact. The counsel for the prosecution have charged those engaged in the defence with considering the overt act as treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle; that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. And the only division of that point, if the expression be allowed, which the court is now examining, is the constructive presence of the prisoner at the fact charged.

To return, then, to the application of the cases. Had the prisoner set out with the party from Beaver for Blennerhassett's Island, or perhaps had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact. Had he not arrived in the island, but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island. But if he was not with the party at any time before they reached the island; if he did not join them there, or intend to join them there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts—then he was not of the particular party assembled at Blennerhassett's Island, and was not constructively present, aiding and assisting in the particular act which was there committed.[20] The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blennerhassett's Island, but the whole evidence shows he was not of that party. In felony, then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestably an accessory and not a principal. But in treason, it is said, the law is otherwise, because the theatre of action is more extensive. The reasoning applies in England as strongly as in the United States. While in '15 and '45 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom, yet no man was ever considered as legally present at one place, when actually at another; or as aiding in one transaction while actually employed in another. With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring that he who counsels, procures, or aids treason, is guilty accessorially, and solely in virtue of the common law principle that what will make a man an accessory in felony makes him a principal in treason. So far from considering a man as constructively present at every overt act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular overt acts of levying war with which he is charged. What would be the effect of a different doctrine? Clearly that which has been stated.

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[20] Note A, § 5.

If a person levying war in Kentucky may be said to be constructively present and assembled with a party carrying on war in Virginia at a great distance from him, then he is present at every overt act performed anywhere. He may be tried in any state on the continent, where any overt act has been committed. He may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts. This is, perhaps, too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of Judge Patterson in Mitchell's Case has been cited on this point, 2 Dall. [2 U. S.] 348. The indictment is not specially stated, but from the case as reported, it must have been either general for levying war in the county of Allegany, and the overt act must have been the assemblage of men and levying of war in that county, or it must have given a particular detail of the treasonable transactions in that county. The first supposition is the most probable, but let the indictment be in the one form or the other, and the result is the same. The facts of the case are that a large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Allegany, for the purpose of committing acts of violence at Pittsburg; that there was also an assemblage at a different time at Couch's fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couch's fort the resolution was taken to attack the house of the inspector, and the body there assembled marched to that house and attacked it. It was proved by the competent number of witnesses that he was at Couch's fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after the action attending the body of one of his comrades who was killed in it. One witness swore positively that he was present at the burning of the house; and a second witness said that "it run in his head that he had seen him there." That a doubt should exist in such a case as this is strong evidence of the necessity that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the judge in this case? Couch's fort and Neville's house being in the same county, the assemblage having been at Couch's fort, and the resolution to attack the house having been there taken, the body having for the avowed purpose moved in execution of that resolution towards the house to be attacked, he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couch's and the marching from thence; and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider the meeting at Couch's, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it; and the judge declared it to be unnecessary that all should have seen him at the same time and place. But suppose not a single witness had proved Mitchell to have been at Couch's, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different state. Can it be believed by any person who observes the caution with which Judge Patterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might, on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jeffreys is enrolled.

But to estimate the opinion in Mitchell's Case, let its circumstances be transferred to Burr's Case. Suppose the body of men assembled in Blennerhassett's Island had previously met at some other place in the same county; that Burr had been proved to be with them by four witnesses; that the resolution to march to Blennerhassett's Island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood county generally—the cases would, then, have been precisely parallel; and the decision would have been the same. In conformity with principle and with authority, then, the prisoner at the bar was neither legally nor actually present at Blennerhassett's Island; and the court is strongly inclined to the opinion that without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds: The first is, that the indictment does not charge the prisoner to have been present. The second, that although he was absent, yet if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act. The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the United States. The court understands it to be directly charged that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose

the law be that the indictment would be defective unless it alleged the presence of the person indicted at the act of treason. If, upon a special verdict, facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned because the indictment was defective in not charging that he was himself one of the assemblage which constituted the treason, or because it alleged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded he would not, and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blennerhassett's Island, it ought to be so construed now. But this is unimportant; for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the overt act, and must be proved, as will be shown hereafter. The second position is founded on 1 Hale, P. C. 214, 288, and 1 East, P. C. 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, (since it admits that one case may be stated, and a very different case may be proved,) I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and, therefore, ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge in the character and essence of the offence, and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the United States, seem to be repugnant to the declarations we find everywhere that an overt act must be laid, and must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion that had the public received his corrected instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied universally to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offence; that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his dicta, and if they admit of being understood in a limited sense, not repugnant to his own doctrines nor to the general principles of law, to understand them in that sense. "If many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals." This is laid down as applicable singly to the treason of counterfeiting the coin, and is not applied by Hale to other treasons. Had he designed to apply the principle universally he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute as well as in the chapter respecting the coin; he would have laid it down when treating on indictments generally. But he has done neither. Every sentiment bearing in any manner on this point, which is to be found in Lord Hale while on the doctrine of levying war or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the dictum of a judge beyond its terms to cases which he had expressly treated, in which he has not himself applied it, and on which he, as well as others, has delivered opinions which that dictum would overrule. This would be the less justifiable if there should be a clear legal distinction indicated by the very terms in which the judge has expressed himself between the particular case to which alone he has applied the dictum and other cases to which the court is required to extend it. There is this clear legal distinction: "They may," says Judge Hale, "be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted. A special overt act of levying war must be laid. This distinction between counterfeiting the coins and that class of treasons among which levying war is placed is taken in the statute of Edward III. That statute requires an overt act of levying war to be laid in the indictment, and does not require an overt act of counterfeiting the coin to be laid. If in a particular case, in which a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow that in other cases, where a general indictment would not be sufficient, where an overt act must be laid, that this overt act need not be laid according to the real fact. Hale, then, is to be reconciled to himself and with the general principles of the law only by permitting the limits which he has himself given to his own dictum to remain where he has placed them. In page 238, Hale is speaking generally to the receiver of a traitor, and is stating in what such a receiver partakes of an accessory: 1st. "His indict-

ment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is procurer, counsellor, or consenter." The words "may be otherwise" do not clearly convey the idea that it is universally otherwise. In all cases of a receiver, the indictment must be special on the receipt, and not general. The words "may be otherwise in case of a procurer," &c., signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons without contradicting the doctrines of Hale himself as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is, that Hale used these words in their restricted sense; that he used them in reference to treasons in which a general indictment would lie, not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed may, perhaps, be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

These observations relative to the passages quoted from Hale apply to that quoted from East, who obviously copies from Hale and relies upon his authority. Upon this point, J. Kelyng, 26, and 1 Hale, P. C. p. 626, have also been relied upon. It is stated in both that if a man be indicted as a principal and acquitted, he cannot afterwards be indicted as an accessory before the fact—whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it would be overruled. Were such a case produced its application would be questionable. Kelyng says an accessory before the fact is quodam modo in some manner guilty of the fact. The law may not require that the manner should be stated, for in felony it does not require that an overt act should be laid. The indictment, therefore, may be general; but an overt act of levying war must be laid. These cases, then, prove in their utmost extent no more than the cases previously cited from Hale and East. This distinction between indictments which may state the fact generally, and those which must lay it specially, bear some analogy to a general and a special action on the case. In a general action the declaration may lay the assumpsit according to the legal effect of the transaction, but in a special action on the case the declaration must state the material circumstances truly, and they must be proved as stated. This distinction also derives some aid from a passage in Hale (page 625) immediately preceding that which has been cited at the bar. He says: "If A be indicted as principal and B as accessory before or after, and both be acquitted, yet B may be indicted as principal, and the former acquittal as accessory is no bar." The crimes, then, are not the same, and may not indifferently be tried under the same indictment. But why is it that an acquittal as principal may be pleaded in bar to an indictment as accessory, while an acquittal as accessory may not be pleaded in bar to an indictment as principal? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessory, the question recurs, on what legal ground does this distinction stand? I can imagine only this: an accessory being quodam modo a principal in indictments where the law does not require the manner to be stated, which need not be special, evidence of accessorial guilt, if the punishment be the same, may possibly be received; but every indictment as accessory must be special. The very allegation that he is an accessory must be a special allegation, and must show how he became an accessory. The charges of this special indictment, therefore, must be proved as laid, and no evidence which proves the crime in a form substantially different can be received. If this be the legal reason for the distinction, it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the counsel for the United States. Suppose an indictment charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case? The guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt, then, consists in procuring the assemblage, and upon this fact depends his criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved; it constitutes an essential part of the overt act. If, then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not also be proved? Must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual make the guilt of the assemblage his guilt, and in the other case the procurement by the individual make the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses. Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which

the accused does not participate in the guilt of the assemblage if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the individual was present by a train of conjectures, of inferences, or of reasoning; the fact must be proved by two witnesses. Neither, where procurement supplies the want of presence, is the mind to be conducted to the conclusion that the accused procured the assembly by a train of conjectures or inferences, or of reasoning; the fact itself must be proved by two witnesses, and must have been committed within the district. If it be said that the advising or procurement of treason is a secret transaction, which can scarcely ever be proved in the manner required by this opinion, the answer which will readily suggest itself is, that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the constitution requires two. The more correct inference from this circumstance would seem to be, that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself. If, then, the doctrines of Kelyng, Hale, and East, be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the United States, the fact that the accused procured the assemblage on Blennerhassett's Island must be proved, not circumstantially, but positively, by two witnesses, to charge him with that assemblage. But there are still other most important considerations which must be well weighed before this doctrine can be applied to the United States.

The 8th amendment to the constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be said to be "informed of the nature and cause of the accusation" unless the indictment give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defence. It is also well worthy of consideration, that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law, which is said to convert the accessory before the fact into the principal, and to make the act of the principal his act. The accessory before the fact is not said to have levied war. He is not said to be guilty under the statute, but the common law attaches to him the guilt of that fact which he has advised or procured; and, as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation, then, which can only be performed where the common law exists to perform it. It is the creature of the common law, and the creature presupposes its creator. To decide, then, that this doctrine is applicable to the United States would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decision that these accessorial crimes are not, in the case of treason, excluded by the definition of treason given in the constitution. I will not pretend that I have not individually an opinion on these points; but it is one which I should give only in a case which absolutely required it, unless I could confer respecting it with the judges of the supreme court.[21]

I have said that this doctrine cannot apply to the United States without implying those decisions respecting the common law which I have stated; because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer be within the definition of levying war, and, independent of the agency of the common law, do actually levy war, then the advisement or procurement is an overt act of levying war. If it be the overt act on which he is to be convicted, then it must be charged in the indictment; for he can only be convicted on proof of the overt acts which are charged. To render this distinction more intelligible, let it be recollected that, although it should be conceded that since the statute of William and Mary he who advises or procures a treason may, in England, be charged as having committed that treason, by virtue of the common law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offence and permit them to be charged as one, yet it can never be conceded that he who commits one overt act under the statute of Edward can be charged and convicted on proof of another overt act. If, then, procurement be an overt act of treason under the constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling, whatever may be the doctrine of the common law in the case of an accessorial offender.

It may not be improper in this place again

[21] See note A, § 1.

to advert to the opinion of the supreme court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is, that an individual may be guilty of treason "who has not appeared in arms against his country; that if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising, certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part: that part is the act of levying war. That part, it is true, may be minute, it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted.[22] The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was, in truth, performed by others, and convicted on their overt acts. It amounts to this and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war. It may possibly be the opinion of the supreme court that those who procure a treason and do nothing further are guilty under the constitution. I only say that opinion has not yet been given, still less has it been indicated that he who advises shall be indicted as having performed the fact.

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's Island; or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place; indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country unless by virtue of a similar operation—a point far from being established, but on which, for the present, no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner and by the same kind of testimony which would be required to prove actual presence.

The second point in this division of the subject is the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable. This point presupposes the treason of the accused, if any have been committed, to be accessorial in its nature. Its being of this description, according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood, has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence is a point already discussed and decided. It is, then, apparent that but for the exception to the general principle which is made in cases of treason, those who assembled at Blennerhassett's Island, if that assemblage were such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although in truth the chief traitors, would in law be accessories. It is a settled principle in the law that the accessory cannot be guilty of a greater offence than his principal. The maxim is "Accessorius sequitur naturam sui principalis"—"The accessory follows the nature of his principal." Hence results the necessity of establishing the guilt of the principal before the accessory can be tried; for the degree of guilt which is incurred by counselling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed. The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A shall be established in a prosecution against B. Consequently, if the guilt of B depends on the guilt of A, A must be convicted before B can be tried. It would exhibit a monstrous deformity indeed in our system, if B might be executed for being accessory to a murder committed by A, and A should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could in no case be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he re-

[22] See note A, § 2.

quire it, or unless a special provision to that effect be made by statute. If, then, this were a felony, the prisoner at the bar could not be tried until the crime were established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because in treason all are principals? Let this question be answered by reason and by authority. Why is it that in felonies, however atrocious, the trial of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessory; for that would be ground on which a great law principle could never stand. Not because there was, in fact, a difference in the degree of moral guilt; for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe is, perhaps, of the two, the blacker criminal; and were it otherwise, this would furnish no argument for precedence in trial. What, then, is the reason? It has been already given. The legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself. Does not this reason apply in full force to a case of treason? The legal guilt of the person who planned the assemblage on Blennerhassett's Island depends not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt, then, in contemplation of law, depends on theirs; and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death as a principal or as an accessory, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others; and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs; and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessory, so far as respects the order of trial, seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent. If from reason we pass to authority, we find it laid down by Hale, Foster, and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach in his notes on Hawkins, and is not, so far as the court has discovered, anywhere contradicted. These authorities have been read and commented on at such length that it cannot be necessary for the court to bring them again into view. It is the less necessary because it is not understood that the law is controverted by the counsel for the United States. It is, however, contended that the prisoner has waived his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment. Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had, by implication, waived his right to demand a species of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights did not require that it should be performed with a full knowledge of its operation. It would seem consonant to the usual course of proceeding in other respects in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted; and that he ought not to be considered as waiving the right to demand the record of conviction, unless with the full knowledge of that right he consented to be tried. The court, however, does not decide what the law would be in such a case. It is unnecessary to decide it; because pleading to an indictment, in which a man is charged as having committed an act, cannot be construed to waive a right which he would have possessed had he been charged with having advised the act. No person indicted as a principal can be expected to say, "I am not a principal. I am an accessory. I did not commit, I only advised the act."

The authority of the English cases on this subject depends, in a great measure, on the adoption of the common law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the United States. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact; and the question whether the treasonableness of the act may be decided in the first instance in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessory, rather than on the positive authority of those decisions. This question is not essential in the present case; because if the crime be within the constitutional definition, it is an overt act of levying war, and, to produce a conviction, ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the court on the present motion? Ought the court to sit and hear testimony which cannot affect the prisoner, or ought the court to arrest that testimony? On this question much has been said —much that may perhaps be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop irrelevant testimony; and, in the course of the argument, it has been repeatedly stated, by those who

oppose the motion, that irrelevant testimony may and ought to be stopped. That this statement is perfectly correct is one of those fundamental principles in judicial proceedings which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend that, in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal; for they do not agree. The jury cannot constitute it; for the question is whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment; but it is an error committed in the direct exercise of their judicial functions. The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common law principle respecting accessories should render it unnecessary; and there is not only no witness who has proved his actual or legal presence, but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions at a different place and in a different state, in order to prove—what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's Island? No: that is not alleged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses; not by the establishment of other facts from which the jury might reason to this fact. The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses in such manner that the question of fact ought to be left with the jury. The conclusion that in this state of things no testimony can be admissible is so inevitable that the counsel for the United States could not resist it. I do not understand them to deny that, if the overt act be not proved by two witnesses so as to be submitted to the jury, all other testimony must be irrelevant; because no other testimony can prove the act. Now, an assemblage on Blennerhassett's Island is proved by the requisite number of witnesses; and the court might submit it to the jury whether that assemblage amounted to a levying of war; but the presence of the accused at that assemblage being nowhere alleged except in the indictment, the overt act is not proved by a single witness; and, of consequence, all other testimony must be irrelevant. The only difference between this motion as made, and the motion in the form which the counsel for the United States would admit to be regular, is this: It is now general for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished, or can it be deemed necessary? If enough be proved to show that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be relevant, why should a question be taken on each witness? The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion. If a contradiction between the two opinions exist, the court cannot perceive it. It was said that levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. To that declaration the court still adheres. It was said that if the overt act were not proved by two witnesses, no testimony in its nature corroborative or confirmatory was admissible, or could be relevant. From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general commanding an army should detach troops for a distant service, would the men composing that detachment be traitors, and would the commander-in-chief escape punishment? Let the opinion which has been given answer this question. Appearing at the head of an army would, according to this opinion, be an overt act of levying war. Detaching a military corps from it for military purposes might, also, be an overt act of levying war. It is not pretended that he would not be punishable for these acts. It is only said that he may be tried and convicted on his own acts in the state where those acts were committed, not on the acts of others in the state where those others acted.[23]

Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice. That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace. That gentlemen, in a case the most interesting, in the zeal with which they advocate particular

[23] See note A, §§ 3, 7.

opinions, and under the conviction in some measure produced by that zeal, should, on each side, press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction, as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail. No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted; because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses. This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point the court for the present withholds its opinion for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution that no such testimony exists, if there be such let it be offered, and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct.

As soon as the CHIEF JUSTICE had concluded, Mr. Hay observed that the opinion just delivered by the court furnished matter for the serious consideration of the counsel for the prosecution; and he hoped the court would grant them time to consider it. After some desultory conversation, the CHIEF JUSTICE, at Mr. Hay's request, delivered him the opinion, that he might read and consider it.

The court adjourned till six o'clock in the afternoon.

At six o'clock the court met, and adjourned till Tuesday.

Tuesday, September 1, 1807.

Mr. Hay informed the court that he had nothing to offer to the jury of evidence or argument; that he had examined the opinion of the court, and must leave the case with the jury. The jury accordingly retired, and in a short time returned with the following verdict, which was read by Colonel Carrington, their foreman: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty." This verdict was objected to by Colonel Burr and his counsel as unusual, informal, and irregular. Colonel Burr observed that wherever a verdict is informal the court will either send back the jury to alter it, or correct it itself; that they had no right to depart from the usual form; that the rule universally is to ask them on their return, "How say you? is he guilty or not guilty?" to which they give a direct answer of "guilty," or "not guilty." That this is correct and responsive to the charge always read to them by the clerk, "If you find him guilty, you are to say so, &c; if you find him not guilty, you are to say so and no more."

Mr. Hay thought the verdict ought to be recorded as found by the jury, which was substantially a verdict of acquittal; and that no principle of humanity, policy, or law, forbade its being received in the very terms used by the jury; that they were not bound to find a verdict in the shortest possible way; that the form did not affect the substance.

Mr. Martin said that it was like the whole play, "Much Ado about Nothing;" that this was a verdict of acquittal; that there was nothing to do but to answer the question of guilty or not guilty; that it was the case with every jury in every instance; they had or had not evidence before them. Did they wish to have the verdict entered in this form on the record, as a censure on the court for suppressing irrelevant testimony? That he was conscious they had no such meaning; and as they had not, the jury ought to answer the question judicially addressed to them simply by a verdict of not guilty, as that was their intention.

Colonel Carrington, one of the jury, observed that it was said among themselves that if the verdict was informal they would alter it; that it was, in fact, a verdict of acquittal.

The CHIEF JUSTICE said that the verdict was, in effect, the same as a verdict of acquittal; that it might stand on the bill as it was if the jury wished it; and an entry should be made on the record of "not guilty."

Mr. Parker, another of the jury, said that if he were to be sent back he would find the same verdict; that they all knew that it was not in the usual form, but it was more satisfactory to the jury as they had found it; and that he would not agree to alter it.

After some further desultory remarks by several of the counsel, Mr. Hay, in answer to the observation that the only correct form was guilty or not guilty, reminded the court of the case of Rex v. Woodfall [5 Burrows, 2661], for a libel, where the jury departed from the usual form, added other words, and found a verdict in these words: "We find the defendant guilty of publishing only." This form, though preferred by the jury, was probably disapproved of by the counsel; but it was taken by the court as they presented it; and,

in the case of Rex v. Williams [unreported], cited in Woodfall's Case by the court, the jury added other words to the usual form of finding the defendant guilty; and as it did not affect the substance, it was entered up by the clerk "Guilty;" and no objection was ever made.

The court then decided that the verdict should remain as found by the jury; and that an entry should be made on the record of "Not Guilty."

The CHIEF JUSTICE politely thanked the jury for their patient attention during the whole course of this long trial, and then discharged them.

NOTE A. 1. The important question whether, under our constitution, a person can commit the crime of treason by merely advising and inciting others to levy war against the United States, without being personally present where war is actually levied by an assemblage of men in a "posture of war," and without doing any overt act constituting a "part" in the fact of levying war, still remains undetermined by any express adjudication. The argument that the constitutional definition of treason can not be extended beyond the plain, natural import of the words, by the interpolation of the common law rule, that whatever will make a man an accessory in felony will render him a principal in treason, is certainly a forcible one; but not conclusive to the minds of all who have investigated the subject. While Chief Justice Marshall, in this case, carefully abstained from pronouncing, judicially, any opinion upon this question, he intimated that, individually, he entertained one; and he stated the argument in favor of the more limited construction so forcibly as to leave little doubt as to what that individual opinion was. Some loose dicta may be found, both prior and subsequent to this trial, recognizing the doctrine that the common law rule above referred to is in full force in this country; but nothing having the semblance of judicial authority. Judge Chase, in his charge to the jury on the second trial of Fries, said: "In treason, all the participes criminis are principals; there are no accessories in this crime. Every act which in the case of felony would render a man an accessory, will, in the case of treason, make him a principal." Professor Greenleaf, in his valuable and generally accurate work on the Law of Evidence (volume 3, § 245), has attached undue importance to this extra-judicial remark. In his text he lays down, as a rule of law, the precise proposition above quoted, and in a note referring to the case of Fries, says: "No exception was taken to this doctrine, in that case, though the prisoner was defended by the ablest counsel of that day, and the case was one of deep political interest." This is certainly a remarkable error, in view of the notorious historical fact that on said second trial Fries was wholly without counsel. His counsel in the former trial, Messrs. Lewis and Dallas, withdrew from the case before the jury were sworn, on the second trial; and it was the announcement of Judge Chase that he should deliver to the jury, at the commencement of the trial, the very opinion from which the above quotation is made, and not permit counsel to controvert any of its positions, that caused them to abandon the defence. And this arbitrary conduct on the part of Judge Chase is the basis of the first charge in the first article of impeachment on which he was subsequently tried before the United States senate. But even if Fries had been defended by counsel, they would not have had the slightest occasion to except to this doctrine, as it could not possibly have any bearing on his case, he having been, according to his own admission, not only present when the war was alleged to have been levied, but the leader and commander of the band of insurgents who committed the hostile acts charged in the indictment. It is here worthy of remark, that while this very question commanded a large share of the attention of the counsel and the court throughout the trial of Colonel Burr, and Fries's Case was frequently cited on other points, the remark of Judge Chase above quoted was never once referred to in support of the position that the common law rule in regard to accessories in treason was in force in this country. Mr. Wickham referred to it once, but only to show its inconsistency with the position assumed by the same judge in the same trial; that English authorities were not to be regarded as precedents in our courts, in prosecutions for treason. But the opinion of Judge Chase in Warrall's Case, 2 Dall. [2 U. S.] 384, was frequently referred to, and urged with much force, in support of the contrary doctrine, viz.: that the federal courts have no common law jurisdiction in criminal cases: and hence that the constitutional definition of treason could not be extended by the application of common law rules. In fact, no judge ever more stoutly contended against the doctrine that common law crimes were cognizable in the federal courts (unless made so by express statute) than he did. He notified the counsel of Fries, before the trial commenced, "that he would not suffer the decisions at common law, and those under the statute of Edward III., to be read." Testimony of Wm. Lewis, 1 Chase, Tr. p. 129. And this was the basis of another charge in his impeachment. An essay on the law of treason, in the Boston Law Reporter of 1851 (volume 14, p. 416), and which has been cited in some of our standard elementary works on criminal law, lays down the proposition in still more positive terms. The writer says: "It is now too well settled to admit of question, that the law knows no accessories in treason; but that every one who, if it were a felony, would be an accessory, is, in the law of treason, a principal traitor. This rule, being now a constituent part of the law of treason, as administered in this country ever since its settlement, and in England for several centuries, its origin and history are of no importance. It is sufficient for us that it is a part of the law of the land." And yet in support of this broad assertion not a single adjudication of any American court is or can be cited. The writer refers only to the dictum of Judge Chase above quoted. Judge Grier, in Hanway's Case, 2 Wall. [69 U. S.] 144, said, in his charge to the jury: "An abettor in murder, in order to be held liable as a principal in the felony, must be present at the transaction; if absent he may be an accessory. But in treason all are principals, and a man may be guilty of aiding and abetting, though not present." This language, strangely enough, has been understood by some as expressing an opinion upon the very question which Chief Justice Marshall so cautiously reserved. But when carefully examined it will be found not to go a single step further than Judge Marshall went. He expressly held, in Burr's Case, that all who are guilty of treason at all, under the constitution and statute, are guilty as principals. He expressly held, too, that a man may be guilty of aiding and abetting in treason, though not present; "however remote from the scene of action." The question upon which he reserved his opinion was, whether a man can be guilty of treason by merely advising, inciting, and instigating others to commit it; and upon this question Judge Grier expressed no opinion in Hanway's Case [supra]. He did not say, as Judge Chase had said, that "every act which in case of felony would render a man an accessory, will, in the case of treason, make him a principal." It is to be presumed that he deliberately stopped short of this; for mere advising and inciting will render a man an accessory in felony, without the performance of any overt act. There was nothing in the facts of Hanway's Case to call for an opinion on the

question which Chief Justice Marshall deemed of such "vast importance" that no tribunal inferior to the supreme court of the United States ought to express an opinion upon it, unless a pending case should absolutely require it; inasmuch as Hanway was notoriously present, taking a leading part in the transactions which were charged as a levying of war. It may be safely asserted, that no decision in this country, having the weight of judicial authority, has gone a single step beyond the proposition laid down in the opinion of the supreme court, per Marshall, C. J., in the Case of Bollman and Swartwout. And that proposition, as interpreted by the same eminent jurist in Burr's Case, is in substance this: That when war is actually levied by an "assemblage of men," in a "posture of war," for a treasonable object, any one who, being leagued in the general conspiracy, performs any overt act constituting a "part" in such fact of levying war, however remote from the scene of action, or however minute that part, is guilty as a principal traitor. The learned chief justice was very careful to explain, in Burr's Case, that the person "remote" from the scene of war, but performing a "part" therein, was not implicated in the crime of treason by virtue of the common law rule that "in treason all are principals," but on the ground that the fact of levying war may consist of a multiplicity of acts, performed in different places, by different persons. After laying down the proposition "that those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the constitution," he adds: "It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war—who counsels and advises it—or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded because that doctrine is inapplicable to the United States, the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to a conviction, is a question of vast importance, which it would be proper for the supreme court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine unless the case before them should require it." In another place, referring to the opinion of the supreme court in the Case of Bollman and Swartwout, he says: "This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing more." And subsequently, in an opinion delivered during the pendency of the motion to commit Burr, Blennerhassett and Smith, he took occasion very emphatically to deny that the proposition laid down by the supreme court, that "a man leagued in the conspiracy may become a traitor by performing a part distinct from that of appearing in arms," involved the adoption of the common law doctrine in relation to accessorial acts in treason. Carp. Rep. 3 Burr. Tr. p. 152. The distinction is this: At common law an accessory may become a principal in treason without performing any overt act, mere advising or inciting being sufficient to implicate him as a principal in the crime of those who do commit the overt act. But the proposition laid down by the supreme court requires the actual commission of an overt act, constituting, a "part" in the fact of levying war, to implicate an absent person in the crime. This distinction, however, appears to have been wholly lost sight of by Judge Kane, in a charge delivered to the grand jury in Philadelphia, in 1851, at the term in which Hanway was indicted. He says: "Though he [the accused] was absent at the time of its actual perpetration, yet if he directed the act, devised, or knowingly furnished the means for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories." In another place he says: "Successfully to instigate treason is to commit treason." These mere obiter dicta of a district judge, thrown out in a charge to the grand jury, derive their only consequence from the fact that Judge Grier, subsequently, in his charge to the petit jury in Hanway's Case, expressed his general concurrence in the doctrines and sentiments of said charge to the grand jury delivered by Judge Kane. But, as has been before stated, there was nothing in Hanway's Case to call for any opinion on the question now under consideration; and it is not to be presumed that Judge Grier intended to affirm the doctrines laid down by Judge Kane in his charge to the grand jury, except in so far as they had some bearing on the case before him.

2. Whether a particular act, performed by an absentee, will constitute a "part" in the fact of levying war in another place, within the meaning of the supreme court, may of course sometimes be the subject of grave doubt. The same difficulty will arise that is always liable to arise in applying general rules to special cases. It must, however, be an "overt act," and must be directly and immediately ancillary to the principal act of war specified in the indictment; otherwise it cannot constitute a "part" thereof. Chief Justice Marshall says: "This part, however remote or minute, constitutes the overt act of which alone the person who performs it can be convicted." It is manifest, however, that he did not mean to say that it must be such an act as of itself would constitute the crime of treason; for in another place he says: "If, for example, an army should be actually raised for the avowed purpose of carrying on an open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him." Yet it is clear that neither the purchasing of military supplies, nor the enlisting of soldiers, though for a treasonable object, will constitute the crime of treason, unless done in connection with and ancillary to some more positive act of war. There must at least be an actual "assembling of men" in "a posture of war," to which such acts have relation, and are ancillary, before they can constitute the crime of treason. In England, as remarked by Chief Justice Marshall, the courts have had no occasion to distinguish between such acts, performed by a person remote from the scene of actual war, as constitute a "part" in the fact of levying war, and so would make him a principal independently of the common law rule which converts all accessories in treason into principals, and such as are purely accessorial in their character; because the operation of that rule renders any such distinction wholly unnecessary. But if said common law rule is not in force in this country, the distinction must be drawn; and in some cases it will be found an extremely subtile one. It is clear that independently of the common law rule above referred to, mere advising and inciting others to levy war would not constitute the crime of treason, though war should actually be levied pursuant to such advice or incitement. It is not so clear, however, that commanding others to levy war, by a person in a situation to enforce obedience to his commands, would not constitute an overt act in the war actually levied in pursuance of such command. Yet in England the distinction between an imperative command and mere advice or incitement is an immaterial one, and hence no attempt has been made to define it. In the foregoing remarks it has not been the object of the writer to show what the decisions of our courts ought to be, on the question under consideration, but simply to show that the English

doctrine, that whatever will render a man an accessory in felony will make him a principal in treason, has never yet been established by judicial authority as the law of treason in this country, and that the question is still an open one, notwithstanding the dicta of some judges and elementary writers to the contrary.

3. It is manifest that while the treasonable assemblage which alone can constitute a levying of war may be limited to a particular place in a particular state or district, an auxiliary act, constituting a part in the war there levied, may be performed in a different state or district. For instance, while the rebel army is besieging a fort or a city in one state, a confederate may be forwarding to that army reinforcements, arms, ammunition and supplies from another state, hundreds of miles distant. In such a case there can scarcely be a doubt that the acts of the distant confederate would constitute such a part in the war levied by the besieging army as would, within the meaning of the supreme court in the Case of Bollman and Swartwout, and of Chief Justice Marshall in Burr's Case, implicate him in the crime of treason there consummated. But in neither of said cases is it expressly stated in what district such "remote" abettor would be liable to prosecution; whether in that where he performed the auxiliary part, or that in which the principal act of levying war was actually committed. It would seem to be fairly inferable from some portions of the opinion delivered in Burr's Case, that unless the person performing such auxiliary part was near enough to the scene of hostile demonstration to be "of the particular party" there assembled, and in such a situation of ability to render them immediate aid as would make him a principal in the second degree in case of felony, he would only be subject to prosecution in the district where he performed the auxiliary acts implicating him in the crime. Other passages in the same opinion quite as clearly indicate that on an indictment specially charging the facts, he might be prosecuted in the district where the principal act of levying war was committed, though not present at the treasonable assemblage, and though he performed in a distant state or district the part implicating him in the crime. For instance, in one part of the opinion the chief justice says: "If, under this indictment, the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage." The implication is clear, that the prisoner might have performed, in Kentucky, a part in a war prosecuted on Blennerhassett's Island. It is equally clear that evidence of the performance of such part was only inadmissible on account of the generality of the indictment, charging him as if actually present with the party on the island; and, as a necessary corollary, that he might have been prosecuted in Virginia for an auxiliary part performed in Kentucky, on a proper indictment, specially charging the facts. This may become a very important question in connection with the current rebellion, and therefore deserves consideration. If a person, performing in one district an act constituting an auxiliary part in the fact of levying war in another district, is liable to prosecution in the place where the principal act is committed, then in case the chief of the rebel conspiracy, or his secretary of war, or any of his principal coadjutors, should ever fall into our hands, all that would be necessary to convict either of them of treason in Maryland, Pennsylvania, Ohio, or Indiana, would be to prove that he had performed in Virginia some act immediately ancillary to the invasions of the two former states by the rebel army under Lee or Early, or of the two latter by the marauders under John Morgan. If (as has been decided by the supreme court) a person performing in one place an act auxiliary to the fact of levying war in another place, "however remote," thereby becomes a principal in the crime of treason, it is believed that, on well established general principles, he will be subject to prosecution in the place where the principal act of levying war, to which his auxiliary act relates, is committed; whatever may have been the opinion entertained by Chief Justice Marshall on the subject. The general principle is believed to be well established, that where a crime is commenced in one place and consummated in another, or where it consists of several acts performed by different persons and in different places, any person implicated as a principal in the crime is liable to prosecution in the place where the crime is consummated, or where the principal act, which gives character to the crime, is committed. Numerous authorities in support of this principle will be found cited in the standard elementary books on criminal law; and the most important are referred to in the case particularly noticed in the succeeding paragraph. The case of People v. Adams, 3 Denio, 190; Id., 1 Comst. [1 N. Y.] 173, is an authority precisely in point on the question under consideration. Adams was indicted in the city of New York for obtaining a large sum of money from a firm in that city by means of fictitious receipts signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of pork and lard for the use and subject to the order of said firm. He pleaded specially to the indictment, that he was a natural born citizen of Ohio, and had always resided there, and had never been in the state of New York; that the receipts were drawn and signed in Ohio, and that the offence was committed by their being presented in New York by innocent agents employed by the defendant in Ohio. This plea was demurred to, and after elaborate argument by the ablest counsel that money could command, the demurrer was sustained, first in the supreme court, and subsequently in the court of appeals. The decision turned upon the point that Adams, having employed innocent agents to consummate the crime in New York, was guilty as a principal, (there being no other guilty person to whose crime his acts could be accessorial;) and being guilty as a principal, he was liable to prosecution in the place where the crime was consummated, though not present, nor even within the general jurisdiction of the state. Now let us apply the principles of this case to the question under consideration. The supreme court has decided that when the crime of treason is consummated by an open act of war committed in one place, whoever performs a part in that war, "however minute or remote from the scene of action," thereby becomes a principal in the crime of treason. And in the New York case just cited, it was decided that whoever is guilty as a principal in any crime is liable to prosecution in the place where the crime is consummated, though not present at that place. Does it not follow, that any one who, in Richmond or elsewhere, performed any act immediately ancillary to the war which was prosecuted in Pennsylvania by the rebel army, in 1863, and thereby became a principal in the crime of treason there consummated, is liable to prosecution in Pennsylvania?

4. Professor Greenleaf, in his work on the Law of Evidence (volume 3, § 243), says it is on the ground of constructive presence "that if war is levied with an organized military force, vexillis explicatis, all those who perform the various military parts of prosecuting the war, which must be assigned to different persons, may justly be said to levy war;" and adds: "All that is necessary to implicate them is, to prove that they were leagued in the conspiracy, and performed a part in that which constituted the overt act, or was immediately ancillary thereto:" (citing Burr's Case.) The author of the essay on the law of treason in the Boston Law Reporter of 1851, (hereinbefore referred to,) takes the same ground; also citing Burr's Case. But however logical it might be to hold that, when war is actually levied by an organized military force

in one place, any one who, being leagued in the general conspiracy, performs any part therein, at another and "remote" place, should be considered as constructively present where the principal act of levying war is committed, it is far from being clear that Chief Justice Marshall intended to assert or admit this principle. Indeed, many expressions in his opinion would seem to imply that he held directly the contrary doctrine. It is true that his argument was mainly addressed to the broader proposition, that any one who advises or procures a treasonable assemblage, constituting an overt act of levying war, is to be considered as constructively present at that assemblage, though in fact hundreds of miles distant. But it is difficult to reconcile his ruling, as well as many of his expressions, with any other opinion than that, where an auxiliary act constituting a part in the fact of levying war is performed at a great distance from the scene of the treasonable assemblage, the absent abettor cannot be considered as constructively present at the assemblage. If he could be held constructively present, evidence of his auxiliary acts would be admissible under an indictment charging him generally, as if actually present; for there is no principle in criminal pleading better settled, than that a principal in the second degree, who is constructively, but not actually present at the fact, may be charged generally with committing the fact. But in Burr's Case it was decided that the evidence of acts done at a great distance from Blennerhassett's Island was inadmissible, because the indictment charged the defendant as being present at the island where the treasonable assemblage was alleged to have taken place. The passage from Chief Justice Marshall's opinion above quoted, where he says, "If, under this indictment, the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage," seems to be susceptible of no other interpretation than this. The reader will find in that opinion other passages equally difficult to reconcile with the doctrine that all who are implicated in the crime of levying war are to be considered as constructively present at the principal scene of the hostile demonstration. While, as has been shown, the theory that in treason the doctrine of constructive presence is to be so extended as to embrace all who perform any part in the fact of levying war by an organized military force, "however remote from the scene of action," does not seem to be sustained either by the reasoning or the ruling of the court in Burr's Case, yet so far as the question now under consideration is concerned, it is deemed to be wholly immaterial upon what theory the absent abettor becomes a principal in the crime, provided he becomes so independently of the common law rule which converts all accessories in treason into principals. It is sufficient that he is a principal, and being such the general rule applies, that he is liable to prosecution where the crime is actually consummated. Whether he becomes a principal on the theory of constructive presence, or on some other theory, independent of the common law rule above referred to, is only important as a question of pleading. If constructively present, he may be charged in the indictment as if actually present. Otherwise the indictment must be special, showing his absence; as was held to be necessary in Burr's Case.

5. It has been supposed by some writers that there is a very great hardship involved in holding a man liable to prosecution for treason in a state or district where he never may have been in his life. But this hardship, if it be one, is not peculiar to prosecutions for treason. Nor is it perceived what reasonable cause any man can have to complain that he is subjected to a prosecution in the place where his criminal acts take effect, and where he intended that they should take effect, though, from the nature of the crime, it was susceptible of being initiated at another place, and was consummated without his personal presence. Professor Tucker puts the case of a person in Maryland, hearing of Fries's insurrection in Pennsylvania, and lending a horse or money to a person avowedly going to join the insurgents, in order to assist him on his journey: and asks if this would amount to levying war in Pennsylvania, where the lender never was? 4 Tuck. Bl. Comm. Append. B. It may be answered, that if the lender was leagued in the general conspiracy, and furnished the horse or the money for the purpose of reinforcing the insurgents by sending them a recruit, he would clearly be guilty of treason, according to the doctrine announced by the supreme court in the Case of Bollman and Swartwout, and by Chief Justice Marshall in Burr's Case. And yet the act would be treason in Maryland only in virtue of its relation to and connection with the insurrection in Pennsylvania, where it was intended to take effect and do its mischief. Suppose, instead of lending a horse or money to a recruit, he should send a wagon load of arms and ammunition to the insurgents, to be used by them in the war they were then prosecuting for the subversion of the government; would it be a peculiarly hard case that he should be subjected to prosecution in the state where lives were actually destroyed by his act, and in pursuance of his intentions? If a person in Baltimore should send by express to a person in Philadelphia, with intent to destroy his life, an "infernal machine" concealed in a box, and the receiver, on opening the box, should be killed by the explosion, it is beyond question that the author of the crime would be liable to prosecution for murder in Philadelphia, although he may never have been in that city, or in the state of Pennsylvania in his life. But suppose instead of sending an "infernal machine," intended to destroy the life of one man, he should send a box of arms and ammunition to a rebel army in open war, intended not only to destroy the lives of many men, but to aid in subverting the government; would not the reasons for holding him subject to prosecution in Pennsylvania (independent of all arbitrary rules of law) be quite as strong as in the other case? If, therefore, it is a general rule of law applicable to other crimes, that whoever is implicated as a principal is liable to prosecution in the state or district where the crime is consummated, there can be no good reason for making an exception to the general rule in the case of treason, on the ground that it will work a peculiar hardship to the accused.

6. Chief Justice Marshall, in his opinion in Burr's Case, says: "If a rebellion should be so extensive as to spread through every state in the Union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed—too violent to be made without clear authority—to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire; if this chief should be there captured and sent to the other extremity for the purpose of trial; if his indictment, instead of alleging an overt act, which was true in point of fact, should allege that he had assembled some small party, which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia at a time when in reality he was fighting a battle in New Hampshire; if such evidence would support such an indictment by the fiction that he was legally present though really absent, all would ask to what purpose are those provisions in the constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?" Although the question to which these remarks had immediate application was as to the form of the indictment, it is perhaps fairly to be inferred that, in the opinion of the chief justice, in the case supposed, the chief of the rebel army would

not be subject to prosecution in Georgia, under any form of indictment. And if (as is rather implied than expressed) it is to be supposed that he had no direct agency in prosecuting the skirmish in Georgia, and performed no part therein, this would undoubtedly be true. But let us suppose another case: Let us suppose that the chief of the rebel army in Georgia, during the present rebellion, should detach a portion of the troops under his command and send them by sea to attack and capture one of the seaboard towns of New Hampshire, furnishing them with all the arms and munitions of war necessary to that end; and that the expedition should succeed in accomplishing its object. Would not the rebel commander perform such a part in the capture of the town as would render him a principal in the crime of treason there consummated? And would he not, on general principles, be liable to prosecution in New Hampshire? If not, then an American citizen who should go into a foreign country—one of the West India Islands for instance—and there fit out, arm, equip, and man a fleet of war vessels, and send them to bombard and capture any one of our Atlantic cities, but remain behind himself, would be guilty of treason nowhere, and might return to the United States with impunity. Suppose that while the battles of South Mountain and Antietam were going on, the chief of ordnance of the rebel army had been stationed at Martinsburg, Virginia, from which point he was sending arms and ammunition to his confederates, engaged in battle in Maryland; would he not have been guilty of levying war in Maryland? If so, could it make any difference that he was similarly engaged at Richmond instead of Martinsburg? In either case the hostile acts would take effect and do their mischief in Maryland; and it is believed that the author of them would be answerable in Maryland, just as much as if, standing on the Virginia side of the Potomac, he had fired a gun into the ranks of our army stationed on the Maryland side of the river.

7. If the principle here contended for be tenable, it does not follow that an abettor, performing an auxiliary part in a war actually levied in another state, would be liable to prosecution only in the state where the principal act of levying war was committed. It is a general, though not a universal rule of law, that when a crime consists of several acts performed in different places, or is commenced in one place and consummated in another, any person implicated as a principal in the crime may be prosecuted either in the place where the crime is consummated, or that in which he personally performs the act which implicates him in it. Rex v. Brisac, 4 East, 164; Rex v. Burdett, 4 Barn. & Ald. 95; Girdwood's Case, 2 East, P. C. 1120; Fost. P. C. 349; People v. Mather, 4 Wend. 229. Upon the authority of these cases, and many others that might be cited, there can be no doubt that a person who, being leagued in the rebel conspiracy, should in Maryland purchase supplies or enlist men and forward them to the rebel army in Virginia, would be liable to prosecution for treason in Maryland. To the rule last laid down there is, however, at least one exception. The crime may have been commenced, or the auxiliary act which implicates the accused in it may have been performed in a foreign country, out of the general jurisdiction of the United States; in which case he could only be prosecuted in the state or district where the crime was consummated. In the case of People v. Adams, above cited, the acts performed by the defendant, in person, were all performed in a foreign state, and therefore he was not liable to prosecution at all in the place where he committed those acts; at least not liable under the laws of New York.

NOTE B. The reasonableness of the doctrine that treason by levying war may be committed without "the actual application of violence to external objects," is forcibly illustrated by the history of the current Rebellion in this country. It is believed that in some of the revolting states the authority of the federal government was completely subverted, and a revolutionary government, de facto, carried into full effect, without the commission of any acts of violence within their limits. Ordinances of secession were passed, renouncing all connection with or subordination to the federal government, and instituting new forms of government entirely independent thereof, which were carried into practical effect without the slightest physical opposition. Such was the unanimity of public sentiment, or the terror inspired by the energy, activity, and preparation of the leading conspirators, that no opposition was attempted by any portion of the people of those states, and there being no federal troops there to enforce the authority of the general government, these revolutionary measures were effectuated without "the application of violence to external objects," simply because there were no external objects present which it became necessary to employ force or violence against. Undoubtedly, in all these cases, the acts above referred to were accompanied by some concurrent acts of preparation for war, such as the organization and embodiment of troops; so that there was, perhaps, an actual "military array," and "posture of war." But according to the doctrine contended for by Mr. Burr's counsel, (especially Mr. Martin,) there could have been no treason committed in such states until there was actual violence committed. We may, indeed, imagine a case where the authority of the general government would be completely subverted in a state, without even a display of any such potential force as is said to consist in the "assembling and marching of troops," and in assuming "a posture of war." The legislature or a state convention might pass an ordinance of secession, and institute a revolutionary government, without making the slightest preparation for maintaining their position by military force. The state might be so surrounded by other revolted states, and public sentiment among its own citizens might be so unanimous, that any immediate preparation for maintaining their position by military force might be deemed unnecessary. All local federal officers might join in the conspiracy, or cease to perform their functions through fear; and so the authority of the federal government might be completely subverted: not only without any actual war, but without any preparation for war. It is not probable that any state assuming to secede from the Union so utterly neglected all preparations for war as this; but in every other respect the supposed case is only a statement of what actually did occur in more than one state. In the case supposed, could the legitimate government be entirely subverted throughout the state, without the guilt of treason being incurred by any one of its citizens? The proposition that it could be is a startling one; and yet there would be no such overt act of levying war as, according to the decisions of the courts, would seem to be an indispensable element in the crime of treason. It might be supposed, by unprofessional readers at least, that the persons by whose acts the authority of the federal government in a state was thus subverted, would be guilty of treason under that clause of the constitution which relates to "adhering to the enemies of the United States, giving them aid and comfort." But conceding that in this Rebellion every state which passed an ordinance of secession, did, by that act alone, give aid and comfort to the rebels in arms, and that the passing of an ordinance of secession is an act of adhesion to the rebel cause, it is doubtful, to say the least, whether the crime of treason can be committed in this country by adhering and giving aid and comfort to rebels. In England, under that clause of the statute of 25 Edw. III., from which this clause of our constitution is copied, it has always been held that treason could not be committed by adhering and giving aid and comfort to British subjects in rebellion. In other words,

that the "enemies" referred to in that clause of the statute are foreign enemies, and not rebels. It is true that in England a person giving aid and comfort to rebels in arms against the government might be guilty of treason; but according to the decisions of the courts it would be treason in compassing the death of the king, or by reason of being accessorial to the levying of war, and not under the clause of the statute which relates to adhering to the king's enemies, giving them aid and comfort. As our constitution has adopted the words of this statute, our courts will give to those words the same construction which the courts of Great Britain had given to them previous to their adoption. No one has ever contended that our courts should give them a broader construction. No question as to the construction of this clause of the constitutional definition of treason arose in the trial of Col. Burr, as he was not indicted under it. But in reference to the other clause, Chief Justice Marshall said it was "scarcely conceivable that the term 'levying war' was not employed by the framers of our constitution in the same sense which had been affixed to it by those from whom we borrowed it." It is believed that in no decision of any of our courts has any construction of this second clause of the constitutional definition of treason ever been given. It has been reported that Mr. Justice Swayne, of the supreme court, early in this Rebellion, in a case which came before him in the Southern district of Ohio, held that treason under this clause of the constitution could not be committed by giving aid and comfort to the rebels; but in fact, as the writer has been informed by Judge Swayne himself, his decision did not turn on that question. It is believed, however, that the courts will be constrained so to decide whenever the question shall come directly before them. It was in view of this doctrine, probably, that congress passed the second section of the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion," &c. (chapter 95 [12 Stat. 589]), which provides: "That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall engage in, or give aid or comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by fine not exceeding ten thousand dollars, and by the liberation of all his slaves, or by both of said punishments, at the discretion of the court." In view of the constructions which the courts of this country have given, and will probably be constrained to give, to the constitutional definition of treason, this is a most important statute, in reference to the existing Rebellion. Adherents to the rebel cause are numerous in some of the loyal states, and are daily doing acts which give aid and comfort to the Rebellion. Military arrests for acts of this description are very common; but as yet there have been comparatively few prosecutions in our civil courts of criminal jurisdiction. Perhaps if grand juries and district attorneys were more vigilant, there would be less necessity for military arrests and military trials in such cases; although, as long as the war lasts, it cannot be expected that military trials will be superseded by prosecutions in the civil courts. Without the aid of the law above cited, it is at least doubtful whether many of the acts of aid and encouragement to the Rebellion which it unquestionably covers, could be punished at all by prosecutions in our civil tribunals; especially if it should be finally decided that the common law rule which makes all accessories in treason principals, is not in force in this country. But this statute clearly reaches all cases, as well of mere advice or incitement of treason in levying war, as of aid and comfort to rebels in arms. It will therefore be the safest course, in all prosecutions against persons who have not clearly been guilty of levying war against the United States, according to the strictest construction of the constitution, to proceed under this statute, rather than for treason. It is true that the penalty prescribed by this statute is less severe than may be inflicted on conviction of treason. But the first section of the same act gives the court a discretion to inflict even a less penalty for treason than may be inflicted on a conviction under said second section. And since this discretion has been vested in the courts, it is not probable that the death penalty would ever be inflicted upon any but the most notorious and culpable traitors, even if convicted of treason. Another reason for proceeding under the statute of 1862, instead of prosecuting for treason, in all doubtful cases, is, that the defendant will not have the right to challenge, peremptorily, thirty-five jurors.

NOTE C. Although the question did not arise in Burr's Case, it may not be amiss here to remark, that some difference of opinion formerly prevailed in this country, whether the crime of treason can be committed without a levying of war with intent entirely to subvert the government of the United States. Mr. Martin, in a part of his final speech in Burr's Case which is not here given, expressed a very decided opinion that the decisions of the courts in Pennsylvania, in the prosecutions growing out of "what were called the whisky and hot water insurrections," were erroneous: that the insurgents in those cases were not guilty of treason, because "there was no design to subvert the government." "Such a thought," he said, "was not entertained. It was the expression of their disapprobation of a particular law, and opposition to the execution of that unpopular law; and the intentions of those people went no further than to induce its repeal." Rob. Rep. 2 Burr. Tr. p. 274. But the doctrines laid down by the courts in the cases referred to, instead of being shaken by time, have been affirmed by several judges of the supreme court of the present day; and it may now be regarded as entirely settled, that any combination and assemblage of men, in force, to oppose generally the execution of any law, will be treasonable. But a combination and assemblage to resist the execution of a law in a particular case, as to prevent the arrest of a particular individual, if the intention be not to oppose the execution of the law in all cases, will only amount to a great riot, or to murder if lives are destroyed. The law was thus laid down by Mr. Justice Grier, in Hanway's Case, in perfect consistence with all the earlier decisions. Mr. Justice Curtis said, in a charge to the grand jury in 1851: "If a person against whom process has issued from a court of the United States, should assemble and arm his friends, forcibly to prevent an arrest, and, in pursuance of such design, resistance should be made by those there assembled, they would be guilty of a very high crime; but it would not be treason, if their combination had reference solely to that case. But if process of arrest issues under a law of the United States, and individuals assemble forcibly to prevent an arrest under such process, pursuant to a design to prevent any person from being arrested under that law, and pursuant to such intent force is used by them for that purpose, they are guilty of treason. The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws. Indeed, such a distinction would be found impracticable, if it were attempted. If this crime could not be committed by forcibly resisting one law, how many laws should be thus resisted, to constitute it? Should it be two, or three, or what particular number? And if all, how easy would it be for the most of treasons to escape punishment, simply by excepting out of the reasonable design, some one law. So that a combination, formed to oppose the execution of a law by force, with the design of acting in any case which may occur and be within the reach of such combination, is a treasonable conspiracy, and constitutes one of the elements of this crime."

Case No. 14,694.

UNITED STATES v. BURR.[1]

[Coombs' Trial of Aaron Burr, 369; 2 Robertson's Report of the Trial of Aaron Burr, 481; 3 Carpenter's Report of Burr's Trial, 93.]
Circuit Court, D. Virginia. Sept. 3, 1807.

CRIMINAL LAW — ARREST AND REMOVAL OF ACCUSED—PROCESS—STATE LAWS—PRODUCTION OF PAPERS—LETTERS TO PRESIDENT—AFFIDAVIT—MILITARY EXPEDITION AGAINST NATION AT PEACE—EVIDENCE—ACTS OF CO-CONSPIRATORS—ACTS IN OTHER DISTRICTS.

[1. Where a person, after acquittal on an indictment for treason, is in the custody of the marshal, bound to answer an indictment for a misdemeanor, the court has no authority to send him to another district for trial for treason in the place where the crime was committed.]

[2. The laws of the several states cannot be regarded as rules of decision (Judiciary Act, § 34, 1 Stat. 92) in trials for offenses against the United States.]

[Cited in Clark v. Sohier, Case No. 2,835; U. S. v. New Bedford Bridge, Id. 15,867.]

[3. The circuit court of the United States, under section 4 of the judiciary act, has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance, without reference to the process given by the state law.]

[Cited in Re Sheazle, Case No. 12,734.]

[4. A capias is the proper process to bring an accused in to answer to an indictment for an offense against the laws of the United States.]

[5. Where the accused is already in court, an order of the court will supply the place of a capias.]

[6. It is sufficient, in an affidavit, for the production of a paper in the possession of the prosecution, to aver that it "may be material" in the defense.]

[7. On a motion to compel the production of a letter written to the president of the United States, and in the hands of the prosecuting attorney, averred to be material to the defense, parts of it cannot be withheld, in the discretion of the prosecuting attorney, on the ground of public interest. The president alone may decide as to the propriety of withholding them, and he cannot delegate his discretion.]

[8. On the trial of an indictment for a misdemeanor, in beginning or setting on foot a military expedition against a nation at peace with the United States, containing no allusion to a conspiracy, the declarations of third persons, not forming a part of the transaction, and not made in the presence of the accused, are not admissible in evidence.]

[9. In such case the acts of accomplices, except so far as they prove the character or object of the expedition in question, are not admissible in evidence.]

[10. The acts of the accused in a different district, which constitute, in themselves, substantive causes for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment.]

[11. Any legal testimony which shows the expedition in question to be military, or to have been designed against the dominions of the nation, as charged, is admissible.]

[At law. Trial of Aaron Burr for a misdemeanor, in beginning, setting on foot, and providing the means of, a military expedition against the dominions or territory of the king of Spain.]

At the meeting of the court on Wednesday, the 2d of September, 1807, Mr. Hay stated that according to his understanding of the opinion of the court delivered in the trial for treason [Case No. 14,693], the evidence of the transactions on Blennerhassett's Island did not come up to the constitutional crime of levying war; and so it would be improper to press the prosecution against Blennerhassett and Israel Smith. Under these circumstances he should enter a nolle prosequi as to the indictments for treason, and move to commit them, and also Mr. Burr, in order that they should be tried in the place where it should appear that the crime had been committed. He moved that Blennerhassett and Smith might be brought into court; and an order was made accordingly.

Mr. Burr then said that the motions were distinct against the several individuals, and they could not be combined. He insisted on a separate examination as to himself, and required a specification of the time and place when and where the offence was said to have been committed, that he might have an opportunity of meeting the testimony.

A debate of considerable length ensued on this motion.

MARSHALL, Chief Justice, finally remarked that as Col. Burr was now in custody of the marshal, and bound to answer an indictment for a misdemeanor, the court had no authority to send him to another district.

Mr. Hay said that all three were in the same situation, and the same difficulty applied to all. He regretted that the difficulty had not been adverted to at an earlier period, which would have saved much trouble; that he did not wish to disturb the opinion of the court, but would proceed with the trial of Col. Burr for a misdemeanor. He requested the clerk to read the indictment in the usual way, that they might proceed without issuing process to take the accused into custody, as he was in court.

The clerk was about to proceed, when Mr. Burr interrupted him, and said that he ought not to be arraigned, but to be permitted to plead by attorney. He said he was in court, not on that indictment, but because he had not moved to be discharged since his acquittal on the first indictment for treason. In this case he wished certain land-marks to be set up, in order to direct in future cases.

A protracted debate ensued, occupying the remainder of the day, in which Mr. Botts made a very long speech, and several of the counsel, on both sides, made shorter ones; all about the question whether a capias or a summons was the proper process to bring Col. Burr before the court, he being all the time in court, and participating in the debate.

[2] [MARSHALL, Chief Justice, said, that if

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see note to Case No. 14,692a.]

[2] [From 2 Robertson's Report of the Trial of Aaron Burr, 481.]

a capias should be determined to be the proper process, he should consider the situation of the party, and direct that he should not be discharged till the cause was finally decided. If a capias should be considered not to be the proper process, a venire facias must be awarded. There was another consideration: If a venire facias issued, it would involve the right to a continuance of the cause till another term. He would consider that with the principal question.

[THE COURT took time to consider; and adjourned till to-morrow.

[Thursday, September 3, 1807.

[MARSHALL, Chief Justice. The question now before the court is whether bail be demandable from a person actually in custody, against whom an indictment for a misdemeanor has been found by a grand jury. As conducting directly to a decision of this point, the question has been discussed whether a summons or a capias would be the proper process to bring the accused in to answer the indictment, if, in point of fact, he were not before the court. It seems to be the established practice of Virginia in such cases to issue a summons in the first instance; and if by any act of congress the laws of the several states be adopted as the rules by which the courts of the United States are to be governed in criminal prosecutions, the question is at an end; for I should admit the settled practice of the state courts as the sound construction of the state law under which that practice has prevailed. The 34th section of the judicial act, it is contended, has made this adoption. The words of that section are "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

[It might certainly be well doubted whether this section (if it should be construed to extend to all the proceedings in a case where a reference can be made to the state laws for a rule of decision at the trial) can comprehend a case where, at the trial in chief, no such reference can be made. Now in criminal cases the laws of the United States constitute the sole rule of decision; and no man can be condemned or prosecuted in the federal courts on a state law. The laws of the several states therefore cannot be regarded as rules of decision in trials for offences against the United States. It would seem to me too that the technical term, "trials at common law," used in the section, is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits, as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty. The provision of this section would seem to be inapplicable to original process, for another reason. The case is otherwise provided for by an act of congress. The 14th section of the judicial act empowers the courts of the United States "to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." This section seems to me to give this court power to devise the process for bringing any person before it who has committed an offence of which it has cognisance, and not to refer it to the state law for that process. The limitation on this power is, that the process shall be agreeable to the principles and usages of law. By which I understand those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.

[Upon general principles of law it would seem to me that in all cases where the judgment is to affect the person, the person ought to be held subject to that judgment. Thus in civil actions, where the body may be taken in execution to satisfy the judgment, bail may be demanded. If the right of the plaintiff be supported by very strong probability, as in debt upon a specialty, bail is demandable without the intervention of a judge. If there be no such clear evidence of the debt, bail is often required upon the affidavit of the party. Now, reasoning by analogy from civil suits to criminal prosecutions, it would seem not unreasonable, where there is such evidence as an indictment found by a grand jury, to use such process as will hold the person of the accused within the power of the court, or furnish security that the person will be brought forward to satisfy the judgment of the court. Yet the course of the common law appears originally to have been otherwise. It appears from Hawkins that the practice of the English courts was to issue a venire facias in the first instance, on an indictment for a misdemeanor. This practice however is stated by Blackstone to have been changed. He says (volume 4, p. 319), "And so in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of capias immediately, in order to bring in the defendant."

[It is then the English construction of the common law, that although in the inferior courts the venire facias might be the usual course, and although it had prevailed, yet that a judge of the king's bench might issue a capias in the first instance. This subject has always appeared to me to be in a great measure governed by the 33d section of the judicial act. That section provides, that for any crime or offence against the United States, the offender may, agreeably to the usual mode of process against offenders in that

state where he is found, be arrested and imprisoned or bailed as the case may be. This act contemplates an arrest, not a summons; and this arrest is to be, not solely for offences for which the state laws authorize an arrest, but "for any crime or offence against the United States." I do not understand the reference to the state law respecting the mode of process as overruling the preceding general words, and limiting the power of arrest to cases in which according to the state laws a person might be arrested, but simply as prescribing the mode to be pursued. Wherever, by the laws of the United States, an offender is to be arrested, the process of arrest employed in the state shall be pursued; but an arrest is positively enjoined for any offence against the United States. This construction is confirmed by the succeeding words: the offender shall be imprisoned or bailed as the case may be. There exists no power to direct the offender, or to bind him without bail, to appear before the court; which would certainly have been allowed had the act contemplated a proceeding in such a case which should leave the person at large without security. But he is absolutely to be imprisoned or bailed as the case may be.

[In a subsequent part of the same section it is enacted "that upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death." There is no provision for leaving the person at large without bail; and I have ever construed this section to impose it as a duty on the magistrate who proceeds against any offender against the United States to commit or bail him. I perceive in the law no other course to be pursued. This section, it is true, does not respect the process upon an indictment. But the law would be inconsistent with itself if it required a magistrate to arrest for any offence against the United States, if it commanded him on every arrest to commit or to bail, and yet refused a capias and permitted the same offender to go at large, as soon as an indictment was found against him. This section therefore appears to me to be entitled to great influence in determining the court on the mode of exercising the power given by the 14th section in relation to process. On the impeachment which has been mentioned, this point was particularly committed to Mr. Lee, and the law upon it was fully demonstrated by him. The only difficulty I ever felt on this question was produced by the former decision of Judge Iredell. If the state practice on this subject had been adopted, I should have held myself bound by that adoption. But I do not consider the state practice as adopted. Mundell's Case [Case No. 15,834] was a civil suit; and the decision was that the state rule respecting bail in civil actions must prevail. Sinclair's Case [unreported] was indeed a case similar to this; and in Sinclair's Case a venire facias was issued. But I am informed by the clerk that this was his act, at the instance of the attorney, not the act of the court. The point was not brought before the court.

[In U. S. v. Callender [Case No. 14,709] a capias, or what is the same thing, a bench warrant was issued. This was the act of the court; but, not having been an act on argument, or with a view of the whole law of the case and of former decisions, I should not have considered it as overruling those decisions if such existed. But there has been no decision expressly adopting the state practice; and the decision in Callender's Case [supra] appears to me to be correct. I think the capias the more proper process. It is conformable to the practice of England at the time of our Revolution, and is, I think, in conformity with the spirit of the 33d section of the judicial act. I shall therefore adopt it. To issue the capias to take into custody a person actually in custody would be an idle ceremony. In such a case the order of the court very properly supplies the place of a capias. The only difference between proceeding by capias and by order, which I can perceive, would be produced by making the writ returnable to the next term.] [3]

Mr. Hay then said he would proceed to the trial of the indictment for a misdemeanor.

Mr. Burr then referred to the letter which had been demanded of the president, which had often been promised but not yet produced. He wished to know whether that letter was in court.

Mr. Hay said he did not know whether the original letter was among his papers or not. He had searched for it, but had not been able to find it. He had a copy, which was ready to be produced.

Mr. Burr said the president had promised that the letter should be produced, and it was strange that it was not here. He was not disposed to admit a copy.

After some further remarks by counsel, the CHIEF JUSTICE said, unless the loss of the original be proved, a copy cannot be admitted.

Mr. Burr then called the attention of the court to the subject of bail, (made necessary by the decision that a capias was the proper process to bring him before the court.)

After some discussion, the CHIEF JUSTICE fixed the amount of the bail at five thousand dollars.

The counsel for the prosecution here took the alarm, that taking bail might entangle the motion intended subsequently to be made to commit for treason in another state. A debate on this subject of considerable length ensued, in the course of which the CHIEF JUSTICE remarked that those who prosecuted had the choice of making the motion to commit for a greater crime by discontinuing the prosecution for a misdemeanor, or of persevering in the latter.

At the close of this discussion, resulting in

[3] [From 2 Robertson's Report of the Trial of Aaron Burr, 481.]

nothing, Mr. Burr observed that he had discovered that a letter written by General Wilkinson on the 12th of November, 1806, to the president of the United States, was material to his defence.

Mr. Hay said he had that letter, and would produce it. But there were some matters in the letters of General Wilkinson which ought not to be made public. It would be extremely improper to submit the whole of his letters to public inspection. He was willing to put them in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause.

The counsel for Colonel Burr were not satisfied with this proposal. They demanded the whole letters.

Mr. Hay said he was willing that Mr. Botts, Mr. Wickham, and Mr. Randolph should examine them. He would depend on their candor and integrity to make no improper disclosures; and if there should be any difference of opinion as to what were confidential passages, the court should decide.

Mr. Martin objected to this as a secret tribunal. The counsel had a right to hear the letters publicly, without their consent.

Mr. Burr's counsel united in refusing to inspect anything that was not also submitted to the inspection of their client.

The CHIEF JUSTICE saw no real difficulty in the case. If there were any parts of the letters confidential, then a public examination would be very wrong; otherwise they ought to be read.

Mr. Hay said the president wrote to him when he understood the process had been awarded, that he had reserved to himself the province of deciding what parts of the letters ought to be published and what parts required to be kept secret; that they wished everything to be as public as possible except those parts which were really confidential. The discussion continued till the court adjourned.

Friday, September 4, 1807.

Colonel Burr renewed his application for the production of the two letters from General Wilkinson to the president of the United States, for one of which a subpœna duces tecum had been awarded. He said that the president was in contempt, and he had a right to demand process of contempt against him; but as it would be unpleasant to resort to such process, and it would produce delay, he hoped the letters would be produced. It might, perhaps, suffice to produce a copy, if duly authenticated, of that of October 21st, which was said to be lost or mislaid. As to the letter of the 12th of November, he had reason to believe that the whole letter had been shown to others to injure him, and as the whole letter had been used against him, the whole ought to be produced.

Mr. Hay said he did not know what was meant by the expression of such a belief or suspicion.

Mr. Burr said he would be more explicit; and asked whether this letter had not been used against him before the grand jury.

Mr. Hay said he could not be certain whether it was produced before the grand jury or not. He was not as well acquainted with what passed before the grand jury as some other gentlemen were.

A long and excited debate ensued, in which Mr. Burr's counsel insisted on the production of the whole letter, and Mr. Hay insisted on withholding certain passages. He said there were two passages in the letter which he could not submit to public inspection; and he did know that they could be extorted from him under any circumstances. Finally, the counsel of Colonel Burr applied for a subpœna duces tecum to Mr. Hay, which was awarded. To this Mr. Hay made a return, tendering a copy of the letter of 12th November, 1806, "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined; the parts excepted being communicated to the president, and he having devolved on me the exercise of that discretion which constitutionally belongs to himself. The accuracy of this opinion I am willing to refer to the judgment of the court, by submitting the original letter to its inspection. I further certify, in order to show more clearly the irrelevancy of the parts excepted to any defence which can be set up in the present case, that these parts contain a communication of the opinion of the writer concerning certain persons, about which opinion, or the fact of his having communicated it, the writer, if a witness before the court, could not legally, as I conceive, be interrogated; and about which no evidence could legally be received from other persons."

The CHIEF JUSTICE asked if there were any objections to this return.

Mr. Burr said he could not be satisfied with a copy of part of the letter.

Mr. Botts said it would be a matter of the deepest regret if an attachment should go against Mr. Hay, and nothing would give him greater pain than to be under the necessity of making such a motion. To avoid this, there was another alternative, but which was, also, extremely disagreeable, as it would produce delay, viz: To move that the cause should be continued until the letter should be produced. He made that motion, and supported it by a speech of considerable length.

Other counsel followed, in a protracted debate on the motion. When the discussion ended the CHIEF JUSTICE delivered the following opinion:

MARSHALL, Chief Justice. [4] [It is not without regret that I find myself constrained to deliver an opinion on the present application. To overrule the motion may, at least, have the appearance of imposing a hardship

[4] [From 2 Robertson's Report of the Trial of Aaron Burr, 533.]

on the prisoner, and to grant it may occasion delay in a case which all must desire to terminate. It is with regret that I decide a question under such circumstances, because it is probable that those parts of the letter which are withheld, are of much less importance than gentlemen suppose; and that the effect of their production would be to dissipate suspicions which are now entertained, and to show that the subject of the controversy is by no means proportioned to the zeal with which it has been maintained. Upon an affidavit made by the accused, a subpœna duces tecum has been awarded to the president of the United States, requiring the production of this letter. In consequence of this process the letter was transmitted to the attorney for the United States, accompanied with a communication from the president, authorizing the attorney to exercise his discretion in the case. In the exercise of this discretion, he has selected certain parts of the letter which he has determined to withhold, because he believes them to be confidential, and therefore such as ought not to be exhibited in public. If this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. In this respect the courts of law are invested with the power of a court of chancery, and if the order be disobeyed by the plaintiff, judgment as in the case of a nonsuit may be entered against him.

[Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? If the opposite party be required to produce his books on a particular subject, it is not necessary that the entries on those books should be stated in order to entitle the applicant to his motion. He cannot be expected to make such a statement. It has always been deemed sufficient to describe the paper required, to express its general purport, and to state its materiality to the case in some degree, even when its contents are known. When a paper is in possession of one party, it is completely in his power, and is required by the other, very strong reasons must be given to justify its being withheld, if it have any relation to the case. Before a court would make a decisive order in such a case it certainly ought to receive reasonable satisfaction of the probable materiality of the evidence asked for and refused, and of its relation to the pending controversy; but the information to be required must depend on the nature of the case.

[Criminal cases, it is true, are not provided for; but courts will always apply the rules of evidence to criminal prosecutions so as to treat the defence with as much liberality and tenderness as the case will admit. The prosecutor is the representative of the government, and the government acts as a party through the agency of the attorney, who directs and manages the prosecution on behalf of government. If there be a paper in the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual who possesses a paper which might be required for the defence. If the executive possess a paper which is really believed by the accused to be material to his defence, ought it to be withheld? The question will recur, is it really material to his defence? The only evidence that can be received on this point is from the party himself, and he has made his affidavit to its materiality. But that is said to be insufficient; and why? Because the averment is, that the letter "may be material" in the defence. Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor. But there were two indictments: the one for treason and the other for a misdemeanor, and the allegation of materiality made in the affidavit may, it is said, refer to either indictment. But the prosecution for treason is terminated, and was terminated before the affidavit was made. Consequently it can relate only to the indictment for a misdemeanor. It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld? Or how can their applicability be shown without requiring the accused prematurely to disclose his defence?

[Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge. That the president of the United States may be subpœnaed, and examined as a witness, and required to produce any paper in his possession, is not controverted. I cannot, however, on this point, go the whole length for which counsel have contended. The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. I do not think precisely with the gentlemen on either side. I can readily conceive that the president might receive a letter which it would be improper to exhibit

in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description. The reason is this: Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view.

[Yet it is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. On the present occasion the court would willingly hear further testimony on the materiality of the paper required, but that is not offered.

[In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them. But to induce the court to take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shown. In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others, which must be respected by the court. They must therefore be approved by himself, and not be the mere suggestions of another for him. It does not even appear to the court that the president does object to the production of any part of this letter. The objection, and the reasons in support of the objection, proceed from the attorney himself, and are not understood to emanate from the president. He submits it to the discretion of the attorney. Of course, it is to be understood that he has no objections to the production of the whole, if the attorney has not. Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation. As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used. The declarations therefore made upon that subject can have no weight. Neither can any argument on its materiality or immateriality drawn from the supposed contents of the parts in question. The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced, or the cause be continued. In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject. I believe, myself, that a great deal of the suspicion which has been excited will be diminished by the exhibition of this paper.] [5]

Mr. Hay said he would consult Gen. Wilkinson, and if he consented, he would produce the letter under the restrictions suggested by the court—preferring that to a continuance of the cause.

On Saturday, the 5th of September, Mr. Hay stated to the court that he would immediately send an express to Monticello (where the president then was) for instructions in relation to producing the letter, and that he would probably get a return by Tuesday evening.

On Wednesday, the 9th of September, a

[5] [From 2 Robertson's Report of the Trial of Aaron Burr, 533.]

jury was empanneled and sworn, just one week having been consumed in the preliminary proceedings hereinbefore briefly noticed.

On the same day, Mr. Hay presented a certificate from the president, annexed to a copy of Gen. Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public.

The clerk read the indictment, consisting of seven counts, all charging the defendant in slightly variant forms, with beginning, setting on foot, or providing the means of a military expedition against the dominions or territory of the king of Spain.

In all the counts the offence was charged to have been committed at Blennerhassett's Island, in the county of Wood, and district of Virginia.

The trial then proceeded, and in the course of it the counsel for the prosecution offered in evidence declarations of Blennerhassett tending to implicate Colonel Burr, and endeavored to support it by alleging: 1st, a conspiracy between these two and others; and that the declarations of one conspirator were evidence against the others; or, 2d, that they were accomplices. They also offered in evidence acts of the nature laid in the indictment, committed by the defendant in Ohio and Kentucky, all of which was objected to.

[The argument on the admissibility of the testimony lasted several days, at the close of which]

[6] [MARSHALL, Chief Justice, delivered the following opinion:

[The present motion is particularly directed against the admission of the testimony of Neale, who is offered for the purpose of proving certain conversations between himself and Herman Blannerhasset. It is objected that the declarations of Herman Blannerhasset are at this time inadmissible on this indictment. The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important. This rule as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question.

[The first exception is, that in cases of conspiracy, the acts, and it is said by some, the declarations of all the conspirators, may be given in evidence on the trial of any one of them, for the purpose of proving the conspiracy, and this case it is alleged, comes within the exception. With regard to this exception, a distinction is taken in the books between the admissibility and operation of testimony, which is clear in point of law, but not at all times easy to practice in fact. It is, that although this testimony be admitted, it is not to operate against the accused, unless brought home to him by testimony drawn from his own declarations or his own conduct. But the question to be considered is, does the exception comprehend this case? Is this a case of conspiracy according to the well-established law meaning of the term? Cases of conspiracy may be of two descriptions. 1st. Where the conspiracy is the crime, in which case the crime is complete although the act should never be performed, and in such cases if several be indicted, and all except one be acquitted, that one cannot, say the books, be convicted, because he cannot conspire alone. 2d. Where the crime consists in the intention, and is proved by a conspiracy, so that the conviction of the accused may take place upon evidence, that he has conspired to do an act which manifests the wicked intention. In both these cases an act is not essential to the completion of the crime, and a conspiracy is charged in the indictment as the ground of accusation. If the conspiracy be the sole charge, as it may be, the question to be decided, is, not whether the accused has committed any particular fact, but whether he has conspired to commit it. Evidence of conspiracy in such a case goes directly to support the issue. It has therefore been determined that the nature of the conspiracy may be proved by the transactions of any of the conspirators in furtherance of the common design; the degree of guilt, however, of the particular conspirator upon trial, must still depend on his own particular conduct.

[In the case at bar, the crime consists not in intention but in acts. The act of congress does not extend to the secret design, if not carried into open deed, nor to any conspiracy, however extensive, if it do not amount to a beginning or setting on foot a military expedition. The indictment contains no allusion to a conspiracy, and of consequence the issue to be tried by the jury is not whether the conspiracy has taken place, but whether the particular facts charged in the indictment have been committed. I do not mean to admit, that by any course which might

[6] [From 3 Carpenter's Report of Burr's Trial, 93.]

have been given to the prosecution, this could have been converted into a case of conspiracy; but most assuredly if it was intended to prove a conspiracy, and to let in that kind of testimony which is admissible only in such a case, the indictment ought to have charged it. I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons, made in the absence of the person on trial, under the idea of a conspiracy, where no conspiracy is alleged in the indictment. The researches of the counsel for the prosecution have not been more successful. But they suppose this case, though not within the letter, to come clearly within the reasoning of those cases where this testimony has been allowed. It has been said, that wherever the crime may be committed by a single individual, although in point of fact more than one should be concerned in it, as in all cases of felony, the prosecution must be conducted in the usual mode, and the declarations of third persons cannot be introduced at a trial; but whenever the crime requires more than one person, where from its nature it cannot be committed by a single individual, although it shall consist, not in conspiracy, but in open deed, yet it is in the nature of a conspiracy, and evidence of the declarations and acts of third persons connected with the accused may be received whether the indictment covers such testimony or not. I must confess that I do not feel the force of this distinction. I cannot conceive why, when numbers do in truth conspire to commit an act, as murder or robbery, the rule should be, that the declaration of one of them is no evidence against another, and yet, if the act should require more than one for its commission, that the declarations of one person engaged in the plot would immediately become evidence against another. I cannot perceive the reason of this distinction; but, admitting its solidity, I know not on what ground to dispense with charging in the indictment the combination intended to be proved. If this combination may be proved by the acts or declarations of third persons made in the absence of the accused, because he is connected with those persons; if in consequence of this connection the ordinary rules of evidence are to be prostrated, it would seem to me that the indictment ought to give some notice of this connection. When the terms used in the indictment necessarily imply a combination, it will be admitted that a combination is charged and may be proved. And where A., B., and C. are indicted for murdering D., yet in such a case the declarations of one of the parties made in the absence of the others have never been admitted as evidence against the others. If then this indictment should even imply that the fact charged was committed by more than one person, I cannot conceive that the declarations of a particeps criminis would become admissible on the trial of a person not present when they were made, unless those declarations form a part of the very transaction charged in the indictment.

[If in all this I should be mistaken, yet it remains to be proved that the offence charged may not be committed by a single individual. This may, in some measure depend on the exposition of the terms of the act; and it is to be observed that this exposition must be fixed. It cannot vary with the varying aspect of the prosecution at its different stages. If, as has been said, a military expedition is begun or set on foot when a single soldier is enlisted for the purpose, then unless it be begun as well by the soldier who enlists, as by the officer who enlists him, a military expedition may be begun by a single individual. So if those who engage in the enterprize follow their leader from their confidence in him, without any knowledge of the real object, there is no conspiracy, and the criminal act is the act of an individual. So, too, if the means are any means, the crime may unquestionably be committed by any individual. Should the term be even so construed as to imply that all the means must be provided before the offence can be committed, still all the means may, in many cases, be provided by a single individual. The rule then laid down by the counsel for the prosecution, if correct in itself, would not comprehend this case.

[Secondly, there are also cases in the books where acts are in their nature joint, and where the law attaches the guilt to all concerned in their commission, so that the act of one is in truth the act of others, where the conduct of one person in the commission of the fact constitutes the crime of another person; but this is distinct from conspiracy. If many persons combine to commit a murder, and all assist in it, and are actually or constructively present, the act of one is the act of all, and is sufficient for the conviction of all. So in acts of levying war, as in the Cases of Damane and Purchase, the acts of the mob were the acts of all in the mob whose conduct showed a concurrence in those acts, and in the general design, which the mob were carrying into execution. But these decisions turn on a distinct principle from conspiracy. The crime is a joint crime, and all those who are present aiding in the commission of it participate in each other's actions, and in the guilt attached to those actions. The conduct of each contributes to shew the nature of this joint crime; and declarations made during the transaction are explanatory of that transaction; but I cannot conceive that in either case declarations unconnected with the transaction would have been evidence against any other than the person who made them, or persons in whose presence they were made. If, for example, one of several men who had united in com-

mitting a murder should have said, that he with others contemplated the fact which was afterwards committed, I know of no case which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken. So if Damane had previously declared that he had entered into a confederacy for the purpose of pulling down all meeting houses, I cannot believe that this testimony would have been admissible against a person having no knowledge of the declaration and giving no assent to it. In felony the guilt of the principal attaches to the accessory, and therefore the guilt of the principal is proved on the trial of the accessory. In treason, all are principals, and the guilt of him who has actually committed the treason does, in England, attach to him who has advised, aided or assisted that treason. Consequently the conduct of the person who has perpetrated the fact must be examined on the trial of him who has advised or procured it. But in misdemeanors by statute, where the commission of a particular fact constitutes the only crime punished by the law, I believe there is no case where the declaration of a particeps criminis can affect any but himself.

[Thirdly. The admission of the declarations of Mr. Blannerhasset may be insisted upon under the idea he was the agent of Col. B. How far the acts of one man may affect another criminally, is a subject for distinct consideration, but I believe there is no case where the words of an agent can be evidence against his principal on a criminal prosecution. Could such testimony be admissible, the agency must be first clearly established, not by the words of the agent, but by the acts of the principal, and the word must be within the power previously shown to have been given.

[The opinions of the circuit court of New York in trials of Smith and Ogden have been frequently mentioned. [Case No. 16,342.] Although I have not the honor to know the judge who gave those decisions, I consider them as the determination of a court of the United States, and I shall not be lightly induced to disregard them, or unnecessarily to treat them with disrespect. I do not, however, in the opinions of Judge Talmadge, perceive any expression indicating that the declarations of third persons could be received as testimony against any individual who was prosecuted under this act. If he has given that opinion, it has certainly escaped my notice, and has not been suggested to me by counsel. He unquestionably says in page 113 of the trial "that the reference which was made to the doctrine of conspiracy did not apply in that case." The reference alluded to was the observation of Mr. Emmet, who had said "that, if the object was to charge Col. Smith with the acts of Capt. Lewis, they ought to have laid the indictment for a conspiracy." The opinion of the judge that the doctrine of conspiracy had no application to the case, appears to me to be perfectly correct.

[I feel, therefore, no difficulty in deciding, that the testimony of Mr. Neale, unless he can go further than merely stating the declarations made to him by Blannerhasset, is at present inadmissible. But the argument has taken a much wider range. The points made, comprehend the exclusion of other testimony suggested by the attorney for the United States, and the opinion of the court upon the operation of testimony. As these subjects are entirely distinct, and as the object of the motion is the exclusion of testimony supposed to be illegal, I shall confine my observations to that part of the argument which respects the admissibility of evidence of the description of that proposed by the attorney for the United States. The indictment charges the accused in separate counts with beginning, with setting on foot, with preparing, and with providing the means for a military expedition to be carried on against a nation at peace with the United States. Any legal testimony which applies to any one of these counts is relevant. That which applies to none of them must be irrelevant. The expedition, the character and object of that expedition, that the defendant began it, that he set it on foot, that he provided and prepared the means for carrying it on, are all charged in the indictment, and consequently these charges may be all supported by any legal testimony. But that a military expedition was begun and set on foot by others, or that the means were prepared or provided by others, is not charged in this indictment, is not a crime which is or can be alleged against the defendant, and testimony to that effect is therefore not relevant. All testimony which serves to show the expedition to have been military in its character, as, for instance, testimony respecting their arms and provisions, no matter by whom purchased, their conduct, no matter by whom directed, or who was present, all legal testimony which serves to show the object of the expedition, as would be either actually marching against Mexico, any public declarations made among themselves stating Mexico as their object, any manifesto to this effect, any agreement entered into by them for such an expedition, these or similar acts would be received to show the object of the expedition.

[In trials of Smith and Ogden they were received. Whether the particular acts of the accused on which his guilt or innocence depends, must precede this species of testimony or may be preceded by it, is a question which merely respects the order of evidence. There can be no doubt but that at some stage of the prosecution, either before or after the particular part performed by the accused has been shown, the character and object of the expedition may be shown, and that by any legal testimony calculated to develope that character and object. Whether this testimony is admissible before the proof which particularly applies to the part performed by the accused, or ought to be introduced by first proving that

part, is a question which is not made in this case, and which was not made in the case of Smith and Ogden. In that case it was certainly entirely unimportant, and it is probably not less so in this. It has been also contended that the acts no more than the declarations of third persons can be given in evidence on this indictment. It has been already said that those acts of equipment which go to show the character of the expedition may be given in evidence. If, for example, Blannerhasset, Tyler, Smith, or any other persons, provided arms, ammunition or provisions which were applied to the armament, this would be evidence, because it would show the character of the expedition. This was done in the case of Smith and Ogden, without enquiring who provided the arms, for they belonged to the expedition. Captain Lewis, for instance, purchased several military equipments. It was not deemed necessary to show that Smith was connected with Lewis, for these purchases were made for the expedition, and Smith was not charged with providing them. He was charged with providing other means; and the means provided by Lewis served to show the character of the expedition. But although the acts of all persons providing means applied to the expedition may be given in evidence upon the same principle that the state of the expedition may be shown, it does not follow that other acts of third persons may be given in evidence. It has also been contended that no transactions out of the district are testimony. This position is correct to a considerable extent, but not to the extent in which it is laid down. A declaration of Mr. Burr, for example, made in Kentucky or elsewhere, that he did not set on foot a military expedition on Blannerhasset's Island to be carried on against the dominions of the king of Spain while the United States were at peace with that power, would I think be evidence. So would the actual marching of the troops proved to be raised by him against the province of Mexico. Testimony which goes directly to prove the indictment may, I think, be drawn from any place. But I do not understand this to be the point really in contest. I understand the counsel of the United States to insist that providing means in Kentucky, that enlisting men in Kentucky, that joining the expedition in Kentucky, may be given in evidence to show that the accused did begin and set on foot the expedition in Blannerhasset's Island, or did provide the means at that place as charged in the indictment. This I understand to be the great question which divides the prosecution and defence.

[It is I believe a general rule in criminal prosecutions that a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged in the indictment was committed. If gentlemen think me wrong in this, I will certainly hear them upon the point, but I believe the position to be correct. Now providing the means for a military expedition in Kentucky to be carried on against the dominions of a prince with whom the United States are at peace, is certainly in itself a distinct offence, upon which an indictment may be as well supported as it can be for providing means for the same or a similar expedition in Virginia. According to the rule laid down then, this testimony cannot be received unless it goes to prove directly the charges contained in the indictment. But how can it go directly to prove those charges? Does it follow that the man who has provided the means in Kentucky has also provided the means in Virginia? Certainly it does not follow; and consequently the acts alleged in Kentucky do not prove the charges contained in the indictment. They would prove the defendant to have been connected in the enterprize, and gentlemen argue as if they thought this sufficient for their purpose. I shall be excused if I employ a few moments in stating my reasons for thinking it not sufficient. I have already said, and surely no man will deny, that two distinct persons may at different places furnish different means for the same enterprize. It will, I presume, not be contended that one of them may be indicted for the means provided by the other. So, too, if the same man shall provide means for the enterprize at different places, as in Virginia and Kentucky. I do not imagine that an indictment for providing arms in Virginia could be supported by proving that he provided ammunition in Kentucky. They are distinct offences, for either of which he may be punished, and the commission of one may render more probable, but does not prove, the commission of the other. How do gentlemen mean to make this testimony more relevant? It is by making the acts of Blannerhasset, Tyler and Smith, the acts of Burr, by insisting that their acts show an unlawful expedition to have been begun by him in Virginia, or that the means for that expedition were provided by him in Virginia. This being accomplished, his acts in Kentucky may be adduced to corroborate or confirm the testimony which discloses his conduct in Virginia. As preliminary then to this testimony, such proof of the specific charges contained in the indictment must be given, as may be left to the consideration of the jury. This proof relates to place as well as to fact. "Of whatsoever nature an offence indicted may be," says Hawkins (2 Hawk. P. C. c. 25, § 35), "whether local or transitory, as seditious words or battery, &c., it seems to be agreed that if, upon not guilty pleaded, it shall appear that it was committed in a country different from that in which the indictment was found, the defendant shall be acquitted." This rule is the stronger in the United States, where it is affirmed by the constitution itself, and where the jurisdiction of the court is limited to offences within the district. Its obligation therefore is complete. If there be any direct testimony that an expedition was begun, or set on foot, or that the

means were provided or prepared in Virginia, that testimony has not yet been heard, so far as I recollect. If there be such testimony it must also be shown that the expedition was begun, or that the means were prepared by the accused. No single act of his in Virginia has been offered in evidence. He made a contract in the state of Ohio for boats and provisions, which may have been intended as a part of the expedition, but no contract appears to have been made in Virginia, nor were the boats constructed or provisions procured in Virginia. How then is it to appear that he begun or set on foot a military expedition in Virginia, or that he provided or prepared the means for such an expedition? It is said, that if he gave orders from Kentucky or elsewhere, and in consequence of those orders the means were provided in Virginia, the accused is within the letter of the act, as well as its spirit, and has himself provided the means in Virginia. If these orders were in proof, the court as well as the counsel would be enabled to view the subject with more accuracy, and to treat it with more precision. Since those orders are not adduced, nor accurately stated, and the question has been argued without them, the court must decline giving any opinion, or consider the orders as offered, and say what orders would be admissible and what inadmissible. The latter course may save the bar the trouble of another argument. To whom are orders supposed to have been given, and who are supposed to have executed them? They must have been given to accomplices or to those who had no share in the expedition.

[The accomplices, under the direction of Col. Burr, have provided the means. Can their liability to the penalties of the law be doubted? I presume not. If persons engaged in the expedition have provided the means for carrying it on, it will, I presume, be admitted that they are within the letter and the spirit of the act. Each man has himself provided and prepared those particular means which he has furnished. If Col. Burr, as was the case with Col. Smith, has supplied money for the expedition, then money may be charged as the means provided by him; but, if that money was advanced to an accomplice, its investment in means for the expedition is the act of the accomplice, for which, being a free agent, he is himself responsible. The accomplice has committed the very act which the law punishes. Has the accused, by suggesting or procuring that act, also committed it? I will not say how far the rule, that penal laws must be construed strictly, may be carried without incurring the censure of disregarding the sense of the legislature. It may, however, be safely affirmed that the offence must come clearly within the description of the law according to the common understanding of the terms employed, or it is not punishable under the law. Now, to do an act, or to advise or procure an act, or to be connected or leagued with one who does that act, are not the same in either law, language, or in common parlance; and, if they are not the same, a penalty affixed to the one is not necessarily affixed to the other. The penalty affixed to the act of providing the means for a military expedition is not affixed to the act of advising or procuring those means to be provided, or of being associated with the man who has provided them. The distinction made by the law between these persons is well settled, and has been too frequently urged to require further explanation. The one is a principal, the other an accessory. In all misdemeanors punishable only by a statute which describes as the sole offender the person who commits the prohibited act, the one is within and the other not within the statute. In passing the act under consideration, congress obviously contemplated this distinction. I presume that in a prosecution under the 3d section, for fitting out a privateer, it would not be alleged that a person who was concerned with the man who actually fitted out the privateer, but who performed no act himself, could be convicted on an indictment, not for being concerned in fitting out the privateer, but for actually fitting her out. These are stated in that section as separate offences. This distinction taken in the law is well understood, and cannot be considered as overlooked by those who frame penal acts. They cannot be considered as intending to describe one offender when they describe another, and, if experience suggests defects in the Penal Code, the legislature exclusively judges how far those defects are to be remedied. While expounding the terms of the act, it may not be improper to notice an argument advanced by the attorney for the United States which was stopped by my observing that he had not correctly understood the opinion delivered in the case of treason. He understood that opinion as approving the doctrine laid down by Keeling and Hale, that an accessory before the fact might plead, in bar of an indictment as accessory, that he had been acquitted as principal, whence it was inferred that, on an indictment for doing an act, evidence of advising or producing that act might be received. I was certainly very far from approving this doctrine. On the contrary, I declared it to contradict every idea I had ever formed on the subject. But, if it were correct, I endeavored to show that it could not affect that case. My disapprobation of the doctrine induced me to look further into it, and my persuasion that it is not law is confirmed. 2 Hale, P. C. p. 292, says: "If A. and B. be indicted of the murder of C., upon their evidence it appears that A. committed the fact and B. was not present but was accessory before the fact by commanding it, B. shall be discharged." In 2 Hawk. P. C. c. 85, § 11, Hawkins discusses the subject, shows in a note the contradiction in those authorities which maintain the doctrine, cites the opposing authorities, and obviously approves the opinion which is here given. It is apparent, then, that the law never considers the

commission and the procurement of an act, even where both are criminal, as the same act.

[I cannot, therefore, consider means provided by those who are his accomplices in the expedition, as means provided by Col. Burr. If the means were provided by order of the accused, by persons not accomplices and not guilty under the act, the law may be otherwise. I shall not exclude such testimony. There is, however, some doubt whether the place of trial should be where the orders were given, or where they were executed. At common law, if an act was procured or advised at one place, and executed at another, it was doubted whether the procurer could be tried at either place, because the offence was not complete at either. This difficulty was removed by a statute made in the reign of Edward VI. If there be testimony showing, by orders from the accused, means were provided in Virginia by a person not an accomplice, it may be received, and the question respecting the scene of trial put in way for a final decision. The question whether all the means must be provided before the offence described in the statute has been committed, relates to the effect rather than to the exclusion of the testimony. I shall certainly not reject any evidence which shows that any means were provided by the accused in the place charged in the indictment. Upon the subject of beginning and setting on foot a military expedition or enterprize, it would be unnecessary at this time to say anything, were it not on the account of the question respecting the introduction of testimony of the district. What is an expedition? What is an enterprize? An expedition, if we consult Johnson, is "a march or voyage with martial intentions." In this sense, it does not mean the body which marches, but the march itself. The term is, however, sometimes employed to designate the armament itself, as well as the movement of that armament. An enterprize is "an undertaking of hazard, an arduous attempt." The proper meaning of this word also describes the general undertaking, and not the armament with which that undertaking is to be accomplished.

[The first count in the indictment charges that Burr began the expedition in "Blannerhassett's Island; the second and third, that he set on foot the enterprize on Blannerhassett's Island. If the term expedition is to be taken in its common and direct sense,—that is, to mean a march or voyage with martial intentions,—it began where that march or voyage begun; and it must have been begun by the accused to bring him within the act. If the term be taken in its figurative sense to designate the armament instead of the movement of the armament, then I cannot readily conceive an act which begins an expedition, unless the same act may also be said to provide the means of an expedition. The formation of the plan in the mind is not the commencement of the expedition, within the act. Our laws punish no mental crimes not brought into open deed. The disclosure of that plan does not begin it. If it did, the first disclosure would be the beginning. I find a difficulty in conceiving any act which amounts to providing the means for an expedition. However, if there can be such an act, and it has been committed in Virginia, it may certainly be given in evidence. The same observations apply to setting on foot an enterprize. These remarks are made to show what it will be necessary to prove in order to let in corroborative proof.

[It is then the opinion of the court, that the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case. That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence. That the acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence unless they go directly to prove the charges laid in the indictment. That any legal testimony which shows the expedition to be military, or to have been designed against the dominions of Spain, may be received. Gentlemen well know how to apply these principles. Should any difficulty occur in applying them, the particular case will be brought before the court and decided.

[After the opinion was delivered, Mr. Hay requested a copy of it, and made some observations as to its effect upon the future progress of the trial. He considered that the man who had the supreme command and direction of this military enterprize (which they could prove it to be) did provide the means and set it on foot. This was a question he thought proper for the consideration of the jury, and this idea would be strengthened by evidence which could be produced, if permitted.

[Mr. Wirt. The fact is, that Mr. Belknap can prove (as well as others) that he sent orders and did other acts showing that he was at the head and command of the whole.

[The CHIEF JUSTICE. But suppose the connection was proved (which I have no doubt could be), and suppose the enterprize originated with Col. Burr (which is very probably the case), others might have provided the means, from what could be made to appear. He is not indicted for being connected with the enterprize, but for providing certain specific means. If the party under Tyler is to be considered as of a military nature, and that an expedition began at Beaver, or where not, if the movement is to be considered as an enlistment of men, then, wherever the first movement was made, there the expedition began. I do not think that his taking the command at Cumberland can be considered as a count in the indictment; it might go to render it more probable (if

there was any doubt as to the transaction) that what was done was under his control; but the act itself must be proved on Blannerhasset's Island; and there the intention with which that act was done would come in by proving that he took the command afterwards. But how can he be charged with beginning there, if it should appear that he began in Pennsylvania? The question of "beginning" I do not mean to take from the jury; of the place of beginning and of the acts themselves, they must decide. An abstract, independent question will arise, however, which is, whether the witnesses proved the indictment or not? Now I do not think that they did prove the indictment. What might be done is a future question.

[Mr. Wirt. Am I to understand, sir, that the acts of accomplices, out of the district, tending to prove the acts laid in the indictment, may be given in evidence?

[The CHIEF JUSTICE. Any act which shows the character of the transaction itself, in my opinion, may be given.

[Mr. Wickham. I understand the opinion of the court to be that we cannot be liable for the acts of others, though done within the district; no auxiliary acts can be given against us, and they are not entitled to go out of the district to show acts done elsewhere, against us?

[Mr. M'Rae. If we shall offer evidence that will be proper to submit to a jury, to prove where he did commence this enterprize, at any period whatever, it is not necessary that we should show that he remained on Blannerhasset's Island all the time. But seeing the enterprize was actually commenced, we shall be able to satisfy a jury that, when Burr was on the island, he did there actually project it, and did agree with Blannerhasset as to its progress, which was afterwards carried on, we ought certainly then to be at liberty to go out of the district to show that he was the principal person concerned in it. I do not suppose it necessary for us to show that all the means were provided by him.

[The CHIEF JUSTICE. There is no doubt which I had at the commencement of this case (which I do not now suggest to make a question of) it relates to the indictment, and consequently to a particular part of the evidence, particularly to the words of the statute "beginning and setting on foot an expedition." I do doubt whether it is not necessary to show in the indictment how the expedition was begun. I do not know that it is necessary to set forth the principal means in the indictment. It is in itself, an extremely vague term, but if it is a necessary one, surely the particular manner of beginning must be showed. I think, however, it ought to be laid in the indictment, and if so, that is a strong reason why it ought to be shown by evidence.

[The counsel on both sides were ordered to be furnished with copies of the opinion, and the court adjourned to Tuesday, ten o'clock.

[Tuesday, September 15.

[Mr. Hay said, that the counsel for the prosecution had agreed to go on as well as they could, for that they had drawn such a construction from the opinion as to excite them to suppose that they had sufficient evidence yet remaining to produce a conviction of the person accused, without interfering with the opinion of the court. He was stating some of the points laid down by the court, as far as we were able to hear him (which was extremely difficult), when Mr. Botts interfered to explain what were the limits set by the court, upon which he dwelt at some length, and repeated most of the arguments before used, as to the absence of Mr. Burr, and the evidence offered respecting conversations held between him and others. Indeed, he took a brief review of the whole opinion, and concluded, upon the whole, that the absence of Mr. Burr rendered all evidence which it appeared could be produced irrelevant; none had been offered, and he defied the prosecution to offer a particle,—for, from the whole review of the opinion, it was not within the compass of the heart of man to produce a conviction.

[Mr. Martin offered a few observations favorable to the production of any evidence which the prosecution could produce: if they exceeded the bounds which the court had justly prescribed, it would then be due time to make objections, on which the court would determine.

[Much desultory conversation ensued, when Richard Neale was again called, and asked whether he was on the island on the night of Blannerhasset's departure. "A. I was not. I left the country in October, and know nothing of it."

[James McDowell was then called and sworn.

[Mr. Burr stated that this witness was introduced for the purpose of proving an interview between him and the accused at the mouth of Cumberland river, where the accused stated to him the object of the expedition. The witness commenced his evidence by saying that he should begin up at Wheeling and proceed downwards to Cumberland where he first saw Col. Burr, when Col. Burr interrupted him by observing that he understood that this was offered as corroborative or auxiliary testimony, but auxiliary to what? They ought first to demonstrate acts done at the island, before they attempt to prove what was done, or (what is worse) said, out of the district.

[Mr. Wirt went into a review of the opinion to support the propriety of offering this species of evidence, and contended that, before they could come to the substantive charge, they ought to be permitted to show the parts so nearly attached as this was. On this ground was General Eaton's testimony admitted, because it bore direct on the charge laid in the indictment, and equally intimate

were the acts at Cumberland. Under the act of congress, the charge is, providing means, &c. Now, was not the assumption of the command of those engaged in this expedition a material article in the means provided or providing? Here was the right to command acknowledged. It is not our meaning to say that there he began the expedition; he provided most of his means elsewhere, but there he met with his men, and there he headed them (he referred to Vaughan's case.) The mouth of Cumberland transaction was one link in the great chain; it commenced perhaps with what occurred between him and General Eaton, and proceeded by degrees till men, arms, &c., were procured, but the superintendence of Burr was discoverable everywhere; he projected and hastened on the scheme, as will appear. The transactions at Cumberland cannot be abstracted more than others of equal importance. Such corroborative testimony as that now offered, he contended, was even let in in capital cases, and could not be excluded without manifest injustice to the prosecution, because of its very intimate connection with the whole. There was a wide difference between a mere connection, and a man having the sovereign command of a criminal transaction (as was now attempted to be proved). The beginning was with General Eaton,—the consummation was to be somewhere else. It would be proved that Burr not only began, but brought the thing about so far as it went; he was the life and prime mover of the whole. Mr. Wirt went into some reasoning and elucidation of the propriety of this evidence; though it was no positive proof of his guilt under the indictment, yet he insisted it was strong circumstantial evidence that these means were his means, and that the evidence was within the meaning of the court, as far as he understood the opinion.

[Mr. Botts expressed his extreme surprise at the light in which the gentlemen had represented the opinion of the court: he made some strong strictures on Mr. Wirt's representations of it, and admired the judge's patience to sit there and hear it. He then quoted some parts of the opinion, and made some strong eulogistic remarks upon it, after which he compared it with the point in dispute; as to Burr's presence, &c. (which has so often been the topic). It was stated to be one continued act. Be it so; let it be supposed to be an act of unanimity and continuity, and how would it then stand? A distinct offence was charged to have been committed by Col. Burr on the island, but, instead of its being done by him, on the island, it appeared to have been done by others, and evidence of words used elsewhere were brought as corroborative, to prove what was done where he was not! By what kind of ingenuity could anything done in Cumberland be transported to Blannerhasset's Island, when the act, though laid there, was already disproved.

[MARSHALL, Chief Justice. I certainly should not have sat so patiently to hear the elaborate arguments which were offered, if I had not had a hope that the opinion which was afterwards delivered would have settled the point; an opinion which I thought was given so clear as to render it unnecessary to give another opinion upon the same point. It appears to me now that it would be unnecessary were it not for the vaguity of the law, and different understandings of gentlemen as to the terms "beginning and setting on foot" an expedition. They vary in opinions amazingly on those terms. Now, what is "beginning"? There must be some definite meaning affixed to the word, or I do not know how a court is to act upon the law. It means something, or else it is too vague for a court to punish those who have committed the act, or are the subjects of prosecution. As I before stated, an "expedition" must mean one of two things; it must indicate the march of a military force or army from one place to another, or it must be considered as a military armament substantively. Now, its natural and direct meaning must be the movement of a military armament, and not the armament itself. Now, when this movement takes place the expedition is said to begin; the march is said to have commenced. But the word also means an armament that moves, rather than the movement of that armament. However, I did not undertake to decide this question of the meaning, because I wished not to fix a positive meaning to terms when they relate to a law that may possibly undergo a revision, particularly when I had no precedent nor assistance in it. But if it be the movement of an armament itself, when that armament existed as such, then as I said before I could not distinguish between providing the means of that armament and the beginning of it. I cannot conceive what it is, nor can I conceive any fact that will amount to a "beginning" this armament, unless it is in the provision of the means, or of some means. Furnishing money or enlisting men may be considered as providing means. This, then, must be beginning the expedition. It must either mean this, or it must mean the march. If it means the march, then the expedition was brought down by Mr. Tyler from Beaver, where they first assembled, and afterwards rested at Blannerhasset's Island, whence they proceeded lower down. If it be expedition, and the meaning of the word is the march of the armament, then the proof is positive that it did not begin at Blannerhasset's Island. If the meaning is the provision of the armament, then the beginning of the expedition is the place where the first means were provided. Taking then, the word in one or the other meaning, it certainly appears to me that the testimony produced by the attorney of the United States disproves his own charge, for that it was not begun on Blannerhasset's Island, where the charge is

laid in the indictment. The beginning, then, is out of the question.

[The question then is whether the means were provided or not on Blannerhasset's Island. If there be any testimony that goes to prove this, I certainly am not at liberty to refuse it. But gentlemen will consider whether they are not wasting the time and money of the United States, and of all those persons who are forced to attend here, whilst they are producing such a mass of testimony which does not bear upon the cause. Any arguments on the principle which was stated, that the testimony respecting means provided elsewhere, supporting this charge, I am willing to hear. If the opinion of the court before given can be proved to be erroneous, I shall be very happy to hear it pointed out, because I wish to be as correct as possible; but, if these principles are not erroneous, why do gentlemen bring witnesses forward in direct opposition to them? I can ascribe no other reason to it, than because the law does not give definite ideas on the subject of its own provisions. The truth is, the words of the law must be taken to retrospect to the origination of the plan. For instance, General Eaton states that in Washington the accused laid before him a certain plan, when he said that he had sufficient means, &c. Now, if those means could be discovered, it certainly shows that the beginning of this expedition was in Washington, but the indictment states it to be on Blannerhasset's Island. Now, unless the fact itself shall be proved, how can there be evidence given of motives, yet undiscovered?] [7]

It is, then, the opinion of the court that the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case. That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence. That the acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment. That any legal testimony which shows the expedition to be military, or to have been designed against the dominions of Spain, may be received.

The attorney of the district finding in the progress of the cause that this decision excluded almost the whole of his testimony, on the 15th of September moved the court to discharge the jury. This was objected to by the defendant, who insisted upon a verdict. THE COURT being of opinion that the jury could not, in this stage of the case, be discharged without mutual consent, and that they must give a verdict, they accordingly retired, and not long after returned with a verdict of "Not guilty."

[7] [From 3 Carpenter's Report of Burr's Trial, 93.]

Case No. 14,694a.

UNITED STATES v. BURR et al.[1]

[Coombs' Trial of Aaron Burr, 377.]

Circuit Court, D. Virginia. Oct. 20, 1807.

TREASON—INTENT IN ASSEMBLAGE—PROOF OF OBJECT—INCIDENTAL TREASON — UNCOMMUNICATED INTENT OF LEADER — MILITARY EXPEDITION AGAINST NATION AT PEACE — HOSTILE ACT AS EXCUSE — PRELIMINARY EXAMINATION OF ACCUSED—PROVINCE OF COURT—PLEA AUTREFOIS ACQUIT.

[1. The question raised by a defense made in the nature of a plea autrefois acquit will not be determined on a preliminary examination to commit a person for high treason.]

[2. While war may be levied without a battle, or the actual application of force to the object on which it was designed to act, and a body of men assembled for the purpose of war, and being in a posture of war, do in fact levy war, the intent is an indispensable ingredient in the composition of the fact; and, if it is charged that war was levied without striking the blow, the intention to strike must be plainly proved.]

[3. Quære, whether, after proving a connection for some general object between persons accused of treason in levying war, the conversations of one with third persons may be given in evidence against the other to prove what that object was.]

[4. The fact that treason might incidentally arise in the attempt to embark troops against a foreign nation with which the United States are at peace, will not infect a previous assemblage of troops, where the treason was neither committed nor intended.]

[5. Either acts of hostility and resistance to the government, or a hostile intention in the body assembled, are necessary to convert a meeting of men with ordinary appearances into an act of levying war. A treasonable intent on the part of the leader or person who convened the assemblage, uncommunicated to the assemblage, is not sufficient.]

[6. A citizen cannot make the election, or anticipate his government's making the election, to consider as an act of war the taking possession by another nation of contested territory, arising out of a dispute as to boundaries.]

[7. The setting on foot or providing the means of a military expedition against a nation with which the United States are at peace is an offense notwithstanding it appear that war is inevitable, unless the prosecution of the expedition depended upor its taking place.]

[8. The question whether a military expedition against a nation with which the United States were at peace was really to depend upon war being declared will not be determined upon a preliminary examination.]

[At law. On motion for commitment of Aaron Burr and Harman Blennerhassett to another district for trial for treason.]

Immediately after the return of the verdict, on the indictment for a misdemeanor [Case No. 14,694], Mr. Hay announced that it was his intention "to move for the commitment of Aaron Burr to that place for trial where the military expedition is said to have been completed;" and that he should combine in the same motion Israel Smith and Harman Blennerhassett, entering a nolle prosequi as to their trials for misdemeanor.

[1] [For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.]

Mr. Burr requested him to allege the place where the act was said to have been committed.

Mr. Hay replied that the evidence which he should introduce would cover a vast extent of territory; that he would name, if he could, the very spot.

Mr. Burr demanded the district, then.

Mr. Hay was not prepared to specify the district.

Wednesday, September 16, 1807.

Mr. Burr insisted on his right to a separate examination, and to demand a specification of the charges intended to be laid.

MARSHALL, Chief Justice, overruled the motion for a separate examination, but decided that a specification in writing was necessary.

Mr. Hay then produced a paper, charging Aaron Burr, Harman Blennerhassett and Israel Smith with treason, in levying war against the United States; and "that an overt act of levying war was committed on an island, whose name is not known, at the mouth of the Cumberland river, in the state of Kentucky; and that other overt acts of levying war were committed at Bayou Pierre, in the Mississippi territory, and on the Mississippi river between the places above named."

Mr. Hay then called a witness to the stand, but had not proceeded far in his examination before the counsel for the defence interposed two objections, viz: 1st. That no evidence was admissible of acts done in the Mississippi territory, because the court had no power to commit for trial in a territory. 2d. That no evidence was admissible as against Colonel Burr alone, because he had been tried by a jury and acquitted, in a former prosecution, on the same charge. On these propositions a protracted discussion ensued.

The CHIEF JUSTICE decided that under the law he had no power to commit for trial in a territory, and, therefore, could not receive evidence of acts done in a territory. On the plea of autrefois acquit he reserved his opinion, but decided to hear the evidence. He subsequently decided to admit the evidence of acts done in the Mississippi territory, "in the expectation that it might serve to explain the meeting at the mouth of the Cumberland, and because it was believed to be proper for an examining magistrate to receive it."

The counsel for the prosecution then proceeded with their testimony. The door was thrown wide open, and nearly everything offered was received, subject to future objection if it should appear not to be relevant to the charges under investigation. The examination of the evidence, with the discussions that arose from time to time as it progressed, occupied the court until the 20th of October. Considering the great length of time consumed in the examination, an astonishingly small amount of additional light was thrown upon the transactions under investigation. General Wilkinson was examined and cross-examined at very great length, and the object of a large portion of the testimony introduced by the defence was to impeach his credibility. To this end much evidence was presented tending to prove his knowledge of and connection with Burr's projected expedition against Mexico, and thereby to contradict his testimony on that subject. In fact, the investigation assumed the appearance of being as much a trial of Wilkinson as of the defendants against whom the charges were pending.

On the 20th of October Chief Justice MARSHALL delivered an opinion of which the following is a copy, except some preliminary remarks on the powers and duties of a judge sitting as an examining magistrate, which are omitted:

The charges against the accused are: 1st, that they have levied war against the United States at the mouth of Cumberland river, in Kentucky; and, 2dly, that they have begun and provided the means for a military expedition against a nation with which the United States were at peace.

With respect to one of the accused, a preliminary defence is made in the nature of a plea of autrefois acquit. If the question raised by this defence was one on which my judgment was completely formed in favor of the person by whom it is made, it would certainly be improper for me to commit him; but if my judgment is not absolutely and decidedly formed upon it, there would be a manifest impropriety in undertaking now to determine it. This does not arise from any fear to meet a great question whenever my situation shall require me to meet it, but from a belief that I ought as well to avoid the intrusion of my opinions on my brethren in cases where duty does not enjoin it on me to give them, as the withholding of those opinions where my situation may demand them. The question whether autrefois acquit will be a good plea in this case is of great magnitude, and ought to be settled by the united wisdom of all the judges. Were it brought before me on a trial in chief, I would, if in my power, carry it before the supreme court. When brought before me merely as an examining magistrate, I should deem myself inexcusable were I to decide, while a single doubt remained respecting the correctness of that decision.

To settle new and important questions in our Criminal Code, especially where those questions are constitutional, is a task upon which a single judge will at any time enter with reluctance; certainly, he would not willingly engage in it while acting as an examining magistrate. There is a decent fitness which all must feel in bringing such questions, if practicable, before all the judges. In England, trials which are expected to involve questions of great magnitude are seldom assigned to one or two judges. At that interesting crisis when Hardy, Tooke, Thelwall, and others were indicted for treason, Chief Justice Eyre was aided and supported by four associate judges of high talents and character. It would, I have

no doubt, in that country be a matter of surprise if any person, whatever might be his station in the judiciary, should undertake to settle a great and novel point on a question of commitment. Although, in the United States, our system does not admit of a commission authorizing a majority of the judges to constitute a court for the trial of special criminal cases, yet it does admit of carrying a doubtful and important point before the supreme court, and I should not feel myself justified were I now to give an opinion anticipating such a measure. I shall therefore consider this motion as if no verdict had been rendered for either of the parties.

Both charges are supported by the same transaction and the same testimony. The assemblage at the mouth of Cumberland is considered as an act of levying war against the United States, and as a military armament collected for the invasion of a neighboring power with whom the United States were at peace. From the evidence which details that transaction, it appears that from sixty to one hundred men, who were collected from the upper parts of the Ohio under the direction of Tyler and Floyd, had descended the river and reached the mouth of Cumberland about the 25th of December, 1806. The next day they went on shore, and formed a line, represented by some as somewhat circular, to receive Colonel Burr, who was introduced to them, and who said that he had intended to impart something to them, or that he had intended to communicate his views, but that reasons of his own had induced him to postpone this communication; or, as others say, that there were then too many bystanders to admit of a communication of his objects. The men assembled at the mouth of Cumberland appear to have considered Colonel Burr as their chief. Whatever might be the point towards which they were moving, they seem to have looked upon him as their conductor. They demeaned themselves in a peaceable and orderly manner. No act of violence was committed, nor was any outrage on the laws practiced. There was no act of disobedience to the civil authority, nor were there any military appearances. There were some arms, and some boxes which might or might not contain arms. There were also some implements of husbandry, but they were purchased at the place. These men assembled under contracts to settle a tract of country on the Red river. No hostile objects were avowed; and, after continuing a day or two on an island in the mouth of the river, the party proceeded down the Ohio. There are some circumstances in this transaction which are calculated to excite attention and to awaken suspicion. If the exclusive object of those who composed this meeting was to settle lands, it would naturally form the subject of public conversation, and there would most probably have been no impediment to a free communication respecting it. The course of the human mind would naturally lead to such communications. The silence observed by the leaders on this subject, connected with hints of ulterior views, seemed calculated to impress on the minds of the people themselves that some other project was contemplated, and was probably designed to make that impression. That the men should have been armed with rifles was to be expected, had their single object been to plant themselves in the Washita; but the musket and bayonet are, perhaps, not the species of arms which are most usually found in our frontier settlements; nor were the individuals who were assembled of that description of persons who would most naturally be employed for such a purpose. The engagement for six months, too, is a stipulation for which it is difficult to account upon the principle that a settlement of lands was the sole or principal object in contemplation. These are circumstances which excite suspicion. How far they may be accounted for by saying that ulterior eventual objects were entertained, and that the event on which those objects depended was believed to be certain or nearly certain, I need not determine; but I can scarcely suppose it possible that it would be contended by any person that the transactions at the mouth of Cumberland do, in themselves, amount to an act of levying war. There was neither an act of hostility committed, nor any intention to commit such act avowed.

Very early in the proceedings which preceded this motion, I declared the opinion that war might be levied without a battle, or the actual application of force to the object on which it was designed to act; that a body of men assembled for the purpose of war, and being in a posture of war, do levy war; and from that opinion I have certainly felt no disposition to recede. But the intention is an indispensable ingredient in the composition of the fact; and if war may be levied without striking the blow, the intention to strike must be plainly proved. To prove this intention, the prosecutor for the United States offers evidence of conversations held by the accused, or some of them, with various individuals, at different times, relative to the views which were entertained, and the plans which had been formed, and of certain facts which took place after leaving the mouth of Cumberland. For although it was decided not to be within the power of this court to commit for trial in a territory of the United States, yet every transaction within a territory has been given in evidence in the expectation that such testimony might serve to explain the meeting at the mouth of Cumberland, and because it was believed to be proper for an examining magistrate to receive it.

That conversations or actions at a different time and place might be given in evidence as corroborative of the overt act of levying war, after that had been proved in such a manner as to be left to a jury, I never doubted for an instant. But that in a case where the intent could not be inferred from the fact, and was not proved by declarations connected with the fact, among which I should include

the terms under which those who composed the assemblage were convened together, this defect could be entirely supplied by extrinsic testimony, not applying the intent conclusively to the particular fact, is a point on which I have entertained doubts which are not yet entirely removed. The opinion of Judge Iredell in the Case of Fries [Case No. 5,126], according to my understanding of it when read at the bar, appears to bear strongly on this point, and that opinion would be conclusive with me, at least while acting as an examining magistrate. I have not reviewed it particularly, because my decision will not depend on the propriety of admitting this mode of proving the intent. It has, also, been made a question, whether after proving a connection between the accused for some general object, the conversations of one of them may be given in evidence against any other than himself for the purpose of proving what that object was. On the part of the United States it is insisted that such conversations may be given in evidence on an indictment for treason in levying war. By the defence it is contended that such evidence is only admissible on indictments for a conspiracy, or on indictments where a conspiracy may be laid as an overt act.

The principle that one man shall not be criminated by the declarations of another, not assented to by him, nor made in due course of law, constitutes a rule of evidence which ought not unreflectingly to be invaded. It is one of those principles on which I do not think myself required to decide, because I am not sure that its decision, however interesting it might be on a trial in chief, would essentially affect the question of commitment, nor am I confident that its decision as argued on the part of the United States would introduce the testimony it was designed to introduce. In the English books generally, the position that the declarations of a person not on trial may be given in evidence against a man proved to have been connected with him, is laid down only in cases of conspiracy, where the crime is completed without any other open deed. The position is certainly not laid down with respect to such cases, in terms which exclude its application to others, but it is not laid down in general terms, and is affirmed to apply to those particular cases, without being affirmed to apply to others. From this general observation relative to the English books, East is to be excepted. He states the proposition generally. Yet it may well be doubted whether this general statement was not with a view to the law in that treason which, in England, almost swallows up every other.

But admitting the law to be the same in treason by levying war as in cases of conspiracy, how far does it extend? The doctrine on this subject was reviewed in the Case of Hardy and Tooke [unreported]. On the part of the crown, a letter of Thelwall containing seditious songs composed by himself, and sung in the society, was offered as evidence against Hardy, who was connected with Thelwall. This testimony was rejected, because it was not a part of the transaction itself, but an account of that transaction given by Thelwall to a person not engaged in the conspiracy. The court was divided, three for rejecting and two for admitting the evidence. A letter addressed by one conspirator to another, but not proved to have been received, was then offered and admitted against the opinion of the chief justice, who thought that such a letter did not amount to an act done which might be evidence, but only to a relation of that act, which could not be evidence. He was overruled, because a letter from one conspirator to another on the conspiracy was a complete act in that conspirator. The next paper offered was a letter from a society in the conspiracy, which was found in the possession of one of the conspirators, and this was unanimously admitted.

The principle which appears to be established by these decisions is, that a letter from one conspirator to another on the subject of the conspiracy is evidence against all, but that a letter from a conspirator to a person not connected with him, stating facts relative to the conspiracy, is only evidence against himself. How far a conversation held with a stranger for the purpose of bringing him into the plot may be considered as a transaction, and, therefore, testimony to show the general conspiracy, does not appear from these decisions. This species of evidence is received to show the general object of the conspiracy, but can affect no individual further than his assent to that object can be proved by such testimony as is admissible in ordinary cases. I notice this point for the purpose of observing that I do not decide it on the present motion.

The first question which arises on the evidence is: With what objects did those men convene who assembled at the mouth of Cumberland? Was it to separate the Western from the Eastern states by seizing and holding New Orleans? Was it to carry on an expedition against Mexico, making the embarkation at New Orleans? Was this expedition to depend on a war with Spain? The conversation held by Colonel Burr with Commodore Decatur stated his object to be an expedition against Mexico, which would be undertaken, as the commodore understood, with the approbation of government in the event of war. To General Eaton, he unfolded, in his various conversations, plans for invading Mexico, and also for severing the Western from the Atlantic states. To Commodore Truxton, he spoke of the invasion and conquest of Mexico in the event of a war, as a plan which he had digested in concert with General Wilkinson, and into which he was extremely desirous to draw the commodore. A circumstance is narrated by this

witness which has been noticed by the counsel for the United States, and deserves consideration. It is the declaration of Colonel Burr that he was about to despatch two couriers with letters to General Wilkinson relative to the expedition. It was at this time that Messrs. Bollman and Swartwout are said to have left Philadelphia, carrying each a copy of the ciphered letter which has constituted so important a document in the various motions that have been made on this occasion. This letter, though expressed in terms of some ambiguity, has been understood by the supreme court, and is understood by me, to relate to a military expedition against the territories of a foreign prince. In this sense the testimony offered on the part of the United States shows it to have been also understood by Bollman, by Swartwout, and by General Wilkinson. The inference is very strong that this letter is the same to which Colonel Burr alluded in his conversation with Commodore Truxton, and strengthens the idea that the accused gave to that gentleman a true statement of the real object, so far at least as relates to the point against which his preparations were to be directed. All the conversation relative to an expedition by sea would be equally inapplicable to any attempt on the territories of the United States and to the settlement of lands. His conversations with the Messrs. Morgan certainly indicate that his mind was strongly directed to military objects, that he was not friendly to the present administration, and that he contemplated a separation of the Union as an event which would take place at no very distant day. His conversation with Lieutenant Jackson points in express terms to hostility against Spain. The conversations of Mr. Blennerhassett evince dispositions unfriendly to the Union, and his writings are obviously intended to disaffect the Western people, and to excite in their bosoms strong prejudices against their Atlantic brethren. That the object of these writings was to prepare the Western states for a dismemberment is apparent on the face of them, and was frequently avowed by himself. In a conversation with the Messrs. Henderson, which derives additional importance from the solemnity with which his communications were made, he laid open a plan for dismembering the Union, under the auspices of Mr. Burr. To others, at subsequent times, he spoke of the invasion of Mexico as the particular object to which the preparations then making were directed. In all those whom he sought to engage in the expedition, the idea was excited that, though the Wachita was its avowed object, it covered something more splendid, and the allusions to Mexico, when not direct, were scarcely to be misunstood. The language of Comfort Tyler also tends to prove that the enterprise was destined against Mexico. The communications made to Gen. Wilkinson deserve much consideration in marking the real intention of the parties, because it is obvious that Colonel Burr, whether with or without reason, calculated on his co-operation, with the army which he commanded, and that on this co-operation the execution of his plan greatly, if not absolutely, depended. To General Wilkinson both the ciphered letter and the explanations made by Bollman and Swartwout declared the expedition to be military and to be intended against Mexico.

I do not think the authenticity of this letter can now be questioned. When to the circumstances enumerated by the counsel on the part of the United States are added the testimony of Mr. Swartwout, and its being written in a cipher previously established between General Wilkinson and Colonel Burr, I think it sufficiently proved, at least for the present, although not in the hand-writing of the person to whom it is ascribed. The conversation stated by Gen. Wilkinson as passing between Mr. Swartwout and himself, so far as it is contradicted by that gentleman, cannot affect Mr. Burr, for this plain reason: the person alleged to have made those declarations avers not only that he never made them, but that he was never authorized to make them; that he never heard from Mr. Burr any sentiment indicating designs against any part of the United States, and never even suspected him of such designs. If, then, Gen. Wilkinson be correct, I must consider the observations he narrates as the conjectures of Mr. Swartwout, not authorized by Mr. Burr.

It is also a circumstance of some weight, that Mr. Burr's declarations at the mouth of Cumberland furnish strong reasons for the opinion that he did not wish those to whom he addressed himself to consider the Wachita as his real ultimate object, and the reference to further information from their particular leaders would naturally induce the expectation that without any open avowal their minds would be gradually conducted to the point to which their assent was to be obtained. We find there were rumors among them of attacking Baton Rouge, of attacking other parts of the Spanish dominions, but not a suggestion was heard of hostility against the United States.

On comparing the testimony adduced by the United States with itself, this is observable. That which relates to treason indicates the general design, while that which relates to misdemeanor points to the particular expedition which was actually commenced. Weighing the whole of this testimony, it appears to me to preponderate in favor of the opinion that the enterprise was really designed against Mexico.

But there is strong reason to suppose that the embarkation was to be made at New Orleans, and this, it is said, could not take place without subverting for a time the government of the territory, which, it is alleged, would be treason. The supreme court has said that to revolutionize a territory by force,

although merely as a step to or a means of executing some greater projects is treason. But an embarkation of troops against a foreign country may be made without revolutionizing the government of the place, and without subverting the legitimate authority. It is true that violence might probably result from such an attempt, and treason might be the consequence of its execution; but this treason would arise incidentally, and would not be the direct object for which the men originally assembled. This treason would attach to those who committed it, but would not, I am inclined to think, infect a previous assemblage convened for a distinct purpose. If the object of the assemblage at the mouth of Cumberland was to embark at New Orleans for the purpose of invading Mexico, the law relative to that assemblage would be essentially different from what it might be if their direct object was to subvert the government of New Orleans by force. If, in prosecuting their purpose at New Orleans, war should be levied, this would be treason at New Orleans when the fact was committed, but it could not, I think, be said to be treason by levying war at the mouth of Cumberland, where the fact was neither committed nor intended. It might be otherwise, if at the mouth of Cumberland the determination to subvert the government of a territory by force had been formed.

This opinion may be in some degree illustrated by the doctrine of the English books. Levying of war is an overt act of compassing the king's death. So is a conspiracy to levy war, provided the conspiracy be direct against the king or his government. But if it be a conspiracy to do an act of constructive treason, which act, if done, would support an indictment for compassing the king's death, the conspiracy without the act will not support the indictment. So, in this case, if the object be embarkation of a body of men against a foreign country, in the execution of which war may or may not be levied, the fact becomes necessary to constitute the treason.

It is also a circumstance of considerable weight with me that the proof exhibited by the United States to establish a general design to dismember the Union applies only to Colonel Burr and Mr. Blennerhassett. It is not proved to have been ever communicated even to Tyler or Floyd. There is not only a failure to prove that such a design was communicated to, or even entertained by the men who were assembled at the mouth of Cumberland; but the contrary is in full evidence. The United States have adduced several witnesses belonging to that assemblage, who concur in declaring that they heard nothing, that they suspected nothing, and that they would have executed nothing hostile to the United States. This testimony cannot be disregarded, for it is uncontradicted, and is offered by the prosecution. How, then, can this assemblage be said to have levied war against the United States?

Had Burr and Blennerhassett constituted this meeting, no man could have construed it into an act of levying war, whatever might have been their purpose. Their being joined by others having no hostile intentions against the United States, who were attached to them with other views, and who would not permit themselves to be employed in the execution of such intentions, does not seem to me to alter the case. The reason why men in a posture of war may be said to levy war before a blow is struck, is that they are ready to strike, and war consists in the various movements of a military force, as well as in actual fighting. But these men were not ready nor willing to strike, nor could their chief be ready to strike without them. He had yet to prevail upon them to come into his measures. This is not a meeting for the purpose of executing a formal design, but a meeting for the purpose of forming a design. It is, therefore, more in the nature of conspiracy than actual war.

Suppose Mr. Burr had, at the mouth of Cumberland, declared his object to be to seize upon New Orleans and dismember the Union, and that upon this declaration his men had universally abandoned him, could this have been denominated an act of levying war? If we forget the constitution and laws of our country, if we suppose treason, like moral guilt, to consist in the intention, and that it may be legally evidenced by the words declaring that intention, the answer to this question may be in the affirmative; but it can only consist in an open deed of levying war. I confess myself unable to perceive how such a proposition can be construed into such a deed.

The case does not appear to me to be essentially varied by the circumstance that this design was not avowed, and that the men followed Colonel Burr with other views. Upon general principles, it appears to me that unless some act be committed from which a treasonable intent may be inferred, that the treasonable intent must be proved in the assemblage, where that assemblage is composed of free agents, as well as in the person who convenes them, before the law considers war as being actually levied.

This opinion is supposed to be contrary to the decision in the Cases of the Earls of Essex and Southampton [1 How. St. Tr. 1333]. I have examined that case as reported in the State Trials, and do not think it in any respect contradictory to the ideas I have delivered. The design of the Earl of Essex was to force his way into the palace, and to remove certain counsellors from the queen, who were his enemies; but he intended no hurt to the person of the queen. For the purpose of executing this design, he assembled a large body of armed men at his own house, who continued embodied after being ordered by the proper authority to disperse, and he also entered the city of London for the purpose of raising the citizens, in order further to aid him in the execution of his plan. Several consultations had been previously held at which the Earl of Southampton assisted, and it is

not alleged in the case that he was not fully informed of these projects. He believed that no design was entertained against the person of the queen, and therefore that his acts were not treasonable; but in the law he was mistaken. In fact, no particular design against her person was entertained, and Essex as little suspected as Southampton that they were committing treason. They were ignorant that the law pronounced those facts to be treason, but they were neither ignorant of the facts themselves nor of the real intention with which those facts were committed.

In this case the judges delivered their opinion of the law on two points. The one, "that in case where a subject attempteth to put himself into such strength as the king should not be able to resist him, and to force and compel the king to govern otherwise than according to his own royal authority and direction, it is manifest rebellion." The other, "that in every rebellion the law intendeth as a consequent the compassing the death and deprivation of the king, as foreseeing that the rebel will never suffer that king to live or reign who might punish or take revenge of his treason or rebellion."

Under this law opinion of the judges, Essex and Southampton, were condemned and executed. The only difference between them was, that the quarrel was the quarrel of Essex, and Southampton only adhered to him, but he adhered to him knowing what he did, and the intention with which he acted.

Believing, then, the weight of testimony to be in favor of the opinion that the real and direct object of the expedition was Mexico, and inclining, also, to the opinion that, in law, either acts of hostility and resistance to the government, or a hostile intention in the body assembled, is necessary to convert a meeting of men with ordinary appearances into an act of levying war, it would, in my judgment, be improper in me to commit the accused on the charge of treason.

It is contended that they are not guilty of a misdemeanor, on one of these grounds: Either the United States were actually at war with Spain, or the expedition was dependent on war, and, in the event of peace, was to be converted into a settlement on the Wachita. It is alleged that we were at war with Spain, because a Spanish army had crossed the Sabine, and entered the territory of the United States. That a nation may be put in a state of war by the unequivocal aggressions of others, without any act of its own, is a proposition which I am not disposed to controvert, but I cannot concede this to be such an act. The boundaries claimed by the United States to their recent purchase of Louisiana are contested by Spain. Now, if either nation takes possession of the contested territory as its own, it is an act which the opposite government may elect to consider either as an act of war or otherwise, and only the government can make that election. No citizen is at liberty to make it, or to anticipate his government. But it is alleged that war, if not absolutely made, appeared to be inevitable, and that the prosecution of the expedition depended on its taking place. That the probability of war was great may be admitted, and this may extenuate the offence; but it still remains an offence which is punishable by law. If the expedition was really eventual, and was not to take place in the time of peace, then, certainly, preparations might be made for it without infracting any law; but this is a fact proper for the exclusive consideration of the jury, and I shall make no comment upon it which might, the one way or the other, influence their judgment.

I shall commit Aaron Burr and Harman Blennerhassett for preparing and providing the means for a military expedition against the territories of a foreign prince, with whom the United States were at peace. If those whose province and duty it is to prosecute offenders against the laws of the United States shall be of opinion that a crime of a deeper dye has been committed, it is at their choice to act in conformity with that opinion.

Israel Smith is not proved to have provided or prepared any means whatever, and therefore I shall not commit him. If he has really offended against the laws, he may be prosecuted for the treason in Kentucky, or for the misdemeanor in his own state, where (if anywhere) his offence has been committed.

After the delivery of the opinion of the court, the CHIEF JUSTICE observed that he had not specified (in that opinion) the particular district to which the defendants were to be committed. He thought it best that there should be only one trial for them; but if Burr was sent to Kentucky, Blennerhassett could not be, because he had provided no means for the expedition but in the district of Ohio.

Mr. Hay then moved for their commitment to Ohio, which was ordered.

Messrs. Burr and Blennerhassett were admitted to bail, in the sum of three thousand dollars each. Luther Martin and Dr. Cummings, securities for A. Burr; Dr. Cummings and Israel Smith, for H. Blennerhassett.

The court then adjourned.

Case No. 14,695.

UNITED STATES v. BURROUGHS.

[3 McLean, 405;[1] 2 West. Law J. 63, 119.]

Circuit Court, D. Ohio. July Term, 1844.

EMBEZZLEMENT FROM MAIL—INDICTMENT—OWNERSHIP OF STOLEN PROPERTY—VARIANCE—SURPLUSAGE—VERDICT.

1. A and B deposited certain bank notes with C and D, to be forwarded to the bank, with certain other notes on the same bank, owned by C and D; and the notes having been all stolen from the mail, may be laid in the indictment as the property of C and D.

[Cited in U. S. v. Jones, 31 Fed. 726.]

[Cited in brief in State v. Beatty, 90 Mo. 144, 2 S. W. 215.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

2. A slight and unsubstantial variance between the indictment and the proof, in regard to the direction of a letter which is not produced, and which the witness states, after the lapse of two years, with doubt, ought not to exclude the evidence.

3. And this is especially the case if, under some counts in the indictment, the objection of variance does not apply.

4. A carrier of the mail, for an offence under the law punishable generally, may be convicted, though not as carrier.

5. And being charged as carrier in the indictment, there being no such offence described, the word "carrier" will be considered as descriptive of his person and as surplusage.

6. One or more good counts in an indictment will sustain a general verdict of guilty, though there be one or more bad counts in it.

[Cited in U. S. v. Burns, Case No. 14,691; U. S. v. Patterson, Id. 16,011; U. S. v. Plumer, Id. 16,056.]

[W. M. Corry moved for a new trial upon the following grounds, which were also urged to the court and jury at the trial:

[The verdict, except on the second count, is unsustained by the evidence. The punishment for the offence mentioned in that count cannot exceed 6 months imprisonment, and a fine. The verdict on the first count cannot be sustained, for the 22d section of the post-office act only provides for the case of stealing the mail from, and not by, the person having the custody of it; the words being "with or without the consent of the person having the custody thereof." It is unnecessary to consider whether the offence charged in this count could be the subject of an indictment in the state court, for the jurisdiction of this court is given only by the law of congress, which does not provide for the case of "stealing the mail" by the person having custody thereof, although the other clauses do provide for the case of the stealing &c. of a letter by such a person; and the indictment must rest therefore upon these latter clauses. See Pooley's Case (Old Bailey, 1801) 1 East. P. C., addenda, 17; Brown's Case, Russ. & R. 32, and the note of decisions on similar enactments; 3 Burn, J. P. 743; Rosc. 703. None of the other counts (except the 2d ut supra) is sustained by the proof, for they all charge that the property in the notes was in Semple & Barker, whereas after the notes were mixed together so that they could not be distinguished one from the other, Semple, Barker, Cooper and Kay, became tenants in common of the whole mass according to their respective proportions. Such is the effect in all cases where the property of different persons is rightf '-ly mixed together. Where it is wrongfully mixed, the wrong doer forfeits his share of the whole to the other owners. 1 Hale, P. C. 413; 2 Bl. Comm. 405; 2 Kent, Comm. 364; Inst. 2, 1, 26, 28; Com. Dig. Pl. (3 M.) 20; Story, Bailm. § 40; 21 Pick. 298, 304; 2 Johns. Ch. 108; 2 Blackf. 377; 2 Camp. 576; 1 Vern. 217; 2 Vern. 516; 2 Dane, Abr. 119; 19 Ves. 432; 7 Mass. 127; Bac. Abr. "Trespass," E, 2. After Semple and Barker had mixed the notes together, and while they retained the possession of the whole, they had a special property in the whole, and could have maintained trover against any person taking them away. But when they had posted the letter containing all the notes, and had thus parted with the possession of the individual portion that had been committed to their charge, in pursuance of the bailment, they retained no right, either of property or possession in the individual share of Cooper and Hay. The only remaining interest of Semple and Barker, was the right of property in their own undivided share, whereas the indictment treats the sole property in a part of the notes to be in them. As their interest was one in common, and not sole, the indictment is not sustained by the evidence in this vital respect. Neither is the allegation, that the letter was directed to "M. Garraty, Esq., Cashier," made out by the evidence. The witness thought that the address did not contain the word "Cashier."

[Charles Anthony, U. S. Dist. Atty., argued that the carrier of a mail might be guilty of stealing it; that the 3d and subsequent counts were sustained by the evidence, as Semple and Barker had possession of the whole of the notes, and that the doctrine as to mixing property belonging to different owners, did not apply to a description of the ownership in an indictment. And that the omission to prove the superscription of the letter to be as stated in the indictment was immaterial, especially as the other counts were sustained.][2]

Jordan A. Pugh and W. M. Corry, for prisoner.

OPINION OF THE COURT. The jury having returned a verdict of guilty, on the seven counts contained in the indictment, a motion is now made for a new trial, and also in arrest of judgment:

On two grounds, the defendant's counsel insist that a new trial should be granted. 1. "Because the bank notes alleged to have been stolen, are stated, in all the counts of the indictment, to be the property of Semple and Barker, whereas the proof showed that they were the property of those persons and two other individuals." 2. "Because the proof was that the letter, which contained the notes, is averred in the indictment to have been directed to 'M. Garraty, Esquire, Cashier,' and the proof was, that it was directed to 'M. Garraty, Esquire.'"

It was proved that there were enclosed in the letter, bank notes on the Lancaster (Ohio) Bank, amounting to two hundred and six dollars; one hundred and ten dollars of which belonged to Semple and Barker, and the residue to James L. Cooper and C. H. Kay. That these latter individuals deposited

[2] [From 2 West. Law J. 63.]

their notes with Semple and Barker, to be forwarded to the bank to procure exchanges. All the notes were enclosed in the same letter, by Semple and Barker, which was signed by them. This is not a question between bailor and bailee; but the only inquiry is, whether there was such a property of all the notes in Semple and Barker, as sustains the allegation in the indictment. On this point there can be no doubt. They had possession of the notes for a special purpose, and were responsible for an improper use of them. The argument that they had parted with the possession of the notes, by enclosing them in a letter, by mail, requires no answer. A mere carrier may be described as the owner of the goods. 1 Hale, P. C. 512. Goods stolen from a washerwoman, may be described as hers, because she is answerable for them. 1 Leach. 357. If a coach be standing in the yard of a coach maker to be repaired, and a plate of glass and hammer cloth be stolen from it, the property may be well laid in the owner of the premises. Id. 356. "Where a parcel is stolen from the boot of a stage, the property may be laid in the driver, though he may be no proprietor of the goods or the coach; and though as against his employers he has a bare charge, but as against the rest of the world, he has a legal possession." Id.

The second ground, as regards the direction of the letter, affords no sufficient reason for setting aside the verdict. Barker, who directed the letter, says that his impression is, that it was directed to "M. Garraty, Esquire, Lancaster, Ohio," but he does not speak positively on the subject. He made no entry of the superscription, and as two years have elapsed, it is hardly to be expected that he should be able to state the fact positively. In Rosc. Ev. 199, "in an indictment upon 7 Geo. III., c. 50, the letter was described as one to be delivered to persons using, in trade, the name and firm of Messrs. B. N. & H.," the word, Messrs., being frequently added to their address, in the direction of letters and other papers received on business, though they themselves, in drawing bills, never used the word. "This was held to be no variance." If the letter had been presented, and the direction of it varied from the allegation in the indictment, it could not have been received in evidence. For, although the direction of the letter need not to have been stated in the indictment, yet having been stated, the proof must correspond with the allegation. But in this case the letter was not produced; the statement of the witness not being positive as to the variance, and the jury having found the defendant guilty generally, the verdict, it seems to us, should not be set aside. There is another view which is conclusive on this point. All the counts of the indictment, except three, are free from the objection of variance. The second count alleges that the letter was addressed to "M. Garraty, Esquire, Lancaster, Ohio." The fifth count charges the defendant with embezzling a bag of letters, as carrier, which contained a bank note. And the sixth count contains the same charge, except a mail of letters is used instead of a bag of letters. The punishment on the two last counts, or either of them, is the same as on the three counts where the variance, if any, exists. So that, the finding of the defendant guilty on those counts does not, in the least, change the nature or amount of the punishment.

A motion for a new trial is addressed to the discretion of the court, and that discretion should never be exercised in favor of a defendant in a civil or criminal case, where substantial justice has been done, and where there is no principle of law which can operate favorably to the defendant. The letter, beyond dispute, was evidence under all the counts, except the third, fourth and seventh. The motion for a new trial is overruled. The motion in arrest of judgment is mainly founded upon the first count in the indictment, which charges the defendant with stealing the mail of the United States. In England, by the statute of 7 Geo. IV. c. 64, a material change has been made in the law, so that many exceptions to an indictment, which were before fatal on a motion in arrest, now must be taken advantage of by demurrer or writ of error. This, however, is not the law in this country. It is insisted that the carrier of the mail, if he take it fraudulently, is only guilty of a breach of trust; that such is the rule at common law, and that the act of congress does not make it an offence. In 1 Leach, 1, it is expressly laid down, that at common law, persons employed in the post-office, have no special property in the letters committed to their charge, which may prevent their stealing from amounting to larceny. If a bag of wheat be delivered to a warehouse man for safe custody, and he take the wheat out of the bag and dispose of it, it is larceny. Russ. & R., 337. Where a clerk embezzled a bill of exchange, which he had received in the usual course of business to be transmitted by post, it was held to be larceny. Case of Paradice, 2 East, P. C. 565; Case of Taylor [3 Bos. & P. 596]. The courts of the United States have no common law jurisdiction of offences, and the above citations are only made to show that the ground assumed as to the acts of the carrier, at common law, is not sustainable. It is admitted, that unless the charge in the first count is sustained under the twenty-second section of the post-office act of 1825 [4 Stat. 108], the count is bad. The words of the section are, "And if any person shall steal the mail, or shall steal or take from or out of any mail, or from or out of any post-office, any letter or packet; or if any person shall take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and

shall open, embezzle or destroy any such mail, letter or packet, the same containing any article of value, or any other article, paper or thing mentioned in the twenty-first section of this act; or if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter or packet containing any article of value, &c., such offender on conviction shall be imprisoned not less than two, nor exceeding ten years." As the carrier of the mail, for any act of violence upon it, is punished with much greater severity than is provided in the above section, a presumption arises that the legislature did not consider the section as applying to a mail carrier. And this view is strengthened, by the provision that the offender shall be equally liable, "whether the mail, letter or packet, was obtained with or without the consent of the person having it in custody." Still, if the language of the section clearly embrace the offence charged, and it is punished nowhere else, the language of the section must govern, whatever may be supposed to have been within the mind of the legislature. It is very clear the defendant cannot be punished as carrier of the mail; but the question is, whether the word "carrier" may not be considered as descriptive of the person, and not as aggravating the offence. Because an individual is a carrier of the mail, it does not follow that he is exempt from punishment for offences disconnected with his employment. Suppose the carrier of the mail should steal a horse, and in the indictment for it he should be described as the carrier of the mail, would that vitiate the indictment? Surely not. As carrier he is not punishable for stealing a horse, but as an individual he is punishable. The description, as carrier, would be regarded as surplusage. And this rule applies to the case under consideration.

The defendant is charged, as carrier, with stealing the mail. Now, there is no such offence known to the law. But stealing the mail is an offence, and, it is supposed, that the defendant, to such a charge, could not plead in justification or excuse that he was a carrier of the mail. Suppose a carrier of the mail should steal a letter from a post-office, and should be indicted for the taking of the letter as carrier, could he not be convicted? His description as carrier would be considered as used to identify him, and not as constituting an ingredient by which the penalty is to be measured. It is supposed that the count is defective, because the property of the mail is not laid to be in the United States, or in any one; nor is its value stated. This being a statutory offence, the value of the mail need not be stated, any more than the value of the letter. If a letter be stolen from a post-office, which contains an article of value, a higher punishment is inflicted on the offender, and consequently the article must be described and the value of it stated. But for the taking of a letter, which contains nothing of value, no value need be averred; and so it is in regard to the mail. I confess that I am inclined to think, if a carrier of the mail, having possession of it, shall steal it, he cannot escape, for the reason that there is no provision in the statute to punish him as carrier. The act is punishable, and I see no reason why a carrier of the mail should escape. But it is unnecessary to overrule the motion in arrest, on this ground. The court do not decide the question. If the first count be bad, there being other counts in the indictment which are good, on a general verdict of guilty, the judgment cannot be arrested. In this, an indictment differs from a declaration. For one defective count in the latter, the judgment must be arrested; while in the former, one good count sustains the verdict. The motion in arrest of judgment was overruled; and the defendant was sentenced to ten years imprisonment in the penitentiary at hard labor.

UNITED STATES (BURROUGHS v.). See Case No. 2,202.

Case No. 14,696.

UNITED STATES v. BUTLER et al.

[2 Blatchf. 201.] [1]

Circuit Court, S. D. New York. May 17, 1851.

JUDGMENT—PAYMENT BY CREDITOR OF PRIOR INCUMBRANCE—RENTS AND PROFITS—LIEN.

1. Where, on the filing of a bill to remove an incumbrance on land, so that it may be sold under the plaintiff's judgment, a receiver is appointed of the rents and profits of the land, they are, in equity, subject to the lien and claim of the judgment, the same as the land itself.

2. Where the parties to such a suit settle it, the plaintiff getting rid of the incumbrance by paying to its holder a certain sum, and the land being thus left subject only to his judgment, the result is, in legal effect, the same, as it respects the lien of the judgment, as if a decree were to be made in the suit that, on payment of the sum, the prior incumbrance should be discharged.

3. On the payment of such sum by the plaintiff, under a decree, the land and the rents and profits would be applicable to the plaintiff's judgment; and, the incumbrance being disposed of by settlement, the land and the rents and profits that have accrued become subject to the judgment.

4. Nor does the fact that the land is then sold under the judgment, and satisfaction entered of the judgment, that being done in pursuance of an agreement with the defendant in the judgment, affect the right of the plaintiff to those rents and profits. They are, in equity, immediately applicable to the judgment when the right under the incumbrance is disposed of; and the agreement to enter the satisfaction after selling the land and applying the proceeds, will be construed, upon a fair interpretation, to intend that the rents and profits which have accrued and are in the hands of the receiver shall also be applied on the judgment.

This was a demurrer to a supplemental bill. The facts were these: In December, 1816,

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

the plaintiffs recovered a judgment against the defendant Thomas C. Butler, in the district court of the United States for the Southern district of New-York, for a large amount. The judgment was recovered on duty bonds, on which Butler and also one Minturn and one J. Sturgis were sureties for others. On the 12th of August, 1816, Butler and wife executed to J. Sturgis a mortgage, covering certain houses and lots in the city of New-York, to secure the payment of $27,000, without interest, in one year thereafter. The mortgage was given to indemnify J. Sturgis against liability on the said bonds. On the 31st of March, 1823, there was upwards of $30,000 due on the judgment against Butler, and on that day the original bill in this cause was filed, to remove the said mortgage as an incumbrance upon the lots, so that they could be sold under the said judgment. J. Sturgis had paid nothing, as surety to the government. Butler put in an answer to the original bill, admitting that the mortgage was given to J. Sturgis for the purpose of raising money to pay the bonds or the judgments recovered upon them; that he had so advised the attorney of the United States; and that he had received no consideration from J. Sturgis for the same. J. Sturgis also answered the original bill, alleging, among other things, that Butler was indebted to him at the time of giving the mortgage; that it was not given solely to indemnify him as surety to the plaintiffs on the bonds; that he had assigned the mortgage to secure the sum of $15,000 due and owing to the firm of Sturgis & Burrows, in Savannah, Georgia; and that Butler had admitted to him that funds had been put into his hands by Minturn & Champlin, the principal debtors in the bonds, to satisfy them, and had stated that he would be kept harmless. On the 11th of February, 1825, a supplemental bill was filed, making Burrows, the surviving partner of Sturgis & Burrows, a defendant, and praying a discovery as to the assignment of the mortgage, and that it might be delivered up and cancelled. Burrows answered, setting up a large indebtedness of J. Sturgis to him and his partner, and alleging that the assignment of the mortgage to them was made in part satisfaction of the same. Replications were filed to the original and supplemental bills, and proofs were taken in the case, and it was brought to a hearing, and, on the 20th of June, 1826, an order was made referring the case to a master, to take and state an account between the defendants Butler and J. Sturgis. [Case No. 16,414.] On the 7th of June, 1827, a further order was entered, appointing Thomas C. Bolton, the master, a receiver of the rents and issues of the premises covered by the mortgage. Before the master completed the reference, and on the 25th of July, 1830, an order was entered discharging him as master and receiver, and appointing in his place Murray Hoffman, who was authorized to receive the balance of money in the hands of Bolton, and deposit it in the New York Life Insurance and Trust Company. Hoffman continued as such receiver down to the sale, hereafter mentioned, of the mortgaged premises.

By an act of congress, passed March 24, 1834, (6 Stat. 555,) the secretary of the treasury was authorized to compromise the bonds and judgments, with the parties liable on them, and particularly with Minturn, surviving partner of Minturn & Champlin, the principal debtors. An arrangement was accordingly made, by which Burrows, the surviving partner of Sturgis & Burrows, in consideration of $6,000, assigned the mortgage to the plaintiffs; and it was further agreed, on the 12th of June, 1834, between the secretary and Minturn, by way of compromising and settling all the claims of the United States upon the late firm of Minturn & Champlin and their sureties, that Minturn should procure to be assigned to the United States the mortgage given by Butler to J. Sturgis, in order to clear the premises from embarrassment, so that they could be made available towards the payment of the judgment against Butler, and, in consideration of the assignment having been made, the plaintiffs stipulated to release all the judgments, (there having been separate judgments against the principal debtors and each of the sureties,) and to discharge them of record, as soon as the mortgaged premises should be sold under the mortgage, or otherwise disposed of. The premises were sold under the judgment against Butler, on the 10th of March, 1838, and purchased by John Rathbone for $25,500, which was much less than the amount then due on the judgment, and the mortgage was assigned to him as a muniment of title. Satisfaction of the several judgments was entered of record on the 4th of August, 1840.

The supplemental bill which was now filed set forth the above facts, and alleged that Hoffman, the receiver, had in his hands $9,000; that a large sum of money, far exceeding the sum in the hands of the receiver, remained due on the judgment against Butler, over and beyond the amount brought by the sale of the mortgaged premises; and that the defendants Laird M. H. Butler and Jonas Butler claimed the funds in the receiver's hands, under an assignment of some interest in the lots from T. C. Butler, but the bill charged that it was made, if at all, during the pendency of the suits against T. C. Butler and the others, and of which these defendants were chargeable with notice. The bill also set forth various judgments recovered by the plaintiffs against T. C. Butler for debts due from him individually, and which remained unpaid, and were a lien on the lots covered by the mortgage, or on T. C. Butler's equity of redemption in them. The bill prayed that the sum in the receiver's hands might be directed to be paid over to the plaintiffs on the balance remaining upon the first-mentioned judgment against T. C. But-

ler, or upon those last-named. To this supplemental bill T. C. Butler and L. M. H. Butler demurred.

Benjamin F. Butler, for plaintiffs.
Edward Sandford, for defendants.

NELSON, Circuit Justice. The answer of Thomas C. Butler to the original bill admits that the mortgage was given to Sturgis for the benefit of the plaintiffs, that is, for the purpose of raising money to pay the judgments recovered on the custom-house bonds, and was, therefore, properly no real incumbrance on the premises, as respected the judgment against Butler. So far as his interest was concerned, therefore, they might have been sold at once under the judgment, and the proceeds applied in payment. The sale, however, was embarrassed by the interest in the mortgage set up by Sturgis, the mortgagee, and by Sturgis & Burrows, the assignees under him. But as, on the filing of the bill to remove this incumbrance, a receiver had been appointed, for the purpose of securing the rents and profits pending the litigation, that they might be applied towards the satisfaction of the judgment, if necessary, they are, in equity, to be deemed subject to the lien and claim by virtue of the judgment, the same as the premises themselves.

The rents and profits thus accruing would have been applied to the judgment, together with the proceeds of the sale, if the proceedings in equity had gone to a final decree in favor of the plaintiffs. Certainly, there would have been no ground for any other disposition, as it respected Butler or those coming in under him, as he had admitted that the premises were subject to the lien of the judgment, from the time it was docketed, free from the mortgage. The litigation with him, as it respected the mortgage, and the right of applying the premises to the satisfaction of the judgment, ended on the coming in of his answer. It continued only in respect to the claim of Sturgis and his assignees. If they had succeeded in establishing the mortgage, and if the premises had, on being sold, turned out to be insufficient to satisfy that security, perhaps they would, it being the first lien, have been entitled, in equity, to have the rents and profits accruing and in the hands of the receiver applied to its payment. That was a question, however, between the plaintiffs and those parties.

Has, then, the settlement made with Minturn and the assignees of the mortgage in any way affected the right of the plaintiffs to this fund? I do not see how this can be. The parties, instead of carrying on the litigation to a final determination, preferred to settle it; and the plaintiffs, by paying the sum of $6,000, got rid of the mortgage incumbrance, and the premises were thus left subject only to the lien of their judgment. In legal effect, the result is the same, as it respects the lien of the judgment, as if a decree had been made, on the coming in of the master's report, that, on payment of such sum, the prior incumbrance should be discharged. On the payment of that sum, the premises and the rents and profits that had accrued and were in the hands of the receiver, would have been applicable to the judgment of the plaintiffs against Butler. The mortgage having been got rid of by the settlement, every thing was accomplished that would have been by a decree to the effect above stated. The land and the rents and profits that had accrued became subject to the judgment; and this is what, as is apparent, was intended by the parties, in their arrangement.

Neither does the entry of satisfaction of the judgment after the sale in any way affect the right of the plaintiffs to the rents and profits. They were in court, awaiting the result of the litigation, to be applied to the judgment; and, in equity, were immediately applicable, when the right under the mortgage was disposed of. Besides, the whole scope of the settlement clearly shows, that it was intended by all parties concerned, that the premises covered by the mortgage, and the rents and profits that had accrued and of right belonged to the judgment creditors, should be applied to the plaintiffs' demand. Butler had nothing to say in the matter, as he had admitted this right in his answer.

I am satisfied, therefore, that there is sufficient equity in the bill to entitle the plaintiffs to this fund, and that the demurrer should be overruled.

Case No. 14,697.

UNITED STATES v. BUTLER.

[1 Cranch, C. C. 373.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

ASSAULT AND BATTERY—SLAVE.

Assault and battery of a slave is an indictable offence.

Indictment [against Isaac Butler] for beating a woman of color (a slave) to her damage, and against the peace and dignity of the government of the United States.

Mr. Hamilton, for the traverser, contended that beating a slave was not an indictable offence.

CURIA, contra. The property which a man has in a slave is not of the same nature as his property in a horse. It is only a right to his perpetual service.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,698.

UNITED STATES v. BUTLER.

[1 Cranch, C. C. 422.] [1]

Circuit Court, District of Columbia. July Term, 1807.

WITNESS—APPEARANCE—CASE CONTINUED.

If a witness appear in court at the term mentioned in his recognizance, and no default be entered against him at that term, and the recognizance be not respited, he is not bound by the recognizance to attend at the following term, although the cause should be continued.

Scire facias against a surety of a witness, bound by recognizance to appear at June term, 1804, and not to depart without leave of court. The breach assigned was that the witness failed to appear according to the recognizance. Upon the trial of the issue the evidence offered, to show the breach, was a record of November term, 1804, stating that the witness was called and failed to appear. There was no record of the respite of the recognizance, nor of a continuance of it, nor of any order for the witness to attend again. It appeared, upon the record of June term, that the witness was allowed for four days' attendance on the prosecution at that term.

THE COURT (nem. con.) said that the record of the default of the witness at November term was not evidence of a breach of the recognizance by not appearing, unless there was a record of a respite, &c., and even then it was doubtful whether the breach assigned should not be that the witness had departed without leave of the court.

Verdict for the defendant.

Case No. 14,699.

UNITED STATES v. BUTLER.

[2 Cranch, C. C. 75.] [1]

Circuit Court, District of Columbia. June Term, 1812.

WITNESS—SLAVE—FREE NEGROES.

1. A slave is not a competent witness against a free black person, in a capital case.

2. But free blacks, unless they are in a state of servitude by law, are competent witnesses against free blacks.

Indictment for arson in burning the stable of Hieronimus.

Mr. Jones, for the United States, offered a slave as a witness.

Mr. Key, for defendant [Minta Butler, a free black woman], objected that he was not a competent witness against a free negro in a capital case.

Mr. Jones admitted the objection to be good.

Mr. Key then objected to free negroes as witnesses against the prisoner, and cited the Maryland act of 1717, c. 13, § 3.

But THE COURT (FITZHUGH, Circuit Judge, absent,) said that only free negroes, during their term of servitude by law, or mulattoes, during their term of servitude by law, were excluded by that act.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,700.

UNITED STATES v. BUTLER et al.[1]

[1 Hughes, 457.] [2]

Circuit Court, D. South Carolina. April 1877.

INDICTMENT—FINDING AND ENTRY—GRAND JURY—CHALLENGE TO ARRAY—PETIT JURORS—CHALLENGES—CONSPIRACY—CIRCUIT COURT JURISDICTION.

1. It is not necessary that the finding of a grand jury upon a bill of indictment presented by them should be read in open court.

2. The handing of the bill to the clerk in open court, and the entry of it by him on the records, is a sufficient publication of the finding of the grand jury.

3. A challenge to the array of the grand jury cannot be made after the jury is organized and has entered upon its duties.

4. The jurisdiction of the United States circuit court for the district of South Carolina extends throughout the entire state.

5. The district attorney is not bound to furnish the defendants with the names of the prosecutor and witnesses in a criminal case not capital.

6. In challenging the petit jurors, the right of peremptory challenge need not be exercised until the opportunity of rejecting for cause is afforded.

7. In presenting jurors for challenge, the government must first exercise its right, and then the defence.

8. As the government is allowed the right of peremptory challenge, it cannot ask a juror to stand aside until the panel is exhausted before challenging for cause or peremptorily.

9. It is a good cause of challenge to a juror, that he has voluntarily joined the Rebellion. See Rev. St. § 820.

10. To convict under this indictment, for conspiracy contrary to the provisions of sections 5508 and 5520, Rev. St., it is not necessary to find that the conspiracy charged was formed against the voter named in the indictment alone. It is sufficient if it is made to appear that he was included among persons actually conspired against.

11. Every member of a conspiracy is responsible, personally, for the acts of every member thereof, done in furtherance of its illegal purposes, whether he be himself present or not.

12. A "reasonable doubt" is something more than a captious doubt. It must be a doubt for which a reason can be given.

[Cited in U. S. v. Stevens, Case No. 16,392.]

13. All citizens of the United States, whether white or black, are included within the protection of the statute alleged to have been violated by the defendants.

This was an indictment for conspiracy against one David Bush to prevent him from giving his support in favor of the election of one Robert Smalls as a member of congress, etc. The indictment was drawn under the provisions of sections 5508 and 5520 of the Revised Statutes of the United States. It

[1] This report of the case has been prepared for this volume [1 Hughes] by William Stone, Esq., late United States Attorney for South Carolina.

[2] [Reprinted by permission.]

consisted of five counts as originally drawn, but the first count was held bad upon demurrer.

[An information filed by the district attorney against the same parties was quashed. Case No. 14,701.]

The indictment was as follows, the formal parts being omitted:

First Count. That Andrew Pickens Butler, George W. Croft, August P. Brown, Abner W. Atkinson, George W. Bush, George B. Bush, Paul F. Bowers, Augustus McDaniels, William S Bush, John Bowers, Whitmore W. Stallings, and John M. Bush, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of Aiken county, South Carolina, on the 18th day of September, A. D. 1876, at Aiken county, in the state of South Carolina, in said district, and within the jurisdiction of this court, unlawfully did conspire together to prevent, by force, intimidation, and threat, one David Bush, a male citizen of the state of South Carolina, and of the United States, who was then and there lawfully entitled to vote at any election by the people in said county, state, and district, from giving his support and advocacy in a legal manner toward and in favor of Christopher C. Bowen, John Winsmith, Thomas B. Johnston, Timothy Hurley, William B. Nash, Wilson Cooke, and William F. Meyers, lawfully qualified persons, as electors for president and vice-president of the United States, contrary to section 5520 of the Revised Statutes of the United States, etc.

Second Count. That Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the said jurors now unknown, late of Aiken county, in the state of South Carolina, on the 18th day of September, 1876, at Aiken county, in the state of South Carolina, in said district, and within the jurisdiction of this court, unlawfully did conspire together to prevent, by force, intimidation, and threat, one David Bush, a male citizen of the United States and of the state of South Carolina, who was then and there lawfully entitled, as an elector, to vote at any election by the people in said county, state, and district, from giving his support and advocacy in a legal manner toward and in favor of the election of one Robert Smalls, a lawfully qualified person, as a member of the forty-fifth congress of the United States, contrary to section 5520 of the Revised Statutes of the United States, etc.

Third Count. That Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the jurors aforesaid now unknown, late of Aiken county, in the state of South Carolina, on the 18th day of September, in the year 1876, at Aiken county, in the state of South Carolina, in said district and within the jurisdiction of this court, unlawfully did conspire together to injure in his person and property one David Bush, a male citizen of the United States and the state of South Carolina, of African descent, who, then and there, was lawfully entitled to vote at any election by the people in said county, state, and district, on account of his giving his support and advocacy in a legal manner in favor of the election of one Robert Smalls, a lawfully qualified person, as a member of the forty-fifth congress of the United States, contrary to section 5520 of the Revised Statutes of the United States, etc.

Fourth Count. That Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of Aiken county, in the state of South Carolina, at Aiken county, in the state of South Carolina, in said district, and within the jurisdiction of this court, on the sixteenth day of September, in the year eighteen hundred and seventy-six, unlawfully did conspire together to injure, oppress, threaten, and intimidate one David Bush, a male citizen of the United States, and of the state of South Carolina, of African descent, of the age of twenty-one years and upwards, and duly qualified to vote at any election by the people in said county, state, and district, in the free exercise of the right and privilege secured to him by the laws of the United States, to wit, in the free exercise of the right and privilege secured to him by section two thousand and four of the Revised Statutes of the United States to vote at a general election by the people, held on the Tuesday next after the first Monday in November, A. D. one thousand eight hundred and seventy-six, without distinction of race, color, or previous condition of servitude, on account of the race and color of him, the said David Bush, contrary to the provisions of section five thousand five hundred and eight of the Revised Statutes of the United States, etc.

Fifth Count. That said Andrew Pickens Butler, etc., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of Aiken county, South Carolina, on the sixteenth day of September, A. D. eighteen hundred and seventy-six, at Aiken county, in the state of South Carolina, in said district, and within the jurisdiction of this court, unlawfully did conspire to injure, oppress, threaten, and intimidate one David Bush, a male citizen of the United States, and of the state of South Carolina, of African descent, of the age of twenty-one years and upwards, and duly qualified as an elector, to vote at any election by the people in said county, state, and district, for representatives in the congress of the United States, in the free exercise of the right and privilege secured to him by the laws of the United States, to wit, in the free exercise of the right and privilege secured to him by section two thousand and four of the Revised Statutes of the United States to vote, without distinction of race, color, or previous condition of servitude, for a representative in the congress of the United States from the Fifth congressional district of the state of South

Carolina, at an election held on the Tuesday next after the first Monday in November, A. D. one thousand eight hundred and seventy-six, on account of the race and color of him, the said David Bush, contrary to the provisions of section five thousand five hundred and eight of the Revised Statutes of the United States, etc.

On the case being called, on motion of the defendants' counsel, the case against A. P. Butler was continued, on the ground that he was a member of the state senate of South Carolina, which was then in session. The counsel for the defence moved that their clients be not compelled to answer to the indictment, on the ground that it was not a legal indictment, as there had been no formal publication of the finding of the grand jury in court.

BOND, Circuit Judge, stated that he remembered the circumstances of the finding of this indictment. It had been brought in by the grand jury, the foreman had handed it to the clerk, by whom it was handed to the court for inspection, and afterwards it was handed back to the clerk for entry. The names of the grand jurors had been called out, and they had been asked if this was their finding, and they had answered that it was. That the handing of the indictment to the clerk, and the entry of it on the record was all the publication ever intended. It was not meant that the whole world should know who were indicted, and for what offences, because the accused could then escape.

WAITE, Circuit Justice, stated that he had never known any other practice.

The counsel for the defendants continued to urge their objection to the indictment upon this ground, but the court adhered to its ruling. The defendants' counsel then challenged the array of the grand jury on several grounds, the principal of which were the following: The grand jurors who were summoned and appeared at the present term of the court were not designated, according to the mode of forming such juries, then practiced in the state courts of the state of South Carolina so far as such mode was practicable in this, that the commissioners who selected the citizens whose names were placed on the jury list, were designated by officers in the judiciary department of the United States government, and were not officers elected by the people, nor appointed by the executive department, as are the like jury commissioners elected and appointed by the state laws which regulate the practice of forming juries in the state courts, and that for the purpose of forming said juries, neither the rule LI of the circuit courts of the United States for the district of South Carolina, nor the order of the circuit court of December 8th, 1876, under which the said juries were formed, conformed the designation and impanelling of juries to the laws and usages relating to jurors in the state courts, in force in said state, at the date of such order as required by section 800 of the Revised Statutes of the United States. That the commissioners so designated by the order of the court for the selection of said juries were themselves officers of the government, and were not calculated to be most favorable to an impartial trial in cases of prosecutions by the government. That the writs of venire were served and returned by the United States marshal for the Eastern district of South Carolina, R. M. Wallace, Esq., who is not "an indifferent person," as required by section 803 of the United States Revised Statutes. That the array of grand jurors returned and accepted is composed of five persons who are not in the venire, and are not returned as additional grand jurors as required by section 808 of the United States Revised Statutes, having been returned as additional jurors by the United States marshal under an order of a judge of the United States court, not issued in the case contemplated by said section, viz., "If, of the persons summoned, less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately, or on a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury;" whereas these challengers say that eighteen of the grand jurors summoned appeared, and the additional grand jurors summoned by said order were not necessary to complete said grand jury. The additional grand jurors so summoned were not from the body of the district, as required by section 808 of the Revised Statutes.

The commissioners designated by the said order of 8th December, 1876, were not persons residing in the Eastern district of South Carolina. The citizens selected by the said commissioners were not selected from the several counties composing the district of the state in which the trial is proposed to be had, in which the accused reside, and in which the alleged offences were said to have been committed, viz., the Eastern district of South Carolina; but a portion of the citizens so selected were selected from counties within the Western district of said state. The court disallowed the challenge to the array on the ground that such a challenge must be made before the jury is impanelled, and that it cannot be made after it has been organized and has entered upon the discharge of its duties. As to the objection that the grand jurors were not all drawn from the Eastern district of South Carolina, the court held: "As to the question of the jurisdiction of this court throughout the entire state of South Carolina, we decide, for the purposes of this trial, in favor of the jurisdiction. This is in accordance with the uniform practice of the court, without objection from any quarter, for nearly half a century. If, after the trial, it is thought desirable to bring the point again to our attention we will consider it, and, in case of disagreement between us as to its

proper determination, certify it to the supreme court for decision."

It was then moved to quash the indictment upon the same grounds as those urged in the challenge to the array, but the court overruled the motion. A demurrer was thereupon filed to the indictment.

The grounds of demurrer were substantially as follows: As to the first count—(1) That the force, intimidation, and threat therein charged are not particularized. (2) That the support and advocacy therein set forth are not particularized. (3) That the legal manner of giving such support and advocacy is not particularized. (4) That the support and advocacy are not stated to be in favor of the persons named as electors. (5) That the persons named as electors are not stated to have been qualified at any time or place. (6) That no place in Aiken county has been specified as the place where the alleged conspiracy was formed. (7) That no election, nor time, nor place thereof is alleged. As to the second count—Same as to first count except (4) That Robert Smalls is not stated to have been a lawfully qualified person as member of congress at any time or place. (5) That it is not stated that the said Robert Smalls was a candidate. (6) That it is not stated from what state or congressional district said Robert Smalls was to be elected, nor from what congressional district he was a lawfully qualified person as a member of congress. As to the third count—Same as first count, except 2d and 5th grounds. (2) That no mode or means of injuring the said David Bush in his person or property is alleged. (5) That it is not stated from what congressional district the election of said Robert Smalls was sought to be supported and advocated, nor from what election district he was a lawfully qualified person as a member of congress. That as to all of said first, second, and third counts in said indictment, race, color, or previous condition is not alleged to be the motive or object of said conspiracy. As to the fourth count—(1) That the injuring, oppressing, threatening, and intimidating therein charged are not particularized. (2) That the description of general election and of the people who were to vote thereat is too vague and indefinite. (3) That the election mentioned therein is described as an election held, and not as one to be holden. (4) That David Bush is alleged as qualified to vote without specification of time or place. (5) That the race and color of said David Bush, on account of which the offence is alleged to have been committed, are not specified. (6) That the right and privilege therein alleged to be secured to the said David Bush by section 2004 of the Revised Statutes of the United States as matters of law, are not secured by said section. (7) That section 5508 does not prohibit or punish the violation of the specific rights declared and set forth in section 2004, and the alleged violation of rights and privilege specifically declared in section 2004 is not in law contrary to the provisions of section 5508, as alleged. As to the fifth count—Same as to the fourth count except third. (3) That no such election as that at which David Bush is alleged as duly qualified as an elector to vote, can be holden. As to all of said counts—(1) That no one of said counts alleges with sufficient particularity the election at which David Bush was lawfully entitled to vote. (2) That the conspiracy charged in each and every count is alleged in terms too vague, general, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defence, and they set forth no specific offence under the law. (3) That no one of said counts contains a charge of criminal matter, indictable under the constitution and laws of the United States. (4) Because each of the sections under which this prosecution is prosecuted, in so far as it creates offences and imposes penalties, is without warrant from the constitution, and is an infringement of the sovereignty of the states and the people. (5) That this court has no jurisdiction to take cognizance of the offences set forth in any of said counts. (6) That no criminal intent is alleged in any one of said counts.

William Stone, U. S. Atty., E. Earle, Asst. U. S. Atty., and D. T. Corbin, for the United States.

James Aldrich, Le Roy F. Youmans, Simonton & Barker, D. S. Henderson, C. Richard Miles, and Edward McCrady, Jr., for defendants.

After argument by the defendants' counsel and the counsel for the United States, the court, by WAITE, Circuit Justice, pronounced the following opinion as to the demurrer:

The first count is bad. Section 5520 makes it an offence to conspire to prevent by force, etc., any citizen, etc., from giving his support or advocacy, in a legal manner, toward or in favor of the election of any legally qualified person as an elector for president or vice-president. In this count the allegation is not that the support or advocacy to be prevented was of the election of the persons named as electors, but of the persons themselves. The offence consists only in the conspiracy to prevent the support and advocacy of the election. The demurrer to this count is, therefore, sustained. As to the other counts the demurrer is overruled, without prejudice, however, to the rights of the defendants to renew their objections upon a motion to arrest, if they shall so desire.

The defendants thereupon severally pleaded "not guilty."

The counsel for defence asked that they be furnished by the district attorney with the names of the prosecutor and the witnesses, but the CHIEF JUSTICE stated that there was no practice justifying such a demand.

It was then moved that the government be required to elect one of the four counts of

the indictment upon which to proceed. The counts charge offences under different statutes, the penalties being different. They also charge offences growing out of different transactions, and they charge offences growing out of transactions on different days, the offences charged in the first two counts being alleged to have been committed on the 18th September, and those in the last two on the 16th September.

BOND, Circuit Judge, announced the decision of the court that there was no reason to compel the government to elect at that stage of the proceedings.

Counsel for the defence then asked the privilege of entering a challenge to the array of the petit jury (pro forma), on the same grounds as the challenge to the grand jury. Granted.

Mr. Youmans, for the defence, said that before the clerk proceeded to impanel the jury he would like to ask for information whether the peremptory challenges must be exhausted before any challenge for cause was made, or vice versa, or whether it was a matter of indifference.

BOND, Circuit Judge, replied that counsel might do either one or the other, but as there were only three peremptory challenges, it would be very foolish to exhaust them before challenging for cause.

After some further discussion it was decided that each juror should be subject first to the challenge of the government, and afterwards of the defence.

The impanelling of the jury was proceeded with, until one Haines was called. He was examined on his voir dire, and was then told by the counsel for the government to stand aside. The defence objected, and insisted that the prosecution must either exercise its right of challenge or waive it entirely and at once. For the prosecution it was contended that the right of qualified challenge in the courts of the United States was sustained by the supreme court of the United States in the case of U. S. v. Marchant, 12 Wheat. [25 U. S.] 480. The rule laid down in that case was subsequently followed in the circuit court for the Eastern district of Pennsylvania in the case of U. S. v. Wilson [Case No. 16,730]. The court held that this rule was in force when the government had no right of peremptory challenge, but as the right of challenging jurors peremptorily has been given the prosecution, it should stand on the same footing with the defence, and either exercise the right of challenge at once or not at all.

When Hutson Lee was called, and while under examination on his voir dire, he was asked whether he had not voluntarily served in the Confederate army. He replied that he had. He was thereupon challenged for cause, in accordance with the provisions of section 820 of the Revised Statutes. The counsel for the defence objected to the challenge on the ground that the disqualification had been removed, together with other disabilities. And on the further ground that congress had no right to append a penalty to a statute regulating the qualifications of jurors. The court decided that it was not a penalty, but a right of challenge given to the government by positive act of congress, which the court had no choice but to observe until it was repealed.

The jury being impanelled, each juror was required to take and subscribe the special oath as provided by section 822 of the Revised Statutes.

The examination of witnesses continued for ten days. Only a brief narrative of the events testified to can be given. To an understanding of them, a description of the place where they occurred is necessary. The Port Royal Railroad extends from Augusta to Port Royal and Beaufort. It crosses the Savannah river a few miles below Augusta, at a point known as the Sand Bar Ferry. A few miles below the point of crossing is a station called Jackson's. Seven or eight miles further down is another station called Ellenton. Here is a settlement of some five or six families, containing about ten white male adults. The county line separating Barnwell county from Aiken county is between two and three miles east of Ellenton. A mile to the north of Ellenton is a stream which empties into the Savannah river, called the Upper Three Runs. It is crossed at a point known as the Union Bridges, one and a half miles from Ellenton, and at Rouse's Bridge, four or five miles further up the stream. Aiken and Augusta are each about twenty miles distant from these bridges, the former being nearly due north from them, the latter northwest from them. Barnwell Court House is about eighteen miles due east from Rouse's Bridge. No villages are between Ellenton or Rouse's Bridge and any of these points.

The government did not attempt to prove the existence of the conspiracy alleged in the indictment, except by circumstantial evidence. The evidence for the prosecution was therefore directed to proof of acts done and declarations made by the alleged conspirators before and at the doing of the overt acts.

As to the acts proved: On Friday, September 14th, 1876, one Peter Williams, a young colored man, was taken from the house of another colored man where he had been staying, by several white men, and told that he had to go to a trial justice's for an alleged assault on one Mrs. Harley and her son, a boy of nine or ten years of age. He was taken to the road, where Mr. Harley, the husband of Mrs. Harley, and others were, was struck three times by him in the face, then, after turning away, and endeavoring to run from his captors, he was pursued and shot at, and severely wounded. From the effects of these wounds he died several days afterwards. After he was shot he was put on a wagon by Harley and his friends, and taken to his (Harley's) house. Here Mrs. Harley was called out to see him. She said he was not the man who struck her. While

lying in the wagon, one of the white men put a pistol to his heel and shot him, the ball coming out at the calf of the leg. He was taken a short distance up the road, thrown into a fence corner, and a white man stood guard over him, declaring that he should not be moved until he died. Later that afternoon a writ was issued by Trial Justice Griffin (colored) for the arrest of this Peter Williams and one Pope for the assault on Mrs. Harley. Angus P. Brown, one of the defendants, was deputed as a special constable to serve it. On Saturday the whites, to the number of nearly two hundred, gathered near Mrs. Harley's with arms and mounted. Harley lived seven or eight miles northwest from Rouse's Bridge. The whites, under command of Angus Brown, left Harley's Saturday afternoon to go in the direction of Rouse's Bridge. They passed the store of one Chavis, where a few colored men had been in the habit of meeting on Saturday afternoon to talk over matters of interest to them. The members were Republicans. As the whites passed the store they made threats against a prominent colored Republican named Holland, who had been a trial justice in Aiken county. Afterwards a large body of armed white men gathered in the neighborhood of Hamburg, and went down towards Rouse's Bridge to join Brown's forces. Saturday night many of the whites staid at Matlock Church, a few miles northwest from Rouse's Bridge. Sunday afternoon they went towards the bridge. The main body numbered between two and three hundred. The Hamburg company had joined them at this time. Colonel A. P. Butler had met Captain Angus Brown on Saturday, and on Sunday he had command of the whites. They halted in an old field, a short distance from the bridge, and remained there some time. While they were there, three colored men were shot. One of them, Henry Campbell, was trying to escape from some whites who had taken him prisoner, and who had taken away from him his gun. He afterwards died from his wounds. The two others were without arms when shot, and were trying to get out of the way of the whites. The movements of the whites had alarmed the colored men, and a small party of them were near Rouse's Bridge on Sunday. Some of them had arms. After three of their number had been shot, the whites sent to them to have a "compromise." Six from each side went near Weatherby's store, a short distance west of the bridge. The whites said they had a warrant for Frederick Pope, and exhibited it. The colored men said he was not with them, and that if they found him they would take him to Aiken and deliver him up. Both parties then agreed to go home. That afternoon, on the south side of the Union Bridges, some of the colored men had assembled at a place where they held their religious meetings. They were greatly alarmed at the action of the whites, and most of them concluded to sleep in the woods that night, and remain together as much as possible. Just at dusk, some of the whites who had been at Rouse's Bridge came across Union Bridges on their way home. They passed the colored people without molestation. A gun was fired after a man named Ashley had passed. It was probably discharged by one of the negroes. No one was injured by it. Soon afterwards a body of whites came up to the bridge and fired into the negroes, killing one of their number, Basil Bryant, instantly. Some of the negroes then returned the fire, and a fusilade was kept up a few minutes from both sides. No serious injuries followed. The whites turned back and the negroes remained in the swamp near the bridge. Monday, the negroes from the neighborhood of Rouse's Bridge came to Union Bridges. They consulted together as to their course. They then went to Ellenton to the number of seventy-five or one hundred. Many had arms. They remained there an hour or so. Here they were met by one Simon Coker, a colored man, who was a member of the legislature from Barnwell county. He lived at Robbins's, a station on the Port Royal Railroad, seven miles southeast from Ellenton. Coker advised them to go home, as he didn't think the white people would trouble them. They took his advice and left in the direction of their homes. Sunday night most of the whites remained at Myers's, eight or ten miles from Rouse's Bridge, on the Augusta road. Sunday afternoon a messenger was sent to Aiken, and Captain G. W. Croft took command of a party of white men, who left there late Sunday night for Ellenton. But the colored people had sent messengers to Aiken, who had reported on Sunday afternoon to the sheriff of that county that the whites were shooting some of their men, and asking him to go down and protect them from further violence. He did not conclude to go until Monday morning. When he did leave he took along his son and three other white men as a posse. He reached Myers's that afternoon and remained there. Croft's company joined the whites about Cowden plantation, near Jackson's Station. The entire body, under Colonel Butler, went towards the railroad. A freight train had run off the track that morning one and a half miles below Jackson's, and the engine and some cars had fallen over on the side of the track. As the whites advanced their skirmishers were thrown out, and by some of the number a negro named Finissee, seen near the track, was shot to death. He was unarmed at the time; after he was shot his right ear was cut off. The whites then proceeded towards Ellenton, crossing the runs at Union Bridges. On their way, a portion of the column went to the house of a colored woman named Joanna Bailey. Two of the defendants, Paul and John Bowers, went into the house and found there one Wilkins Hamilton, a nephew of Joanna. He had been shot in the leg the-

night before at Union Bridges. He was unarmed when these two entered the house, and offered them no resistance. Five pistol-balls were shot into him by these two men, in the presence of his aunt, killing him instantly. They rejoined the column, and proceeded with it to Ellenton. Near the station they killed another colored man, John Kelsey, who was trying to escape from them. Afterwards the column turned and went by the house of some colored people named Kelsey. Six young colored men had eaten dinner there. As they heard the advancing column of mounted men they ran from the house. David Bush and Sam Brown, a deaf and dumb boy, were killed by the whites in the field near the house. Warren Kelsey was killed in his yard, in the presence of his wife and family, while begging for his life and promising to vote the Democratic ticket. The whites, after going about a mile beyond this place, returned to Ellenton. The main body of them encamped there that night.

The following morning the whites moved towards Rouse's Bridge, by the road on the east side of the runs. The negroes who were in the swamp above the bridge heard a great shouting from the women about nine o'clock in the morning, that "the Yankees had come." They therefore came out of the swamp, and found that a detachment of United States troops, under the command of Captain Lloyd and Lieutenant Hinton, had marched from Aiken pursuant to orders from General Ruger, to see what was going on. They halted not far from Rouse's Bridge, on the west side of the runs. The negroes were delighted at the arrival of the United States soldiers. Some of them were on their knees praying, and saying, "Thank God, the Yankees have come." As some of the negroes came up there was firing heard towards the swamp, and the officers were told that the whites had shot one of the colored men. Presently there was a cry, "Here they come." Captain Lloyd and Liutenant Hinton looked down the road and saw an armed body of white men approaching. They walked down the road to meet it. They stopped and spoke to one man at the head of the column. While they were talking with him Colonel Butler came up and asked what they proposed? They replied they had nothing to propose. Afterwards Captain Croft and another man were sent to them by Colonel Butler, and they were asked what their orders were. They said simply to preserve the peace. Croft asked if they would disperse the negroes should the whites leave for home. They replied they would advise them to go home, and had no doubt they would do so. In about half an hour the whites rode off in the direction of Myers's and Augusta. The officers estimated the number of white men at between 300 and 400, all well armed and mounted. The negroes in the swamp were estimated at from 75 to 100, and their arms were very poor; many had no arms at all.

About the time of the conference between the army officers and Colonel Butler at Rouse's Bridge, a party of white men who had remained at Ellenton, and who were apparently under the orders of O. N. Butler, of Augusta, went to Robbins's Station on the Port Royal road. A construction train and a passenger train went down there, and the party under Butler found Simon Coker, who has been before alluded to as the man who had been at Ellenton the day before, and who had advised the negroes to disperse. He was going to the railroad station for the purpose of going down the road to Tennessee. He had his satchel in his hand, and was unarmed when taken prisoner by Butler's men. Both trains backed up to Ellenton, and Coker was taken out of the car. He was surrounded by many of the white men, and did not seem to realize that his life was in danger. About twelve o'clock, he was taken to an old field some 200 or 250 yards distant. The whites surrounded him, and a volley of bullets was shot into him, killing him instantly. He was left to lie where he had fallen, but after his death his pockets were examined by those who had participated in killing him. O. N. Butler, with several of the men who were at Ellenton when Coker was killed, had come down from Augusta on Monday morning in the train, and had got off at Jackson's Station with his men. They were all well armed. They met the whites under command of A. P. Butler near the wrecked train on Monday forenoon, and went with them to Ellenton and co-operated with them on Monday forenoon. On Tuesday afternoon, after Coker had been killed, a body of seventy or eighty white men, among whom were some of the men who had been with Colonel Butler at Rouse's Bridge on that morning when he said the whites would disperse and go peaceably to their homes, came to a field by the roadside about three miles below Ellenton, in which were William Goodwin and his son Charles, and Robert Turner and his son George, all colored, picking cotton.

Robert Turner thus described what followed: "They flung open the big gate, and they all poured in like a storm, and went down to William Goodwin and took him and carried him outside of the fence, and enlisted him with the horse company; and my son had gone outside in the wood whilst they were tangling about, and he came back in the house and got in the house and sat down. . . . . They hunted all about in the cribs and the fodder-loft and everywhere else. They spied him, I suppose, when he went off out of the field. They couldn't find him. After awhile two of them went into the house. . . . . They took him out of the house. His wife beckoned to me. . . . . I went to them and begged them not to kill my son; he was sick, and I knew he never would go out in any riot. I asked them, 'Please not to kill him; he is a poor sickly creature, and he never got in any disturb-

ance.' . . . . Then they carried him off in the woods, him and William, to a thicket by the side of the branch, and killed him. . . . . I took my little wagon, and went and found him dead, and hauled him and fixed him and buried him." William Goodwin's body was found the next day, with nine bullet-holes through it, in the swamp about one hundred yards from where George Turner had been killed.

On the following Thursday a body of armed white men, some of whom were proved to have been at Rouse's Bridge on Tuesday when the whites promised to go home peaceably, went to the house of Dick Thompson (colored), a few miles from Rouse's Bridge, in Barnwell county. Here they found Thompson and one Edward W. Bush. Both were in the house unarmed, sitting on a bed. They were taken out of the house and carried down a lane. Thompson was allowed to go back. Bush was taken down to the foot of the lane, and in about half an hour three of the white men fired each two shots into him, killing him instantly. His wife was at the house with three young children when he was taken out, and the children called to the men, "Don't kill papa."

To prove the motive for the killing of these thirteen men whose deaths have been referred to, the prosecution introduced declarations of the alleged conspirators. The defendant, Atkinson, told Moore, one of the witnesses, before the occurrences, that the leading rascals of the Republican party were going to be killed before the election. That the Democrats would wade to their saddle-skirts in blood to carry the election. He advised Moore to join a Democratic club or he would not live until the election. The defendant, George W. Bush, told David Bush, in the presence of his wife, about two weeks before the riot, that he could not remain on his place unless he voted the Democratic ticket or refused to vote at all. On the morning of the day on which David Bush was killed, George W. Bush came to David's house. He was absent, but his wife was at home. About thirty armed and mounted white men were with him. He took out a list which he called a "dead list," and read from it the names of several prominent colored Republicans in that vicinity who were to be killed. On this list was the name of her husband. That evening, after her husband was killed, George W. Bush, with some of the men who were at her house in the morning, rode up. Bush with three or four others came to the house and told her her husband was killed, and his body was under a persimmon tree in the Kelsey field. On Monday, one Darius Weathersby (colored) was taken a prisoner by the whites. He was asked if he ever voted and if he would vote the Democratic ticket if turned loose. Some of the men said they were going to kill the leading men. John Scott was taken a prisoner the same day, and remained under guard that night. The white men told him that night they were going to kill every d——d negro in the country. It was the leading men they wanted. They said they were going to breakfast on Simon Coker. One of the white men got Scott off at daylight, and told him the men would kill him. He hid him in a store at Ellenton and saved his life. One Anselen Kelly heard a conversation between two of the whites engaged in the riots some time before they took place. One of them in discussing the political campaign said that the plan was to kill eight or ten leading Republican negroes, and they could manage the balance. Berry Riley was told that if he voted the Republican ticket he would die, that the Democrats intended to carry the election if they had to wade to their saddle-skirts in blood. Willis Leddick heard the men of the company that went from Hamburg to join Captain Brown, on Saturday, September 16th, say they were going down to get Mink Holland, and stick his head up in Edgefield; that they were after the leading men; that this was a white man's government and they were going to have it. Columbus Roundtree was told that the whites intended to adopt the Mississippi plan—kill a few of the niggers and scare the balance. The defendant, George W. Bush, said that the riot was not started altogether in behalf of Mrs. Harley, but to win the election. Two colored men who had been sent to Aiken on Sunday for the sheriff, were captured by the white men going from Aiken to Ellenton, when about one and a half miles from Aiken. They were compelled to go back home as prisoners. About four miles from Aiken they were compelled by some of these men to get down on their knees, and made to swear that they would vote the Democratic ticket. Colonel A. P. Butler asked Bryant Council, who was taken prisoner by the whites on Monday, what his politics were. He replied that he had not determined. Butler told him to fall in line. Some of Butler's men struck him over the head with a gun. Albert Carroll was told that the whites were going to carry the election on the Mississippi plan, the shotgun policy. H. J. Miller (white) told Carroll a week after the Hamburg riot that the Democrats intended to carry the election if they had to kill every negro in the whole country. (Miller was on the stand as a witness for the defence, and did not deny this fact.) O. N. Butler was consulted by the whites as to what should be done with Coker. He said, "Kill him. All we want to do is to kill the leaders and then we can rule the others." In reply to the testimony adduced for the prosecution the defence introduced evidence tending to show that the gathering of whites on Saturday and Sunday was for the purpose of assisting Captain Brown in executing the warrant for the arrest of Frederick Pope. That the conduct of the whites subsequently was justified by the action of the negroes, and that they were simply engaged in quelling a riot. That most of the negroes who were

shot or killed on Sunday and Monday were the aggressors, and were shot in self-defence. It was shown that Mrs. Harley and her son had been assaulted on Friday by two unknown negroes. Suspicion rested on Peter Williams and Frederick Pope. Williams was captured, was struck in the face by Mr. Harley, then attempted to run and escape, but was pursued, shot, and afterwards carried into Harley's house. Mrs. Harley at first said he was the wrong man, but after seeing his face she said he was one of the men who was at the house, but not the one who struck her. That afternoon Trial Justice Griffin issued a warrant for the arrest of Williams and Pope, and appointed A. P. Brown special constable to serve it. No return was ever made upon the warrant.

Saturday afternoon the whites gathered at Harley's, and started towards Rouse's Bridge to arrest Pope. Many of them slept at Matlock Church that night. Sunday morning they went on towards the bridge. That morning, Dunbar Lamar came for Trial Justice Griffin saying that Colonel A. P. Butler had sent for him. He went to within a short distance of the bridge, and found Butler there with about eight hundred white men. Butler requested him to go down and talk to the colored people; that he wanted to make one more effort to quell the riot. In regard to the shooting of Henry Campbell on Sunday morning, one Tavell swore that he saw a colored man in the field raise a gun and shoot, and that his mule was struck with shot. That he then fired, and shot the man apparently in the arm. Two witnesses, Ransom and Page, testified that before Campbell was shot, they were surrounded by several negroes, and that threats were made to kill them. Page said he told the negroes that they had a warrant for Pope, and that he saw him among them, but they said they intended to protect him. At the conference held between the whites and negroes one of the negroes asked if the agreement for peace had anything to do with their voting. The whites replied that it had not. Sunday afternoon the whites started to go towards their homes. Many of them remained all night at Myers's. That afternoon, one Solomon testified that about sixty negroes were drilling in front of his store, which was a short distance to the north of Union Bridges. Solomon made a list of their names in Hebrew, which his clerk, H. J. Miller, afterwards wrote out from his dictation. Towards dusk some of the white people passed Solomon's store to go across the bridges towards their homes in the direction of Ellenton. After four or five had passed, one Elmore Ashley passed on horseback. He testified that when about seventy-five yards from the bridge he was halted by some colored men there. One took his gun from him, but it was restored by another of the party. Some called out "Kill him!" He put spurs to his horse, and was fired at. Just as the gun was discharged his horse stumbled. He was not hurt. Several white men then rode down towards the bridge and fired at the negroes. The fire was returned. At the first fire from the whites Basil Bryant was instantly killed. A few of the white men were wounded with small shot. The whites retreated. Some went back to Myers's and reported that the negroes had ambushed and killed some of their number. Captain William D. Bush went to Augusta and reported all along the road that the negroes were rising and killing white men. Small bands of armed negroes were reported at various points about Ellenton on Sunday. Sunday night, about eight or nine o'clock, one John Williams (white) was killed near Cowden, a plantation between Jackson's Station and Ellenton. He was with a man named Stallings when he was killed. Stallings testified that he was shot by negroes who were in the woods.

Sunday night, the telegraph wire was cut at the bridge just above Ellenton. Monday the whites, in command of A. P. Butler, went to the wreck of the train on the Port Royal Railroad. As they neared the road, there was a line of skirmishers deployed. A gun of some sort was fired by unknown parties, some of the shot from which struck one car of the freight train, while others struck the rails. Soon afterwards a colored man was seen crossing the track, and was shot and killed by the whites. (This man was Kit Finissee.) Colonel Butler sent orders to the skirmishers after this man was shot to be careful not to shoot their own men. O. N. Butler and some men from Augusta were met at this place. They joined the column and remained with it the rest of the day. From Cowden the whites went to Ellenton. On the way several prisoners were taken On arriving at Ellenton, a negro fired into the whites from behind a wood-pile. He was killed. (This was John Kelsey.) No body of negroes at Ellenton then. There was a great deal of shooting by the whites at Ellenton in all directions. From Ellenton the whites went towards the Kelsey House and the plantation of Major Crossland, half a mile or more beyond there. As the head of the column neared the Kelsey House six or seven men ran out and fired. The column was well closed up. No white man was shot. The whites then fired and killed three of the men. The others escaped. After going up as far as Major Crossland's, the column returned to Ellenton by another road. A company of white men from Edgefield joined Butler at this time. A. C. Jordan, a son of the sheriff of Aiken county, met Butler at Crossland's. He had left Aiken in company with the sheriff about ten o'clock that morning. When within a few miles of Rouse's Bridge, the sheriff turned to go in that direction, as it was there that the negroes were who had sent for him. His son told him it would not be safe to go that way. They therefore went to Myers's, which they reach-

ed about three o'clock. The sheriff remained there, and told his son to go to Rouse's Bridge and to tell Colonel Butler, or whoever was in command, that he thought the whites were in the right this time, and that if he wanted any assistance in quelling the riot to let him know, and he thought he could get it. Butler said he thought he had sufficient men to quell them. He said he had been asked to go to Ellenton, as the negroes were massed there. The whites remained at Ellenton that night, and put out pickets. A detachment under Captain Brown went across Union Bridges and staid there all night. Monday evening a party of white men from Barnwell were fired into about a mile from Robbins's Station on the road to Ellenton. They were going to Ellenton. It was dark, and it could not be told who did the shooting. One Robert Williams was killed. Two others were wounded. Whites returned the fire. The whites fell back to Steel Creek Bridge. On Tuesday the main body of whites left Ellenton about seven o'clock to go to Rouse's Bridge, where the negroes were reported to be massed. The son of the sheriff, when nearing the bridge, was in command of the skirmishers on the left of the road. The skirmishers were dismounted. In their front were mounted "scouts." Some of the scouts testified that two negroes fired into them as they neared the bridge. Several of them returned the fire. By this time there was a great shouting across the bridge. When they reached the bridge the planks were off. The stream was forded, and the skirmish line advanced on the other side. It was then that the whites met the army officers. After the whites had agreed to disperse and go home, a request was made for volunteers to go to Ellenton, but Colonel Butler did not wish the men to go.

Dr. William S. Cannon testified that he was at Ellenton on Tuesday. Saw Coker there, and spoke to him. Didn't know the white men who had him in charge. They were mostly strangers. He remained at the station until about one o'clock, reading papers. When he left the depot he heard he had been shot half an hour before. His killing didn't create much excitement. Nobody seemed to know or care anything about it. He went home and ate dinner. After dinner rode back and looked at his body. He estimated the number of white men who were at Ellenton on Monday afternoon at from three hundred to five hundred. Their column was about half a mile long.

Testimony was given tending to show that on Monday morning, at Union Bridges, some of the negroes were noisy and were calling for "white blood." They had a drum Monday morning, and it was beaten when they went to Ellenton. No one was injured by the negroes at Ellenton or elsewhere on Monday, and no property was destroyed by them, so far as appeared by the evidence. A gin-house was burned on Sunday night some miles below Ellenton. It was not shown by what means it was set on fire. It was also proved by the witnesses for the defence that several white families were at Myers's on Monday and Tuesday for protection. On Wednesday night, September 20th, James Patterson, the sheriff of Barnwell county, was wounded in the face and breast by shots fired at him when near Ashley's, five or six miles from Rouse's Bridge, in Barnwell county. He was riding in a buggy at the time with a friend. He could not tell who shot him. He remained that night at Ashley's, and went home the next day.

Trial Justice Griffin, a witness for the defence, testified that on Tuesday or Wednesday—he thought it was Tuesday—he held an inquest as to John Williams, the white man who was killed Sunday night. The jury did not view the body. Testimony was taken and the jury returned a verdict that deceased came to his death from gunshot wounds inflicted by parties unknown. On cross-examination, he said that Mr. Paul Hammond advised him not to go home that evening after the inquest. He said he had promised his wife that he would do so if he were alive. A pass was therefore given him, which was produced. It was as follows: "Silver Bluff, S. C., September 18th, 1876. Pass the bearer, Charles Griffin, on special business. A. P. Butler. Paul Hammond." The date is wrong. It should have been September 19th. Griffin left about half-past three o'clock for home. He lived towards Augusta, in Beech Island, some ten or fifteen miles from Silver Bluff. On his way home he was taken prisoner by a party of about thirty men, who were going towards Augusta. They cursed him, called him a d——d radical, and said they were going to kill him because he was a Republican. He pleaded for his life, and showed the pass which he had. They halted and consulted together, and finally released him. Before doing so, however, he promised not to vote the Republican ticket. Afterwards, he came up to the main party. He promised them that if they would spare his life, he would not give any of the names that were there. The witness was asked the names of any of the party. He replied that he could not give it, unless it were forced out of him. He was then asked if he felt that it would be unsafe to reveal the names now, and he said he believed the same party would, perhaps, hurt him if they could get him. Some of the same party he had seen on Sunday, at Rouse's Bridge.

In reply to the evidence for the defence, the prosecution introduced evidence to show that the colored men who were at Kelsey's did not fire guns at all. Also that the firing on Tuesday morning, at Rouse's Bridge, was commenced by the whites. Matt Scott (colored) was shot, and still carries the bullet under the skin. He was unarmed. He said the bullets whistled around him "like bees around a gum." His brother Isaac said he

and Matt were going down the hill to cross the bridge, to get with the rest of the negroes. That he didn't know there were any white people near. They were shot at, and he was shot in the right thigh. He turned and ran up the hill. He ran twenty or thirty yards, then turned and fired his gun—an old shotgun. Then he ran across the hill, the white men after him. He fell into a deep gully, and thought that he thus saved his life.

The testimony having closed, and arguments having been made for the prosecution and defence, WAITE, Circuit Justice, charged the jury as follows:

The defendants, George W. Croft, Angus P. Brown, Abner W. Atkinson, George W. Bush, George B. Bush, Paul F. Bowers, Augustus McDaniels, William L. Bush, John Bowers, Whitmore W. Stallings, and John M. Bush, are on trial before you upon the second, third, fourth, and fifth counts of the indictment alone, as the first count has been adjudged to be insufficient in law. The second and third counts are predicated upon section 5520 of the Revised Statutes of the United States, which, so far as it is applicable to this case, provides that if two or more persons conspire to prevent by force, intimidation, or threat any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as a member of the congress of the United States, or to injure any citizen in person or property, on account of such support or advocacy, each of such persons shall be punished by fine or imprisonment, or both.

The second count charges, in substance, that the defendants, together with divers other persons, did unlawfully conspire together to prevent by force, intimidation, and threat, David Bush, a citizen of the United States, and of the state of South Carolina, and lawfully entitled to vote at any election by the people of Aiken county, from giving his support and advocacy, in a legal manner, toward and in favor of the election of Robert Smalls, a lawfully qualified person, as a member of the forty-fifth congress of the United States. To convict under this count it is necessary for you to find from the evidence. 1st. That David Bush was a citizen of the United States, that is to say, that he was born or naturalized in the United States, and subject to the jurisdiction thereof. 2d. That he was lawfully entitled to vote at any election to be held in Aiken county for a member of the congress of the United States, that is to say, that he was of the age of twenty-one years, or upwards, and had resided in the state of South Carolina one year, and in the county of Aiken sixty days, and that he labored under none of the disabilities named in the constitution of the state. 3d. That Robert Smalls was a lawfully qualified person for the office of a member of the congress of the United States, or in other words, that he had attained the age of twenty-five years, and had been seven years a citizen of the United States, and was an inhabitant of this state; and 4th. That the defendants, or some of them, on or before the 18th of September last, unlawfully conspired among themselves or with others to prevent Bush, by force, intimidation, or threat, from giving support and advocacy to the election of Smalls as a member of the congress of the United States.

The third count differs only from the second in that it charges the conspiracy of the defendants to have been to injure Bush in his person and property, on account of his having given support and advocacy, in a legal manner, in favor of the election of Smalls as a member of the forty-fifth congress. To convict under this count, your findings must be the same as under the second, except in respect to the object of the conspiracy. As to that you must be satisfied from the evidence that the defendants, or some of them, unlawfully conspired among themselves or with others, with the intent to, and for the purpose of injuring Bush in his person or his property, because of his having given support or advocacy to the election of Smalls.

The fourth and fifth counts are predicated upon section 5508 of the Revised Statutes of the United States, which provides among other things, that if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of having exercised the same, they shall be punished by fine and imprisonment, and shall be thereafter ineligible to any office or place of honor, profit, or trust, created by the constitution or laws of the United States. The fourth count charges that the defendants, together with divers other persons, to the jurors unknown, conspired to injure, oppress, threaten, and intimidate one David Bush, a male citizen of the United States, of African descent, and duly qualified to vote at any election by the people of Aiken county, in the free exercise of the right and privilege of voting at a general election by the people on the Tuesday after the first Monday in November, 1876, on account of his race and color. To convict under this count you must be satisfied from the evidence: 1. That Bush was a citizen of the United States and a qualified voter of Aiken county, the same as under the former counts. 2. That the defendants, or some of them, conspired among themselves or with others to injure, oppress, threaten, or intimidate him in the free exercise of his right and privilege of voting at the election in November last; and 3. That this was done on account of his race or color. The fifth count differs only from the fourth in that it charges the conspiracy to have had special reference to the election of a mem-

ber of congress for the Fifth congressional district of this state, to be voted for at that election. The controlling element in the offence charged in both these counts is the race or color of Bush. It is not enough that the defendants may have conspired against him on account of his political opinions, or on account of his support or advocacy of any political party, for that is not the crime of which they are in these counts accused. In the second and third counts such is, in effect, the charge, but in the fourth and fifth it is not. To convict under the latter counts it must appear that the object of the defendants in their unlawful combination was to interfere with his right and privilege of voting on account of his race or color, without regard to his political belief or association. As it appears from the evidence that Bush was killed on the 18th of September last, it follows that you must find that the conspiracy against him, whatever may have been its character, was formed on or before that day.

It has not been attempted on the part of the defence to contradict the evidence offered by the government to prove that Bush was a colored man, or that he was a citizen of the United States, or a lawfully qualified voter of Aiken county, or a member of the political party which, on or about the 15th of September last, put Smalls in nomination for election as a member of congress for the congressional district in which Aiken county is situated. It is not probable, therefore, that you will have any difficulty in arriving at a conclusion upon these preliminary questions. The real controversy before you is as to the existence of the alleged conspiracy. It is to this point that the evidence to which you have been listening with such attention for so many days has been principally directed. And here it is proper to say in the outset that the defendants are not on trial for the killing of Bush, or of any other of the numerous homicides that were committed during the disturbances which followed the alleged attack by two negroes upon Mrs. Harley and her little son, near Silverton, on the morning of Friday, the 15th of September. The shocking details of these transactions, which have been given in evidence, are only to be considered by you with reference to their bearing upon the existence of the alleged conspiracy to prevent by force, intimidation, or threats the support and advocacy by Bush of the election of Smalls, or to intimidate him on account of his race or color in the free exercise of his right to vote. However much you may deprecate the acts which have been described by the witnesses, the punishment of those guilty of them has been committed by the laws to other courts than this. Power for that purpose exists in the government of the state, and under our political system the courts of that government can alone be resorted to for the trial and conviction of such offenders. But the acts themselves are proper subjects for your consideration, so far as they legitimately tend to prove the crime charged in this indictment, and which has been made an offence against the laws of the United States. It is not for you to consider whether these laws are wise or unwise. That was the duty of congress when it passed them, and, having been passed, neither you nor the court have at this time anything else to do but to see that they are properly enforced. Their object is to protect the citizens of the United States in the lawful enjoyment of rights which have been secured to them by the constitution and laws of the United States, and while in this case they have been resorted to on account of the alleged violation by white men of the privileges of colored men, they are equally open to the whites against the blacks, should occasion ever require. So far from arraying race against race, their object is to prevent such a calamity. Neither are you to inquire at whose instance the indictment has been found or the trial had. Equally unimportant is it to you or to us whether the state or its officers have been unable or unwilling to punish offences against its own laws, or to bring to judgment in its own courts the violators of its own peace. It is enough for us that the government of the United States has seen fit, through its own appropriate department, to bring this case here for judicial investigation.

We do not propose to comment at all upon the evidence which has been adduced before you. You have listened to it patiently as it came from the witnesses, and we have no doubt will consider it in your room with all the care and judgment the importance of the case demands. The claims, both of the government and the defendants, have been argued before you by able counsel. There has been no attempt to establish the conspiracy which is charged by direct proof. No witness has been brought before you to swear that he was present when the unlawful combination alleged was in terms agreed upon by the parties or any of them. The testimony is wholly circumstantial, and consists of the acts and declarations of the parties named in the indictment, and of those who are alleged to have been their co-conspirators. In judging of the proper effect of these acts and declarations as evidence to sustain the indictment, you must consider them with reference to the circumstances under which the parties were placed at the time, and the rumors which, acting as prudent men, they would then have reasonable cause to believe were true.

On the part of the defendants it is claimed that at the commencement of the unfortunate occurrences which are in evidence, they were acting as officers of the law for the arrest and punishment of the two negroes who made the attack upon Mrs. Harley, and afterwards for the suppression of a riot which arose out of an attempt by the colored people

in that vicinity to resist them in the performance of their duties. For this purpose it has been shown that a warrant was sued out before Trial Justice Griffin for the arrest of Peter Williams and Frederick Pope, charged with the alleged assault, and that Captain Brown, one of the defendants, was deputed as a special constable for its service. By the laws of the state every constable is a conservator of the peace, and may take into custody and carry to the nearest trial justice, any person or persons who may be, in his view, engaged in riotous conduct or open violation of the peace and refuse, upon his command, to desist therefrom; and also any person who may, in his view, commit any felony or misdemeanor; and for the purpose of preserving the peace, and also executing any criminal process. Every constable has the power of ordering out such posse comitatus to his assistance as may be necessary to enable him to discharge his duty. In suppressing riotous assemblages, the officers of the law and those who assist them, in case of resistance, may attack, wound, and, if necessary, kill those who resist, taking care to commit no unnecessary violence or to abuse this power legally vested in them. Every one is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act under the color or pretext of the law. This is the language of Lord Mansfield, as it has been read to you by one of the counsel for the defendants in his argument, and correctly expresses the rule of law applicable to such a case. You may properly be governed by this rule in the consideration of the evidence in this case. If the acts done by the defendants and those engaged with them in giving effect to their common purpose were no more than were necessary for the execution of the warrant which Captain Brown had for service, or the suppression of what was in fact, or may have been supposed to be, a riotous assemblage; if no unnecessary violence was committed, and the power which was lawfully vested in the officer and his posse was not in any respect abused, then you may with propriety conclude that the sole object of the parties was to execute the warrant and suppress the riot. But if you, on the contrary, find that unnecessary violence was employed and that illegal acts were wantonly committed, then you may with equal propriety further inquire whether the parties in their combined action had any other object in view, and if so, what it was. It is claimed on the part of the government that the process of the law was used only as a pretext, and that the real purpose of the parties was to carry into effect a conspiracy which had already been formed by them or some of them against Bush. This is the precise question which you are called upon to determine, and you are compelled to determine it upon circumstantial evidence alone. That kind of evidence, if full and complete, is as convincing as that which is called direct. But to warrant a conviction upon such evidence alone, the circumstances proven must not only be consistent with the theory of the guilt of the defendants, but they must be entirely inconsistent with any other rational conclusion.

To convict under this indictment it is not necessary to find that the conspiracy charged was formed against Bush alone. It is sufficient if it is made to appear to your satisfaction that he was included among persons actually conspired against. Neither is it necessary that he should have been mentioned by name in the agreement or mutual understanding of the conspirators. It is sufficient if you find that the conspiracy was formed against a class which included him, and that in the execution of the common purpose it was actually carried into effect against him. Each member of a conspiracy is responsible personally for the acts of every member thereof, done in furtherance of its illegal purposes, whether he be himself present or not. It follows that the acts and declarations of one of the conspirators while actually engaged in giving effect to the common purpose, may be given in evidence against his co-conspirators. Having a common purpose, the acts and declarations of one while carrying that purpose into effect are the acts and declarations of all. But isolated acts of violence by individuals who may have been engaged in the conspiracy cannot be used against the others, unless it appears that they were done in furtherance of the common purpose. All are bound by them if they resulted from the original unlawful agreement between the parties to accomplish by their concerted action the proposed result. All who were present when the acts of violence, which are relied upon as evidence of the conspiracy in this case, were committed, may not have been conspirators. It is possible that some may have supposed that the whole object of the assemblage was to suppress a riot and preserve the peace. Others, who were in fact the conspirators, may have taken advantage of the occasion to carry their unlawful purposes into effect. Whether this was so or not is for you to determine, and in order that justice may be done and the guilty punished while the innocent escape, the law permits you to so frame your verdict as to accomplish that end. It may be—1. Guilty as to all upon all the counts. 2. Not guilty as to all upon all the counts. 3. Guilty as to some upon all the counts, and not guilty as to others. 4. Guilty as to some upon one or more of the counts, and not guilty as to the others. The burden of proof, gentlemen, is upon the government. It is a wise maxim of the law in favor of life and liberty, that every man is presumed to be innocent until he is proven guilty, and this presumption is to continue with your sitting as jurors, until it has been overcome by the testimony beyond a reasonable doubt. But

a reasonable doubt is something more than a captious doubt, a mere vague notion that possibly the accused may be innocent. It must be a doubt for which a reason may be assigned. It need not be a reason sufficient to convince another, but it must be such as may properly influence the mind of one who is honestly endeavoring to perform his solemn duty as a juror.

And now in conclusion, gentlemen, we say to you that both the government and the defendants are entitled to the independent judgment of each one of you upon the issues presented for your consideration. It is sometimes the case that jurors agree that the vote of a majority, or some other number less than the whole, shall be adopted as the verdict to be returned. Such an arrangement is not in accordance with the requirements of the law. Each of you must find the verdict he agrees to upon his own oath, and no one has the right to shift the responsibility of his final action from his own conscience to that of one or more of his fellows. You may be convinced by his reasons, but you ought not to put yourself in a position to become bound by his simple vote. It is your duty to consult together, to compare your recollections of the testimony, to consider carefully among yourselves the bearings it has upon the facts to be established, and to harmonize your views if possible, but your verdict should be in accordance with your own deliberate judgment.

A single word more. It has been argued before you that this is a political trial and that the prosecution has been instituted and carried on for political purposes alone. Such arguments, gentlemen, should have no influence with you. The case to you and to the court also is political only in the sense that it grows out of an alleged offence against the political rights of a citizen of the United States, secured to him by the national constitution. That a number of citizens of the United States have been killed, there can be no question. But that is not enough to enable the government of the United States to interfere for their protection. Under the constitution that duty belongs to the state alone. But when an unlawful combination is made to interfere with any of the rights of national citizenship secured to citizens of the United States by the national constitution, then an offence is committed against the laws of the United States, and it is not only the right, but the absolute duty of the national government to interfere and afford to its citizens that protection which every good government is bound to give. The case, as alleged in this indictment, is such a case, and you, as citizens, are bound to lift yourselves above the political arena, and render your verdict regardless of popular clamor or partisan excitement. The statute which is to-day invoked for the punishment of an offence against a colored man, may to-morow be used for the protection of a white man. All citizens of the United States, whether they be white or black, are included within its provisions.

You have, gentlemen, a solemn and important duty to perform, and the case is committed to your most careful consideration.

The jury, after remaining out over thirty hours and being unable to agree, except as to Abner W. Atkinson, whom they found not guilty, were discharged, and a mistrial was entered as to the other defendants.

Case No. 14,701.

UNITED STATES v. BUTLER et al.

[4 Hughes, 512.]

Circuit Court, D. South Carolina. Dec. 6, 1876.

FELONIES, WHAT ARE—INDICTMENT AND INFORMATION—CONSPIRACY.

[The crime of conspiring to injure or intimidate citizens of the United States in the exercise of their civil rights is an infamous crime, which must be proceeded against by indictment, and not by information.]

[This was an information against A. P. Butler and others charging them with a violation of Rev. St. § 5508, which provides for the punishment of conspiracies to injure or intimidate citizens of the United States in the exercise of their civil rights. Heard on motion to quash the information.]

Before BOND, Circuit Judge, and BRYAN, District Judge.

BOND, Circuit Judge. In determining this motion we do not think it necessary to settle what conspiracy was an infamous crime at common law, for though in criminal matters the common law of England at the time of the making of the federal constitution must be looked to to determine the character of offenses which are described in the language of the common law, yet we think the statute under which this information is filed is sufficiently plain to determine this motion. In the first place, section 1022 of the Revised Statutes gives authority to file informations in all cases arising under chapter 7, tit. "Crimes Which are not Infamous," from which it is plainly to be inferred that chapter 7, in the judgment of the law-makers, describes some crimes which are infamous to which section 1022 did not apply. But in looking through that chapter there is no crime mentioned which can be thought infamous unless it be the one described in section 5508, under which this information is filed; for which the party convicted is not only to be fined and imprisoned but also to be disqualified ever thereafter from holding any place of trust and profit or honor under the laws of the United States, and is rendered ineligible to office. And in section 5509, it is provided that if in the course of violating section 5509 "any other felony" be committed which is another indication that in the mind of the legislature a felony had

before been described or at least an infamous crime. But again by section 5509 if upon the trial we find that in the course of violating section 5508 a murder or arson has been committed we are to punish the violation of section 5509, with the punishment the state law affixes to those crimes, does not that constitute the offense against section 5508, a capital offense, that being the punishment for murder in South Carolina? All criminal statutes are to be construed strictly and in favor of liberty. And we think there is no question that offenses under this section 5508 must be presented by a grand jury and can not be tried upon information.

[For a report of the trial of the indictment against the same parties, see Case No. 14,700].

Case No. 14,702.

UNITED STATES v. BUTLER et al.

[18 Int. Rev. Rec. 164.]

Circuit Court, N. D. New York. 1873.

INTERNAL REVENUE—ASSESSOR'S LIST—TAX DUE—PRIMA FACIE CASE.

The assessor's original list, transmitted to the collector, is prima facie evidence of amount of tax due. The government need not, in the first instance, go into particulars of assessment, or show that it was properly made. That this was the case is inferred from assessment itself, until the contrary is shown by party objecting to it.

Case No. 14,703.

UNITED STATES v. BUTTERFIELD et al.

[7 Ben. 412.] [1]

District Court, S. D. New York. Aug., 1874.

LIABILITY OF ASSISTANT TREASURER OF THE UNITED STATES FOR MONEY LOST—COMMISSION ON SALE OF STAMPS.

1. While B. was assistant treasurer of the United States at New York, certain moneys, in his hands as such officer, were lost by clerks. The United States brought suit on his official bond, to recover the amount. After the commencement of the suit, B. made a claim to the proper department of the government, for an allowance on the sales of stamps by him as such assistant treasurer, sufficient to make the amount of 5 per cent. on the amount of the sales, including the sum which he had allowed to the persons to whom he had sold the stamps, under the 170th section of the act of June 30th, 1864 (13 Stat. 297). The government disallowed the claim, holding that, under the 6th and 22d sections of the act of August 6th, 1846 (9 Stat. 65), he was not entitled to anything for such sales above the sum which he had allowed to others, as above stated. The allowance so claimed was more than the amount of money lost; and the bondsmen claimed that it should be made by the government. If it was made, nothing was due on the bond: *Held*, that B. and his bondsmen were liable on their bond for the money lost.

2. The provisions of the 22d section of the act of August 6, 1846, were inconsistent with those of the 170th section of the act of June 30, 1864, and the later one must prevail.

3. B., therefore, was entitled to the allowance which he claimed; it made no difference that the claim for the allowance was not made till after this suit was brought; and the defendants were entitled to judgment.

At law.

George Bliss, U. S. Dist. Atty.

William D. Shipman, for defendants.

BLATCHFORD, District Judge. On the 23d of June, 1869, the defendant Daniel Butterfield was appointed assistant treasurer of the United States, and treasurer of the assay office, at New York. On the 26th of June, 1869, he, as principal, and the other four defendants, as sureties, executed a bond to the United States, reciting the appointment of Butterfield to said office on said day, and conditioned that the bond should be void, if Butterfield "has truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge, all the duties of said office, according to the laws of the United States, and, moreover, has well, truly and faithfully kept, and shall well, truly and faithfully keep, safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by the act of congress hereinafter specifically referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same has been, or shall be, ordered by the proper department or officer of government to be transferred or paid out, and, when such orders for transfer or payment have been, or shall be, received, has faithfully and promptly made, and shall faithfully and promptly make, the same as directed, and has done, and shall do and perform, all other duties, as fiscal agent of the government, which have been, or may be, imposed by any act of congress, or by any regulation of the treasury department, made in conformity to law, and also has done and performed, and shall do and perform, all acts and duties required by law, or by direction of any of the executive departments of the government, as agent for paying pensions, or for making any other disbursements which either of the heads of those departments may be required by law to make, and which are of a character to be made by a depositary constituted by an act of congress, entitled 'An act to provide for the better organization of the treasury, and for the collection, safekeeping, transfer and disbursement of the public revenue,' approved August 6, 1846, consistently with the other official duties imposed upon him," and that otherwise such bond should remain in force. The plaintiffs bring suit on the bond, and assign, in the declaration, as a breach of the condition of the bond, that the defendant Butterfield did not truly and faithfully continue to execute and discharge all the duties of the said office, according to the laws of the United States, and did not faithfully and

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

promptly make transfers or payments of all the public money collected by him, or otherwise at any time placed in his possession and custody, when the same was ordered by the proper department or officer of government to be transferred or paid out, and when said orders were received, as directed, and did not perform all other duties, as fiscal agent of the government, which had been, and were thereafter, and during his occupancy of said office, imposed by any act of congress, or any regulation of the treasury department, made in conformity to law, but on the contrary, on the 16th of November, 1869, wrongfully converted to his own use the sum of $2,219 00, currency of the United States, and $100 00, gold coin of the United States, which money was the property of the United States, and collected by him, or placed in his possession and custody, as such assistant treasurer and treasurer of the assay office, and did not faithfully and promptly make transfers or payments thereof, although the same were ordered by the proper department and officer of the government to be transferred and paid out, and said orders were received by him, as he was directed. The declaration claims, as damages, $2,219 00 currency, and $100 00 gold.

The defendant Butterfield entered upon the duties of said office, and continued therein until the 16th of November, 1869, when he resigned. In the discharge of the duties of said office, which involved the receiving, handling, care and disbursement of very large sums of money daily, he was assisted by a large number of clerks and other subordinates. Among said clerks were one Field and one Tandy. All of said clerks and subordinates in said office were, and always have been, in practice, nominated by the assistant treasurer, and confirmed by the secretary of the treasury, and, before entering upon their duties, are required to take, and did, in fact, take, the oath required by the 1st section of the act of August 6, 1861, 12 Stat. 326. None of said clerks or subordinates receive any commission or formal evidence of their appointment, except notice of their nomination and approval. In fact, they could be, at any time, suspended by the assistant treasurer and removed by him, subject to the approval of the secretary of the treasury. The assistant treasurer always assigned to each of said clerks and subordinates their duties, and changed said duties at will. For the convenient transaction of the business of said office, the same is, under the direction of the assistant treasurer, divided into departments, one of which is designated as the "currency receiving department." During all the time the defendant Butterfield filled the office of assistant treasurer, the said currency receiving department was under the charge of said Field, as its chief. On the evening of the 21st of August, 1869, a deficit was discovered in the currency funds of said department, to the amount of $2,075 00, and the same has never been recovered, nor has the amount thereof ever been accounted for, or paid over, to the plaintiffs. During the time the defendant Butterfield so acted as assistant treasurer at New York, said Tandy was employed in the gold room, in the office of said assistant treasurer, and had charge, during the day, of the gold and silver coin which might be received therein. On the 6th of August, 1869, a deficit of $100 00 in gold coin was discovered in the cash room of said Tandy, when making up proof, and the said missing $100 00 has never been recovered, nor its loss accounted for, nor has the same ever been paid to the plaintiffs. When the defendant Butterfield entered upon the duties of his said office, he found said Field and said Tandy employed therein, they having been appointed during the term of the predecessor in office of the defendant Butterfield. The defendant Butterfield gave them no new appointment, but knew that they were so employed, as they had been since 1864, and did not suspend them or attempt to remove them. On entering upon the duties of his office, he announced to all employed therein, that they would be retained in their places until removed. Field and Tandy have ever since remained employed in said office. Neither the plaintiff nor the defendant Butterfield have ever been able to discover the cause of the disappearance of the money so lost, though the fact of such loss was immediately made known, and every effort was put forth to ascertain the manner in which such loss occurred; but there is no evidence or reason to believe, nor do any of the parties to this suit believe or suspect, that any portion of such money was taken by said Field or said Tandy, or with their connivance, knowledge or consent. The same never came into the hands of the defendant Butterfield, although it was part and parcel of the public moneys in the assistant treasurer's office, belonging to the plaintiffs, nor was the defendant Butterfield guilty, in any manner, of any actual wrong or neglect in reference thereto, nor is he, in any manner, chargeable with, or responsible for, said loss, except as he may be held responsible in judgment of law.

The defendant Butterfield, between the 23d of June, 1869, and the 16th of November, 1869, and while he was discharging the duties of said office of assistant treasurer, was, in conformity with the 170th section of the act of June 30, 1864, 13 Stat. 297, supplied by the commissioner of internal revenue, with revenue stamps of the character named in that section, for sale for the accommodation of the public, as therein provided, and such stamps, between such dates, were delivered by said commissioner to the defendant Butterfield, for that purpose, to an amount exceeding in value the sum of $1,669,637 50, and the defendant Butterfield actually sold the same to the amount of that sum, and fully

accounted for the proceeds thereof to the plaintiffs. The said 170th section contains this provision: "In any collection district where, in the judgment of the commissioner of internal revenue, the facilities for the procurement and distribution of * * * * * adhesive stamps are or shall be insufficient, the commissioner as aforesaid is authorized to furnish, supply and deliver to the collector, and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depositary thereof, or any postmaster, a suitable quantity or amount of * * * adhesive stamps, without prepayment therefor, and shall allow the highest rate of commissions allowed by law to any other parties purchasing the same." The 161st section of the same act contains this provision: "The commissioner of internal revenue * * * is hereby authorized to sell to and supply collectors, deputy collectors, postmasters, stationers, or any other persons, at his discretion, with adhesive stamps * * * as herein provided for, in amounts of not less than fifty dollars, upon the payment, at the time of delivery, of the amount of duties said stamps, * * * so sold or supplied, represent; and may allow upon the aggregate amount of such stamps, as aforesaid, the sum of not exceeding five per centum, as commission to the collectors, postmasters, stationers or other purchasers." Five per centum on the amount of stamps so received and sold by the defendant Butterfield was $83,481 87. In the settlement of the stamp account of the defendant Butterfield with the plaintiffs, they allowed him, as the amount of such commissions to which he was entitled, the sum of $73,645 64, and no more, such last named sum being the sum which he had allowed to the persons to whom he had sold said stamps. In October, 1873, and after the commencement of this suit, and not before, the defendant Butterfield made to the proper department of the government a claim to have allowed and paid to him the balance of said five per centum on the amount of said stamps so received and sold by him, namely, the sum of $9,836 23. On the 8th of November, 1873, such claim was rejected.

The foregoing facts are not in dispute. The defendants deny the liability of the defendant Butterfield for the money lost, and, if liable for it on the bond, claim to have allowed, in extinguishment of it, so much of the $9,836 23 as is sufficient for that purpose.

While there cannot be any doubt, upon principle and authority, that the defendants are liable, on their bond, for the money lost, I think it cannot be recovered in this suit, because the defendant Butterfield is entitled to the allowance claimed.

The ground on which the claim was disallowed by the treasury department was, that, by the 22d section of the act of August 6th, 1846 (9 Stat. 65), it is declared that the salary of the assistant treasurer shall be in full for his services, and that he shall not charge or receive any commission, pay or perquisite for any official service of any character or description whatsoever; and that, by the 6th section of the same act, he is required to do and perform all acts and duties required by law or by direction of any of the executive departments of the government. These provisions of law were regarded by the treasury department as still in force, and in view of them, and of the fact that the office of the assistant treasurer at New York was held to be part of the treasury itself, the department refused to allow to the defendant Butterfield any commissions on stamps beyond what he had allowed to purchasers of them from him.

By the 161st section of the act of 1864, congress adopted the policy of permitting the commissioner of internal revenue to sell stamps to officers such as collectors, deputy collectors, and postmasters, in certain amounts, on prepayment therefor of their face value, less a commission, to be allowed to such officers, of not exceeding five per centum on the aggregate amount of the stamps. By the 170th section of the same act, in order to increase the facilities for procuring stamps, it authorized the commissioner to furnish stamps to collectors, assessors, assistant treasurers, designated depositaries, and postmasters, without limit as to amount, and without prepayment, and prescribed that he "shall allow the highest rate of commissions allowed by law to any other parties purchasing the same." Under the 170th section, the officers named therein, when supplied with the stamps, became purchasers of them, as fully as the officers named in the 161st section became purchasers of stamps, when supplied with them under that section. The price was not to be paid in advance, but was to be the face value of the stamps, less the highest rate of commissions allowed by law to any other purchaser. This rate, by the 161st section, was five per centum. By the 170th section, if the commissioner chose to supply the stamps to an assistant treasurer, the allowance of the five per centum commission was made imperative. The words are "shall allow." This allowance, so far as assistant treasurers are concerned, is inconsistent with the provisions of the 22d section of the act of 1846. The two cannot stand together. The later one must prevail.

The fact that the claim for the allowance was not made till after this suit was brought is of no importance.

On the agreed statement of facts, there must be judgment for the defendants.

[Subsequently a motion, on affidavits made by the district attorney of the United States, for leave to put in further evidence tending to show error in the statement of accounts of the treasury department, on which the case had been submitted to the court, was denied. Case No. 14,704.]

Case No. 14,704.

UNITED STATES v. BUTTERFIELD et al.

[8 Ben. 23.] [1]

District Court, S. D. New York. Feb., 1875.

MOTION TO CORRECT AGREED STATEMENT OF FACTS —TRIAL—NEW TRIAL—LACHES—TREASURY DEPARTMENT.

1. A suit was brought against B., who had been assistant treasurer of the United States, and against his sureties on his official bond. It was tried on an agreed statement of facts, which included an account from the treasury department at Washington. One question in the case was as to the right of the defendant B. to an allowance of certain commissions on the sale of stamps, which commissions exceeded the claim against him. The court made a decision that he was entitled to the allowance and that there must be judgment for the defendant [Case No. 14,703]. Before any order or judgment was actually entered, the United States district attorney made a motion to the court for leave to correct the agreed statement of facts, on affidavits setting forth that the statement was erroneous, because it did not show that the allowance in question had been in fact made *Held*, that, as there was nothing in the minutes of the court showing any action by the court on the evidence submitted to it, it must be held that the trial was not concluded.

2. Therefore, the rules applicable to new trials were not to be invoked;

3. To justify the court in granting the motion, it must be shown not only that the plaintiff had not been guilty of laches, but that the statement of facts was actually erroneous in the particular in question.

4. Although the district attorney had been shown not to be guilty of laches, it had not been shown that the officers of the treasury department charged with the duty of stating the accounts between the United States and B. had not been guilty of laches, nor had it been shown how the alleged error arose.

5. Therefore, the motion must be denied, with leave to renew it on further papers.

After the decision made by the court in this case, which is reported in the 7th volume of these Reports [supra], the district attorney of the United States made a motion, on affidavits, for leave to put in further evidence, tending to show a mistake of fact in the treasury statement on which the case had been submitted to the court. The defendants [Daniel Butterfield and others] raised the objection that the application was substantially one for a new trial, and that a proper case for granting a new trial had not been made out.

George Bliss, U. S. Dist. Atty.

William D. Shipman, for defendants.

BLATCHFORD, District Judge. I do not think it can be said that the trial of this cause has yet been concluded. There is nothing in the minutes of the court showing any action by the court on the evidence submitted to it, which evidence consisted wholly of the written statement agreed to by the parties. I think, therefore, that the rules applicable to new trials are not to be invoked. Therefore, if a proper case be shown, the plaintiffs may be allowed to withdraw their assent to the agreed statement of facts. To justify the court in allowing this, it must not only be shown that the plaintiffs have not been guilty of laches, but the court must see that the agreed statement of facts is in fact wrong in the particular in which it is alleged to be wrong. The agreed statement is a formal stipulation, signed by the district attorney and by the attorney for the defendants, stating that the parties agree on the facts therein set forth. The affidavit of the district attorney, on which the motion is now made by the plaintiffs to amend such statement of facts in the respects indicated in such affidavit, and that the decision rendered by the judge herein be changed accordingly, and that judgment be ordered as the facts require, sets forth that the agreed statement was erroneous, in that the amounts therein stated to have been allowed to the defendant Butterfield as commissions on sales of stamps should have been $85,084.46 instead of $73,645.64, and that consequently the claim of the defendant Butterfield to be allowed the further sum of $9,836.23 was and is unfounded, because that sum had been allowed to him by allowing to him the $85,084.46. It also sets forth that the error arose from mistakes made by certain clerks in the treasury department in making up the account on which said statement of facts was based, and that said account did not truly state the transactions between the plaintiffs and the defendant Butterfield, and that such errors were not known to the district attorney at the time of the trial, but that as soon as he learned them he brought them to the notice of the attorneys for the defendants.

The district attorney has been guilty of no laches, but it is not shown that the officers of the treasury department charged with the duty of stating the accounts between the United States and the defendant Butterfield have not been. The accounts, when stated, are made evidence against the party that he owes to the United States the balance of money shown by the account to be due from him to the United States. It is stated in the agreed statement of facts, that, in the settlement of the defendant Butterfield's stamp account with the United States, they allowed him, as the amount of commissions to which he was entitled, $73,645.64, and no more. This shows that a settlement or statement of account between the United States and the defendant Butterfield was made by the United States. A copy of such statement from the books of the treasury department is before me, showing an account between the defendant Butterfield and the United States in respect to stamps, in which he is charged with $2,036,250.94 as the value of stamps de-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

livered to him, and is credited with the same sum, made up by $1,669,639.50 remitted by him, and $73,645.64 commissions allowed him, and $292,965.80 as the value of stamps turned over by him to his successor. If in fact the allowance for commissions was $85,084.46 it is not shown when the error in the statement of account was discovered at the treasury department, or by whom, or how it came to be made, or that it ought not to have been discovered sooner than it was, or what the mistakes are that were made by the clerks, or who the clerks were, or that the errors were not known to the proper officers of the department when the agreed statement of facts was signed, or that the true amount allowed for commissions was not known to them when the statement of account was made and when the agreed statement of facts was signed.

Moreover, the statement annexed to the affidavit of the district attorney, as showing the manner in which the alleged error arose, is one from which it cannot be seen how such alleged error arose, inasmuch as it does not show an allowance for commissions of $11,438.82 more than the $73,645.64.

On the papers now before me I must deny the motion, with leave to the plaintiffs to renew it on further papers.

Case No. 14,705.

UNITED STATES v. BYERS.

[4 Cranch, C. C. 171.] [1]

Circuit Court, District of Columbia. May Term, 1831.

LARCENY—BANK NOTE—PROOF OF GENUINENESS.

Upon the trial of an indictment for stealing a note of the Bank of the United States, it is not necessary that the United States should prove that it was a genuine note of that bank, otherwise than by producing the note itself; nor that it was the note of a chartered bank.

Mr. Hellen, for prisoner [Jane Byers], required that the United States should strictly prove that it was a genuine note of the bank; and cited 2 Starkie, Ev. (Am. Ed.) 829, in the note, which refers to the case of State v. Tillery, 1 Nott & McC. 9, and Russ. Crimes (Am. Ed.) 1032.

But THE COURT (CRANCH, Chief Judge, doubting) stopped the attorney of the United States, and said that the note itself, being proved to be the note stolen, is prima facie evidence of what it purports on its face to be.

Mr. Hellen then contended that the United States must prove it to be a note of a chartered bank.

But THE COURT (CRANCH, Chief Judge, doubting) said that the ninth section of the penitentiary act only required that it should be a bank-note.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,706.

UNITED STATES v. CADWALADER et al.

[Gilp. 563.] [1]

District Court, E. D. Pennsylvania. June 4, 1835.

OFFICER—COMPENSATION—CREDITS—DEPARTMENT REGULATIONS.

1. Where a public officer, not appointed or prohibited by law, is employed by the head of a department, his duties and compensation are to be regulated by the agreement made in the case.

2. No agreement made by the head of a department, with an agent appointed under the act of 3d March, 1809 [2 Stat. 535], will entitle him to more than the compensation allowed thereby.

3. A discretion is vested in the head of a department, to allow a special officer, employed under it, compensation for his services even beyond the amount agreed upon, should he consider them equitably entitled to it.

4. Where the accounts of a public officer, employed by the head of a department under a special contract, are settled, and a certain rate of compensation allowed, he continues to be entitled to the same rate of compensation for similar subsequent services, until a new agreement or notice of change.

5. A claim for a credit, not actually disallowed, is to be considered only as suspended, if disapproved and passed over by the head of a department

6. The regulations of a department of the government in settling its accounts, are intended for general rules in the transaction of its business, but are subject to the revision of a court and jury, when they work manifest injustice to individuals.

This was an action of debt, brought to recover the sum of eleven thousand six hundred and twenty-two dollars and sixty cents, which it was alleged Mr. M'Call in his lifetime had received from the United States for their use, and which was still due and unpaid by his representatives. To this action the defendants [Thomas Cadwalader, Robert M'Call and Thomas Cadwalader, Jr., executors of Richard M'Call, deceased] pleaded the general issue and a set-off, with leave to give the special matter in evidence.

On the 4th June, 1835, the case came on for trial before Judge HOPKINSON and a special jury, when the following facts were proved:

Early in the year 1815, Mr. Richard M'Call was appointed consul of the United States for the port of Barcelona. About the same time, a squadron was sent to the Mediterranean, and it was determined by the navy department to employ him as a special agent for this squadron, to be employed as long as his services should be considered necessary, and with authority to draw bills on certain houses in Europe. A letter of the secretary of the navy of the 7th March, 1815, fixes as his compensation for these services, "a commission of two per cent. on his disbursements, provided the whole sum so allowed should not exceed that authorized to be given to a navy agent," which was two thou-

[1] [Reported by Henry D. Gilpin, Esq.]

sand dollars per annum. Mr. M'Call did not consider this sufficient for the labours and responsibility of such an office, and, on the 12th April, the secretary of the navy, Mr. Crowninshield, agreed to extend the allowance by adding, "a commission of two and a half per cent. on absolute expenditures made when he should be absent from Barcelona, following the squadron;" requiring distinct accounts of disbursements made under those circumstances. Mr. M'Call proceeded to the Mediterranean and commenced his special agency on the 13th July, 1815. From that time until November, 1817, his place of residence on land was at Barcelona, but he was frequently, and for considerable periods, either following the squadron, or at Carthagena, Marseilles, Mahon, or other places which the duties of his agency required him to visit. At the latter period he removed to Gibraltar, considering that the most convenient place for supplying the squadron, and thenceforth it became his place of residence. His accounts were made up at the end of every half year, and transmitted with the vouchers to the treasury department. The compensation which he claimed in these accounts, was always two and a half per cent. on all disbursements made by him for the public service, elsewhere than at Barcelona, and two per cent. on those made there, up to the sum of two thousand dollars per annum: he also charged the United States for the clerk hire, storage and office expenses, which were actually incurred. On the 20th June, 1817, the first settlement of his accounts took place at the treasury, and embraced only those from 13th July to 24th October, 1815: during the whole of that period he was absent with the squadron, and two and a half per cent. on all his disbursements were allowed. On the 25th May, 1821, the auditor having before him for settlement all the accounts from 25th October, 1815, to 1st July, 1820, referred to the secretary of the navy, Mr. Thompson, the claim of Mr. M'Call for two and a half per cent. on his disbursements, after he went to reside at Gibraltar, and also his charges for clerk hire, &c. there. On the 1st June, 1821, the secretary of the navy decided, that Mr. M'Call's compensation was to be regulated by the letters between him and the secretary of the navy, Mr. Crowninshield, in 1815, from which he thought "it fairly to be intended, that his compensation was not to exceed two thousand dollars a year, for all business transacted at his permanent place of residence. At the time the arrangement was made he resided at Barcelona, and the just interpretation of the agreement was, that the same rate of compensation should apply as to all business at his permanent place of residence." He therefore declined allowing him more than at that rate for expenditures at Gibraltar after his removal to that place. On the 4th June, the auditor communicated this decision of the secretary to Mr. M'Call, and in the settlement made on the 22d May, 1822, the whole commissions from October, 1815, to July, 1820, amounting to thirty-one thousand three hundred and fifty-nine dollars and forty cents, were suspended. To this decision Mr. M'Call did not assent, and in 1824 came to the United States for the purpose of having the subject thoroughly investigated and disposed of, declaring at the same time that he should be obliged to relinquish the agency if his claims were refused. His disbursements for the navy department had then amounted to about two millions of dollars, and been attended with no loss to the United States. The subject of the suspended items was fully and carefully re-examined by the secretary of the navy, Mr. Southard, who differed in his view of it from his predecessor, and at the settlement made on the 31st December, 1824, the commissions before suspended, and an additional sum of twelve thousand and twenty-four dollars and twenty-five cents, for subsequent commissions, were carried to his credit: he was also allowed one thousand dollars for clerk hire, and eight hundred and ninety-five dollars for office rent and expenses annually. After this settlement Mr. M'Call resigned his consulate, but returned to Gibraltar and continued to execute his agency. His accounts up to the 1st January, 1828, were from time to time settled on the same basis. On the 3d March, 1830, the auditor having before him the accounts from 1st January, 1828, to 1st January, 1830, containing similar claims for commissions and office expenses, referred them to the secretary of the navy, Mr. Branch, stating that "for those allowances he found no authority in law, in the regulations of the navy department, or in any entry by the secretary upon the vouchers." On the 12th March, the secretary of the navy decided that Mr. M'Call was to receive the same compensation as a navy agent while permanent, and when absent from his place of residence, that agreed on by the secretary of the navy, Mr. Crowninshield, in his letter of 12th April, 1815. On the 15th March, 1830, a settlement was made in accordance with this decision. Mr. M'Call, who had returned home, resigned his agency, and on the 21st April, 1831, a final settlement on the same basis was made at the treasury, by which a balance was asserted to be due to the United States of eleven thousand six hundred and ninety-three dollars and fifty-eight cents. This balance was made up of the following items:

(1) Balance in Mr. M'Call's hands admitted to be due and tendered by him to the treasury..	$ 5,478	94
(2) Commissions on disbursements at Gibraltar over and above the compensation of a navy agent	2,309	26
(3) Commissions on bills of exchange	44	40
(4) Office rent and charges for two years	3,790	00
(5) Subsequent correction	70	98
	11,693	58

Mr. Gilpin, U. S. Dist. Atty.

This is a question of contract, of written contract. Mr. M'Call was not a navy agent, under the act of 3d March, 1809, whose character, duties and compensation are fixed by law; but a special agent of the navy department, chosen to perform a certain duty pointed out by that department, for which they agreed to allow him a certain compensation. The whole was reduced to writing, weighed by him for more than a month, modified at his suggestion, and again put in writing; he then entered on the stipulated duties. By this contract he must abide. It is found in the letters of himself and the secretary of the navy, Mr. Crowninshield, in March and April, 1815. He was to have the same allowance as a navy agent when at his place of permanent residence. After 1817, this was Gibraltar. In 1820, he claimed more while there; he claimed two and a half per cent. on all disbursements. In 1821, this was submitted to the secretary of the navy, Mr. Thompson, who refused it. In 1824, it was renewed and admitted; but still on the ground of this contract, not in opposition to it. That contract remained unchanged. It speaks for itself. If an erroneous construction was put upon it, the United States are not affected by it. In 1830, the same allowance is again claimed; it is refused as it had been in 1821, and this refusal obliges them to bring the present suit. The defendants make the same demand before this court, which Mr. M'Call made at the treasury; the same reply is given; the contract does not authorize it. U. S. v. Lyman [Case No. 15,647]; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 735; U. S. v. Macdaniel, 7 Pet. [32 U. S.] 1.

M'Call & Cadwalader, for defendants.

If the accounting officers had received the evidence of Mr. Southard's construction of this contract, which has been submitted to the court and jury, they would never have refused these allowances. Their ground of rejection is, that there is no entry of his decision. The case is here to be passed upon with a full knowledge of it. That construction was unquestionably right; but if it were not, it is sufficient to sanction the items of set off which the defendants offer. By the original contract, the compensation was fixed in two contingencies; the first, when Mr. M'Call was at Barcelona, there he had his consulate and its profits, as well as his own business, and the additional compensation of a navy agent was liberal and sufficient; the second, when he had to accompany the squadron, fix his residence for a greater or less time at other places, and sacrifice his own concerns for those of the public, for this he asked and was promised only the customary commercial commission of a merchant, two and a half per cent. The words of the correspondence in 1815, bear this construction, and it is consistent with usage and justice. As to the allowance for office expenses, it is made to navy agents in the United States, and therefore falls within the express stipulation of the letter; but if it were not, it is sanctioned by the usage of the department, which was confirmed by this court in a late case. To say that it was wrong in the secretary of the navy to allow, in 1824, what was rejected in 1821, is to confound together suspension and rejection; these claims were large, and in settling the account they were passed by for further consideration; they were not rejected; they came up in 1824, as matters yet undecided. The decision of Mr. Southard, therefore, was right in all respects, at the time it was made. But that is not the question here. This claim commences four years after Mr. Southard's decision. It commences entirely, after Mr. M'Call had come to this country, conferred with the department, and returned to the Mediterranean with their plighted faith to allow it. The contract, made by the letters of 1815, was at an end; the settlement of 1824 became a contract, which had not been terminated by the government in 1830. No doubt the secretary of the navy might refuse these allowances after that time; but he cannot do so retrospectively; it has been laid down by this court, as well as by the supreme court, that no change in a usage is to be retrospective; that a person, who has for years received a compensation, cannot be deprived of it by the head of a department, who shall construe a contract differently from his predecessors. U. S. v. Macdaniel, 7 Pet. [32 U. S.] 1; U. S. v. Duval [Case No. 15,015]; Armstrong v. U. S. [Id. 548].

Mr. Gilpin, U. S. Dist. Atty., in reply.

In 1815, a contract was deliberately made, between Mr. M'Call and the secretary of the navy, so explicit in its terms, that it cannot be misunderstood. The question is, whether or not that contract allows him two and a half per cent. commissions on all his disbursements at his place of permanent residence, and a regular annual sum of one thousand eight hundred and ninety-five dollars, for office expenses. On its face it certainly does not. At the time of the first settlement these allowances were not claimed; on the contrary, the commissions on disbursements at Barcelona, were charged separately from those on disbursements while absent, and no claim was made for any office expenses. At the time of the second settlement, a similar distinction was made; but it was observed, that after his permanent residence was fixed at Gibraltar, he claimed the extra commissions; this was refused from the outset, and in 1821, was deliberately examined and rejected; it was not merely suspended, for the letter of the secretary of the navy is positive as to the meaning of the contract, and settled the point definitely so far as the department could do so; the suspension was to give time to ascertain the periods of absence and residence at Gibraltar, so as to adjust the ac-

counts; there was no hesitation or suspension as to the propriety of the allowance; up to this time there was no claim even of an annual sum for office charges. In 1824, Mr. M'Call comes to the United States, and a third settlement is made; he puts in a claim again for the extra commissions during his residence at Gibraltar, and an entirely new one for office expenses, the whole amounting to sixty thousand dollars. This was allowed by the secretary of the navy, but not by any change in the contract; it was his interpretation of that instrument; there was no new contract, nor indeed any written order, given at the time, at least none has been found. This act then made no variation in the rights of either party; a claim was made by Mr. M'Call under his contract, at that time, and he obtained it. If his decision was wrong, it cannot affect the rights of the United States; it cannot change their written agreement with their agent; it cannot govern the construction of the instrument on a subsequent occasion. Whenever Mr. M'Call presented his accounts, they were to be settled by the officer for the time being, according to the existing contract; and if at one time an error was made, it is no reason that it should also be made at another; the settlements were from time to time, the contract was continuous; it existed in 1829, as much as in 1815, and alone governed each intermediate settlement. Now the very words of the letters confine the extra commission to disbursements made when absent from the place of permanent residence, and seem to place that item beyond question. As to the office charges. no proof of the same annual allowance to any navy agent was given; much less to a special agent, whose extra commissions gave him so large a compensation. Neither item, then, can be properly allowed under the agreement; and if the view is correct, that this agreement continued in force up to 1830, that no legal change had been made in it, and no new one formed, then the accounting officers were correct in rejecting them, and this jury ought not now to allow them.

HOPKINSON, District Judge (charging jury). (After stating the several charges of the United States against the defendant, which constitute the claim sought to be recovered in this action, and also, generally, the grounds on which it is resisted, the judge instructed the jury on the matters of law arising in the case, substantially as follows:) The jury must bear in mind that the appointment of Mr. M'Call, to the duties of a navy agent, was not made under the act of congress of 3d March, 1809, and of course the question of his compensation for his services is not to be governed by the provisions of that law. Had his appointment been under that law, our course in the decision of this cause would be very plain and easy. We should follow the directions of the law, without regarding the acts or opinions of the secretary of the navy, as no agreements by him with Mr. M'Call, however explicit, if made in violation of the law, could be attended to here. The defendant, also, is presumed to have known the law by which his office was conferred on him, and to have known further that no contract made by the secretary with him, not warranted by the law, could be enforced in any court of the United States. Mr. M'Call was not appointed by virtue of that act of congress, but under a general authority, lawfully exercised by the secretary of the navy, to appoint agents of the department, who are not, properly speaking, navy agents, nor officers of the United States, but the agents of the secretary or his department. In such cases, where there is no statutory prohibition or limitation, a large discretion is allowed to the departments. In such appointments the duties of the agent, as well as his compensation and emoluments, must be regulated by the agreement made between him and the secretary. The duties and the compensation must wait upon the object of the appointment; they will vary according to the circumstances of each case; they may be permanent or temporary, more or less. We have, then, not to look to the law of 3d March, 1809, for the liquidation of this account, for our guide and rule in settling the claims of the respective parties, but we must look truly and conscientiously to the agreement between them, upon the faith of which the services of the defendant were rendered. The changes that have taken place in the office of secretary of the navy, have probably produced all the difficulties between the defendant and the department, but they can produce no change in any contract made within the authority of the officer who made it.

The original agreement is contained in a correspondence between Mr. Crowninshield, the then secretary of the navy, and Mr. M'Call. The several letters do not appear to me to be ambiguous, at least as regards the principal item of dispute, that is, the commissions or compensation to be allowed to the defendant; and my construction of them inclines to the opinion given upon them by Secretary Thompson, who had succeeded Mr. Crowninshield in the navy department. When Mr. M'Call rendered his first account to the department, or when it was there settled, Mr. Thompson was in office, and had the account settled according to his construction of the contract. If the duties and services of the appointment turned out to be more onerous, important and expensive than was contemplated when the contract was made, they nevertheless can have no operation in changing the meaning or construction of the contract, but they would afford a good and just reason for modifying it for the future, or for making a new and different one. or for the exercise of the secretary's discretion in making allowances to meet these un-

expected contingencies. Thus, if the contract had been made on the basis, that the residence of Mr. M'Call was to be at Barcelona, where living was cheap and commissions low, and where he had also a consulate, and it turned out that the public service required the navy agent to remove to Gibraltar, this would be a fair ground for a new contract, or for additional, equitable allowances. The secretary was not restricted to make no allowances but such as came strictly within the letter of the contract, if he should think there had been services performed, or expenses in that service incurred, not provided for by the contract. It is unfortunate that the secretary who made the agreement was not first called upon to say what was intended by it. His construction would probably have been received as authentic by his successors. The accounts of Mr. M'Call were submitted to the auditor, and by him referred to the secretary, whose decision upon them I am inclined to adopt. It is said Mr. M'Call acquiesced in this decision. Did he do so? It is true he continued to hold the appointment, but to make strong remonstrances against that decision; and it is to be remarked that, in his appeal to the secretary, he takes the ground of his services, and not of the contract, to support his claims. This was correct.

Before Mr. M'Call again rendered his accounts to the department, another secretary, Mr. Southard, came into the office. Mr. M'Call renewed his charges, not only for the period between his first and second accounts, but introduced the very items that had been rejected or suspended by the former secretary. A question has arisen as to what items were rejected and what suspended. It is said that the charge of commissions only was suspended, but that, as to the other disputed items, the opinion of Secretary Thompson is clear, explicit and final. This may or may not have been his intention; but the suspension, as it appears on the account, goes to the whole of it; and we should presume that Mr. M'Call so understood it, as he would hardly have preferred those charges again, in the face of Mr. Thompson's decision, had he continued in office.

The accounts of the defendant were submitted to Secretary Southard, who seems to have given them a full and careful examination, and finally he passed and allowed the accounts, admitting all Mr. M'Call's charges, not only for the period subsequent to his own coming into office, but for the antecedent time, allowing the items which his predecessor had refused or suspended. Mr. Southard must, like the defendant, have considered that these items were suspended, and not finally decided upon by Secretary Thompson. Although Mr. Thompson had given his opinion on the principle on which the account should be settled, yet the items affected by the principle were suspended, and not finally acted upon; they were not closed against future consideration and adjustment, by Mr. Thompson himself, or by a successor to his authority. Whatever may have been his reason for not directly applying his principle to the items in question, Mr. Southard believed, and I cannot say he was mistaken, that the whole account, when it came to him, was open for his examination and judgment; and he acted upon it accordingly. With my understanding of the original contract with Mr. Crowninshield, as I have intimated, I must consider that, in passing this account and allowing the disputed charges of the defendant, he did not proceed on the ground of that contract, for I do not see how it could bear him out; but that he did proceed on a ground equally tenable and firm, that is, by virtue of his general authority, as the head of his department, to exercise his discretion in making compensation to the agents of the department for their services, in conformity with his judgment and views of the justice of the case, after a longer experience and a fuller knowledge of the nature of the defendant's services, had enabled him to appreciate their value, and to estimate more correctly the expenses to which they exposed the agent.

But it is worthy of particular attention, that the account thus settled by Mr. Southard, which contained the very charges formerly suspended or rejected, as it may have been, has been considered by the department to be finally closed; the defendant obtained his credits; they cannot now be disturbed, and no attempt is made by this suit to disturb them. If this suit had been brought for the allowances made by Mr. Southard, anterior to the settlement of 1824, we might have been called upon to look to and construe the original contract; but it is now unnecessary, as the accounts now in controversy, are subsequent to that settlement. Before these accounts of the defendant were presented to the department, another change had taken place in the office of secretary; Mr. Branch had succeeded Mr. Southard. The accounts are sent to the new secretary by the fourth auditor, with certain objections, or rather questions upon them. The result was, that Mr. Branch, going back to the original contract for the adjustment of the accounts, resumed the opinion of Secretary Thompson and adjusted them accordingly, as the district attorney has submitted them to you, that is, refusing the defendant credit for the charges which Mr. Southard had allowed in the previous settlement of his accounts.

We have now arrived at the real question in this case, which is, are we at this time at liberty to go back to the contract between Secretary Crowninshield and Mr. M'Call, and to receive or reject the disputed items of his account, as we shall believe they are or are not warranted by the construction we shall put upon that contract; or, on the other hand, are we not bound by the allowances made by

Secretary Southard, to the defendant in the settlement of his account in 1824, either, as a construction of the contract binding on the United States, or as constituting a new contract for the subsequent services of the defendant? With the opinion I have, and which I have already intimated, of the meaning of that contract, I cannot think that Mr. Southard admitted the charges in question by virtue of that contract; but that he considered them not to have been finally acted upon by his predecessor, that they were, therefore, open to his judgment upon them, and that after receiving the personal explanations of the charges from Mr. M'Call, who had returned to the United States for the purpose of settling this account; after learning from him the real nature and extent of his services, and his extraordinary expenses in performing them, together with the change that had taken place in his situation and residence, and the importance and extent of his duties, the secretary took upon himself, as he clearly had a right to do, if the former secretary had but suspended these charges for further explanation, to make these allowances and fix the compensation of the agent, according to his view of the circumstances shown to him, in support of their justice and equity. In Macdaniel's Case, 7 Pet. [32 U. S.] 1, it is said by the judge, delivering the opinion of the court that "it will not be contended that one secretary has not the same power as another, to give a construction to an act which relates to the business of the department." The court in that case fully recognise the discretion which any one of the great departments of the government must be allowed to exercise, in the distribution of its duties and responsibilities, and that while he regulates the exercise of his powers by the law, it does not follow that he must show a statutory provision for every thing he does.

In the case submitted now to this court and jury, we are not called upon to decide upon the right of Mr. Southard to admit the credits in question, whether they had been suspended or rejected by the former secretary. Whether Mr. Southard was right or wrong in his action upon the account which he settled with the defendant in 1824, and in his allowance of credits to the defendant in that account which had formerly been withheld, is, at this time and in this suit, of no importance. This suit is not brought by the United States to recover back the money, credited and allowed to the defendant by that settlement, upon the allegation, that the secretary transcended his power in allowing those credits, or on any other allegation. No attempt is made to disturb that settlement. This action is now brought to recover from the defendant the money which he retains for his compensation and charges, for services and expenses subsequent to that settlement, and in strict conformity with the allowances that were made to him by the secretary, in that settlement. Then the question is, if it can be called a question, had the secretary a right to make a contract or arrangement with his agent, acting under and by his authority, performing the services of the department under his direction and controul, for the compensation for these services and for the expenses for which he was to be allowed in performing them? If the secretary had this power, if he has made this contract with the defendant, and the defendant, upon the faith of the contract, has gone on to render his services and to disburse his money in the public service, it is for us to inquire, whether Mr. Southard has exercised his discretion discreetly or not; whether he has been too liberal or not in the terms he gave to his agent. That such an arrangement, such a contract, was made, seems to me to be proved beyond a question by the testimony of Mr. Southard, and of Mr. Watkins at that time the fourth auditor of the treasury department, in addition to the evidence afforded by the settlement itself. On the faith of this agreement, Mr. M'Call resigned his consulship at Barcelona, returned to Gibraltar, resumed the duties of his agency, and devoted himself to them. No question has been made of the fidelity and ability with which he performed these duties.

You will observe that this case comes before you, on a more free and extensive ground than it stood at the department, when these credits were refused. The officers of that department looked at the case only as it appeared on their books and records; they decided it by their regulations for the settlement of accounts, which are intended only for general rules in the transaction of the business of the office, and for the government of extraordinary cases. The courts have often revised the decisions made by the strictness of these regulations, where they worked manifest injustice to the individuals concerned. The accounting officers of the department, in this instance, took up the original contract as it appears in the correspondence between Secretary Crowninshield and the defendant; they put their construction upon it, with which I do not find fault, and they stopped there. As they found nothing on their books and records of the subsequent proceedings of Mr. Southard, they paid no attention to them. It is our duty, however, to go further into the truth and justice of the case, and to decide upon the rights of the parties by the laws of the land, and not by the office rules of a department. Upon these principles of law, applied to your own views of the evidence, you will make up your verdict. The defendant admits a balance to be due from him to the United States of five thousand four hundred and seventy-eight dollars and ninety-four cents, which he has always been ready to pay. The United States claim from him the sum of eleven thousand six hundred and twenty dollars and sixty cents, with interest amounting to thirteen hundred and twenty-eight dollars and thirty-one cents. The difference is made by the disputed items in the

defendant's account, upon which you are to decide.

The jury found a verdict for the United States for five thousand four hundred and seventy-eight dollars and ninety-four cents.

Case No. 14,707.

UNITED STATES v. CALDWELL.

[8 Blatchf. 131.] [1]

Circuit Court, S. D. New York. Jan. 3, 1871.

EXTRADITION — BROUGHT WITHIN JURISDICTION — TRIAL FOR ANOTHER OFFENCE.

The defendant was indicted for bribing an officer of the United States. He pleaded that he was brought into the jurisdiction of the court on a charge of forgery, under an extradition treaty, and that such offence of bribery was not within the treaty. On demurrer to the plea: *Held*, that the plea was bad.

[Cited in U. S. v. Johnson, Case No. 15,487; New Jersey v. Noyes, Id. 10,164; U. S. v. Lawrence, Id. 15,593; Re Miller, 23 Fed. 33; Ex parte Hibbs, 26 Fed. 429; U. S. v. Rauscher, 119 U. S. 424, 7 Sup. Ct. 243.]

[Cited in Adriance v. Lagrave, 59 N. Y. 113; State v. Stewart, 60 Wis. 590, 19 N. W. 429; Com. v. Hawes, 13 Bush, 703; Hackney v. Welsh, 107 Ind. 255, 8 N. E. 142; Ker v. People, 110 Ill. 639; State v. Vanderpool, 39 Ohio St. 276.]

[This was an indictment against Richard B. Caldwell for bribing an officer of the United States government. The prisoner pleads to the jurisdiction of the court. Heard on demurrer to the plea.]

Noah Davis, U. S. Dist. Atty.
William H. Anthon, for defendant.

BENEDICT, District Judge. This case comes before the court upon a demurrer to the plea. The prisoner has been indicted for the offence of bribing an officer of the United States. To this indictment the defendant pleads, that this court ought not to take cognizance of the offence in the indictment specified, because, at the time when he was arrested and brought within the jurisdiction of this court, he was a resident of Prescott, in the province of Ontario, dominion of Canada, and was brought into the jurisdiction of this court on a charge of forgery, under the provisions of the treaty between her Britannic majesty and the United States of America, commonly called the "Ashburton Treaty," ratified August 9th, 1842 [8 Stat. 576], providing for the extradition of persons charged with certain offences, and the offence specified in said indictment is not one of the offences mentioned in the said treaty, and this court has no jurisdiction in the premises. To this plea the government demurs, and thus the question is raised, whether the facts set forth in the plea are sufficient to oust this court of jurisdiction to try the defendant for an offence otherwise conceded to be within its cognizance.

On the part of the defence, reliance is placed upon sundry cases in the tribunals of this state, which furnish, it is claimed, a support to the proposition of the defence, that this court has jurisdiction of the person of the prisoner for a single purpose only, namely, his trial for the crime for which he was extradited. The cases referred to are civil cases, wherein the service of the warrant of arrest was set aside by the court on motion, because it appeared that the plaintiff in the action had resorted to fraud to procure the presence of the defendant within the territorial jurisdiction of the court, in order that he might cause his arrest. Such cases do not furnish a rule applicable in criminal prosecutions, nor do I find any case where a warrant of arrest of a person charged with crime at the instance of the people, has been set aside, because of deceit practiced to bring the accused within the reach of the warrant.

But, if the same rule were applicable in criminal prosecutions and in civil actions, and if the question here arose on a motion to set aside the arrest, instead of on a plea to the jurisdiction, I am of the opinion that the relief could not be granted, for the reason that the person of the prisoner is not within the jurisdiction of the United States by virtue of any warrant issued out of this or any court. The prisoner was brought within the jurisdiction of the United States by virtue of a warrant of the executive authority of a foreign government, upon the requisition of the executive department of the government of the United States; and, while abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints do not form a proper subject of investigation in the courts, however much those tribunals might regret that they should have been permitted to arise. To hold otherwise, would, in a case like the present, permit a person accused of crime to put the government on trial for its dealings with a foreign power. In the present case, there is hardly room for the charge that the extradition proceedings against the accused were in bad faith, inasmuch as the records of this court show an indictment duly found against the accused for the crime by reason of which his extradition was granted. But, whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss for even a plausible reason for holding, upon such a plea as the present, that the court is without jurisdiction to try him. The question appears to me to be not one of jurisdiction of the court, but rather of privilege from arrest; and I cannot say that the fact, that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery, affords him a legal exemption

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

from prosecution for other crimes by him committed.

I may add, that the Case of Heilbronn [Case No. 6,323], which, so far as I know, is not reported, probably affords a precedent for the action of the government in the present case. Heilbronn was delivered by the government of the United States to the government of Great Britain, upon a charge of forgery. When the facts out of which the charge arose were proved before the commissioner, the ground taken in his behalf was, that the crime committed was not forgery, but embezzlement. The commissioner held otherwise, and the prisoner was extradited; but, upon his arrival in Great Britain, he was there indicted and convicted of embezzlement. upon the same facts which had been claimed before the commissioner to show forgery. That case presented, therefore, the point now taken here; but, whether it was taken upon the trial in Great Britain, I do not know. I do not, therefore, refer to the case as an authority, but simply notice it, as, perhaps, a precedent.

The demurrer must be held to be well taken, but the defendant has leave to withdraw his plea, and enter a plea of not guilty.

Case No. 14,708.

UNITED STATES v. CALDWELL.

[2 Dall. 333.]

Circuit Court, D. Pennsylvania. 1795.

WITNESSES—FAILURE TO OBEY SUBPŒNA—ATTACHMENT.

[1. Judges of a county court are not excused from obeying a subpœna to appear as witnesses, on the ground that the judges of the state supreme court are holding a nisi prius court in the county, and that the occasion seems to require respectful attention to them on the part of the county judges; and in case of a failure to obey the subpœna an attachment will issue.]

[2. Prior service of a subpœna upon a witness who fails to appear is an indispensable requisite to awarding an attachment against him.]

[Cited in The Laurens, Case No. 8,122; Dreskill v. Parish, Id. 4,076.]

This was an indictment for a misdemeanor committed in Northumberland county, in which a subpœna had issued, on the part of the defendant, to summon Samuel M'Clay, Esq., and John M'Pherson, Esq., associate judges of the county courts of Northumberland, to appear in the circuit court as witnesses on the 4th of May. The subpœna was served on Mr. M'Clay on the 28th of April, and on Mr. M'Pherson the next day. E. Tilghman now produced an affidavit, "that they were material witnesses, without the benefit of whose testimony, the defendant apprehended and believed he could not safely proceed to trial;" and moved for a postponement, not only in this case, but, also, in cases of Montgomery, Lang and Stockman; in which, to save expence, no subpœna had issued, though the same persons were material witnesses for the respective defendants.

Mr. Rawle, the district attorney, objected, that from the 4th of May, when the subpœna was returnable, a sufficient time had elapsed to have brought the witnesses to Philadelphia upon an attachment; but he consented to consider the subpœna as having issued in all the causes. There was no legal necessity for the witnesses, merely because they were county judges, to attend the nisi prius of the supreme court, which is alleged in excuse for their absence; and as this is not a capital case, the application for delay is not entitled to be treated with any peculiar indulgence.

E. Tilghman replied, that the subpœna had been served in a reasonable time; and, although no attachment had been moved for, it is some excuse for the defendant, that he expected the trials for treason would first come on; and for the witnesses, that their official situation seemed to prescribe a respectful attention to the judges of the supreme court, who were then holding a court of nisi prius, in the county of Northumberland. But after the oath which the defendant has taken, the court will not presume, that his application for delay is without just cause; and if there is just cause, they will not compel him to proceed to a trial, under such disadvantages. Besides, it is not desired, to put off the trial till the next term, but only for a few days, that an express may be sent for the witnesses; as with the benefit of their testimony it is immaterial to the defendant when he shall be tried. Though, if the delay is limited to a few days, it will be necessary, in order to remove all future cavil, to move for an attachment against the witnesses.

BY THE COURT:—We have no hesitation in granting the indulgence of a delay for a few days. The cause may, therefore, be continued till this day week; and, in the meantime, let the attachment issue; but it can only be in the case, in which the subpœna has been actually served. The practice must always be strict in the previous stages of the business, before an attachment can be awarded; and all the documents upon which it is awarded, must be filed with the court.

PATERSON, Circuit Justice:—We pay no respect to persons. The law operates equally upon all; the high and low, the rich and poor. If we issue a subpœna to a justice or a judge, and it is not obeyed, we should be more strict in our proceedings against such characters, than against others, whose office did not so strongly point out their duty.

Case No. 14,709.

UNITED STATES v. CALLENDER.

[Whart. St. Tr. 688; Chase's Trial, Append. 65.]

Circuit Court, D. Virginia. 1800.

INDICTMENT FOR SEDITIOUS LIBEL—PROVINCE OF COURT AND JURY — PLEADING — EVIDENCE IN JUSTIFICATION — TRIAL — CHALLENGES OF JURORS.

[1. In a prosecution for libel under the sedition law (Act 1798) the jury have nothing to do with assessing the fine in case of a conviction. That is for the court alone.]

[2. Where an indictment for libel is founded upon passages contained in a book, it is not necessary to set out the title of the book; but it is sufficient to aver that upon a date mentioned defendant did publish, etc., a false, etc., libel "of the tenor and effect following," and then set out the passages complained of.]

[3. An allegation of "tenor and effect" requires proof of the substance only, and not the precise words.]

[4. Where the accused relies upon a justification, the proof of the justification must extend to the whole charge, otherwise it is insufficient and inadmissible; and it is not competent to prove one part of the specific charge by one witness and other parts by different witnesses.]

[5. In a prosecution for seditious libel the only question which can be put to a juror challenged for favor is whether he has ever formed and delivered an opinion upon the charge against the accused; and it is improper to ask whether he has ever formed and delivered an opinion on the book in which the alleged libellous passages occur.]

[6. Principal challenges to the array, or the whole jury at once, are always for partiality in the sheriff, and not in the jurors, and such challenges are to be determined by the court; whereas challenges for favor, in the particular jurors, are to be determined by triers sworn by the court. And the fact that a partial juror has been returned is no reason for inferring partiality in the sheriff, so as to furnish ground of challenge to the array.]

[7. The court may demand a statement in writing of questions intended to be put to a witness, in order that no illegal evidence may be heard by the jury and make an undue impression.]

[8. The right of the jury in criminal cases to determine the law as well as the facts does not extend to a determination of the question whether a statute of the United States produced to them is void as contravening the constitution. The constitutionality of the law under which the indictment is found is a matter solely for the court, and counsel will not be permitted to argue that question to the jury.]

[Cited in Sparf v. U. S., 156 U. S. 70, 164, 15 Sup. Ct. 273.]

[Indictment against James Thompson Callender for a seditious libel against the president of the United States.]

The matter set out in the indictment as libellous was as follows: "The reign of Mr. Adams has been one continued tempest of malignant passions. As president, he has never opened his lips, or lifted his pen without threatening and scolding; the grand object of his administration has been to exasperate the rage of contending parties, to calumniate and destroy every man who differs from his opinions. Mr. Adams has laboured, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life. The contriver of this peace has been suddenly converted, as he said, to the presidential system, that is to a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism. The same system of persecution has been extended all over the continent, every person holding an office must either quit it, or think and vote exactly with Mr. Adams. Adams and Washington have since been shaping a series of these paper jobbers into judges and ambassadors, as their whole courage lies in want of shame; these poltroons, without risking a manly and intelligible defence of their own measures, raise an affected yelp against the corruption of the French Directory, as if any corruption would be more venal, more notorious, more execrated than their own. The object with Mr. Adams was to recommend a French war, professedly for the sake of supporting American commerce, but in reality for the sake of yoking us into an alliance with the British tyrant.—While such numbers of the effective agents of the Revolution languish in obscurity, or shiver in want, ask Mr. Adams whether it was proper to heap so many myriads of dollars upon William Smith, upon a paper jobber, who, next to Hamilton and himself is, perhaps, the most detested character on the continent.—You will then make your choice between innocence and guilt, between freedom and slavery, between paradise and perdition; you will choose between the man who has deserted and reversed all his principles, and that man whose own example strengthens all his laws, that man whose predictions, like those of Henry, have been converted into history. You will choose between that man whose life is unspotted by a crime, and that man whose hands are reeking with the blood of the poor, friendless Connecticut sailor: I see the tear of indignation starting on your cheeks! You anticipate the name of John Adams.—Every feature in the conduct of Mr. Adams, forms a distinct and additional evidence, that he was determined at all events to embroil this country with France. Mr. Adams has only completed the scene of ignominy which Mr. Washington began.—This last presidential felony will be buried by congress in the same criminal silence as its predecessors. Foremost in whatever is detestable, Mr. Adams feels anxiety to curb the frontier population. He was a professed aristocrat; he had proved faithful and serviceable to the British interest. Thus we see the genuine character of the president, when but in a secondary station, he censured the funding system, when at the head of affairs, he reverses all his former principles. He exerts himself to plunge his country into the most expensive and ruinous establishments. In the

two first years of his presidency, he has contrived pretences to double the annual expense of government by useless fleets, armies, sinecures and jobs of every possible description. By sending these ambassadors to Paris, Mr. Adams and his British faction designed to do nothing but mischief. In that paper with all the cowardly insolence arising from his assurance of personal safety, with all the fury, but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary, this libeller of the governor of Virginia, bawls out to arms! then to arms! It was floating upon the same bladder of popularity that Mr. Adams threatened to make this city the centrical point of a bonfire. Reader, dost thou envy that unfortunate old man with his twenty-five thousand dollars a year, with the petty parade of his birth-day, with the importance of his name sticking in every other page of the statute book. Alas! he is not an object of envy, but of compassion and of horror. With Connecticut more than half undeceived, with Pennsylvania disgusted, with Virginia alarmed, with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honest friends, he cannot enjoy the sweet slumbers of innocence, he cannot hope to feel the most exquisitely delightful sensation that ever warmed a human breast, the consciousness of being universally and deservedly beloved.—It is happy for Mr. Adams himself, as well as for his country, that he asserted an untruth. In the midst of such a scene of profligacy and of usury the president has persisted as long as he durst, in making his utmost efforts for provoking a French war. For although Mr. Adams were to make a treaty with France, yet such is the grossness of his prejudice, and so great is the violence of his passions, that under his administration America would be in constant danger of a second quarrel. When a chief magistrate both in his speeches and newspapers, is constantly reviling France, he can neither expect nor desire to live long in peace with her. Take your choice, then, between Adams, war and beggary, and Jefferson, peace and competency."

On Wednesday, May 28, a continuance was asked for by the defendant's counsel, upon the following affidavit:

"City of Richmond, ss. This day James Thompson Callender made oath before me, a magistrate of the said city, that William Gardner, Tench Coxe, Judge Bee, Timothy Pickering, William B. Giles, Stephen Thompson Mason, and General Blackburn, he believes to be material witnesses in his defence, against an indictment found against him during the present term of the circuit court of the United States for the middle circuit, Virginia district: that William Gardner aforesaid resides, he believes, in Portsmouth, in the state of New Hampshire; that Tench Coxe aforesaid resides in Philadelphia, in the state of Pennsylvania; that Judge Bee resides, the deponent hath understood, in South Carolina, but in what part of the state he knows not; that Timothy Pickering aforesaid resided of late in Philadelphia, in the state of Pennsylvania, but where he resides at this time the deponent doth not know; that William B. Giles aforesaid, he hath understood since he hath been furnished with a copy of the indictment, and since the said Giles hath left town, resides in the county of Amelia; and that Gen. Blackburn resides in the county of Bath. The said James Thompson Callender further declares, that he expects to prove by the said William Gardner, and that he verily believes that he shall prove by the said William Gardner, that the said William Gardner was commissioner of loans for the state of New Hampshire, under the government of the United States, and that he was turned out of the said office of commissioner of loans because he, the said Gardner, refused to subscribe an address circulated in the town of Portsmouth, in New Hampshire, and presented to the president of the United States in the year 1798, at the instance of several inhabitants of the said town, in which address unequivocal approbation of the conduct of the said president, in the administration of the United States, is expressed.

"(2d) That said James Thompson Callender also declares, on oath, that he verily believes that he shall prove, by the evidence of Tench Coxe aforesaid, that he, the said Tench Coxe, in the year 1798, held an important office under the government of the United States, to wit, commissioner of the revenue, from which office the said Coxe was ejected by the present president of the United States, because he did not approve the measures of his the said president's administration, or the principles on which it was conducted. That he verily believes that he shall be able to prove, by the evidence of Judge Bee, that he did receive from the president of the United States, in the year 1799, a letter, in which he the said president did advise and request the said Judge Bee, then acting in his judicial character, to deliver to the consul of the British nation in Charleston Jonathan Robbins, alias Thomas Nash, who had been apprehended and carried before the said judge on a charge of murder committed on the high seas, on board the British frigate Hermione.

"He farther deposes on oath, that he verily believes that he shall be able to prove, by the evidence of Timothy Pickering, that the president of the United States was in possession of despatches from Mr. Vans Murray, American minister in Holland, containing assurances on the part of the French Republic that ambassadors from the United States would be received in a way satisfactory to the people and government of the United States, many weeks while congress was in session, before he communicated the same to congress.

"The deponent further saith, that he verily believes that he shall be able to prove, by the evidence of Stephen Thompson Mason and William B. Giles, that John Adams, president of the United States, has unequivocally avowed, in conversation with them, principles utterly incompatible with the principles of the present constitution of the United States; principles which could not be carried into operation under any political institution without the establishment of a direct, powerful, and dangerous aristocracy; that he declared, in express terms, to the said Stephen Thompson Mason, that he had no more idea that the present federal constitution could, for any length of time, control the people of the United States, than that it could control the motion of the planets; that he also declared to the said Stephen Thompson Mason, that he had no more idea that a political society could exist without a distinction of ranks, than that an army could exist without officers; and also that he can prove, by the said William B. Giles, that the president of the United States has avowed, in conversation with him, a sentiment to this effect, that he thought the executive department of the United States ought to be vested with power to direct and control the public will. That this deponent verily believes that he shall be able to prove, by General Blackburn, that he did, on the —— day of ——, in the year 1798, receive an address from John Adams, president of the United States, in answer to the field officers of Bath county, in which the said president does avow that there was a party in Virginia which deserved to be humbled into dust and ashes before the indignant frowns of their injured, insulted, and offended country. And this deponent further saith, he is advised and believes that it is material to his defence against the indictment aforesaid, that he should procure authentic copies of sundry answers made by the president of the United States to addresses from the inhabitants of the United States, in various parts thereof, which authentic copies he cannot procure, so as to be in readiness for trial during the present term. He also saith that he is advised and doth believe, that a certain book, entitled 'An Essay on Canon and Feudal Law,' or entitled in words to that purport, ascribed to the president of the United States, and of which he believes the president is the author, is material to his defence, and that he cannot procure a copy of the same, and evidence that the said president is the author thereof, without being allowed several weeks, and perhaps months, for the purpose. He further saith that he is told by the counsel who mean to appear for him, that they cannot possibly be prepared to investigate the evidence relating to the several charges in the indictment, even if all the persons and documents wanted were upon the spot."

The motion, after having been argued by Mr. Hay and Mr. Nicholas for the traverser, and Mr. Nelson, District Attorney, for the United States, was refused by the court, but a postponement granted till the ensuing Monday.

On Monday, the 2d of June, Mr. Callender appeared in court, attended by his counsel, Mr. Nicholas, the Attorney-General of the State, Mr. Hay, and Mr. Wirt.

The traverser being called, a postponement for a few hours was asked, until it could be ascertained whether Mr. Giles would attend or not. The badness of the weather on the preceding day, it was suggested, had probably prevented his arrival in town as early as might otherwise have been expected. The judge desired to know whether the counsel for the traverser wished a postponement for a few hours only, or until the next day, as they might make their choice. The next day was preferred.

On Tuesday, the motion for a postponement until November was renewed.

Mr. Hay said that Mr. Giles had not arrived, and that he did not then expect him. Mr. Giles would, probably, presume that the indictment was either tried or continued to the day to which he was summoned, and as he had not come on that day he could not be expected at all. Mr. H. then remarked that the court had declared the evidence of Mr. Giles to be material, not only in express terms, but by a partial postponement, and inferred that the trial ought not to take place until his personal attendance could be procured.

Mr. H. then requested the attention of the court to other reasons, which satisfied his own mind, that the motion ought to be granted.

The laws and customs of the state of Virginia were in favour of the motion. In this state when an indictment for misdemeanour is found, the party is not arrested and brought into court, but a summons issues returnable to the succeeding court. In the interval the party has time to collect and prepare the materials for his defence. It was true, as to himself, that he had long ago formed a determination to appear in behalf of the first man who should be indicted in this state for a libel under the sedition law. He had formed this resolution because he was convinced, after the most mature deliberation, preceded by a calm and temperate investigation of the subject with gentlemen who differed from him in political sentiment, but were of the first characters for talents, that the second section of the sedition law was unconstitutional. But he had never supposed the trial would take place immediately after the prosecution was commenced, and therefore, though he was ready to discuss the question concerning the "rights of the jury to decide the law of the case," and the question concerning the constitutionality of the law, he was not ready to state and to comment on the evidence on which the traverser relied. This had been

already asserted to the court. But there was another point worthy of notice. He was not ashamed to acknowledge, he said, that he was but little acquainted with the doctrine of libels. Happily for the repose of people, no instance had occurred in this state which had turned the attention of professional men to that subject. In the little time, therefore, that had elapsed since the traverser had been arrested, he had not had leisure to examine a point which appeared to him to merit some consideration.

The second section of the sedition law made falsehood as well as scandal and malice an essential part of every libel, and by the last sentence the party accused is allowed to show in his justification the truth of the matter charged to be libellous.

Mr. H. said, he would not pretend to say decidedly what ought to be the construction of that law, but the opinion which he had been able to form after a very short consideration of the subject, was, that the object of the law was to punish a man, not for abuse nor for erroneous deductions or opinions, but for "fact falsely and maliciously asserted." If this idea was correct, it became a matter of consequence to do what had never been done perhaps before, to draw a line of discrimination between fact and opinion; because if the indictment contained against the traverser charges of being guilty of error in opinion as well as falsehood in fact, it was so far defective, and ought not to be regarded in preparing for a defence, or notice by the jury in assessing the fine.

Here the judge interrupted Mr. H., and told him that he was mistaken in supposing that the jury had a right to assess the fine. It may be conformable, said he, to your local state laws, but it is a wild notion as applied to the federal court. It is not the law.

Mr. H. said that he was somewhat perplexed. He could sometimes answer arguments, but not authority; however, if he was permitted to proceed, he would state his ideas about fact and opinion, and then leave the subject to the court.

Mr. Hay said, that the observations which he was about to make, were hazarded without that deliberation to which he could wish to have recourse. He was not, however, urging an argument, but praying for time to prepare one. It seemed to him, he said, that the assertion of a fact was the assertion of that which, from its nature, was susceptible of direct and positive evidence; everything else was opinion. For instance, if one man should say of another that he stole a horse, the assertion, if true, could be demonstrated to be true by proving that he did steal a horse; or if one man said of another that he was a thief, the person making the charge might support it by proving that the party accused had taken property secretly, without the consent or knowledge of the owner. About evidence in a question of this sort, all men of common understanding would form the same opinion. But what sort of evidence would be necessary to prove the first words of the indictment, that the reign of Mr. Adams had been one continued tempest of malignant passions? The circumstances to which the writer might allude, and which satisfied his mind that Mr. Adams was intemperate and passionate, would only prove to a man of different political complexion, that he was under the influence of a patriotic, honest and virtuous sensibility. When Mr. Adams said in his reply to the people of Arlington and Sandgate, "that he had long seen the exertions of dangerous and restless men misleading the understanding of well-meaning citizens, and prompting them to such measures as would sink the glories of America, and prostrate her liberties at the feet of France,"—some might conceive that he was speaking the language of passion and malignity. Many were of that opinion,—Mr. H. himself was. He did not think that Mr. Adams could point his finger to a single man who deserved a reproach so vile. It was language calculated to exasperate the rage of contending parties. On the other hand, he was willing to admit that there were men of good sense and upright principles who really believe that the president spoke the plain truth, and that they themselves had seen such men as he had described. This was a question of opinion only, and therefore was open to endless discussion.

One instance more would completely illustrate his meaning. The indictment charged the traverser with having maliciously asserted, that the president had reversed all his principles. If this assertion could be proved, it would be necessary, 1st. To show what his principles were.—2d. What they are now. The first branch of discussion presented difficulties absolutely insurmountable. Men of different political opinions, furnished with the same materials of information, would form conclusions diametrically opposite. Let them take for their guide the vindication of the constitution of the United States. Many were perfectly satisfied that the president of the United States, instead of approving the federal constitution, was of opinion, that a government composed of an hereditary chief magistrate, and senate, and a house of commons or representatives, chosen by the people, was better calculated than any other to secure the liberties and promote the happiness of the people. Mr. Hay avowed that he had no doubt that such was the opinion of the president. But others might think, and many had said, that the fair inference was, that he was cordially attached to the principles on which the constitution of the United States was constructed. What the president's principles had been, therefore, was a question, about which there would forever be a difference of opinion; and if the assertion made by the traverser was not capable of being proved or disproved, the privilege of giving the truth in evidence was a

nullity. A jury of one party would not believe it when given; a jury of the other party would not require it to be given.

Mr. Hay concluded by saying that delay was of no consequence to the traverser. Not only his little property, but his liberty was at stake. He wished to have time to defend himself by counsel who felt competent to the task which they were to perform. As to the United States at large, an immediate trial could be of no sort of consequence, nor can it be of any moment, said Mr. H., to the party who, it is said, has been libelled. The reputation of the president of the United States must for ever rest on the opinion of a virtuous and intelligent people: and standing on its mighty basis, it could never be affected by the abuse or declamation of an individual, and that individual an obscure and friendless foreigner.

Mr. Nicholas then made a few observations.[1]

We conceive that the testimony of Mr. Giles is extremely important; he will prove, as Mr. Callender has stated in his affidavit, that Mr. Adams, the president, wished that the executive had power to control the public will.

This testimony, when compared with the books of the president, will substantiate the charges in the book written by Mr. Callender. It will go strongly to a confirmation of the charges in dispute; it goes directly to that part of the indictment, where he is charged with having said, that the president is a professed aristocrat. It has been stated, that as there are nineteen charges in the indictment against the traverser, though we prove eighteen of them to be true, yet he must be found guilty, because we do not prove the truth of the nineteenth;—but how is it possible for us to defend ourselves, or how can we be prepared for trial, if the witness, by whom we can prove that particular charge, be absent? If the court think that, in order to justify ourselves, we must prove the whole libel to be true, and it shall appear that testimony to prove a particular charge is wanting, the court will afford us an opportunity of adducing it. I conceive, with submission, that the former judgment of the court, in particularly postponing the trial, admitted the evidence of Mr. Giles to be material, and that his personal attendance would be essential to justice.

Here, CHASE, Circuit Justice, informed Mr. Nicholas that he had not apprehended the opinion of the court rightly, and that although on the application of the counsel for the traverser, the court had given them the choice of postponement of the trial till to-day instead of a few hours; yet it was not meant by that indulgence, either to declare the testimony of Mr. Giles material, or to postpone the trial till another term, on account of his absence. Mr. Nicholas then urged once more the necessity of postponing the trial till Mr. Giles could attend. The question, he said, on a motion for a continuance, is, can the testimony of the absent witness substantiate the defence or the point in issue? How can it be done, if the witness be not present? When a witness, to prove the truth of a particular charge, is absent, I trust the court will give us time to avail ourselves of his evidence, and will not precipitate a trial, when a trial will not demonstrate that the decision is right; for if the defendant be found guilty when his witnesses are absent, and counsel unprepared, the verdict will not satisfy the public mind of his guilt.

Here CHASE, Circuit Justice, stopped Mr. Nicholas, and addressed the counsel for Mr. Callender, thus:—

It is wholly improper to go back to the former motion. Gentlemen, you misapprehend the intention of the court, in postponing the cause till to-day—you ought to confine yourselves to the present motion. Two reasons are assigned for postponing the trial: the first, that Mr. Giles is absent, and it is inferred, that the court, by not ruling a trial before, admitted his evidence to be material. The court did not enter into the question whether it be material or not. It appeared, that he was within a little distance of this place, and the cause was suspended till Monday, that Mr. Giles might be summoned, before that day, to attend. On Monday, you asked for a postponement of the trial for a few hours, and it was stated that, perhaps he might come in the course of the day. Instead of a few hours, you had choice of continuing it till to-day. Mr. Giles has been summoned, and does not attend. Regularly you ought to take out an attachment against him, for not attending, after having been served with the subpœna, and apprised, that his evidence was required by the traverser. There is no reason to believe he will be here during the term of the court: you do not expect him; if such excuses as these authorize a postponement of the trial, it must be evident that this cause will never be tried. It is not necessary to say whether Mr. Giles, if present, could be sworn or not; because the traverser is not entitled, on general principles, to a continuance. Another reason assigned is, that as the jury are to assess the fine, it is essential that the traverser should have the privilege of adducing testimony to mitigate it. This may be the practice in your own state courts. Your own court will be governed by your own laws; but it does not apply to the federal courts. The jury are not to regulate the fine. It is a mistaken idea; they have nothing to do with it. But it is stated that the counsel are unprepared to defend the traverser. You

[1] Here Mr. Robertson's report begins. The report in the Virginia Examiner makes Judge Chase refuse the motion directly at the close of Mr. Hay's speech. I have preferred Mr. Robertson's narrative, however, not only because he was a responsible reporter, but because his report was afterwards verified by him under oath.

show yourselves to be men of ability, and there is no difficulty in the cause; but you say that you are not ready to discuss the difference between fact and opinion: that the charges in the indictment are merely opinion, and not facts falsely asserted. Must there be a departure from common sense, to find out a construction favourable to the traverser? This construction admits the publication, but denies its criminality. If the traverser certainly published that defamatory paper, read it and consider it. Can any man of you say, that the president is a detestable and criminal man? The traverser charges him with being a murderer and a thief, a despot and a tyrant! Will you call a man a murderer and a thief, and excuse yourself by saying it is but mere opinion—or, that you heard so? Any falsehood, however palpable and wicked, may be justified by this species of argument. The question here is, with what intent the traverser published these charges? Are they false, scandalous, and malicious, and published with intent to defame? It is for the jury to say, what was the intent of such imputations, and this is sufficiently obvious. The cause must be tried. I am sworn to do justice between the United States and the prisoner at the bar. I do not dictate to you how you are to defend him, but you must defend every man according to the law; and without intending any disrespect to either of you, I must confine you to what I think the law.

The marshal was then ordered to call the jury.

Mr. Nicholas.—We mean to challenge the array and take every advantage which the laws of the country give us. In support of this doctrine, I will read a passage from "Trials per Pais." (Here he read the passage.) I believe there is testimony in court to prove that one of the jurors returned by the marshal, has expressed his sentiments hostile to the traverser. It is like a case stated in the books, where a verdict was set aside, because a juryman had previously said, that the man accused ought to be hanged; and in that case, on the second trial, every juryman was called to say, whether he had formed any opinion on the subject or not?

CHASE, Circuit Justice.—My construction of the law is quite the contrary. I have always seen triers sworn to decide these questions. How is this done in your country? Challenges for favour must be decided by triers. I suppose there must be triers sworn.

Mr. Nicholas.—I believe the books lay down this distinction. Challenges to the array are either principal challenges, or challenges for favour;—causes for principal challenges are always tried by the court; challenges for favour are always tried by triers.

CHASE, Circuit Justice.—Well, sir, your challenge is for favour, because you state the juror to be unfavourable to the traverser.

Mr. Nicholas.—This book states it as a cause of principal challenge.

CHASE, Circuit Justice.—Show me that book: it is not the best authority. Have you Coke upon Littleton in the house? If I had it we would see the whole doctrine at once. I am persuaded that Coke upon Littleton states, that challenges for favour must be decided by triers. The oath of the triers is laid down there. Challenges to the array are for partiality in the sheriff.

Coke upon Littleton being produced, and the judge having examined it, observed, the case is clear. Principal challenges to the array, or the whole jury at once, are always for partiality in the sheriff, and not in the jurors.

Mr. Nicholas said, that the law might perhaps consider the return of a partial juror, as sufficient to ground a challenge to the array, on the principle of partiality in the sheriff, and wished to know if he was correct in this idea of the law.

CHASE, Circuit Justice.—No sir, the law is not so. You must proceed regularly. You may bring in proof if you can, that any juror has delivered his opinion upon that case heretofore; or you may examine the juror himself, upon oath, to this effect. You may do either, but not both; and this alternative offered, you must consider not as a strict right.

The counsel chose to rely on the jurors themselves.

The first juror was sworn, and the judge put the following question to him: "Have you ever formed and delivered an opinion upon the charges contained in the indictment?" The juror answered, that he had never seen the indictment, nor heard it read. The judge then said, he must be sworn in chief.

Mr. Hay asked permission to put a question to the juror before he was sworn in chief. The judge desired to know what sort of a question he meant to put, and told him he must first hear the question, and if he thought it a proper one, it might be put.

Mr. Hay.—The question which, with the permission of the court, I meant to have asked, is this: "Have you ever formed and delivered an opinion on the book entitled, 'The Prospect Before Us,' from which the charges in the indictment are extracted?"

CHASE, Circuit Justice.—That question is improper, and you shall not ask it. The only proper question is, "Have you ever formed and delivered an opinion upon this charge." He must have delivered as well as formed the opinion. Such a question as you propose, would prevent the man from ever being tried—the whole country have heard the case, and very probably, formed an opinion. You might mislead men by your ingenuity, and if you were indulged in putting the question, the traverser might never be tried. He has answered, that he never saw the indictment, nor heard it read, and if he has neither read nor heard the charges, I am sure he cannot have formed or delivered an opinion on the subject.

Mr. Hay then asked, that the indictment might be read to the juror, because, perhaps,

when he heard and understood the charges, he would answer, that he had both formed and delivered an opinion upon them.

The judge replied, that the court had already indulged him as far as they could. That the answer of the juryman was explicit—that they could not go further than they had gone, and that he ought to be satisfied.

The juryman was then sworn in chief, and the issue was explained, that it must be proved that the traverser wrote or published the book—that the charges were false, scandalous and malicious, and that he wrote them with intent to defame, and that if he could prove the charges he must be acquitted. The same question, "whether they had formed and delivered an opinion on the charges against the traverser," was put by the judge, to eight of the other jurymen successively, before they were sworn in chief, and they all answered in the negative.

The counsel for the traverser said, that it was unnecessary to put this question to the other three jurymen, and they were accordingly sworn in chief immediately. The eighth juror answered, when the previous question was put to him, that though he had never read or heard the charges in the indictment, and knew not what the traverser had published, yet he had formed an unequivocal opinion, that such a book as "The Prospect Before Us," came within the sedition law. But no objection was made to him, and he was sworn like the rest.

The indictment was then read by the clerk.

Mr. Nelson, the district attorney, then said: I shall not attempt, gentlemen of the jury, to excite your passions or inflame your feelings. I shall endeavour to be cautious, and avoid uttering what ought not to be said, which may in any manner influence your judgment, upon your oath; for in that office which I hold, which is that of the people of United America, it is more than a common duty, to take care not to step beyond that line which leads to justice. To that state in which your passions shall be; to such feelings as you shall possess, after hearing the charge contained in the indictment, the evidence in support of it, and a fair statement and representation of the case, I shall leave and entrust the case. In the present state of the business, it will be proper for me to call your attention to the statute or act of congress, which relates to this case.

Here Mr. Nelson read the second and third sections of the sedition law. [Lyon's Case, Case No. 8,646, and note.]

Upon this statute James Thompson Callender is now indicted, and the indictment charges that, maliciously designing and intending to defame the president, he, James Thompson Callender, did publish the libel set forth therein, with intent to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States towards him. It will be for you, gentlemen of the jury, in this case to determine whether the traverser has, or has not, been the publisher of this paper. This point being ascertained, it will be for you to consider with what view, and for what purpose, a paper like this has been composed and published. If you believe it to be a candid and fair discussion of constitutional subjects, of real grievances, or of political opinions and principles generally, you will not consider it to be a libel within the statute. If you believe the facts and allegations averred in the paper are true, you will consider that the traverser hath defended himself according to the statute; but if, from internal evidence in the paper itself, you do not think so, you do not believe it to be a candid evidence and fair discussion of constitutional subjects, real grievances, or political opinions and principles, and that it does not contain the truth in all parts, you must find the traverser guilty. You will take the paper into your room with you, and consider it coolly and dispassionately, free, and discharged from all that you may have heard abroad respecting it, and determine in your minds whether it be possible to give it any other construction than that which the indictment has ascribed to it. To me it seems impossible that the extremest ingenuity can show that it was written for any other purpose. However, gentlemen of the jury, to you I submit the calm examination of the paper, upon the paper itself, and this business as to the libel which, or such parts of which, as are charged in the indictment, I shall lay before you, after it shall be proven by witnesses, who will be produced to show that James Thompson Callender, the traverser, did publish this paper; and, in laying it before you, I will make such observations as may seem to me proper and necessary to be made.

Mr. Hay understood that some of the witnesses who are to be examined to prove the guilt of the accused, were themselves, in the estimation of the law, equally guilty; that they have printed, though they had not written the libel in question. He would, therefore, beg leave to make it known to those who were in any degree implicated, that they are not bound to accuse themselves, and may withhold, if they think proper, such part of their evidence as has a tendency to criminate themselves.

CHASE, Circuit Justice.—This is correct. Every person concerned in the publication is protected by law from compulsion to criminate himself; but, I suppose, if any of them give his evidence, the government of the United States is pledged not to institute a prosecution against him. Of this he may be assured.

Mr. Nelson then called Wm. Duval, who said that he saw Mr. Henry Banks have the book called "The Prospect Before Us"; that Mr. Banks gave him the book to read; that the next day he saw Mr. Callender, who told him that he must pay him a dollar for the book given him by Mr. Banks; that he did

then pay the dollar for it to Mr. Callender; and that the book, he believes, contained some of the charges in the indictment.

Mr. Banks was then called.—He declared that, some time ago, he had become a subscriber to the book entitled "The Prospect Before Us," and paid the money at the time of subscription; that he lent the book to Major Duval, and sent to inform Mr. Callender, that he might get the money for it of Major Duval, and that he could get another copy himself another time; that he got from Mr. Callender the copy he delivered to Major Duval; that he never heard the traverser acknowledge that he was the author, but that his opinion upon the subject was clear.—The judge told him that his opinion was no evidence against the traverser.

Wm. Burton was next called.—He said that he purchased such a book from Mr. Pleasants (who is a bookseller as well as a printer); that he paid the money to Mr. Pleasants, and Mr. Callender was present.

Wm. A. Rind was next called.—His testimony substantially was, that a copy of the book in question, then in court, belonged to him; that, a considerable time ago, Mr. Lyon applied to them to print the National Magazine; that they entered into contract for the purpose of printing twenty-two sheets of that, or an equivalent in other work; that, after a great part of the magazine had been printed, it stopped, either for the want of paper or some other cause; that Mr. Lyon then brought "The Prospect Before Us"; that they printed four or five half-sheets of it; that the proof-sheets were sent to Mr. Callender for correction, and returned corrected in his handwriting; that Mr. Callender once corrected a proof-sheet in a large room at the office; that Mr. Callender came once to hurry the work, and said he would pay, but that he considered Mr. Lyon as paymaster; that, at Mr. Dixon's office, Mr. Callender said he would give him twenty copies if he would read one through, as he was sure it would convert him; that a small part of the manuscript remained in his possession, which he produced, then in court, and which he believed to be the handwriting of Mr. Callender. Being asked if he had ever seen Mr. Callender write, he said he had; that Mr. Callender once took the debates in the house of assembly for them.

The book and manuscript sheets were then compared, and found to correspond; this occupied some time, and the judge took some pains in examining and comparing them.

Meriwether Jones said, that he had never read the book till after the presentment was made, except a few passages, and perhaps about thirty-three pages; that not a word of it was printed at his office, though he sold some of the copies for the benefit of Mr. Callender; that he only possessed one copy (which he then showed), and which he declared he found where Mr. Callender generally kept his papers; that whenever he sold any of the books, Mr. Callender received the money; that he kept a memorandum of the money he received that he might know how much he owed him; that he could not positively say whether Mr. Callender was the author of the book or not; that he had never told him he was, though he had his opinion and belief on the subject; that he had published proposals to print the book, and, afterwards, that he had them for sale, but he did not recollect whether he published that he had them for sale for the benefit of Mr. Callender, though the fact was so; that the strongest proof he had of Mr. Callender being the author, was a conversation that he had with him respecting that part of the book where, speaking of Washington and Adams, it used the term poltroons; Mr. Callender said he alluded to some who had received appointments from them, and not to themselves.

Thos. Nicholson said, that Mr. Callender had called at his house to engage him to publish a part of the book; that he could not do it then; that he called on him the next day, accompanied by Mr. Meriwether Jones, for whom he was then engaged to print; that Mr. Jones told him that he might suspend his work, which he was then engaged in, to do Mr. Callender's; that he printed seven pages of the book, that Mr. Callender paid him for it, and he understood it was for his emolument.

John Dixon said, that he printed the greatest part of the book (about 120 pages) at the request of Mr. Lyon, and that Mr. Callender corrected the proof-sheet.

Jas. Lyon's evidence was, that he did not know that Mr. Callender was the author of the book, but that he knew him to be the publisher of it, jointly with himself; and that he probably (but he did not recollect certainly) had furnished Mr. Rind with the copy of the book; that Mr. Callender corrected the sheets from the press; that he never saw Mr. Callender writing, but supposed, from having seen the manuscript, and some writing which was (said to be) written by him, that he wrote it.

Samuel Pleasants deposed, that he had sold copies of this book; he understood that the books were sent to him from the book-binder, for Mr. Callender; that he received both the money and the subscription papers for him, and paid him the money he received; that he sold, perhaps, a hundred copies.

The oral testimony of the United States being finished, the attorney for the United States was about to point to the jury the passages in "The Prospect Before Us" corresponding with the charges in the indictment, when Mr. Hay objected to the introduction of that book.

I conceive, he said, that this book cannot be adduced in evidence, in support of the charges stated in the indictment. Perhaps my stating to the court the reasons which have led me to this conclusion, may subject me to the imputation which has more than

once fallen from the bench. It has been the pleasure of the court to observe, that the defence had been conceived and continued in error. What I am about to say will not, perhaps, induce the court to change that opinion. It is with great diffidence I address the court on a subject which I have not had sufficient leisure to investigate. If, unfortunately, my conception of this law be mistaken, I hope I shall be excused, and that the reprimand will not be severe, when it is recollected that I have had not sufficient time for a full examination of the case. The position for which I contend is, that the book entitled "The Prospect Before Us" cannot be given in evidence in support of the indictment. The title of the book is not mentioned in the indictment. It states, that "on the first day of February, one thousand eight hundred, the traverser did write, print, utter, and publish, a false, scandalous, and malicious writing against the president of the United States, of the tenor and effect following: 'The reign of Mr. Adams,' &c." In prosecutions for libels in the English courts, great strictness is observed; the difference of a single letter between the words of the indictment and those in the written or printed paper adduced in evidence, is fatal; and when "tenor and effect" are inserted, all the authorities concur in declaring, that they impose on the prosecutor the necessity of proving the very words in the indictment. The first charge in the indictment is for a libellous writing of the following tenor: "The reign of Mr. Adams has been one continued reign of malignant passions." The book which is introduced in support of this charge begins differently, and contains a hundred other pages, and many pages besides, and is not named in the indictment. The position for which I therefore mean to contend is, that when libellous passages are extracted from a book which has a name by which it can be described, it is the duty of the prosecutor to describe the book by that name; for instance, he ought, in this case, to have stated, that the party accused had published a false, scandalous, and malicious writing, entitled "The Prospect Before Us," containing, among other things, the passages complained of. There are two strong reasons to support this doctrine. The first ground on which I rest the validity of this observation is, that the practice has been invariably so. I have taken the trouble of examining fifteen or twenty cases, in all of which the books from which libellous passages were taken, had a name or title, and the prosecutor described every one of them by the name which the author had chosen to give it. From these I will select three cases, to show that the description of the libellous writing by the title given it by the author, has been deemed essentially necessary, the first of which was remarkable for the length of the title; the second, where the paper contained the libel, had a number as well as a title, and both the number and the title were recited. (Here Mr. Hay showed from a book concerning libels, that the title in those two cases, and the number in the latter of them were recited.) And the third, where the libel was published in the French language, in which case the title, though lengthy, was recited in that language, and then in English. In page 87 of the same book there is a history given of a prosecution by information against the Chevalier de On, for publishing a libel against the Count de Guerchy, ambassador from France. The prosecution was commenced in the court of king's bench. The information states the title, the name of the libel fully and literally, as it was published in French, and then states the translation in English at full length. I bring forward these cases to prove what the practice is; and it is an observation of one of the best judges that ever sat in the king's bench, Lord Holt, that "the form of pleading is evidence of what the law is." If, then, it be the practice to recite in the indictment the name, to describe the title of the book, or libel published; if this has been the invariable practice ever since the unhappy prosecutions for libels took place in that country—I believe there is no doubt but the title of this book ought to have been stated in the indictment. I have learned to think with diffidence, but I am firmly persuaded that the attorney for the United States cannot give a single case from the English books of a contrary practice: and with respect to prosecutions in the United States, I know not what the practice may be in the few instances that may have occurred. It appears, too, that substantial reasons, founded on principles of sound law, and sound justice, can be adduced in support of this practice. A principle on which I rely to explain this practice to be correct, is, that it is a universal rule of law, that if a man's words, spoken or written, be made the foundation of a charge against him, the whole should be taken together. If the whole writing charged to be libellous, be stated in the indictment, it will be in the power of the defendant to resort to other passages of the same book to explain it.—If the defendant were indicted for publishing "The Prospect Before Us," he could resort to other parts of the book for an explanation. It was the duty of the attorney for the United States to have done so; as he has omitted it, he ought to be precluded from producing it in evidence.—I will now state the other reason, in support of my objection to the admissibility of this book as evidence: It is founded on this principle which hath always prevailed, or was supposed to prevail in criminal law, that in all criminal cases, the offence should be described with all possible accuracy and precision. In felony, it is necessary to insert in the indictment the goods and chattels alleged to be stolen, as well as the name of the person to whom they belong. The reasons are furnished by the books, why this preci-

sion is deemed necessary; the first, that the defendant may know the charge against him, and be able to defend himself; the other, that he may plead the conviction or acquittal in bar of a subsequent prosecution for the same offence. Here he referred to Hawkins' Pleas of the Crown (page 322) as authority. The defendant is charged with writing and publishing a libel of "the following tenor and effect": and but very few passages are selected from the book, which bear but a very little proportion to the extent of the whole of it. I ask, how is the defendant to know whether these few passages were taken from "The Prospect Before Us," or from some newspaper, in which they have been republished by some person, for whose conduct he was not responsible? Unless the charge be accurately specified, it is impossible for him to defend himself. In support of this indictment, evidence as to either case might be brought forward.—If in the indictment he had been charged with publishing a book, entitled "The Prospect Before Us," he would have known with an absolute certainty and demonstration, (by the copy with which he had been furnished,) what was meant to be proved against him, and what was necessary for him to prove in his own vindication; as this is not the case, and as he was not bound to know whether the passages were taken from the book or a newspaper, containing extracts from it, in the publication of which he had no concern, and for which he is under no responsibility, he ought to be sheltered by law from this evidence, which is attempted to be introduced against him. The second reason has made a great impression on my mind, and yet retains its influence. I conceive, that one writing against the president, containing fifty libellous passages, if published at the same time, can be but one act, and if there be but one act, there can be but one prosecution; if the present indictment had mentioned the title of the book, and the very passages relied on as parts of this book, the decision of this jury and this court which is about to be pronounced in this case, might be pleaded in bar to any subsequent indictment, for the same or any other passages in the same book. It is no argument to say, that there will be no subsequent prosecution; in times like these, it is impossible to predict what may be attempted, and if such a prosecution were to take place, I should not be more surprised than I am at present. If the title of the book had been inserted in this indictment, and a subsequent indictment were to be brought forward, I know that the defendant would plead in bar, that he had been formerly convicted or formerly acquitted; and the production of the record alone would protect him; but if the title of the book is not to be recited, the record will not be conclusive, and a second prosecution may take place: for the second indictment, compared with the present record, will contain no internal evidence, that the traverser had been formerly tried for the same offence, but he must resort to oral testimony, to prove that this book had been given in evidence against him at a former trial; and he might not be able to procure witnesses, whose testimony would be sufficient to establish this point. These are the reasons which induce me to think that this book ought not to be admitted to go in evidence to support the charges in the indictment. This principle has a considerable operation in questions of private property. In an action of debt, if a bond or writing be the ground of the action; if there be the most minute variance between the bond or writing stated in the declaration, and that which is adduced in evidence in support of it, the party must suffer a nonsuit. If this precision and minute attention to accuracy be required in actions of property between man and man, is it not infinitely more important that the same principles should govern in criminal cases? If the argument be good in one case, it appears to be irresistible and omnipotent in the other.

Here CHASE, Circuit Justice, requested Mr. Hay to point out these parts of the authorities referred to, on which he relied to establish his doctrine.

Mr. Hay.—If the court will have a little patience I will find the places.

CHASE, Circuit Justice.—I will have a great deal.

Mr. Hay.—The authorities I rely on are, Hawkins' Pleas of the Crown (page 322), and Salkeld's Reports (page 660). In this last book it is adjudged that when an indictment uses the words "secundum tenorem et effectum," it binds the prosecutor to a literal recital; and any the least variance between the charge in the indictment and evidence offered to support it is fatal. The case I here refer to was an information for a libel: "In which libel were contained divers libellous matters secundum tenorem et effectum, and in setting forth a sentence of the libel, it was recited with the word 'nor' instead of the word 'not,' but the sense was not altered thereby. The defendant pleaded not guilty, and this appearing upon evidence, a special verdict was found, and the court held that the word 'tenor,' imports, a 'true copy,' and that the variance was fatal; for 'not' and 'nor' are different; different grammar, and different in sense; and Powys' Justice held as to the point where literal omissions, &c. would be fatal; that where a letter omitted or changed makes another word, it is a fatal variance; otherwise where the word continues the same; and in the principal case no man would swear this to be a literal copy." It appears from well established authorities that the words "in manner and form following," do not bind the prosecutor to recite exactly, but the word "tenor" hath so strict a technical meaning, that it binds him to a literal copy. These principles certainly apply to the case before the court. The words

"tenor and effect following" are stated, and the evidence is variant.

Here CHASE, Circuit Justice, interrupted Mr. Hay, and spoke to this effect: You are certainly mistaken in your statement of the law, as applied to the case now before the court. In the cases you mention there is really a variance between the indictment and the evidence. Your objection is, that there is a variance between the thing charged in the indictment and the writing offered in evidence. But this case is very different; there is no variance. To ascertain this point I will state the indictment, and compare it with the law on which the prosecution is founded. The indictment charges, that the traverser, "maliciously intending to defame the president of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously write, print, utter and publish, a false, scandalous and malicious writing, against the president of the United States, of the tenor and effect following, that is to say: 'The reign of Mr. Adams has hitherto been one continued tempest, &c.' Now what is the law? The act of congress provides among other things that, 'if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, any false, scandalous and malicious writing or writings, against the government, or either house of the congress, or the president of the United States, with intent to defame the said government, or either house of congress, or the said president, or to bring them, or either or any of them, into contempt or disrepute, or to excite against them the hatred of the good people of the United States, &c.'" The indictment charges the defendant with publishing a false, scandalous and malicious writing against the president, and the law provides against the publication of false, scandalous and malicious writings against the president.—The offences stated in the indictment correspond with those expressed in the law; the question then is, whether the name of the book in which such false, scandalous and malicious writings are published, must be recited in an indictment against an offender? It brings it to this point—Is it necessary that the title of the publication should be examined before it can be ascertained that it comes within the law? Any false, scandalous and malicious writing published with intent to defame, is provided against by law, whatever may be its title or name, or whether it have any name or not. I know that cases can be produced where the title of the libel is recited in the indictment. I remember one case where a man was indicted for publishing a libel called "The Nun in her Smock;" but it was not necessary to mention the title of the libel in that case, nor is it essential in any. Why is it necessary that every charge against a defendant should be explicit? It is that he may clearly comprehend it, and be prepared to make his defence: it is not necessary for this purpose to recite the name of the libel. The charge against the traverser is very explicit, and he well understands and is prepared to defend it; but it is no censure on his counsel that they urge this argument in his favour. You argue further, on a supposition, that if a subsequent prosecution were to be instituted for the same offence, the verdict and judgment now to be rendered could not be pleaded in bar. It requires very little legal ability to demonstrate that the title need not be recited; and it is equally easy to prove that the decision in this case may be pleaded in bar of any other prosecution for the same offence. The attorney for the United States must prove that the traverser did publish a false, scandalous and malicious writing, with intent to defame the president. This can be done without reciting the title; and if he supports by the evidence any entire charge—if he proves that the traverser did publish any false, scandalous and malicious writing, it will be sufficient to support the indictment as to that charge, but he must be acquitted of the other charges: and the charges of which he may be found guilty, can be easily compared to charges in any subsequent indictment. This is quite different from the cases where there is an actual variance between the paper charged, and the paper offered in evidence. I understand that difference to be, that where the prosecutor undertakes to say that certain precise words have been published, he must establish them; but when he states words of the tenor and effect following, he will only be obliged to prove the substance;[2] but you insist that the whole original, including the title, must be copied in the indictment verbatim et literatim. I wonder you did not add et punctuatim also. There is no real variance, and there is an end of the objection. You are mistaken.—I pronounce this to be the law, and I shall instruct the jury, that they may find the traverser guilty of part of the charges, and acquit him of such as are not proved.

CHASE, Circuit Justice, then informed the attorney for the United States, who was about to rise to prove the admissibility of the book as evidence, that it was unnecessary for him to make any reply, and there was no good reason to exclude it; that all

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2 This position, notwithstanding the boisterous way in which it is laid down, is incorrect. There must be always at common law an exact recital of the alleged libellous matter, unless in the indictment itself the pleader excuses himself from so doing on the ground of the destruction of the instrument, or its possession by the defendant. See the authorities collected in Whart. Prec. of Ind. 545. "Tenor and effect" exacts a literal recital. Ford v. Bennett, cited 1 Ld. Raym. 415; Rex v. Bear, 2 Salk. 417. At the same time, Mr. Hay's position, that the title must be set out, is not sustained by the authorities, though it is clear that in knocking it down, Judge Chase knocked down nearly the whole law of libels besides.

that was necessary to be done on the part of the United States was to prove the charges to be true, and the book called "The Prospect Before Us" was good evidence to support it.

Mr. Nelson.—Although the paper is long and complicated, the testimony is not so. The testimony, as I stated to you before, is concise, plain, and correct. If there be a man who, now that he has heard that testimony, entertains a doubt whether this libel was published by the traverser, it will be useless for me to address him; if there be a man who doubts on that point, his mind must be imperviable to the traits of truth; his mind must be panoplied o'er with doubt, skepticism and prejudice. If no doubt remain on this point, the question first in order to be examined is decided: whether there be room for doubt, a summary review of the testimony will ascertain. Can there be a doubt —when all the witnesses have concurred in establishing this one point — that James Thompson Callender corrected the proof-sheets? Can there be a doubt, when those who sold the copies of the book have all said that they sold them for his benefit, and that he received the money? When it has been proved that he received the money from one purchaser himself, and that he paid for printing part of it—that part of the manuscript is in his own hand-writing—can there be any doubt?—And when, in addition to this, one witness declares that he knew him to be a joint publisher with himself, and another witness declared, that he explained the meaning of a certain term, supposed to be ambiguous in its application, is it possible to entertain any doubt? Thus stands the evidence as to the publication. It will be proper for me, gentlemen of the jury, to state to you what is a publication in point of law, as to writing or printing: that the direct or indirect circulation or emission of a libel, is a publication thereof, in law and in fact, has never been questioned in a court of law. If it appears to you that James Thompson Callender did not directly or indirectly emit or circulate this paper, then is he not the publisher thereof; if he be not the publisher directly nor indirectly thereof, then ought he to be acquitted: and if he be the publisher, and the intention thereof be not criminal, that is, if the matter therein contained be not false, scandalous and malicious, still ought he to be acquitted; but if he be the publisher, and the matter be libellous, that is, false, scandalous and malicious, the intention must be wicked and criminal, and you must find him guilty. For the questions you are to try, gentlemen of the jury, are: Was this paper published by the traverser? Was the intention criminal? that is, is the matter false, scandalous and malicious? The evidence which you have heard ascertains the first question, and an examination of the paper, or such parts of it as are laid in the indictment, will decide the second question. Whether your hearts are at ease—whether your passions are untouched—whether your feelings are unaffected, now that you have fully heard the charge, you best know. It remains only now for me, gentlemen of the jury, to call upon you, in the name of your country, whose interest you are to defend whilst you protect the rights of the individual. I call upon you in the name of your God, a portion of whose justice you are about to administer, and on your oaths, uninfluenced by favour, partiality, prejudice or affection, to discharge your duty to your God, to your country, and to yourselves.

Here Mr. Nelson read the first charge in the indictment, and proceeded to comment at great length upon the libellous passages, sentence by sentence. I have told you, he closed by saying, and again repeat, that it is the peculiar privilege of every citizen of this happy country to place confidence in whom he pleases, and at the constitutional periods of making new elections, to withdraw his confidence from a former representative, and place his trust in another; and even expatiate on the virtues of the new candidate; but this does not warrant him to vilify, revile, and defame another individual, who is a candidate. Cannot a good thing be said of one individual, without saying black and damnable things of another? Is it necessary, in order to recommend one man to the presidential office, that you should charge another with bringing on his country war and beggary? The whole forms a perfect chain of malice, falsehood, and slander. Thus have I made, gentlemen of the jury, a calm, uncoloured statement of facts. I have not highly varnished, nor have said anything but what is consistent with truth. What impression the evidence or charge may have made on your minds, whether your feelings be affected, you and each of you know best. It remains only now for me, gentlemen of the jury, to remind you, that you are not only to protect the interests of your country, but to defend the rights of that individual; and in the name of God and of your country, I call upon you to discharge your duty to both and to yourselves.

The attorney for the United States having concluded, the counsel for the traverser introduced Colonel John Taylor (of Carolina county) as a witness, and he was sworn; but at the moment the oath was administered, the judge called on them, and desired to know what they intended to prove by the witness. They answered that they intended to examine Colonel Taylor to prove that he had avowed principles in his presence which justified Mr. Callender in saying that the president was an aristocrat; that he had voted against the sequestration law, and the resolutions concerning the suspension of commercial intercourse with Great Britain, by which he defeated every effort of those who were in favour of those beneficial measures which were well calculated to promote the happiness of their country.

The judge demanded a statement in writing of the questions intended to be put to the witness.

Mr. Nicholas remarked, that the traverser was at least entitled to every indulgence which had been shown to the attorney for the United States; that this requisition had not been made of the attorney, when he introduced witnesses on behalf of the United States, nor was it according to the practice of the state courts; that he wished the witness to state all he knew that would apply to the defence of his client; that he did not know what the witness would precisely prove, but that if the court insisted upon it, he would furnish a statement of the questions which he should first propound, but requested that he might not be considered as confined, in the examination of the witness, to the questions so stated.

CHASE, Circuit Justice.—It is right to state the questions intended to be propounded to witnesses, in all cases, and the reason is extremely plain. Juries are only to hear legal evidence, and the court are the only judges of what is or is not legal evidence, to support the issue joined between the parties. To say that you will correct improper evidence, after it shall have been given, is improper, because illegal evidence, once heard, may make an undue impression, and, therefore, ought not to be heard at all by the jury; and the attorney for the United States had, in opening the cause, stated the purpose for which he introduced the witnesses.

CHASE, Circuit Justice, having received a statement of the questions meant to be put,[3] and which were propounded by Mr. Nicholas, declared Colonel Taylor's evidence to be inadmissible. No evidence, said the judge, is admissible that does not go to justify the whole charge. The charge you mean to justify by this witness, as I understand you, is, that the president is a professed aristocrat, and that he has proved serviceable to the British interest. You must prove both these points, or you prove nothing. Now as you do not attempt to prove the whole of one specific charge, but only a part of it, your evidence cannot be received; this is the law, both in civil and criminal cases; he who justifies, must justify an entire charge, or else his defence does not amount to a justification in law. You have not proved the truth of any particular charge, though in order to excuse it, you must prove the whole; to prove the truth of a part only, is not proving what is material. The attorney proposed to prove his indictment. He has exhibited his oral and written testimony to prove it. The traverser excuses himself from the imputed guilt, by averring that part of some of the charges is true. Is this evidence proper when the whole charge is in issue? If it be, the proof of a very trivial part of an important indictment would excuse from the whole; but I pronounce the law to be otherwise, and take the responsibility on myself, and risk my character on it. It may be said that this will preclude the party from the privilege of his testimony; but this will only be a misrepresentation, it precludes them from no legal benefit. My country has made me a judge, and you must be governed now by my opinion, though I may be mistaken; but if I am not right, it is an error in judgment, and you can state the proceedings on the record so as to show any error, and I shall be the first man to grant you the benefit of a new trial by granting you a writ of error in the supreme court. It is on these grounds that I reject the evidence of the gentleman. The very argument assigned by the young gentleman who spoke last, has convinced my mind that I am right. The offered testimony has no direct and proper application to the issue; it would deceive and mislead the jury; an argumentative justification of a trivial, unimportant part of a libel, would be urged before a jury as a substantial vindication of the whole. You would, by misleading the jury under such illegal testimony, destroy public treaties and public faith; and nothing would be more uncertain than law, were such an illegal excuse admitted in courts of law.

Mr. Nicholas suggested that it might be proper to prove one part of a specific charge by one witness, and another part by another, and thereby prove the charge.

CHASE, Circuit Justice, in answer, repeated some of his former arguments, and added, that the very argument suggested by the young gentleman who spoke last, convinced his mind that it would be improper to admit the testimony now offered to the court; that to admit evidence, which went to an argumentative establishment of the truth of a minute part of the charge by one witness, and another minute part by another witness, would be irregular, and subversive of every principle of law; that it had no relation to the issue; that it was a popular argument, calculated to deceive the people, but very incorrect.

Here GRIFFIN, District Judge, being called upon by CHASE, Circuit Justice, to deliver his opinion on the question before the court, declared that he concurred with his brother judge.

CHASE, Circuit Justice, then observed: This is a new doctrine, inculcated in Virginia. You have all along mistaken the law, and press your mistakes on the court. The United States must prove the publication, and the fallacy of it. When these things are done,

[3] Ques. 1st. Did you ever hear Mr. Adams express any opinion favourable to monarchy and aristocracy: and what were they? Ques. 2d. Did you ever hear Mr. Adams, whilst vice president, express his disapprobation of the funding system? Ques. 3d. Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration law, and the bill for suspending commercial intercourse with Great Britain?

you must prove a justification, and this justification must be entire and complete, as to any one specific charge; a partial justification is inadmissible. I am happy to find that my brother Judge GRIFFIN concurs with me in opinion.

The counsel for the traverser again desired to be heard on the subject.

Mr. Hay spoke thus: The question before the court is, whether this evidence goes to prove the truth of the whole charge? The opinion given by the court I understand to be, that evidence cannot be produced by the traverser to prove the truth of a part of a charge; but if evidence could be adduced to prove the whole, then such evidence would be admissible. One specific charge is twofold; that the president is an aristocrat; and that he proved serviceable to the British interest. The evidence, we suppose, will support this charge; we wish to prove the truth of the whole charge if we can, though I do not know that it is in our power. The evidence, we have reason to believe, goes first to prove that he is an aristocrat, and secondly, that he did prove serviceable to the British interest; if the testimony will in fact prove these two points, whatever may be the opinion of the court, I do not hesitate to say that, in my estimation, it will fully excuse and justify the traverser; if we can prove that the president has avowed aristocratical sentiments in conversation, and that he did in reality prove faithful and serviceable to the British interest, the traverser must be acquitted of this charge. As to the first part, I can prove by the words of Mr. Adams, published by himself, in his book called "A Defence of the American Constitution," that he thinks a government of three parts, a king, lords, and commons, the best in the world. Suppose, in addition to this, it could be proved that a law passed the house of representatives of the United States, to sequester British property; and suppose that one-half the senate of the United States were in favour of it; and that the policy of passing the law was advocated by the best and wisest men in this country, who have the same pretensions to patriotism and virtue that Mr. Adams has, but that its passage was prevented by the casting vote of Mr. Adams as speaker of the senate, would not the traverser be justified as to this charge? Would it not demonstrate that he proved serviceable to the British interests? By the answers to the first and third questions we expect to prove both these points.

Here Mr. Nelson objected to the introduction of such testimony, as being altogether inadmissible; that gentlemen ought to reflect that, if such evidence as this was to be received, any other testimony, however irregular or improper, might also be admitted; and, particularly, that it would be a departure from the universal principle of law, which required the production of the best testimony which the nature of every case admitted, and that the journals and records of congress were the best evidence of what votes had been given on any subject discussed before that body.

CHASE, Circuit Justice, then addressed himself to Mr. Nelson thus: Being very much pressed, by the young gentlemen who defend the traverser, to admit this testimony, I was going to recommend to you to permit those questions to be put to the witness, though they are certainly irregular. I wish you could consent that they should be propounded.

Mr. Nelson declared that he did not feel himself at liberty to consent to such a departure from legal principles.

Mr. Wirt then rose and addressed the jury. —He premised that the situation of the defendant and his counsel was extremely embarrassing; that as Mr. Callender had been presented, indicted, arrested and tried, during this term, he had not been able to procure the testimony essential to his defence, nor was his counsel prepared to defend him; and he insinuated that the conduct of the court was apparently precipitate, in not postponing the trial until the next term.

CHASE, Circuit Justice, told him he must not reflect on the court.

Mr. Wirt said, that his object was not to reflect on the court, but to apologize to the jury for the weakness of a defence which he was about to make.

After observing that his apology included the very reflection he denied, the court told him to proceed in his cause.

Mr. Wirt.—Gentlemen of the jury, I am prevented from explaining to you the causes which have conspired to weaken our defence, and it is no doubt right that I should be prevented, as the court have so decided. Permit me, then, gentlemen, to pass on abruptly to the law, under which we are indicted. You will find that a material part of your inquiry will relate to the powers of a jury over the subject committed to them, whether they have the right to determine the law, as well as the fact. In Virginia, an act of the assembly has adopted the common law of England; that common law, therefore, possesses in this state all the energy of a legislative act. By an act of congress, the rules of proceedings in the federal courts, in the several states, are directed to conform to the rules of the states in which such court may be in session; by that act of congress, it is therefore provided, that the practice of the courts of Virginia shall be observed in this court: to ascertain your power, therefore, as a jury, we have only to refer to the common law of England, which has been adopted in the laws of this state, and which defines the powers of juries in the state courts. By the common law of England, juries possess the power of considering and deciding the law as well as the fact, in every case which may come before them. I have no doubt but I shall receive the correction of the court, if I am

wrong in these positions. If, then, a jury in a court of the state would have a right to decide the law and the fact, so have you. The federal constitution is the supreme law of the land; and a right to consider the law, is a right to consider the constitution: if the law of congress under which we are indicted, be an infraction of the constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oaths.

Here CHASE, Circuit Justice—Take your seat, sir, if you please. If I understand you rightly, you offer an argument to the petit jury, to convince them that the statute of congress, entitled, "An act, &c.," commonly called the "Sedition Law," is contrary to the constitution of the United States and, therefore, void. Now I tell you that this is irregular and inadmissible; it is not competent to the jury to decide on this point; but if you address yourselves, gentlemen, to the court, they will with pleasure hear any reasons you may offer, to show that the jury have the right contended for. Since I came into the commonwealth, I understood that this question would be stirred, and that the power of a jury to determine the validity or nullity of a law would be urged. I have, therefore, deliberately considered the subject, and I am ready to explain my reasons for concluding that the petit jury have not a right to decide on the constitutionality of a law, and that such a power would be extremely dangerous. —Hear my words: I wish the world to know them,—my opinion is the result of mature reflection.

(Here the judge then read part of a long opinion, to show that the jury had not the right contended for; after which, he told the counsel for the traverser, that he would hear with pleasure any arguments which could be urged to show that he was mistaken.)

Mr. Wirt.—I shall state to the court, in a few words, the reasons which have induced me to ascribe this right to the jury. They are sworn to give their verdict according to the evidence, and the law is evidence; if the jury have no right to consider the law, how is it possible for them to render a general verdict? Suppose, for example, an indictment for murder—how can the jury pronounce a verdict of guilty, or not guilty, if they have not the right as well of ascertaining whether the facts have been committed, as whether they amount to a breach of law? This doctrine is too clearly established to require the aid of authorities.

CHASE, Circuit Justice.—No man will deny your law—we all know that juries have the right to decide the law, as well as the fact—and the constitution is the supreme law of the land, which controls all laws which are repugnant to it.

Mr. Wirt.—Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.

CHASE, Circuit Justice.—A non sequitur, sir.

Here Mr. Wirt sat down.

Mr. Nicholas then addressed the court. I am so much under the influence of duty that, though I am in the same situation with the gentleman who preceded me, and though the court seem to be impressed with the opinion, that the jury have no right to determine on the constitutionality of an act of congress, yet, arduous as the task may be, I shall offer a few observations to show that they have this right. I intend to defend Mr. Callender by the establishment of two points. First, that a law contrary to the constitution is void; and, secondly, that the jury have a right to consider the law and the fact. First, it seems to be admitted on all hands, that, when the legislature exercise a power not given them by the constitution, the judiciary will disregard their acts. The second point, that the jury have a right to decide the law and the fact, appears to me equally clear. In the exercise of the power of determining law and fact, a jury cannot be controlled by the court. The court have a right to instruct the jury, but the jury have a right to act as they think right; and if they find contrary to the directions of the court, and to the law of the case, the court may set aside their verdict and grant a new trial.

CHASE, Circuit Justice.—Courts do not claim the right of setting aside the verdict in criminal cases.

Mr. Nicholas.—From this right of the jury to consider law and fact in a general verdict, it seems to follow, that counsel ought to be permitted to address a jury on the constitutionality of the law in question;—this leads me back to my first position, that if an act of congress contravene the constitution of the United States, a jury have a right to say that it is null, and that they will not give the efficacy of a law to an act which is void in itself; believing it to be contrary to the constitution, they will not convict any man of a violation of it: if this jury believed that the sedition act is not a law of the land, they cannot find the defendant guilty. The constitution secures to every man a fair and impartial trial by jury, in the district where the fact shall have been committed: and to preserve this sacred right unimpaired, it should never be interfered with. If ever a precedent is established, that the court can control the jury so as to prevent them from finding a general verdict, their important right, without which every other right is of no value, will be impaired, if not absolutely destroyed. Juries are to decide according to the dictates of conscience and the laws of the country, and to control them would endanger the right of this most invaluable mode of trial. I have understood that some reliance would be placed on two decisions of the courts of this state, in which they determined two acts of our legislature to be unconstitutional; but when we come to analyze these decisions, they will not authorize the belief that the jury have not the

right I contend for—they only prove that the judiciary can declare legislative acts to be unconstitutional; they do not prove that a jury may not have a similar power. In the case of Kamper v. Hawkins [1 Va. Cas. 20] they refused to carry into effect a law which gave the district courts a right to grant injunctions in certain cases, because they thought it unconstitutional, and that the courts had no power to act under the law: that case did not turn on a relative view of the power and connection of a court and jury, it was a question whether the courts would exercise a particular jurisdiction, and carry into effect that act as practiced by the judges in chancery; but they never decided that a jury had not a right to determine on the constitutionality of a law, nor could a question about this right have arisen in those two cases; the court said that the judiciary were not bound to carry into effect an unconstitutional law. I do not deny the right of the court to determine the law, but I deny the right of the court to control the jury; though I have not bestowed a very particular attention on this subject, I am perfectly convinced that the jury have the right I contend for; and, consequently, that counsel have a right to address them on that subject. The act of congress to which I have alluded, appears to have given to the jury the power of deciding on the law and the fact; and I trust, that when this whole question comes into consideration, the court will suffer the counsel for the traverser to go on to speak to the jury, subject to the direction of the court.

Mr. Hay rose, after Mr. Nicholas concluded, and observed that he was prepared to address the court on the extent of the powers of the jury in the case at bar. The arguments, said he, which I shall urge, I shall address to the court, not wishing to be heard by the jury, or to be attended to by the numerous auditory now present. A question of great importance depends on this decision; much of the public happiness, of the public peace, of the public liberty, depend on the final decision which shall be pronounced on this subject. I entertained doubts at first; but a calm and dispassionate inquiry, and the most temperate investigation and reflection, have led me to believe and to say, that the jury have a right to determine every question which is necessary to determine, before sentence can be pronounced upon the traverser. I contend that the jury have a right to determine whether the writing charged in the indictment to be false, scandalous and malicious, be a libel or not. If this question should be decided in the affirmative by the court, I shall endeavour to convince the jury that it is not a libel, because there is no law in force under the government of the United States, which defines what a libel is, or prescribes its punishment. It is a universal principle of law, that questions of law belong to the court, and that the decision of facts belongs to the jury; but a jury have a right to determine both law and fact in all cases.

Here Judge CHASE asked Mr. Hay whether he meant to extend his proposition to civil as well as criminal cases, and told him that if he did, the law was clearly otherwise.

Mr. Hay answered, that he thought the proposition universally true, but it was only necessary for him to prove it to be true in cases of a criminal nature.

Judge CHASE again interrupted Mr. Hay, and briefly expressed his opinion of the law. And then Mr. Hay folded up and put away his papers, seeming to decline any further argument.

Judge CHASE requested him to continue his argument, and added—"Please to proceed, and be assured that you will not be interrupted by me, say what you will."

Mr. Hay refused to proceed.

Judge CHASE observed, that though he thought it his duty to stop the counsel when mistaking the law, yet he did not wish to interrupt them improperly; that there was no occasion to be captious; and concluded thus, "Act as you please, sir."

Judge CHASE then proceeded.[4] "I will assign my reasons why I will not permit the counsel for the traverser to offer arguments to the jury, to urge them to do what the constitution and law of this country will not permit; and which, if I should allow, I should, in my judgment, violate my duty, disregard the constitution and law, and surrender up the judicial power of the United States, that is, the power intrusted by the constitution to the federal courts, to a petit jury, in direct breach of my oath of office. The indictment charges that the traverser, on the 1st day of February, 1800, designing and intending to defame the president of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously write, print, utter, and publish (or did cause or procure to be printed and published), a false, scandalous, and malicious writing, against the said president of the United States, of the tenor and effect stated in the indictment. On examining the indictment, it appears, that twenty separate and distinct sets of words are set forth therein, as allegations or charges against the traverser. He has plead "not guilty" to all of them. To support this indictment on behalf of the government of the United States, it must be proved to the jury; first, that the traverser did write, print, utter or publish, or did cause or procure to be printed or published, a false and scandalous writing against the president of the United States; secondly, that the said writing is false, scandalous, and malicious; and thirdly, that it was pub-

[4] "This charge was taken from the manuscript copy from which the judge read, the rest of the proceedings being taken in shorthand."

lished with intent to defame the president, &c., as stated in the statute and charged in the indictment. If these three facts shall be established to the satisfaction of the jury, they must find the traverser guilty, generally, unless he can prove to them the truth of the matter contained in the publication, in which case, the statute on which the traverser is indicted excuses him. If all the twenty sets of words, stated in the indictment as charges against the traverser, shall not be proved against him; or if he can prove that any of them are true, the jury will acquit him of such of them as shall not be established against him, and also of such of them as he can prove to be true; and they will find him guilty of the residue.

These inquiries, on behalf of the government of the United States, and on the part of the traverser, are proper for, and within the jurisdiction and the terms of the oath of the petit jury, who have been sworn "that they will well and truly try the issue joined between the United States and the traverser at the bar, and a true verdict give according to their evidence." The issue joined, therefore, is, whether the traverser is guilty of the several offences charged in the indictment; and to this issue no evidence is admissible (on the part of the government, or of the traverser) but what is pertinent or applicable to it. The petit jury, to discharge their duty, must first inquire, whether the traverser committed all or any of the facts alleged in the indictment to have been done by him, some time before the indictment. If they find that he did commit all or any of the said facts, their next inquiry is, whether the doing such facts have been made criminal and punishable by the statute of the United States, on which the traverser is indicted. For this purpose, they must peruse the statute, and carefully examine whether the facts charged and proved are within the provisions of it. If the words that create the offence are plain and intelligible, they must then determine whether the offence proved is of the species of criminality charged in the indictment; but if the words are ambiguous or doubtful, all construction should be rejected. The statute, on which the traverser is indicted, enacts "that the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases." By this provision, I understand that a right is given to the jury to determine what the law is in the case before them; and not to decide whether a statute of the United States produced to them, is a law or not, or whether it is void, under an opinion that it is unconstitutional, that is, contrary to the constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law; and whether they amount to the offence described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law. To decide what the law is on the facts, is an admission that the law exists. If there be no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them.

The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. To determine the validity of the statute, the constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the constitution, is prohibited by it expressly, or by necessary implication. Was it ever intended, by the framers of the constitution, or by the people of America, that it should ever be submitted to the examination of a jury, to decide what restrictions are expressly or impliedly imposed by it on the national legislature? I cannot possibly believe that congress intended, by the statute, to grant a right to a petit jury to declare a statute void. The man who maintains this position must have a most contemptible opinion of the understanding of that body; but I believe the defect lies with himself. If any one can be so weak in intellect as to entertain this opinion of congress, he must give up the exercise of the power, when he is informed that congress had no authority to vest it in any body whatsoever; because, by the constitution, (as I will hereafter show,) this right is expressly granted to the judicial power of the United States, and is recognized by congress by a perpetual statute. If the statute should be held void by a jury, it would seem that they could not claim a right to such decision under an act that they themselves consider as mere waste paper. Their right must, therefore, be derived from some other source.

It appears to me that all the rights, powers, and duties of the petit jury, sworn in this cause, can only be derived from the constitution, or statutes of the United States made agreeably to it; or from some statute of this commonwealth not contrary to the federal constitution or statutes of congress; or from the common law, which was adopted by the federal constitution in the case of trials by jury in criminal cases. It never was pretended, as I ever heard, before this time, that a petit jury in England (from whence

our common law is derived,) or in any part of the United States ever exercised such power. If a petit jury can rightfully exercise this power over one statute of congress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed on the exercise of such power; it must rest in discretion only. If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control. The power to abrogate or to make laws nugatory, is equal to the authority of making them. The evident consequences of this right in juries will be, that a law of congress will be in operation in one state and not in another. A law to impose taxes will be obeyed in one state, and not in another, unless force be employed to compel submission. The doing certain acts will be held criminal, and punished in one state, and similar acts may be held innocent, and even approved and applauded in another. The effects of the exercise of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to dissolve the union of the United States, on which, under Divine Providence, our political safety, happiness, and prosperity depend.

No citizen of knowledge and information, unless under the influence of passion or prejudice, will believe, without very strong and indubitable proof, that congress will, intentionally, make any law in violation of the federal constitution, and their sacred trust. I admit that the constitution contemplates that congress may, from inattention or error in judgment, pass a law prohibited by the constitution; and, therefore, it has provided a peaceable, safe, and adequate remedy. If such a case should happen, the mode of redress is pointed out in the constitution, and no other mode can be adopted without a manifest infraction of it. Every man must admit that the power of deciding the constitutionality of any law of the United States, or of any particular state, is one of the greatest and most important powers the people could grant. Such power is restrictive of the legislative power of the Union, and also of the several states; not absolute and unlimited, but confined to such cases only where the law in question shall clearly appear to have been prohibited by the federal constitution, and not in any doubtful case. On referring to the ninth section of the first article of the constitution, there may be seen many restrictions imposed on the powers of the national legislature, and also on the powers of the several state legislatures. Among the special exceptions to their authority, is the power to make ex post facto laws, to lay any capitation, or other direct tax, unless in proportion to the census; to lay any tax or duty on articles exported from any state, &c. &c. It should be remembered that the judicial power of the United States is co-existent, co-extensive, and co-ordinate with, and altogether independent of, the federal legislature, or the executive. By the sixth article of the constitution, among other things, it is declared that the constitution shall be the supreme law of the land. By the third article, it is established "that the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as congress may from time to time ordain and establish; and that the judicial power shall extend to all cases in law and equity, arising under the constitution and laws of the United States."

Among the cases which may arise under the constitution, are all the restrictions on the authority of congress, and of the state legislatures. It is very clear, that the present case arises under the constitution, and also under a law of the United States, and therefore it is the very case to which the constitution declares the judicial powers of the United States shall extend. It is incontrovertible that the constitution is the supreme law, and therefore, it must be the rule by which the federal and state judges are bound to regulate their decisions. By the sixth article of the constitution, it is provided (among other things) that all members of congress, and of the several state legislatures, and all judicial officers of the United States, and of the several states, shall be bound by an oath or affirmation to support the constitution. By this provision, I understand that every person, so sworn or affirmed, promises that he will preserve the constitution as established, and the distribution of powers thereby granted; and that he will not assent to any amendment or alteration thereof, but in the mode prescribed in the fifth article; and that he will not consent to any usurpation by any one branch of the legislature upon the other, or upon the executive, or by the executive upon either branch, or by any department or officer of government, of the power granted to another; or that the power granted to either shall be exercised by others. I also understand by this engagement, that the person taking it, promises also that he will oppose by his example, argument, advice, and persuasion, and by all other means in his power, force only excepted, any design, advice or attempt to impair or destroy the constitution. If this exposition of this solemn obligation is substantially correct, I cannot believe that any person having the same understanding of it, will maintain that a petit jury can rightfully exercise the power granted by the constitution to the federal judiciary.

From these considerations I draw this conclusion, that the judicial power of the United States is the only proper and competent authority to decide whether any statute made by congress (or any of the state legislatures) is contrary to, or in violation of, the federal constitution. That this was the opinion of

the senate and house of representatives, and of General Washington, then president of the United States, fully appears by the statute, entitled "An act to establish the judicial courts of the United States," made at the first session of the first congress (on 24th September, 1789, chapter 20, § 8 [1 Stat. 76]), which enacts, "that the justices of the supreme courts, and the district judges, shall take an oath or affirmation in the following words, to wit: 'I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ——, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'" No position can be more clear than that all the federal judges are bound by the solemn obligation of religion, to regulate their decisions agreeably to the constitution of the United States, and that it is the standard of their determination in all cases that come before them. I believe that it has been the general and prevailing opinion in all the Union, that the power now wished to be exercised by a jury, properly belonged to the federal courts. It was alleged that the tax on carriages was considered by the people of this commonwealth to be unconstitutional, and a case was made to submit the question to the supreme court of the United States, and they decided that the statute was not unconstitutional, and their decision was acquiesced in. I have seen a report of a case (Kamper v. Hawkins [supra]), decided in 1793, in the general court of this commonwealth, respecting the constitutionality of a law which gave the district courts a power of granting injunctions in certain cases, in which case the judges of the general court (four to one) determined that the law was unconstitutional and void. On yesterday I saw the record of another case, in the court of appeals of this commonwealth (in 1788), on which it appears that the general assembly passed "An act to establish district courts," and the judges (ten being present), adjudged "that the constitution and the said act were in opposition, and could not exist together, and that the court ought not to do anything officially in the execution of an act, which appeared to be contrary to the spirit of the constitution." I also observed, that the then governor, Mr. Edmund Randolph, immediately on this decision, called the general assembly by proclamation; and I have been informed that they altered the law according to the opinion of the court. From these two decisions, in the two highest courts of justice in this state, I may fairly conclude, that, at that period, it was thought that the courts of justice were the proper judicature to determine the constitutionality of the laws of this commonwealth. It is now contended, that the constitutionality of the laws of congress should be submitted to the decision of a petit jury. May I ask, whence this change of opinion? I declare that the doctrine is entirely novel to me, and that I never heard of it before my arrival in this city. It appears to me to be not only new, but very absurd and dangerous, in direct opposition to, and a breach of the constitution. And I wish those who maintain this doctrine, and have sworn to support the constitution, conscientiously to reconsider their opinions with a calm and deliberate temper, and with minds disposed to find the truth, and to alter their opinion if convinced of their error. It must be evident, that decisions in the district or circuit courts of the United States will be uniform, or they will become so by the revision and correction of the supreme court; and thereby the same principles will pervade all the Union; but the opinions of petit juries will very probably be different in different states.

The decision of courts of justice will not be influenced by political and local principles, and prejudices. If inferior courts commit error, it may be rectified; but if juries make mistakes, there can be no revision or control over their verdicts, and therefore, there can be no mode to obtain uniformity in their decisions. Besides, petit juries are under no obligation by the terms of their oath, to decide the constitutionality of any law; their determination, therefore, will be extra judicial. I should also imagine, that no jury would wish to have a right to determine such great, important, and difficult questions; and I hope no jury can be found, who will exercise the power desired over the statutes of congress, against the opinion of the federal courts.

I have consulted with my brother, Judge GRIFFIN, and I now deliver the opinion of the court, "That the petit jury have no right to decide on the constitutionality of the statute on which the traverser is indicted; and that, if the jury should exercise that power, they would thereby usurp the authority entrusted by the constitution of the United States to this court." Governed by this opinion, the court will not allow the counsel for the traverser to argue before the petit jury, that they have a right to decide on the constitutionality of the statute, on which the traverser stands indicted. If the counsel for the traverser had offered sufficient arguments to the court, to show that the petit jury had this right, the court, on being convinced that the opinion delivered was erroneous, would have changed it; for they hold it a much greater reproach for a judge to continue in his error, than to retract. The gentlemen of the profession know, that questions have sometimes occurred in the state courts, whether acts of assembly had expired, or had been repealed; but no one will say that such questions were ever submitted to a jury. If the constitution of the United States had not given to the judiciary a right

to decide on the constitutionality of federal laws—yet, if such power could be exercised, it could not be by a juror, from this consideration—it is a maxim of law in all the states, that the courts have the exclusive right to decide every question, as to the admissibility of evidence in every case, civil or criminal, whether the evidence be by act of assembly, or by deed, or other writing, or by witnesses.

Judge CHASE concluded with observing, that, if he knew himself, the opinion he had delivered and the reasons offered in its support, flowed not from political motives, or reasons of state, with which he had no concern, and which he conceived never ought to enter courts of justice; but from a deliberate conviction of what the constitution and the law of the land required. "I hold myself equally bound," said he, "to support the rights of the jury, as the rights of the court." I consider it of the greatest consequence to the administration of justice, that the powers of the court, and the powers of the petit jury, should be kept distinct and separate. I have uniformly delivered the opinion, "that the petit jury have a right to decide the law as well as the fact, in criminal cases;" but it never entered into my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States. It is my duty to execute the laws of the United States with justice and impartiality, with firmness and decision, and I will endeavour to discharge this duty with the assistance of the Fountain of Wisdom, and the Giver of all human reason and understanding.

After two hours, the jury returned with a verdict of guilty, upon which the court sentenced the traverser to a fine of two hundred dollars, and an imprisonment of nine months.

NOTE I. The tempest which this trial excited can now hardly be understood. The papers, for the first time in our history, were crammed with detailed reports, in which evidence and speeches were given at large. Virginia was in a flame; for even before the trial, affidavits were circulated in which it was stated that upon starting for Richmond, Judge Chase had publicly announced that "he would teach the lawyers in Virginia the difference between the liberty and the licentiousness of the press" (see Chase's Trial, 43); and that he had told the marshal "not to put any of those creatures called Democrats on the jury" (Id. 44). In his usual coarse jocularity, he had likened himself to a schoolmaster, who, breaking into the chamber of a few unruly boys, was about to reduce their notions of their own importance by a little wholesome chastisement: and his auditors roared at the picture of the burly judge, stretching in turn the representatives of the Virginia chivalry over his knee, and then sending them off one by one, cured by the same vigorous application. Judge Chase's peculiar recklessness of manner during the trial, can only be explained on the principle that, possessed with this notion, he was determined to do all that he could do, to humiliate and degrade the spirited bar which was called around him. He had hardly entered into the court house, before he saw that the most distinguished lawyers even in that most distinguished body had been pitched upon to conduct the defence; and he could not but feel that the crowd with which the room was filled, was attracted much more by the struggle to take place between the court and the counsel, than that between the prosecution and the prisoner. He thought it was better to settle the matter at once; and it must be confessed that the slap he gave Mr. Nicholas and Mr. Hay at the outset—something so far beyond anything they had ever calculated on as possible in judicial warfare—completely deprived those two eminent lawyers of their self possession. He had them down, and soon after adding Mr. Wirt to their number—whom he called a "young man," telling him to sit down, though that most courteous and eloquent counsel was then nearly middle aged, a widower, with a family of children—he proceeded to tuck them under his elbow, and at his leisure to apply to them that correction which he had promised. How richly he did so, the trial in the text amply shows. But not only all Virginia, but the profession throughout the country, was stung to the quick. The Philadelphia bar, as has been already noticed, was aroused by a similar invasion of its prerogative; and for a long time counsel declined to appear before the judge who had thus violated, as they alleged, the decorum of his office. At the very moment a determination was avowed to obtain an impeachment, and at last, in January, 1804, Mr. Randolph rose in the house of representatives, and made the long-expected charges. At another period, it will probably be necessary to consider at large this memorable trial; and in the preliminary notes to this work, an outline of Judge Chase's life has been given in which the general character of the proceeding is noticed. At present it is enough to consider its relation to the present case. Five articles of the impeachment were based on Callender's trial, and of these the fate was as follows: Art. II. Misconduct in refusing to overrule the objection to John Bassett, as a juror. Guilty, 10; not guilty, 24. Art. III. Misconduct in refusing to permit Mr. Taylor to be examined. Guilty, 18; not guilty, 16. Art. IV. Rude, contemptuous, and indecent conduct during the trial. Guilty, 18; not guilty, 16. Art. V. Misconduct in issuing bench warrant, instead of summons. Guilty, none; not guilty, 34. Art. VI. Misconduct in refusing continuance. Guilty, 4; not guilty, 30. On the third and fourth articles nothing but Judge Chase's age, and the peculiar party sympathies of the senate, saved him, as was conceded at the time, from a conviction by the requisite majority of two-thirds. The fourth article, it is true, rested on the abuse of a discretionary power, not susceptible, perhaps, of exact legal measurement; but the rejection of Mr. Taylor's testimony, on which the second article hung, was a palpable and unprecedented violation of the law of evidence. Mr. Taylor was offered to prove the truth of one of the several allegations in the alleged libellous article; the sedition act provided that the defendant should be permitted to give the truth in evidence; Judge Chase refused to allow Mr. Taylor to be examined, because it was no defence to justify part of the libellous matter; it was necessary that there should be a justification of the whole. In other words, a witness was rejected, who proved a material part of the defendant's case, simply because the particular witness was not able to prove the whole of it. Callender himself, like all the other subjects of the sedition law, was a foreigner, and was as depraved in morals as he was malignant in temper. "He seemed to have been a man," says Mr. Harrison, the accomplished historian of Virginia (2 Hist. Va. 373), "in whose heart vindictive passion raged without control." The "Prospect Before Us," from which the libellous matter in the text was extracted, is now, as it was then by all honourable minds, surrendered to infamy, and the only regret is, that a creature so contemptible should have been temporarily honoured by the fires of a martyrdom like that which the present trial inflicted. Mr.

Tucker (2 Life of Jefferson, 120), after mentioning that, on Mr. Jefferson's accession, he refused Callender the office of postmaster at Richmond, thus states the sequel of his history: "It should be further mentioned that Mr. Jefferson, as soon as he became president, exercised his powers of pardon in favour of Callender, as well as all others who had been convicted under the sedition law, and were then undergoing sentence of imprisonment. He took great offence at the refusal, and in no long time was found writing in opposition to the new administration: and he openly justified his desertion, on the ground of the ill-treatment he had received from Mr. Jefferson. He was of course welcomed by the new allies, and having connected himself with the editor of an obscure journal, recently established in Richmond, (the Recorder,) he poured forth against the Republican party generally, and Mr. Jefferson in particular, a torrent of scurrility and slander, of which no example had been previously afforded in the United States, not even by himself. The private life of Mr. Jefferson, present and past, was the subject of the closest scrutiny; and, whenever he was believed to be vulnerable, no matter for what cause, or upon what evidence, he was unhesitatingly assailed in the grossest and most offensive way. Such, too, are the debasing effects of party malignity, that there were not wanting those of the Federal party who were panders to this writer's vindictive calumnies, and communicated every piece of scandal or gossip, no matter how unfit for the public eye, how unsupported by evidence, or improbable in itself, which was thought at all likely to lower the chief magistrate in the eyes of the nation. The paper which was the vehicle of these slanders, and which previously circulated scarcely out of Richmond, now found its way to the remotest parts of the Union. It remains to be added that, while this wretched libeller, who had now become an habitual sot, was disseminating his slanders and ribaldry with untiring virulence, he was one morning found drowned in James' River, where he had been bathing, it was supposed, in a state of intoxication."

The following letters of Mr. Jefferson are here of some interest:

Mr. Jefferson to Mr. Monroe.

(3 Jeff. Corres. 503.)

"Washington, July 15th, 1802. Dear Sir:—Your favour of the 7th has been duly received. I am really mortified at the base ingratitude of Callender. It presents human nature in a hideous form. It gives me concern, because I perceive that relief, which was afforded him on mere motives of charity, may be viewed under the aspect of employing him as a writer. When 'The Political Progress of Britain' first appeared in this country, it was in a periodical publication called the Bee, where I saw it. I was speaking of it in terms of strong approbation to a friend in Philadelphia, when he asked me if I knew that the author was there in the city, a fugitive from prosecution on account of that work, and in want of employ for his subsistence. This was the first of my learning that Callender was the author of the work. I considered him as a man of science fled from persecution, and assured my friend of my readiness to do whatever I could to serve him. It was long after this, before I saw him; probably not till 1798. He had in the mean time written a second part of the 'Political Progress,' much inferior to the first, and his 'History of the United States.' In 1798, I think, I was applied to by Mr. Leiper to contribute to his relief. I did so. In 1799, I think, S. T. Mason applied for him. I contributed again. He had by this time paid me two personal visits. When he fled in a panic from Philadelphia to General Mason's, he wrote to me that he was a fugitive in want of employ, wished to know if he could get into a counting house or school, in my neighborhood, or that of Richmond; that he had materials for a volume, and if he could get as much money as would buy the paper, the profit of the sale would be all his own. I availed myself of this pretext to cover a mere charity, by desiring him to consider me a subscriber for as many copies of his book as the money enclosed ($50) amounted to; but to send me two copies only, as the others might lay until called for. But I discouraged his coming into my neighborhood. His first writings here had fallen far short of his original 'Political Progress,' and the scurrilities of his subsequent ones began evidently to do mischief. As to myself, no man wished more to see his pen stopped; but I still considered him as a proper object of benevolence. The succeeding year he again wanted money to buy paper for another volume. I made his letter, as before, the occasion of giving him another fifty dollars. He considers these as proofs of my approbation of his writings, when they were mere charities, yielded under a strong conviction that he was injuring us by these writings. It is known to many that the sums given him were such, and even smaller than I was in the habit of giving to others in distress, of the Federal as well as the Republican party, without attention to political principles. Soon after I was elected to the government, Callender came on here, wishing to be made postmaster of Richmond. I knew him to be totally unfit for it, and however ready I was to aid him with my own charities (and I then gave him fifty dollars), I did not think the public offices were confided to me to give away as charities. He took it in mortal offence, and from that moment has been hauling off to his former enemies, the Federalists. Besides the letter I wrote him in answer to the one from General Mason's, I wrote him another containing answers to two questions he addressed me. 1st. Whether Mr. Jay received salary as chief justice and envoy at the same time? and, 2d. Something relative to the expenses of an embassy to Constantinople. I think these were the only letters I ever wrote him, in answer to volumes he was perpetually writing to me. This is the true state of what has passed between him and me. I do not know that it can be used without committing me in controversy, as it were, with one too little respected by the public to merit that notice. I leave to your judgment what use can be made of these facts."

Mr. Jefferson to Mrs. Adams.

(4 Jeff. Corres. 23.)

"Washington, July 22d, 1804. Dear Madam:—Your favour of the 1st instant was duly received, and I would not again have intruded on you, but to rectify certain facts which seem not to have been presented to you under their true aspect. My charities to Callender are considered as rewards for his calumnies. As early, I think, as 1796, I was told in Philadelphia that Callender, the author of the 'Political Progress of Britain,' was in that city, a fugitive from persecution, having written that book, and in distress. I had read and approved the book; I considered him as a man of genius, unjustly persecuted. I knew nothing of his private character, and immediately expressed my readiness to contribute to his relief, and to serve him. It was a considerable time after that, on application from a person who thought of him as I did, I contributed to his relief, and afterwards repeated the contribution. Himself I did not see till long after, nor ever more than two or three times. When he first began to write, he told some useful truths in his coarse way; but nobody sooner disapproved of his writing than I did, or wished more that he should be silent. My charities to him were no more meant as encouragements to his scurrilities, than those I gave to the beggar at my door, are meant as rewards for the vices of his life, and to make them chargeable to myself. In truth, they would have been greater to him, had he never written a word, after the work for which he fled from Britain. With re-

spect to the calumnies of writers and printers at large, published against Mr. Adams, I was as far from stooping to any concern or approbation of them as Mr. Adams was respecting those of Porcupine, Fenno, or Russell, who published volumes against me for every sentence rendered by their opponents against Mr. Adams. But I never supposed Mr. Adams had any participation in the atrocities of these editors, or their writers. I knew myself incapable of that base warfare, and believed him to be so. On the contrary, whatever I may have thought of the acts of the administration of that day, I have ever borne testimony to Mr. Adams' personal worth; nor was it ever impeached in my presence without a just vindication on my part. I never supposed that any person who knew either of us, could believe that either of us meddled in that dirty work. But another fact is, that I liberated a wretch who was suffering for a libel against Mr. Adams! I do not know who was the particular wretch alluded to; but I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity as absolute and as palpable as if congress had ordered us to fall down and worship a golden image. It was accordingly done in every instance, without asking what the offenders had done, or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended sedition law. It was certainly possible that my motives for contributing to the relief of Callender, and liberating under the sedition law, might have been to protect, encourage, and reward slander; but they may also have been those which inspire ordinary charities to objects of distress, meritorious or not, or the obligation of an oath to protect the constitution, violated by an unauthorized act of congress. Which of these were my motives, must be decided by a regard to the general tenor of my life. On this I am not afraid to appeal to any nation at large, to posterity, and still less to that Being who sees himself our motives, who will judge us from his own knowledge of them, and not on the testimony of Porcupine or Fenno. You observe, there has been one other act of my administration personally unkind, and suppose it will readily suggest itself to me. I declare, on my honour, madam, I have not the least conception what act is alluded to. I never did a single one with an unkind intention. My sole object, in this letter, being to place before your attention, that the acts imputed to me are either such as are falsely imputed, or as might flow from good as well as bad motives, I shall make no other addition than the assurance of my continued wishes for the health and happiness of yourself and Mr. Adams."

[NOTE 2. Subsequently, upon the trial of the impeachment of Mr. Justice Chase, before the senate of the United States, the second article charged Judge Chase with overruling the objection of John Basset, who wished to be excused from serving on the jury in the trial of Callender, and causing him to be sworn, and to serve on the said jury, by whose verdict Callender was convicted.

[Basset had expressed no wish to be excused, provided there would be no impropriety in his being sworn, but from a delicate scruple he informed the court, that he had seen in the newspapers, extracts said to be taken from "The Prospect Before Us;" that he had no knowledge whether they were truly extracted, but if they were and the context did not explain away the apparent meaning of the extracts, he had made up his opinion unequivocally that their author came within the provisions of the sedition law.] [5]

UNITED STATES (CALLENDER v.). See Case No. 2,321.

[5] [From 1 Chase's Tr. p. 200.]

Case No. 14,710.

UNITED STATES v. CALLICOTT et al.

[7 Int. Rev. Rec. 177.]

Circuit Court, E. D. New York. May, 1868.

INTERNAL REVENUE COLLECTOR — ACCEPTANCE OF FRAUDULENT BOND.

[On the prosecution of an internal revenue collector for accepting a fraudulent bond for the transportation of distilled spirits, evidence that the collector accepted 18 or 19 bonds, forged both as to principal and surety, in the same month, and that, when fraud was suggested, he delayed to institute an investigation, may be considered, as tending to show his participation in the fraud.]

The defendants [Thomas C. Callicott and John S. Allen] were the former collector of internal revenue for the Third district of New York, and his deputy. The indictment against them was founded upon the thirtieth section of the act of March 2, 1867 [14 Stat. 484], and the forty-second section of the act of July 13, 1866 [14 Stat. 162]. They were indicted jointly with others against whom the government discontinued.

E. W. Stoughton, Mr. Tracey, U. S. Dist. Atty., and Mr. Keasby, U. S. Dist. Atty. for New Jersey, for the United States.

Mr. Jenks and I. T. Williams, for defendants. Mr. Williams fell sick during the trial, and C. De Witt was added to defendants' counsel.

Before NELSON, Circuit Justice, and BENEDICT, District Judge.

NELSON, Circuit Justice (charging jury). The indictment in this case found against the accused is, in substance, that Callicott and Allen, collector and deputy collector of internal revenue of the Third collection district of New York and others named and unknown, contriving and intending to defraud the United States of divers sums of money payable for taxes upon 200 barrels of distilled spirits, on the 7th of May, 1867, conspired together to procure to be fraudulently executed, a certain bond required by the laws of the United States and regulations of the commissioner of internal revenue; that is to say, a bond for the transportation of distilled spirits dated the 7th of May, 1867, purporting to be a sufficient bond for the transportation, executed by R. H. Hand as principal, and William Malin and John Jaggard as sureties, for the sum of $30,000 each, conditioned for the transportation of the 200 barrels from the bonded warehouse of John Wilson, in Brooklyn, to the bonded warehouse of M. S. Cole, of the Third district of Massachusetts, Boston,—whereas, in fact, the name of Hand was forged and the sureties were insufficient and wholly worthless, as the said Callicott, Allen and the others well knew, by which fraudulent bond payment of the tax was evaded, and lost to the United States. The indictment also charges that Callicott and Allen fraudulently accepted this Hand bond for the transportation of spirits as above stated—as above described—and did thereup-

on permit and allow the 200 barrels to be removed from the warehouse of Wilson, well knowing the insufficiency of the bond and of the sureties.

This is the substance, gentlemen, of the charge in the indictment against the accused, —in what may be called the first count in the indictment. There is also a count in it charging a conspiracy of the defendants to connive at the fraudulent execution of this Hand bond, and to accept it as security within the act of congress for the transportation of the spirits from Wilson's warehouse; and upon the acceptance of which a permit was granted to remove the spirits to the warehouse in Boston already referred to. The offence as stated in the indictment is founded upon the thirtieth section of the act of March 2, 1867, and which provides that "if two or more persons conspire together to defraud the United States in any manner whatever, and one or more of them shall do any act to effect the object, the parties to the conspiracy shall be deemed guilty of a misdemeanor, and on conviction shall be liable to a penalty of not less than $1,000 nor more than $10,000 and to imprisonment not exceeding two years."

The acts of the parties, you will observe here described as constituting the offense, fall short of the actual commission of the fraud against the government. The conspiracy to defraud with any one act by either of the parties constitutes the offense. The mere combining or confederating to commit the fraud is sufficient without any actual perpetration of it, or loss or damage to the government if any one of them has taken a step toward its execution, toward carrying into effect, as in the present case, the procurement of the fraudulent bond. That is one step—or the granting of a permit would be another step, for the withdrawal of the whiskey from the warehouse. The law strikes at the incipient steps, the germ of the offence, with a view the more effectually to deter persons from entering upon the fraud, and lays hold of them before its consummation.

The other offense charged, and which we refer to, is founded on the forty-second section of the act of July, 1866. It provides that if any person shall sign any fraudulent bond or permit, or other documents required by law, or who shall fraudulently procure the same to be executed, or who shall connive at the execution thereof by which the payment of any internal revenue tax shall be evaded, or attempted to be evaded, or which shall be executed for the purpose of withdrawing spirits from a bonded warehouse, on conviction shall forfeit all his interest in the spirits (if he has any,) and be imprisoned for a term of not less than one year nor more than five years. This act makes it an offence for any person to execute or to connive at the execution of a fraudulent bond, or to execute or connive at the execution of a fraudulent permit or other documents required by law, with a view to evade the payment of the tax, or for the purpose of withdrawing the spirits from a bonded warehouse.

It will thus be seen, gentlemen, how specific and particular the offence or offences charged in the indictment in this case are described in the acts of congress—so specific that any person who can read cannot misunderstand them, more especially public officers who are appointed to carry into execution the laws and provisions of the acts; whose attention must, therefore, necessarily have been drawn to the particular provisions as the guide of their conduct and the foundation of their duties.

By the fortieth section of this act of 1866, distilled spirits which have been inspected, gauged and marked by an inspector may be removed without the payment of the tax from the bonded warehouse of the distillery, as exemplified in the case of Wilson upon the execution of a transportation bond, as the commissioner of internal revenue may prescribe,—which he has done, as you see from the form of the execution,—and may be transported to any general bonded warehouse used for the storage of spirits, and immediately (according to the law) on its arrival at the bonded warehouse to which the spirits have been transferred, they are to be again gauged, again inspected, and placed in the warehouse.

The Hand bond, which figures largely in this case, was got up under this provision of the law and the regulations of the commissioner That this bond was grossly fraudulent, and was got up for the purpose of defrauding the government by the removal of whiskey from Wilson's warehouse without paying the tax, is undeniable, and that it effected the purpose designed by procuring the removal of the 411 barrels—in two lots, I refer to the whole—without the payment of tax—whereby the government lost some $46,000 tax, is equally true. The proof on this subject is overwhelming. We need not, therefore, give ourselves any trouble to look critically into the evidence as to the fact that the government was defrauded in this removal. Witnesses concerned and engaged in the execution of it, have given us a detailed account of the manner in which the fraud was perpetrated. The material and only question, therefore, left open for your examination and judgment, is whether the defendants, Callicott and Allen, were parties to this fraud, connived at it, or co-operated in its perpetration. It is the evidence in the case bearing upon this question—the whole of it so far as it has any bearing upon this question—that it becomes necessary that you should look critically into it, examine it, and upon which evidence you will find your verdict. Were they parties to this fraud? The question has been very fully, fairly and ably examined and discussed by each of the learned counsel who has addressed you on the subject, and I do not doubt but that you are already very fully possessed of the question,

and of all the evidence which has any pertinent bearing upon it. I do not intend, therefore, to be tedious in going over, for I am quite satisfied with the discussion by the learned counsel. All I intend is to draw your attention more especially and exclusively to the real question in the case—the question of fact in the case.

The ground taken in the defence is that Callicott, the collector, had no knowledge of the fraud in the execution of this bond—this Hand bond; that it was not executed before him, but before Allen, the deputy, and hence he had no means of knowledge, or even of suspicion, that there was anything wrong in getting it up, or in the execution of it. Now, this is certainly true as it respects the execution of the bond; it was not executed in his room in the building, but in the adjoining room—the front room, occupied by the deputy—and so far the ground taken on the part of the learned counsel is well founded on the evidence; but it should be remembered—he had it afterward in his possession for several days for the purpose of examination, and with a view to ascertain if it was good security for the tax on the whisky to be removed. When Hardy applied to him with the bond for the permit the first time, he declined to give the permit—and took the bond to look into it—took it from Hardy to look into it, and several days elapsed before Hardy called again for the permit. And when he did, the bond was still with Callicott, for he took it to look at it according to this witness and said he believed it was all right. Now, if he had really made an examination into the sufficiency of the security he would naturally look to the character and condition of the sureties as these were the most important names on the bond—sureties for the principal. Any examination instituted by any person of common understanding with the view to ascertain the sufficiency of the bond—the responsibility of it—for any purpose—would naturally lead the person to look to the conditions of the sureties upon it; and it is quite natural that the collector should have followed that view. Their places of residence were accurately upon the bond, and in this city where they resided. One of them, according to a witness, a responsible witness, whose tenant he was, states that Martin lives within ten minutes walk from the collector's office; the other, Jaggard, within about a mile from the office. If he had gone there, or if he had sent there to inquire of these names, as we see from the testimony in the case, the fraudulent character of the bond would have at once been revealed.

There is also another circumstance in respect to this bond which we think should not be overlooked. The experiment was tried upon Callicott to get a permit to remove this whisky without any bond, indicating thereby unmistakably a design to perpetrate a fraud by using him and his office in the removal of the whiskey. You recollect the application by Cunningham and the delivery of two blank permits to Callicott with a mark, I think made by McMullen, which was pointed out to him by Cunningham, and which permits he was requested to sign by his friend who had made these marks; and this without a transportation bond, without any sort of a bond. The meaning of this application could not be misunderstood, it was openly and undisguisedly made, and could have no other result if complied with—if the application was complied with—than to defraud the government. And I am sorry to say—sorry to be obliged to say—that Callicott entertained the application, received the blanks (the blank permits,) for further consideration; that is, according to the evidence of the witness. He took them and said he would see about them, instead of rejecting them instantly with indignation. Now, to say the least of this, Callicott, we see, was advised, and had a knowledge that these parties, Cunningham and McMullen, two of the conspirators, intended to perpetrate a fraud upon the government. He was thus put upon his guard by this fraudulent conduct, and if an honest officer, he would naturally have seen to it that no contrivance of theirs—no subsequent contrivance of theirs—such as getting up a fraudulent bond or otherwise, that the fraud should succeed. He was admonished that these persons had made an experiment upon him with a view to get the 200 bbls. from the Wilson warehouse without payment of the tax, and without any security—without any bond. The first lot, 200 barrels, was removed by means of this bond, and a permit was given upon the face of it by the collector. Instead of being taken to Boston according to the conditions or terms of the permit, a large portion of it was taken to rectifying establishments in this neighborhood, including Brown and others, a firm which embraced McMullen as one of the partners. Thus the fraud was perfected.

I shall not go into the details, but you remember the disposition that was made of it. A large portion of it was sold for $1.30 a gallon, and the money went into the hands of McMullen.

Afterward another application was made to the collector for the removal of 211 barrels from the same warehouse and by the same parties. This lot of whiskey was removed on the 24th and 25th of May. Now it is admitted—it is not to be denied upon the evidence—that this lot—this second lot—was removed without any bond. The old permit was used, the date being altered from the 14th to the 24th of May, and a transportation order of the same date—24th of May, signed by Callicott, was procured. These papers were procured by McMullen who afterward delivered them to Cunningham, and upon which the whisky was removed—211 barrels—not to Boston according to the directions in the order, but to these rectifying estab-

lishments in the neighborhood, especially to that of Brown and others. Unexplained, this is a manifest fraud upon the government by the collector—no bond, no payment of the tax.

But an explanation has been offered by the learned counsel for the defendants, and it is for you to examine it, and for you to determine the weight of it. It is this: that McMullen altered the old permit himself from the 14th to the 24th, and that the transportation order which was genuine and bore the same date, the 24th, was given under the supposition that it was intended to apply to the first permit—the permit of the 14th of May. It is not denied that the alteration in the old permit from the 14th of May to the 24th, was made by McMullen. It is proved to be in his handwriting and doubtless he altered it; but the transportation order dated on the same day of the alteration and signed by Callicott, he must have procured. He was the man who went to obtain the permit for the second lot, and who brought the papers and delivered them to Callicott, who delivered them to Dayton, the storekeeper. McMullen, therefore, must have got the transportation order which was issued on that day. Now, the first permit that was given on the 14th of May, conferred full authority upon these parties to remove 200 barrels of whisky from this warehouse to Wilson's. It required no transportation order—that is, none was given at the time; but the permit was given as full authority to the parties for the benefit of McMullen; he was the master spirit—for his benefit—full authority to remove the 200 barrels. The argument is, and you must give it such weight as you think it is entitled to, that the collector may have supposed that these first 200 barrels of whisky were not immediately removed upon that permit of the 14th of May, and that they may have remained there in the warehouse for the ten days, and that this order was given for the purpose of accompanying that first permit with a view to the removal of the first lot of 200 barrels. That is the argument, and that is the explanation which the learned counsel has given. It is for you to look at it, to examine all the circumstances connected with the removal of the second lot, and the papers on which it was made. Now, De Veau who was the bond clerk in the office, wrote this transportation order. He was the witness that testifies that he wrote it, and that it is in his handwriting; and he is the one you recollect, when it was removed by Dayton to the office, that was concerned in the alteration of the date of that order from the 24th to the 16th. He has given us no explanation of the order—of this transportation order—thus written by him. He has not given any explanation that it was issued for the purpose of accompanying the first permit of May 14. He has given no explanation of it, but left it unexplained. There was at least such indiscretion in giving this second order—or rather this transportation order—as very properly called for observations as respects official duty.

The collector knew that he had given this authority for the removal of 200 barrels on the 14th from Wilson's warehouse, and he thus gives a second authority to remove the same number of barrels ten days afterward, leaving it open to these parties engaged in both applications to him—these who had made the application for the removal of the first 200 barrels, and had also subsequently renewed the application for 211 more, and who had, in the first application indicated, a disposition to perpetrate a fraud upon the government in the removal of this whiskey. Under these circumstances, and in connection with these parties who are thus suspected, it would have been wise on the part of the public officer, before he put into their hands these two authorities, that could be used for the purpose of taking out a double quantity if he had instituted an inquiry, either by himself or by his clerks, or deputies, at the warehouse of Wilson, to see whether the first 200 barrels had not already been removed. I understand that it was not over a mile or two—two or three miles from the collector's office, this warehouse. It would have been no great trouble, consumed not much time to have instituted this inquiry when the application was made for two hundred barrels more, to see whether the first permit had been used in the transfer from the warehouse of the whisky.

There is one more topic I am going to call your attention to for a moment, and then I shall leave the case to you; and that is the circumstance connected with the application of the district attorney on the 28th of May, for the privilege of examining these bonded warehouses, B. You have that account from the assistant district attorney. What led to this application is a fact that seems to be in some dispute between the learned counsel, although I recollect distinctly the testimony of Mr. Allen, and it is on my notes. Twenty-one barrels of the last lot of the 211 were seized in the carts on the ninth, and were in the street in front of the office of the district attorney. The seizure of course, produced some sensation among the parties who were interested in the removal, and on the part of the district attorney, who was looking to the interests of the government. It seems that Mr. Allen in the interest of the government, went with Cunningham, who was interested in getting the 21 barrels released, to the office of the collector. Mr. Allen, the assistant district attorney, states that he there put the question to the collector whether this whiskey that was thus seized and detained had been removed in pursuance of an order from him, and the answer, as stated by Mr. Allen, was that he had given the order to remove from class A, Wilson's warehouse, to class B, general bonded warehouses. That is the testimony of Mr. Allen. It is questioned on the

part of the counsel for the accused, that is upon the contradiction which would exist between the two orders, for Allen's testimony is not mistaken, that the first transportation order was to carry this whiskey to Boston. The second transportation order, according to the account which we have from Mr. Allen, was not under that order, but under an order to transfer the whiskey from class A to class B, bonded warehouses. I don't put weight upon that, what I wish to call your attention to is this: This suggestion of the removal of the whiskey from the warehouse of Wilson to class B,—the general bonded warehouse,—excited the suspicion of the district attorney that there was something wrong about the removal. Hence, he instructed his assistant, on the 28th, to go to the collector and get the privilege of having these bonded warehouses, class B, examined, to see if he could find where this whiskey had been transferred. He went there, and on putting the question to him, the collector was unable to state to him in what particular warehouse, class B, this whiskey had been transferred. If he had been able to do so, why of course the assistant district attorney could have made the examination at once, but he was unable to tell him, and stated to him that Mr. Dayton, the removal officer, had the order or permit; that he was then gone and probably he would not be able to find it that afternoon, but he would see the officer and get the papers from him. Well, Allen called the next day, the 29th, and that day the collector was not in, but he saw Tappan, and all the papers that Tappan could find was this Hand bond and they examined that. He called the third day and saw the collector. He had not been able to see the storekeeper, the one who held the permit for this transfer to class B. He called on the 31st day, and although there was an arrangement that he would permit these warehouses to be examined if one of his deputies could accompany the district attorney or his agent, yet there was a postponement—there was a delay from the 28th to the 31st inclusive.

You must remember that the most of this whisky—the whole of it, indeed—had been removed on the 25th; it was in the city. Now, if there really was any ground for suspicion as suspected of this second lot of whisky, and the removal of it, and the perseverance on the part of the district attorney, with a view to get an opportunity to explore these warehouses with a view to find the whisky, if there was any real ground of suspicion, even the suggestion of suspicion, that fraud had been committed in the removal of this whisky from the warehouse of Wilson, why, certainly the collector should have been the first man that would have put in requisition all his official force for the purpose of ferreting out the fraud upon the government, that had been suggested in the removal of the whisky by the district attorney.

I shall not take up your time upon the fraudulent bonds in general. It would not have been remarkable nor singular, if, in the multitude of business of an office of this kind, occasionally an imposition should have been pressed upon him. But the idea that some eighteen or nineteen fraudulent bonds, forged both as to principal and as to surety or otherwise tainted with fraud; that there should have been that number accepted in succession, within a limit of about a month, was sufficient to excite surprise, if not suspicion, and call for an explanation.

Now, gentlemen, return to the question that I put to you in the opening, and that is: look at these facts; this testimony which I called your attention to, and if I have omitted anything in the facts that your attention has been called to by the learned counsel, examine all and determine whether or not these defendants have been parties to the fraud or connived at the fraud against the government which is admitted, and about which there is no controversy. If you are satisfied upon the examination of the evidence that they are, you are bound to convict; if not, to acquit them.

The jury then retired. After an absence of four hours they re-appeared, and stated through the foreman that they had not agreed upon a verdict.

THE COURT ordered them to retire.

The next day at 10 o'clock the jury appeared in the United States circuit court room and announced through their foreman that they were unable to agree. They were again ordered to retire. The foreman intimated that he desired to submit a few questions in a written form to the court for instruction on several points.

BENEDICT, District Judge, in view of the absence of the counsel for the prisoners, and the presiding justice, deferred answer until 1 o'clock, when the jury was summoned.

NELSON, Circuit Justice, then said: We have examined the request for instructions which was submitted to Judge BENEDICT this morning, and will instruct the jury upon the points submitted. First point: "Can the jury bring in a verdict on one of the statutes charged to have been violated, and alone?" Second point: "What is the legal weight of the testimony of the witness Cunningham?"

You may bring in a verdict formed on one of the provisions of law alleged to have been violated alone. The fact of the witness being a co-conspirator affects the credibility of his testimony, and the jury have a right to regard the question of credit; but if the testimony is corroborated by other witnesses, then credit is to be given to it. You may regard the weight of the evidence of a co-conspirator if it stands alone, but if it is corroborated, then you are bound to credit it. This case has occupied much time, and has been examined with attention by you, and it is highly important that a determination should

be arrived at. It has involved great expense to the government, and a new trial would necessitate renewed expense and delay; and it is therefore desirable that you should reach a conclusion without great delay. The jury will return.

The jury then retired, and at 7 o'clock they re-appeared and announced that they had agreed upon a verdict, convicting Callicott, and acquitting the other defendant, John S. Allen.

Mr. Callicott was remanded to the penitentiary.

[NOTE. The defendant Callicott was, on June 5, 1868, sentenced to pay a fine of $10,000 and to be confined in the Albany penitentiary for the period of two years. In December following he petitioned for a writ of habeas corpus in the circuit court to inquire into the legality of his imprisonment. The petition was denied. Case No. 2,311. Subsequently, and a short time before the expiration of the two-year sentence, he again petitioned Circuit Judge Woodruff for a writ of habeas corpus. Between the time of the swearing to this last petition and the hearing on the application the petitioner was unconditionally pardoned by the president. The petition was, notwithstanding, prosecuted, and was again denied. Id. 2,323.]

Case No. 14,711.

UNITED STATES v. CALVIN et al.

[2 Cranch, C. C. 640.] [1]

Circuit Court, District of Columbia. April Term, 1826.

SLAVERY—INDICTMENT FOR RIOT AND ASSAULT AND BATTERY—HOW TRIABLE.

This court has not jurisdiction of riot, and assault and battery, by slaves, in Alexandria county.

Indictment for a riot, and assault and battery, by slaves, on a constable.

Mr. Taylor, for defendants' masters, moved to quash the indictment, because by the law of Virginia of December 17, (Laws 1792, p. 187, § 11), it is enacted that "riots, routs, unlawful assemblies, trespasses, and seditious speeches by a slave or slaves, shall be punished with stripes at the discretion of a justice of the peace; and he who will, may apprehend and carry him, her, or them before such justice." This law was continued in force in the county of Alexandria by the act of congress of the 27th of February, 1801 (2 Stat. 103). The common-law punishment of misdemeanors by fine and imprisonment is not applicable to slaves, who can have no property, and whose time and labor belong to their masters, so that imprisonment would be no punishment to them.

Mr. Swann, for the United States. By the act of the 27th of February, 1801 (2 Stat. 103), this court has cognizance of all crimes and offences. The jurisdiction of the justice may be concurrent.

THE COURT (nem. con.) was of opinion that this court has not jurisdiction; and that the indictment must be quashed, and the prisoners committed to take their trial before a justice of the peace.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,712.

UNITED STATES v. CAMBUSTON.

[Hoff. Land Cas. 86.] [1]

District Court, N. D. California. Dec. Term, 1855.[2]

MEXICAN LAND GRANT—VALIDITY OF GRANT.

No opposition to the confirmation of this claim.

Claim [by Henry Cambuston] for eleven leagues of land in Butte county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Volney E. Howard, for appellee.

HOFFMAN, District Judge. The original grant in this case is not produced, but it is shown to have been in the possession of the grantee in the year 1850, when it was deposited by him in the government archives, where it still remains. A traced copy is, however, filed; and the genuineness of the original fully established by proof. It appears in evidence that efforts to occupy the land were made by the grantee within the year, and that in 1847 he had built a house, stocked his rancho, and cultivated a portion of it under the superintendence of his major domo. The exterior boundaries of the tract are sufficiently indicated in the grant, and the quantity of land to be taken within those boundaries is mentioned as eleven leagues, if so much can be found outside of the lands of the neighbors, whose lines are to be respected.

The commissioners have confirmed this claim, and although the absence of the expediente containing the petition and other proceedings prior to the grant prevents the proof in this case from being of so conclusive character as in many others, yet the board does not seem to have entertained any doubt as to its genuineness, nor has the claim been opposed in this court in any argument on the part of the United States. It has been submitted to us for decision without comment, and though we would have desired fuller proofs on the subject, we do not feel at liberty to disregard the uncontradicted evidence which establishes the genuineness of the grant. The claim must therefore be confirmed.

[NOTE. Upon an appeal to the supreme court, the decree above was reversed, with directions to remand the cause to this court for a further hearing. 20 How. (61 U. S.) 59. In accordance with this mandate, the cause came before this court for a further hearing, which resulted in a decree rejecting the claim. Case No. 14,713. Cambuston having died, his widow ap-

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 20 How. (61 U. S.) 59.]

peared in court, and asked to be permitted to become the party claimant of the land, as executrix of the will of her deceased husband, which had been admitted to probate May 3, 1869. An order to this effect was made April 3, 1875, and on the same day the claimant asked that a new trial be granted, and that the decree rejecting the claim might be reversed. The parties thereupon appeared, and, after hearing, the court denied the motion. On the same day, April 3, 1875, another appeal was allowed, both from the final decree and the order refusing a new trial. The United States moved to dismiss the appeal, because taken too late. The motion to dismiss was granted. 95 U. S. 285.]

Case No. 14,713.

UNITED STATES v. CAMBUSTON.

[7 Sawy. 575.] [1]

District Court. D. California. June, 1859.

MEXICAN LAND GRANTS—CAPACITY OF FOREIGNERS TO RECEIVE—REPEAL OF LAWS—AUTHORITY OF GOVERNORS — PRESUMPTIONS FROM OFFICIAL ACTS.

[1. The law of Mexico of 1824, which permitted and invited foreigners to settle on the vacant lands of the republic, was repealed by the law of December 29, 1836, which provided "that foreigners cannot acquire real estate in the republic, unless they have been naturalized and married to a Mexican woman, and have otherwise complied with the laws relating to such acquisition. The acquisitions of colonists will be subject to special laws of colonization." But if it be assumed that the act of 1836 did not repeal the law of 1824, such repeal was effected by the 12th article of the law of 1842, which provides that "foreigners cannot acquire royal or public lands, in all departments of the republic, without contracting for them with the government, which passes this right as representing the domain of the Mexican nation." Therefore, after the latter act, no unnaturalized foreigner had capacity to receive a grant of land without the express license of the supreme government.]

[2. The rule that public acts of public officers shall, in absence of proof to the contrary, be presumed to have been done in the exercise of a legitimate authority, applies with but little force to grants of land made by the Mexican governor of California, within a few weeks before the territory passed from his hands, and during the heat and conflict of the struggle in which his power was overthrown, especially where the evidence that the formalities required by law were observed is imperfect and unsatisfactory, and rests wholly in parol, where it does not appear that any preliminary inquiries were made as to the point on which he is supposed to have exceeded his authority, and where his situation and the mode in which he exercised his authority in other cases about the same time suggests a suspicion of carelessness and recklessness in the exercise of his powers.]

[3. Where a grant was made by the governor of California, just before the territory was wrested from his hands, to one who was commonly supposed to be a French citizen, and in whose behalf the French minister to Mexico had made strong representations to that government a short time before, and it was not stated in the grant either that he had been naturalized or that he had obtained a license from the supreme government to take the lands, *held*, that the mere fact of the making of the grant did not, under the circumstances, raise any presumption that he had been naturalized or that he had received such license, and the burden was on him to show affirmatively the existence of one of these facts in order to establish his right to receive the grant. U. S. v. Reading, 18 How. (59 U. S.) 9, distinguished.]

[Cited in Bouldin v. Phelps, 30 Fed. 569.]

[4. The Mexican governors of California had no authority to remove the disabilities of foreigners in respect to holding lands under the laws of 1836 and 1842; and an attempt to make a grant to a foreigner by executing the necessary papers could not, therefore, operate as an enfranchisement, which would render the grant effectual.]

[Claim by Henry Cambuston for 11 leagues of land in Butte county, on the Sacramento river.]

HOFFMAN, District Judge. The claim in this case having been confirmed by this court [Case No. 14,712], the case was appealed to the supreme court, by whom the decree was reversed, and the cause remanded for further proofs. [20 How. (61 U. S.) 59.]

The principal grounds assigned by the supreme court for their decision, are: The want of all record testimony, or any explanation of its absence. The unsatisfactory character of the evidence as to the genuineness of the signatures. The absence of any evidence that the preliminary steps required by the law to a grant of public domain by the governors had been observed, especially those which were matters of record. That the grant was not recorded in the proper book, or in any book whatever, so far as appeared by the proofs. That it was a pure donation, without pecuniary consideration or meritorious services. That it was unaccompanied by the forms and usages always observed in making grants. That it was unknown to any one except the grantee and one other interested person, until 1850. That it was made by a governor who had recently expelled his predecessor, and who was not proved to have been recognized by the supreme government. That it was made but one month and a half before the conquest of the country by the United States forces, and during the very heat and conflict of the struggle in which the power of the governor was overthrown; and, therefore, that his authority to make it, and the bona fides of its exercise, should be scrutinized with great care.

As these objections had not been urged before the commissioners or this court, the cause was remanded that the claimant might, if in his power, remove them by the introduction of further evidence. Further evidence has accordingly been taken, and the cause is again submitted for decision.

As to many of the points alluded to by the supreme court, the testimony leaves no room for doubt. The original grant is produced from the archives where it has remained since 1850, when it was deposited with Major Canby.

The signatures of Pico and Moreno are un-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

doubtedly genuine. The grant is also shown to be in the handwriting of Augustin Olvera, who was secretary to the departmental assembly; and Mr. Hopkins, the keeper of the archives, states that, in the water-marks and general appearances of the paper on which it was written, it corresponded with paper used at its date. That officer seems to entertain no doubt of the genuineness of the signatures, and his opinion is of great value.

The real point in the case is not whether Pico and Moreno signed the grant, but when they did do so. It is also shown, and the fact is known to the court as part of the history of the country, that Pio Pico had been recognized by the supreme government as constitutional governor of the department before the date of this grant.

Before proceeding to consider the proofs as to the facts that the preliminary steps requisite to a grant were taken, and which explain the absence of record evidence that it issued, it may be observed that, according to the usage of the Mexican government, the record evidence, as well of the preliminary proceedings as of the issue of the grant, should be found in the espediente, and in the book known as the "Toma de Razon."

The espediente, as is well known, consisted of the petition, with the marginal order of the governor; the informes, when they were furnished; the decree of concession, and, usually, a borrador, or draft, of the title delivered to the party. These papers, stitched together, formed the espediente, which was preserved among the archives and formed the only record of the proceedings, except that contained in the Toma de Razon. This last was a book in which short entries were made of the date of the grant, the name of the grantee, and that of the land granted.

If, therefore, the espediente in any case be lost, and the Toma de Razon, for the year in which the grant was made, be also lost, no record evidence of the grant would exist, unless it should happen to be referred to in other grants or espedientes, a reference not likely to occur with respect to a grant of late date.

It is shown in this case, and the fact is notorious, that the book of Toma de Razon, for the year 1846, is not among the archives. It is also in proof that the archives were, for some months after the seizure of the country by the Americans, left in a condition where spoliations or loss of documents may have taken place. But the extent of such spoliations has been greatly exaggerated, for the archives exist in a degree of completeness and perfection greater, perhaps, than could have reasonably been anticipated, as is proved by the fact that all the espedientes, to the number of four hundred and twenty-two, of which a list was made by Jimeno, are found on the files. Nevertheless, it is possible that some espedientes have been lost. Colonel Fremont appears to have removed several, which were lost in the mountains; and the testimony of Captain Halleck shows that such an accident may very possibly have happened.

The absence, therefore, of all record evidence of this grant does not conclusively show that no espediente in the case ever existed. It may possibly have been lost; but such an accident is extremely improbable.

It has already been stated that all the espedientes mentioned in Jimeno's list, to the number of four hundred and twenty-two, are found in the archives. The latest concession entered in that list is dated December 24, 1844. I am not aware that the espediente for any concession mentioned in the Toma de Razon for the succeeding year, and which contains entries down to December 23, 1845, is lost, though such may be the case.

It was certainly, therefore, by a most unfortunate, and what would, a priori, be thought a most improbable accident, that the espediente in this case was lost, when so large a number of similar documents, subjected to the same chances, were preserved in an unbroken series. To prove the existence of the espediente the claimant has examined Pio Pico and Jose Matias Moreno.

Governor Pico swears that he does not remember the petition, but that it must have been presented, or the grant would not have issued; that he believes the signatures to be those of himself and Moreno, and that he also believes the grant was signed on the day it bears date. He does not pretend, however, to remember the fact of having made the grant, nor that any informes were asked for or obtained, but, with his usual caution or evasiveness, confines himself to the expression of his belief that it bears his signature and was executed at its date.

Moreno's testimony is more positive. He swears that a petition signed by Cambuston was addressed to the governor, praying for certain lands in the North; that the petition was dated previously to the grant; that he saw this petition when he became secretary, May 1, 1846; and that attached to it were the informes of certain authorities (who they were he does not recollect), and an order of the governor directing the grant to issue.

He also testifies that he made a note of the grant in the Toma de Razon, and that the espediente remained among the archives until Governor Pico and himself were driven from the country. No other witness is produced by whom the petition of Cambuston or the espediente was ever seen, or who has any knowledge of their existence.

The officers who gave the informes are not produced, though it would seem not difficult to discover who they were, and to procure from them evidence of the fact that they reported on the application.

As Governor Pico makes no mention of any informe, and merely infers that a petition was presented from the fact that a grant issued, the only evidence tending to show that the espediente was formed, and that the usual

preliminary steps were taken by the governor, is that of Moreno,—a witness not unknown to this court, and whose credibility it has, on several occcasions, been called upon to consider.

The existence of a document of this character, unknown to any other person,—which is not found in its proper place of custody, where it would be found unless an extraordinary accident be supposed to have occurred,—a part of which (viz., the petition) would probably have been known to other persons than the applicant, and certainly to the authorities by whom the informe was furnished, can hardly be said to be satisfactorily proved by the uncorroborated testimony of Moreno.

The fact, however, that a grant was asserted to be in existence in 1846 or 1847, is testified to by some witnesses on whom the court can rely with entire confidence.

P. B. Reading testifies that he heard of this claim as early as 1846; that he heard several persons speak of the Cambuston claim as adjoining Sutter's northern line near the "Buttes," on the Sacramento. On his cross-examination he states that, according to his best recollection, he heard this in 1846,—certainly not previously; but that, in looking back for thirteen years, it is not possible to recollect such a fact with certainty unless connected with some event.

Colonel J. D. Stevenson, who arrived in California March 6, 1847, in command of the first regiment, New York volunteers, testifies that he became acquainted with Cambuston in April, 1847, and was intimate with him and his family until he left Monterey, in May of the same year; that he renewed his acquaintance with him in October, 1848, and has been closely intimate with him ever since; that in 1847 he was in the habit of visiting daily the Soberanes family, with whom Cambuston was then residing, and into which Cambuston subsequently married; that Doctor Townsend and his wife were also residing with that family, and that he first heard the grant spoken of by these latter in presence of Cambuston; that it was alluded to as being the Sacramento valley between Sutter's line and that of a man named Flugge; that subsequently, in May, 1847, he became acquainted with Flugge, and continued intimate with him until he (witness) left Los Angeles, in the fall of 1848; that he had frequent consultations with him respecting his rancho; that in various conversations Flugge spoke of a grant to Cambuston between his own rancho and Sutter's line; that in October, 1848, or the spring of 1849, Cambuston showed him (witness) a paper purporting to be a grant for the ranch in question; that he (witness) advised him to retain it carefully until a government should be organized; and that he subsequently filed it with Major Canby, by his (witness') advice.

Jacob A. Morenhout testifies that he first heard of the claim of Cambuston, in 1846, soon after his arrival in California; that when obtaining a description of the French residents from his predecessor in the office of consul of France, he was told by the latter that Cambuston had a claim for a large tract of land on the Sacramento river, but that it was then thought of no value; that in 1847, as he believes, or perhaps in the beginning of 1848, Cambuston deposited in the consulate a bundle of papers, among which was this title; and that he is positive he saw the title long before there was any doubt raised about it, and before the lands were of any value.

The evidence of this witness, which had been taken before the commissioners, was disregarded by the supreme court because of his interest in the suit. The testimony above cited is contained in a deposition taken since the cause was remanded. In that deposition he states in the most positive manner that he has sold out all his interest in the claim, and that he has now no interest whatever in the event of the suit. His character is wholly unimpeached, his testimony entirely uncontradicted. He came to California as consul of France, and he continues to hold the office of vice consul at Monterey to the present time. I know of no reason why his statements should not be received by the court with entire confidence. Captain H. W. Halleck testifies that he heard of this grant in the spring of 1847, and also heard that Cambuston was endeavoring to get Americans to go and settle upon it.

It must, I think, be taken as proved, that a grant of some kind was in existence shortly after the date of the grant produced in this case, and before the return of Pio Pico to California in the spring of 1848. All the witnesses agree that the grant heard of by them was for lands in Sacramento valley. Colonel Stevenson identifies the grant he heard of with that now exhibited by the designation of Flugge's rancho as one of its boundaries, and his conversation with Flugge respecting it; and Morenhout mentions that he was "attracted by the quantity, eleven leagues, but it was not worth anything."

The objection, therefore, of the supreme court, "that the grant was unknown to any person besides the grantee and another interested party, until filed among the archives in 1850," is conclusively answered.

There is also some evidence to show that in October, 1846, the land was occupied and cultivated. But the only testimony on this point is that of Victor Prudon; and the fact is not material, for the occupation testified to was after the conquest, and the existence of the grant shortly after its date is proved, as we have seen, by more reliable testimony.

With respect to the consideration for the grant, Governor Alvarado testifies that Cambuston rendered services as public printer to the government from 1841 to 1846; that he was not paid for those services; and that he (Alvarado) offered him land in payment,

which he did not then accept; but that he (witness) heard that one of his successors had granted land in compensation. With respect to this testimony it is to be observed: (1) That it is only hearsay. (2) That no mention is made in the grant of any such consideration. (3) That it appears from the documents produced from the archives, and which will hereafter be referred to, that on the eighth of August, 1844, Bocanegra, minister of relations of Mexico, transmitted a dispatch to the governor of California, in which he enclosed a communication from the French minister at Mexico, complaining that Henry Cambuston, a French citizen, had been driven from California, and that Cambuston protested his innocence, etc. The French minister, therefore, demands that he be permitted to return, etc.

The statement of Alvarado, that from 1841 to 1846 Cambuston was employed at Monterey as teacher and public printer, must consequently be untrue. It cannot be said, therefore, that the objection raised by the supreme court that this grant was a pure donation has been satisfactorily answered.

An objection, however, is taken to this claim, which was not urged heretofore, either in this or the supreme court. It is claimed that Cambuston was a citizen of France, and therefore incapable of taking a grant.

This objection is urged: (1) To show that, even if all the preliminary steps had been taken, and the grant in all other respects regularly made, the governor exceeded his powers. (2) That the fact that the grantee was a foreigner, and notoriously known to be such, would certainly have been made known to the governor had the usual informes with regard to the qualifications of the applicant, etc., been asked for and obtained, and that the fact that he was so known to be a foreigner, is a strong circumstance to show that the grant was executed without the usual informes having been asked for. (3) That the issuing of so large a grant to a foreigner at that time, and under the circumstances of its alleged execution, shows the want of that bona fides on the part of the governor in the exercise of his authority, which, as also the existence of his authority to make the grant, the supreme court has declared, "should in this and similar cases be inquired into, and scrutinized with great care."

The evidence which is relied on to prove that Cambuston was an unnaturalized foreigner, is the following:

(1) The deposition of Morenhout, taken by the claimant. This witness testifies that when he arrived here as French consul, he obtained from his predecessor a description of the French residents of the country, and was told that Cambuston had a grant, etc., and that subsequently Cambuston deposited his papers in the consulate.

This witness does not expressly state that Cambuston was a Frenchman, but it is clearly to be inferred from his account that he first obtained information about his affairs, as such, and the subsequent reception of the papers in the consulate, can hardly be accounted for on any other hypothesis.

(2) Colonel Stevenson, also a witness for the claimant, states that Cambuston spoke French and Spanish, but no English.

(3) It appears from the archives that, on the eighth of August, 1844, a dispatch was sent by Bocanegra, minister of relations of Mexico, to the governor of California, inclosing a communication from the French minister at Mexico, in which the latter complains that Henry Cambuston, a Frenchman, established in Monterey, had been driven from California; that Cambuston protested his innocence. The minister, therefore, remonstrates against such arbitrary conduct, and asks that he be permitted to return, etc. It also appears that, on the twenty-ninth of January, 1846, Manuel Castro, then prefect of Monterey, transmitted a communication to the secretary of the department, containing an account of a quarrel which had occurred between himself and Henry Cambuston, a teacher in the public school, and inclosing copies of communications relative thereto, between Louis Gasquet, acting French consul, and Jose Castro, commandant general, and also a copy of the proceedings had against Cambuston by Manuel Castro. In all these proceedings, Cambuston is spoken of, both by the French consul and General Castro, as a French citizen. It does not, however, appear, that the interference and protection of the French minister in 1844, or that of the French consul in 1846, were claimed by Cambuston.

As this objection was for the first time taken in the brief filed by the United States, the case was opened, that the United States might adduce the testimony above referred to from the archives, and that the claimant might show, if possible, either that he was not a foreigner, or had been naturalized. No proof on these last points has been submitted by him. In the briefs filed on the part of the claimant, it is not urged that as a matter of fact Cambuston is not a Frenchman. He resides in this country, and is not unfrequently in this city. He is known to a large number of people, as is shown by the witnesses whom he has himself produced. If he were not a Frenchman, Morenhout, Colonel Stevenson, and many others could readily have so stated. The absence, therefore, of any attempt to repel the presumptions arising from the proofs above cited, and even of any denial of their truth, justifies me in treating those proofs as establishing that Cambuston was a French citizen. Assuming, then, that he was a foreigner, and not naturalized, we proceed to inquire whether he could take lands by grant in colonization, and whether in attempting to grant lands to him, Governor Pico exceeded his authority.

By the law of 1824, foreigners were not

only permitted but invited to settle, as colonists, on the vacant lands of the Mexican republic.

But the circumstances connected with the settlement of Texas, or other considerations, induced the government, in 1836, to adopt a more jealous and exclusive policy.

By the constitutional laws of December 29th of that year, it is provided, "that foreigners cannot acquire real estate in the republic, unless they have been naturalized and married to a Mexican woman, and have otherwise complied with the laws relating to such acquisitions. The acquisitions of colonists will be subject to special laws of colonization."

Under this provision it might perhaps have been doubtful whether it was intended merely to prohibit the acquisition of lands by foreigners in the ordinary modes, leaving their rights to acquire lands as colonists to be governed by the then existing special laws, or whether it was intended to make the prohibition general, leaving their rights as colonists to be fixed by future special laws.

But we have abundant evidence of the construction given to this provision by the authorities of California. In 1843, Isaac J. Sparks, a native of the United States, but a naturalized Mexican, applied for a grant of land, and the usual informes were ordered. The alcalde of Santa Barbara reported that Sparks "was married in the United States, which is a good reason why he cannot marry with any one in this country." And Dominguez, the prefect, reported that "as the law in speaking of strangers, prohibits them from acquiring real estate in the republic unless naturalized therein, married with a Mexican, etc., your excellency will order in the matter what may be proper."

On these reports Micheltorena orders the proceedings to be suspended "until the arrival of the new constitution," viz., that of 1842, which will presently be noticed.

In December of the same year Sparks renewed his application, wherein Jimeno, the secretary, reported:

"The party interested has not acquired the land he petitions for, on account of his not being married to a Mexican, as required by the constitution of 1836, and although by a subsequent decree foreigners were allowed to acquire real estate in the republic, exceptions are made in the frontier departments, which have been subjected to regulations which have not yet been received. I believe it would be an act of justice to grant the land to the petitioner, as he is honorable and industrious, and a naturalized citizen."

The land was accordingly granted, but without the power to sell.

In the case of Sansevain, a French citizen, who applied for a grant, Jimeno reported as follows: "Don Pedro Sansevain is not naturalized, an indispensable requisite in order to acquire property in the territory, but he may be permitted to cut wood upon the land until he is naturalized and can receive the title he desires."

Sansevain was accordingly naturalized, and on the twenty-first of April, 1846, renewed his application as a Mexican, by naturalization, to Governor Pico, by whom the land was granted on the twenty-first of April, 1846, about one month before the date of the grant to Cambuston. In the decree of concession and the final title, the fact is carefully set forth that the grantee is a Mexican citizen by naturalization.

I am not aware of any case in which the espediente shows that this "indispensable requisite," as it is called by Jimeno, was dispensed with. It is surprising that the first and only instance of the kind should be that of Cambuston, who two years before had been driven from the country, and a few months before had been involved in a long and acrimonious dispute with the authorities, in which the representative of his nation felt himself called on to interfere.

The subsequent decree to which Micheltorena and Jimeno allude is undoubtedly that of March, 1842.

By this law, foreigners, not citizens, were authorized to acquire real property in the republic; but by article 9, it was enacted, that "those arrangements should not include the departments on the frontier and bordering on other nations, in regard to which special laws of colonization will be enacted, without the power to foreigners to ever acquire property in them without the express license of the supreme government." Rock. p. 612.

It is suggested that this was a restriction intended to be made in future laws of colonization, and not a limitation in the then existing laws.

But even if this be so, the latest existing law was that of 1836, which we have seen denied all right to foreigners to acquire lands, unless naturalized and married to a Mexican, and it is impossible to suppose that Santa Ana, when by his edict of 1842 he removed these disabilities as to the central departments, and declared that the frontier departments were not included in the new arrangements, but with respect to them special colonization laws should be enacted, under which foreigners should not acquire lands without the express license of the supreme government, intended that the ancient and liberal law of 1824 which offered lands to all foreigners, without the license of the supreme government, should remain unrepealed.

The fact that future special laws of colonization containing this restriction were promised, shows that he, like Micheltorena, Jimeno, and the other authorities of California, regarded the law of 1824 as modified or repealed, in this respect, by the law of 1836.

But even if, contrary to the construction given to it by Jimeno, we construe the law of 1836 as not repealing the colonization laws

of 1824, that repeal must, nevertheless, be deemed to have been effected by the twelfth article of the law of 1842.

That article provides that "foreigners cannot acquire royal or public lands, in all the departments of the republic, without contracting for them with the government, which possesses this right as representing the domain of the Mexican nation." Rockw. p. 613.

It must, therefore, be concluded, that at the time the grant to Cambuston purports to have been issued, he had, if an unnaturalized foreigner, no capacity to take lands without the express license of the supreme government.

It is urged, however, that the court is bound to presume that the governor did not exceed his authority; and, therefore, it must presume either that Cambuston was naturalized and that the governor was duly apprised of the fact by the preliminary proceedings, or else that the express license of the supreme government was obtained.

It is undoubtedly true, as a general principle, that the public acts of public officers purporting to be exercised in an official capacity and by public authority shall, in the absence of proof to the contrary, be presumed to have been done in the exercise of a legitimate, and not a usurped, authority. U. S. v. Arredondo, 6 Pet. [31 U. S.] 727.

The acts, therefore, of a public officer, to whom a public duty is assigned, within the sphere of that duty, are, prima facie, taken to be within his power. "He who would controvert a grant executed by the lawful authority, with all the solemnities required by the law, takes upon himself the burden of showing that the officer transcended the powers conferred upon him, or that the transaction is tainted with fraud." U. S. v. Clarke, 8 Pet. [33 U. S.] 453.

These principles are declared by Mr. Chief Justice Marshall "to be too deeply founded in reason and law ever to be successfully assailed."

The justice of this remark is obvious. As by hypothesis the only evidence of the existence or non-existence of the power in the officer is the fact that he exercised it, the court is compelled to adopt one of two presumptions: either that he acted legally, or illegally. In the absence of all proof to the contrary, it could not rationally be presumed that he acted illegally. The other alternative must, therefore, be accepted.

But the force of this presumption must, from the nature of things, vary with the circumstances. Where the officer, as a governor or viceroy, appointed by the king, dependent on his favor and liable to be punished for disobedience; where the act in question is one of a series by which he repeatedly and notoriously assumed the power in question; where no assignable motive appears which could have induced him, in the particular case, to exercise a usurped authority, nor any circumstances either in his own situation or that of the grantee, or in the mode of exercising his power,—which suggests doubt as to the bona fides of the transaction, the presumption we are considering may be regarded as almost conclusive.

But where, as in this case, the grant purports to have been made by a governor within a few weeks of the time when the government of the territory passed from his hands, and during the very heat and conflict of the struggle in which his power was overthrown, where the evidence that the formalities required by law were observed is imperfect and unsatisfactory, and rests wholly in parol, where it does not appear that any preliminary inquiries were made as to the point on which he is supposed to have exceeded his authority, and where the situation of the granting officer, and the mode in which he exercised his authority in other cases at or about the period when the grant purports to have been issued, suggest the suspicion of carelessness, if not recklessness, in the exercise of his powers,—under all these circumstances it must be admitted that the presumption we are considering loses much of its force, if it be not entirely repelled.

It is declared by the supreme court in this case, that this grant, purporting to have been made under the circumstances above referred to, and "all others similarly situated, should be scrutinized with great care, both as to the authority of the governor to make them and the bona fides of its exercise."

But how can such scrutiny be exercised if we apply to them a blind and technical presumption of legality, raised by the mere fact that the governor signed the grant, and treat that fact as satisfactory evidence of the governor's authority, unless the United States produce proofs to the contrary, in their own nature impossible to be furnished?

The United States have shown that the governors of the frontier departments had no power to grant lands to foreigners; certainly not without the express license of the supreme government, if we adopt the construction of the law of 1842, most favorable to the claimant.

They have also shown, I think satisfactorily, that the grantee was a Frenchman, and that within a few months of the date of the grant his rights as such were vigorously asserted by the representative of his nation; that he was by that officer and by the California authorities treated and recognized as such throughout a protracted proceeding; and, as this proceeding was taken for his benefit, it may be reasonably inferred to have been at his instance; and he should be regarded as having asserted his status as a French citizen, and as having demanded protection of the representative of his country as such.

No informes or preliminary inquiries were proven which show that it was ascertained by the governor that the grantee had been naturalized, nor is he, as was usual and almost invariable in similar cases, declared to

be such in the grant. If, then, this proof be not sufficient to overcome the presumption arising from the fact that the governor signed the grant, in what way can it be met?

The United States cannot prove the negative fact that the grantee was not naturalized. They may raise, as they have done, a strong presumption to that effect, by showing that he was of French birth, and that rights were claimed for him as a French citizen a few months previous to the grant. But as the forms of the proceeding to obtain naturalization were exceedingly simple, and they could be taken before any magistrate, it is impossible to prove that a particular person was not naturalized.

It seems to me clear, therefore, that in such a case the foreigner should prove the affirmative fact that he was naturalized—a fact peculiarly within his knowledge, and the means of proving which are easy. No such proof has been offered in this case.

The same observations apply to the other presumption in which the court is asked to indulge, viz.: That the grant was expressly authorized by the supreme government. The very state of facts for which the United States contend—viz., that no license was obtained—supposes affirmative proof that it was not given to be unattainable; for all that could be shown would be that no such license appears of record, in the archives or elsewhere, and such is the proof in this case.

Governor Pico, who was a witness for the claimant, makes no mention of any such license; and as it would have been the solitary instance of the kind which, so far as I am informed, ever occurred in the history of California, the fact could hardly have escaped his memory, nor would the claimant have omitted to establish it by the testimony of the governor.

Besides, it is impossible to suppose that so protracted and troublesome a proceeding as demanding and obtaining the license of the supreme government would have been resorted to, when the applicant could, without delay or difficulty, have been naturalized by an ordinary magistrate.

The idea, therefore, that such a license may have been obtained, appears to me rather an ingenious suggestion of counsel, than a legal presumption which the court should indulge.

But the case of U. S. v. Reading, 18 How. [59 U. S.] 9, is relied on as an authority decisive of this case. In that case the grant contained the usual recital "that the proper proceedings and investigations had been previously complied with according to the provisions of the laws," etc., in the form invariably adopted in all grants.

"Now this," say the supreme court, "is not merely the language of clerical formality, though it might be the same from usage in like cases, but it is a declaration of the governor's official and judicial conscience; that his power to make the grant has been used in a fit case," etc.

"We consider it conclusive of the fact of the petitioner's naturalization, precluding all other inquiries about it, in our consideration of this case, by the record."

With reference to that case, it is to be observed:

(1) That the grant to Major Reading states "that he is a Mexican by naturalization," which is not stated in the grant to Cambuston; and it further appeared, from the espediente, that the usual informes were obtained, and the petitioner reported by Jimeno to be a proper person for the governor's favor.

(2) So far as the principles laid down by the supreme court, in the extract above cited, can be supposed to apply to this case, they must be taken as overruled by its more recent decision in the case we are now considering.

"It is true," say the supreme court, "the document recites that a petition was presented, and that the customary investigation had been made in respect to the application. But this cannot be regarded as conclusive, or even satisfactory evidence of these facts when the question is raised, whether or not the alleged grant is made in conformity with the requirements of law—in other words, whether the preliminary conditions had been complied with, which enabled the governor in the particular case to make the grant." U. S. v. Cambuston, 20 How. [61 U. S.] 68.

The court then proceeds to distinguish between the Florida and Louisiana cases and those in California. In the first, the existence of the power to grant and the regularity of its exercise were presumed from the facts of the habitual granting of lands by certain officers, and the customary mode adopted in making them. In the California cases the power is expressly conferred and the manner of its exercise prescribed by law; and therefore no presumptions are admissible. But the court must look to the law for the power to make the grant, and the manner of its exercise.

If, then, the court refused to treat the recital that the customary investigation had been had, etc., as conclusive or even satisfactory evidence of the fact, but remanded the case that such proofs might be given, it is difficult to perceive how this court can treat the same recital as proving not only that the investigations were made, but that they resulted favorably to the petitioner, and that he was ascertained to have been naturalized, especially as he is not stated in the grant to have been a citizen, either by birth or naturalization.

In the Case of Reading, the informe of Jimeno, and the statement in the grant that he was a naturalized citizen, may well be regarded as a judicial ascertainment of the fact precluding all subsequent inquiries upon the subject.

But in this case no informes are produced. We have only the statement of Moreno that they existed in an espediente, which is lost,

and which no other witness ever saw. As to its contents we are wholly uninformed—and the grant does not contain the result of the investigation, for contrary to the almost invariable practice, the political status of the grantee is not mentioned.

One other argument urged by the counsel for the claimant remains to be noticed. It is insisted that the "prohibition against foreigners holding lands is not restrictive upon the power of the governor to remove the disability, and a grant by him operates as an enfranchisement." In support of this proposition various cases are cited. 20 Johns. 706; 7 Johns. 290; 9 Johns. 362; 5 Cow. 397; 2 Wend. 133. But the distinction between those cases and the case at bar is obvious. In the decisions referred to, it is held that where the legislature directed a grant to issue to a particular person by name, or to a class of persons of which he was one, and a patent was executed to him in pursuance of the statute, it could not be objected that other and general laws disabled him from taking. The same sovereign authority which created the disability was competent to remove it, and the law authorizing the patent was held to operate as a repeal pro tanto of the previous general laws. In such cases the question is clearly one of intention, not of power. But the governor of California had no similar power. He was a subordinate agent, with powers conferred and limited by law. To say that he had authority to remove a disability created by law is to say that he was above and not subject to the law, and to affirm in effect that a violation of law by an officer of government operates as a repeal of it.

I have thus, in obedience to the injunction of the supreme court, inquired into and scrutinized this case with great care as to the authority of the governor to make the grant, and the bona fides of its exercise.

The result of that inquiry is, that the grantee was a foreigner, and does not appear to have been naturalized; nor is it shown that the express license of the supreme government was obtained. The governor, therefore, had no authority to make the grant.

The claim must be rejected.

NOTE. It will be observed that in the foregoing opinion the question is not presented by counsel, nor discussed by the court, whether a grant by the governor, unapproved by the departmental assembly, vested such a title in the grantee (assuming him to have been capable of taking) as the United States are bound to respect, notwithstanding that the land was not occupied or cultivated before the subversion of the Mexican authority. This point is supposed to have been determined by the supreme court in the case of Fremont v. U. S. [17 How. (58 U. S.) 542], the omission to take possession and fulfil the conditions during the short interval that elapsed between the date of the grant and the acquisition of the country by the United States being considered by the counsel for the United States entirely insufficient to give rise to the presumption of abandonment.

The following note was prepared for insertion in a volume of decisions of this court in land cases which it was proposed to publish. That project having been abandoned, it has been thought convenient to append it to the foregoing opinion. The Case of Cambuston was among the first decided by this court under the authority of Fremont v. U. S., and is believed to present a striking illustration of many of the observations in the annexed note.

The case of Fremont v. U. S., was among the earliest of the cases decided by the United States district court on appeal from the board of commissioners. It was the first in which the supreme court announced the principles by which this class of cases was to be decided. It has, therefore, remained the most important and the leading case on this branch of the law, and has exercised a controlling influence on all subsequent decisions of this court.

As the judgment of the district court was reversed by the supreme court, a fuller exposition of the grounds of that judgment than circumstances then permitted will, it is hoped, not be deemed disrespectful to the supreme court, nor, perhaps, prove uninteresting to the reader.

The authority of the governor of California to grant lands in colonization was derived from the law of 1824, and the regulations of 1828 made by the executive in virtue of the authority conferred by the law.

The first eight articles of those regulations are as follows:

"(1) The governors of the territories are authorized (in compliance with the law of the general congress of the eighteenth of August, 1824, and under the conditions hereafter specified), to grant vacant lands in their respective territories, to contractors (empresarios), families, or private persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating or inhabiting them.

"(2) Every person soliciting lands, whether he be an empresario, head of a family, or private person, shall address to the governor of the respective territory, a petition setting forth his name, country, profession, the number, description, religion, and other circumstances of the families, or persons with whom he wishes to colonize, describing, as distinctly as possible, by means of a map, the land asked for.

"(3) The governor shall proceed immediately to obtain the necessary information whether the petition embraces the conditions required by the said law of the eighteenth of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to, or if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant.

"(4) This being done, the governor will accede or not to said petition, in exact conformity to the laws on the subject, and especially the beforementioned one of the eighteenth of August, 1824.

"(5) The grants made to families or private persons, shall not be held to be definitively valid without the previous consent of the territorial deputation, to which end the respective documents (espedientes) shall be forwarded to it.

"(6) When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision.

"(7) The grants made to empresarios for them to colonize with many families, shall not be held to be definitively valid until the approval of the supreme government be obtained, to which the necessary documents must be forwarded, along with the report of the territorial deputation.

"(8) The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given."

Under the earlier governors, and especially un-

der Figueroa, who appears to have been among the most enlightened of them all, the practice observed in granting lands appears to have been in precise conformity with the requirements of the regulations.

The petition, accompanied by the diseno, was presented, and was referred by a marginal order to the municipal authorities, or other fit persons, for informes as to the qualifications of the petitioner, his means of occupying the land, etc., and also as to the condition of the land, whether vacant or not, and as to its extent.

When the informes were received, the governor decided upon the application. "If he acceded to the petition," he did so by making a short decree, usually called the decree of concession, which was at ached to the petition and informes, and constituted the espediente. The decree of concession usually directed that the espediente should be sent to the most excellent departmental assembly for their approval, but no title paper or documento was as yet delivered to the party interested. It was not until after the assembly had approved the concession, and it had thus become "definitively valid," that the documento or title paper mentioned in the eighth article was delivered "to the party interested to serve as a title." This documento always expressed that it was in conformity with the provisions of the laws; and it contained various conditions, the breach of which subjected the land to "denouncement" by any one who might desire to obtain it for himself.

It would seem from the language of the eighth article that it was only when the concession had thus become definitive, and when the documento had been furnished to the party, that he had the right to apply to the "respective judge" to obtain a judicial measurement and delivery of possession of the land. In one instance, at least, which has fallen under my notice, it appeared that the judicial officer refused to give the possession on the ground that the concession had not been approved, and, on appeal to the governor, the local officer was sustained.

The loose and informal mode of conducting business, the small value of the lands, the infrequency of the meetings of the assembly, and other causes, soon led the governors to depart from the strict course of procedure with respect to concessions of land which Figueroa had observed; and the practice grew up of issuing the final documento, or title paper, immediately upon the making of the decree of concession. A clause was, however, inserted in the title, to the effect that the grant was subject to the approval of the most excellent departmental assembly. The grant was then, in advance of the approval, delivered to the party, and he usually proceeded at once to occupy the land.

It would seem, however, from the instance cited above, that when the point was formally presented to the governor, he did not feel at liberty to direct the judicial possession to be given by the "corresponding judge," until, by the approval of the assembly, the grant had assumed definitive validity

Of the grants so made by the various governors, many were subsequently approved by the assembly. This was done after a reference to a committee of that body, and upon a report by that committee. A resolution of approval was then passed, and a testimonio, or certified copy of the resolution of approval, was furnished to the party interested.

That the assembly did not consider their duties merely formal, is proved by the fact that, in some instances, the extent of the land granted was materially reduced, or rather the concession was approved only to a limited extent. In many cases, however, the espedientes seem never to have been transmitted to the assembly, and many of the ancient inhabitants of the country were found at the conquest in possession of and claiming to own lands by virtue of grants by the governor, unapproved by the departmental assembly.

There were also found in the possession of many persons, grants by the governor for extensive tracts which they had never occupied, nor, as in the case of the grant to Alvarado, perhaps even seen. As the Mexican rule approached the period of its final subversion, when war with the United States was on all sides recognized as impending, and after the rising of the American settlers in the country, known as the "Bear Flag War," had occurred, the governor (Pio Pico) appears to have distributed grants with a lavishness that would justify the suspicion that he hoped to secure to his countrymen, by the pen, the lands he foresaw they were about to be deprived of by the sword.

Under these circumstances, it became a point of vital importance to determine the effect and legal operation of the unapproved grants of the governors of California.

On this point two opposing views were suggested.

(1) It was held by some that the regulations merely provided that the concessions of the governor should not possess definitive validity until approved by the assembly or the supreme government, and that they did not provide that until such approval they should possess no validity whatever; that even when disapproved by the assembly the grant did not fail, but it was then the governor's duty to transmit the espediente to the supreme government for its approval, and the grant remained valid and effective, though not definitively so, until the supreme government had refused to approve it; that the concessions of the governor must, therefore, be deemed to have passed to the grantee a base or determinable fee, liable it is true to be divested by the refusal of both the assembly and the supreme government to approve, but remaining a vested and valid right of property until that contingency occurred. It was therefore contended, that the practice of issuing the grants immediately on making the decree of concession, and subject to the approval of the assembly, was more strictly in accordance with the law than that which obtained under Figueroa; and that the estates so granted, not having been divested by any refusal to approve on the part of the Mexican authorities, must be held valid and indefeasible by the American authorities.

It was also urged that, inasmuch as by the regulations it was the duty of the governor, not of the grantee, to transmit the espediente for approval to the assembly, any omission or neglect of duty in that respect ought not to work an injury to the grantee.

(2) On the other hand, it was maintained that the regulations, by a just and inevitable construction showed that, to make a valid or complete grant, the concurrence of either the assembly or the supreme government was necessary; that the practice under Figueroa was the only practice which could have been adopted in strict conformity with the law; and that grants issued in advance of and subject to the approval of the assembly, were essentially inchoate or imperfect titles; that the application, therefore, of the grantee for a confirmation, was in effect an application to the United States to complete and give definitive validity to a grant which, by Mexican law, was incomplete, and not "definitively valid," and which the United States were at liberty to refuse, unless the grantee could urge equitable considerations in his favor, such as would have bound the conscience of the former government if it had been asked to approve the concession; that these equities were to be found in the fact of the occupation and cultivation of the land, which would justify the grantee in asserting that he had rendered, and the former government received, the consideration upon which, by the policy of the colonization laws, the lands were granted. But where no such fact appeared, and where no settlement had been effected, and whether by the fault or the misfortune of the grantee was immaterial, the United States were at liberty to refuse to confirm and complete the title, defective and incomplete in itself, and

in aid of which the claimant could invoke no equities. The last view was that adopted by this court, for reasons, the fallacy of which I am obliged to confess myself to this day unable to perceive. It will be sufficient in this note rather to indicate than to develop or enlarge upon them.

(1) Whatever may be said of the validity which the unapproved grants of the governor may have possessed, it is evident, from the regulations, that the power to grant lands was intended to be vested in the governor concurrently with the assembly, or by and with the consent of that body; that the power of granting the public domain in the territories was not to be exercised at the absolute will of a governor appointed at Mexico, but was to be subject to the approval of the local legislative assembly, and in case of disagreement to the final decision of the supreme government.

To carry out this policy, the only strict and regular mode which could have been adopted was that pursued by Figueroa, whose practice was, as already stated, to decide himself in the first instance on the application, that is, to accede or not to the petition, then to transmit the espediente to the assembly, and to issue the documento or title paper when their approval had been obtained.

But if the governor had authority to grant an estate to an applicant, which could only be divested by the refusal of both the assembly and the supreme government to approve the grant, he could readily have defeated the whole policy of the law, for he had only to omit to send in the espediente for approval. The contingency on which the estate was to be divested could in such case never occur; for until the grant was submitted for their approbation they could have no opportunity to disapprove it.

But that the final title was not to issue until the concession had become definitive, that is, until it had been approved, is clear, from the very terms of the eighth article.

"The definitive grant asked for being made, a document signed by the governor shall be given to serve as a title to the party interested," etc.

It will be observed that this is the only document which, by the regulations, was at any time to be delivered to the party. Up to the time of its reception he might have remained in entire ignorance of the result of his application, and it was only by virtue of this document that judicial possession of the land could be given.

If, then, this document was his only title paper, and if, by law, it ought not to have been issued until the grant had, by approval, become definitive, it follows that no rights legally passed to him by virtue of any action of the governor previous to such approval; and that the delivery of the final documento, in advance of and subject to an approval, could not, in strictness, have vested any estate defeasible or other in the grantee.

It is, of course, not supposed that the action of the governor in acceding to the petition, or making his first decree of concession, was of no effect. It was the performance of a part, and a most important part, of the acts necessary to the execution of a grant of public lands. But it was not all that the law required. And until the concession had been approved it conferred no legal rights, any more than the nomination by the president of an officer to the senate confers, without confirmation by that body, a right to the office.

That it was the governor's duty to transmit the espediente to the assembly, and in case of their disapproval to the supreme government, is admitted.

But that fact serves more clearly to show that until such approval the proceeding remained exclusively in the hands and under the control of the government or granting power. That the applicant was not recognized as having yet acquired any rights, and might even, as before observed, have been ignorant of the action of the government; for otherwise the duty of perfecting his title by the confirmation of the assembly would have been imposed upon the petitioner.

The fact, then, that a grant was not submitted to the assembly is not charged upon the applicant as a fault. It was his misfortune that the proceedings necessary to pass the title were not had. But the circumstance that the governor neglected his duty in this respect can have no effect to impart a validity to the governor's preliminary action, which it would not otherwise possess.

But as the practice of issuing the final title in the first instance had so long and so extensively prevailed in the country, as many ranchos had long been held and occupied under no other title, it seemed just to treat the reception of such a title as constituting an equity, which when followed and consolidated by an occupation and settlement, i. e., the rendering of the consideration contemplated by the colonization laws of Mexico, authorized the claimant to demand a confirmation by the United States.

But where the land had not been occupied, where the claim was founded solely on the fact that a title, unapproved by the assembly, had been delivered to the party, I was of opinion that he had no right to demand that this government should complete and make definitive that which the former government had left incomplete and inchoate.

The same conclusion was reached by another course of reasoning.

(2) It cannot be denied that the assembly and the supreme government possessed the right to avoid, by refusing to approve, the act of the governor in making the concession. This was a sovereign and a proprietary right expressly reserved to them by the law, and by the terms of the document delivered to the party.

This right passed to the United States by the conquest, and could justly have been exercised in all cases where the Mexican authorities, had their government not been subverted, would have been at liberty to do so, i. e., where no equitable circumstances existed sufficient to bind the conscience of that government.

If, then, the Mexican government had found itself in the same condition as that in which the United States were placed; if lands which had been distributed by the league as almost without value had suddenly commanded enormously increased prices; if an immense immigration had set in of other Mexican citizens, who asked for and were willing to buy tracts of only one hundred and sixty acres instead of eleven square leagues; if the possession of such immense estates by single individuals had become contrary to the policy of her laws, the genius and habits of her citizens, and inconsistent with the rapid development of the resources of the country; if all these circumstances had existed, it may be declared with some confidence, that Mexico would have felt it to be not merely her right but her duty to exercise the power expressly reserved to her of avoiding the concessions of the governor, by refusing to approve them, in all cases where the grantee could allege no solid equities in his favor.

If, then, she had avowed her willingness to confirm and approve all such grants whenever on the faith of them the grantee had actually occupied and settled upon the land,—that is, whenever he could show that the government had received the consideration which the policy of the former laws had required,—it seemed to me that she would have done all that could have been claimed or expected from either her justice or her generosity.

The United States, succeeding to the rights and duties of Mexico, was at liberty to assume the same position, and had a right to demand, when called upon to recognize or confirm an unapproved grant, that the claimant should show occupation and cultivation of the land; not to avoid a forfeiture, as for breach of conditions subsequent in the grant, but as an indispensable

part of the equities on which he could rely for a confirmation.

It was for these reasons that I considered that in all cases evidence of the fulfilment of the conditions of occupation and cultivation was indispensable, and that as occupation and cultivation constituted an essential element of the equities on which alone the claimant could base his application, no excuses for its omission, or explanation of the obstacles which prevented it, could be received; for the inquiry was not whether by neglect he had forfeited a vested right, but whether by performing certain acts he had acquired one, or, in other words, whether any equitable circumstances existed which bound the conscience of this government to confirm and complete the title.

Under this view, the questions presented under the Mexican colonization laws bore a close analogy to those debated and decided in the Louisiana and Florida cases, in which it was held by the supreme court that the performance of the conditions constituted the chief ground of the claimant's equity. The decisions of that court in those cases I therefore considered as affording a guide and imposing a rule for the determination of land cases in California, and as the later decisions in the cases of U. S. v. Boisdore [11 How. (52 U. S.) 63], De Vilemont v. U. S. [13 How. (54 U. S.) 261], Glenn v. U. S. [Id. 250], etc., had rigorously required the exact fulfilment of the conditions, I feel obliged, reluctantly, to follow them; and in the Case of Cervantes [Case No. 14,768], to demand an occupation and settlement within the time limited in the grant—a decision apparently harsh and illiberal, but which, under the pressure of the later decisions of the supreme court, I thought myself compelled to make. But in the case of Fremont, I entertained no doubt. Alvarado, the original grantee, had not only never occupied, but, so far as appeared, had never even seen, the land for which he obtained a concession; and the obstacles which prevented a settlement existed at the time he applied for and procured the concession, and when he assumed the implied obligation to occupy and cultivate the land.

This land, unavailable and almost worthless under the Mexican government, had, chiefly in consequence of the American occupation, assumed an enormous value. It seemed to me, therefore, clear that the United States were in that case justified in refusing to recognize and perfect a claim in support of which the claimant could urge no other fact than the possession of a title-paper signed by the governor, but unapproved by the assembly or the supreme government.

But the supreme court overruled this decision. In its opinion, that tribunal seems to have adopted a view not precisely in accordance with either of those stated in this note.

It regarded the grant to Alvarado "as having given him a vested interest in the quantity of land therein specified;" but it proceeded to inquire "whether there was any breach of the conditions annexed to it, during the continuance of the Mexican authority, which forfeited his right and revested the title in the government." Fremont v. U. S., 17 How. [58 U. S.] 560.

To determine this point, the supreme court further proceeded to inquire, whether there had been such unreasonable delay or want of effort on the part of Alvarado to fulfil as would justify the presumption that he had abandoned his claim before the Mexican power ceased to exist. The court then considered the various obstacles which had prevented a settlement, and the efforts made to effect one; and finding no unreasonable delay or neglect on the part of the grantee, confirmed the claim.

The language of the supreme court is not explicit as to the important point whether it regarded the unapproved grant of the governor as vesting a legal estate, liable to be divested by breach of conditions subsequent, or as passing merely an equitable interest which the United States were bound to respect, unless forfeited by unreasonable neglect to fulfil the conditions.

On the true construction of the opinion of the supreme court, in this respect, much diversity of opinion has prevailed. If the grant to Alvarado had been approved by the assembly, and had thus become complete and definitive by the concurrence of all the granting powers necessary to its execution, the conditions would have remained conditions subsequent, the breach of which would not forfeit the estate, but would have merely rendered it liable to denouncement—a formal proceeding or mode of enforcing a forfeiture well known to the Mexican law. But if no such proceeding had been taken, and the fee remained in the grantee, undivested by any act of the Mexican authorities, it would seem that the courts of the United States could have no power to inquire into and declare forfeitures which had accrued under the former government.

But inasmuch as the supreme court did enter into the inquiry whether the grantee had forfeited his rights by delay or neglect, in its judgment, unreasonable, it may be inferred that the court must have regarded the estate or interest vested in the grantee as an equitable interest, liable to be divested by unreasonable delays or neglects, which might constitute an equitable forfeiture.

But whatever may have been the views of the supreme court on this question, the practical result of the decision was most important. For under it, every claim for which a title-paper signed by the governor was exhibited was to be confirmed, unless the United States could show that there had been such unreasonable delay or neglect to fulfil the conditions as would create the presumption of an abandonment.

The views previously taken by this court had been commended to it, not more by their supposed technical accuracy than by considerations of their policy and practical advantage.

In deciding upon the genuineness of any claim to land under Mexican grants, the most, if not the only, satisfactory evidence which can be offered, is that furnished by the archives and afforded by the notorious possession and claim of ownership under the former government.

But, under the decision of the supreme court, I found myself unable practically to apply this latter test; for it was always easy, in cases of fraudulent or antedated grants, to locate the land in districts where it could readily be shown that Indian hostilities presented an insuperable obstacle to a settlement, and by parol proof of this fact and of some efforts or attempts at a settlement by the pretended grantee, to make the case precisely analogous to that of Fremont.

But this was not the most important practical consequence of the decision. A greater part of the grants by Pio Pico, which have obtained the sobriquet of "eleventh-hour grants," were executed but a few months before the final subversion of the Mexican authority. The grantees, in many instances, had not seen the land, and had never taken any steps to effect its settlement. Unapproved by the assembly, issued with evident signs of haste if not carelessness, never occupied or cultivated, they seemed to possess less equities than almost any other. But these grants were precisely those with regard to which the court could not declare that they had been forfeited by abandonment.

The distracted condition of the country, and the impracticability of occupying the land, could always be alleged in excuse for the omission to do so. And independently of such excuses, it seemed impossible to presume an intention to abandon, from a neglect of a few months, when the customary period allowed for the purpose was one year.

The difficulty, therefore, of declaring the grant forfeited by abandonment increased in proportion to the shortness of the interval between its execution and the conquest of the country. And thus those grants, issued under the circumstances which have been mentioned, and which seemed more than all others destitute of real

equities, were the most secure from the operation of the principle announced in the Case of Fremont.

The book of Toma de Razon, for 1846, having been lost, and it being possible that the espediente in a particular case had met the same fate, the absence of archive testimony could not be regarded as conclusive evidence of the spuriousness of the title; and parol testimony, which it was not easy to contradict, however much it might be distrusted, was generally at hand to afford the requisite secondary proof of the contents of the lost espediente.

As proof of occupation could not be exacted, the court felt obliged to confirm these titles on proofs which amounted to little more than the verification of the signatures of the officers who executed them.

This result might, it is true, have been avoided by inquiring into the bona fides of the exercise of his authority by the governor. But an attempt to ascertain the motives of an officer, when performing an official act admitted to be legally within the limits of his authority, would in most cases prove abortive and unsatisfactory, and the conclusion reached would often be of too speculative and conjectural a character to form the basis of a judicial determination. For these reasons, it seemed to this court, when these cases were first brought before it, clear, that as a matter of law, as well as on the grounds of policy, and as a means of preventing frauds, evidence of occupation and cultivation should in all cases be exacted, where a claim was made under a grant by the governor, unapproved by the departmental assembly.

Case No. 14,714.

UNITED STATES v. CAMPBELL et al.

[4 Cranch. C. C. 658.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

WITNESS—ONE JOINTLY INDICTED—ACQUITTAL.

If two be jointly indicted for robbery, and if one be acquitted, and the other convicted, the latter may have a new trial without the other, who may be examined as a witness upon the new trial.

John Campbell and Thomas Turner were jointly indicted for the robbery of Mrs. Queen. Turner was acquitted, but Campbell was convicted, and moved for a new trial on the ground that Turner was now a good witness for Campbell, and that other evidence also had been discovered. A doubt was suggested whether a new trial could be granted to one without setting aside the verdict as to the other also, but upon the authority of Mawbey's Case, 6 Term R. 619–640, and 1 Chit. Cr. Law, 659, 660.

THE COURT (nem. con.) granted Campbell a new trial, without disturbing the verdict as to Turner, and permitted Turner to be examined as a witness for Campbell, who was thereupon acquitted also.

UNITED STATES (CAMPBELL v.). See Case No. 2,373.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,715.

UNITED STATES v. CANAL BANK.

[3 Story, 79; [1] 7 Law Rep. 88.]

Circuit Court, D. Maine. May Term, 1844.

UNITED STATES—PRIORITY—DEEDS—RECORD—ATTACHMENT.

1. The United States have no such priority over other creditors of their debtors, as to entitle them to a prior satisfaction, by attachment and levy, over prior attaching creditors.

[Cited in U. S. v. Griswold, 8 Fed. 501; Bush v. U. S., 14 Fed. 323.]

2. In Massachusetts and Maine, a creditor, attaching real estate, can hold the same against a person purchasing prior to the attachment, but whose deed is not recorded until after the attachment; provided the attaching creditor has no notice of the deed, at the time of the attachment.

3. The United States, by attachment and levy of execution upon real estate, do not acquire any better title to the same, than the debtor himself had.

4. B. attached certain land, as the property of C., on October 4, 1839, and levied an execution thereon, on November 11, 1840. C. conveyed the same land to H. by deed, prior to the attachment, but the deed was not recorded until October 26, 1839, and B. had no notice thereof, prior to that time. The United States recovered judgment against C. and H. on duty bonds, subsequent to October, 1839, and levied their execution on the same premises, prior to November 11, 1840, "as the estate of any or all the debtors." It was *held*, that the United States were not entitled to a priority against B.

This was a writ of entry, on the plaintiffs' own seisin, wherein they demanded of the defendants seisin and possession of certain premises, situated in Portland, Maine, described in the writ. It appeared, from the agreed statement of facts, that on the 24th of October, 1839, the present defendants attached certain real estate, of which the demanded premises composed a part, on a writ against James C. Churchill and Caleb S. Carter. Having obtained judgment, the present defendants caused their execution to be duly levied thereon, November 11, 1840, agreeably to the laws of Maine. It also appeared, that on the —— day of October, 1839, Churchill, and Churchill and Carter, conveyed the demanded premises, by certain deeds, to Noah Hinkley; but the deeds were not recorded, nor their existence known to the present defendants, until October 26, 1839, and no change of possession of the premises had taken place. It further appeared, that the plaintiffs, after the attachments before mentioned, commenced suits against the said Churchill, Carter and Hinkley, on duty bonds, falling due subsequent to the attachments before mentioned; that they recovered judgment, and caused their executions, issued thereon, to be levied on a part of the demanded premises, "as the estate of any or all the debtors," prior to the levy of the defendants' executions before mentioned.

[1] [Reported by William W. Story, Esq.]

It was agreed, that the conveyances from Churchill, and Churchill and Carter, to Hinkley, were not an assignment and transfer of all their property, and that they never made a general assignment of all their property, until long after that transaction, when they did so under the provisions of the bankrupt law, in 1842. If, upon these facts, the plaintiffs could maintain this action, judgment was to be entered in their favor, for that part of the demanded premises included in their levy; otherwise, judgment was to be rendered for the defendants.

Parks, Dist. Atty., for the United States.
Mr. Goodenow, for the tenants.

STORY, Circuit Justice. Upon this statement of the facts, several questions have been suggested. In the first place, whether the United States have any priority, or privilege, in respect to the debts due to them by their debtors, over the debts due to private persons, so as to entitle them to a prior satisfaction, upon any judgments obtained against their debtors, out of the property attached, before other attaching creditors, whose attachments are of an earlier date. In my judgment they have not. It has long since been settled, by the solemn adjudications of the supreme court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity; but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some statute, passed by congress, in virtue of its constitutional authority. This was expressly so held in U. S. v. Fisher, 2 Cranch [6 U. S.] 358, 396, and the doctrine has ever since been strictly adhered to. U. S. v. Hooe, 3 Cranch [7 U. S.] 73; Prince v. Bartlett, 8 Cranch [12 U. S.] 431; Thelleson v. Smith, 2 Wheat. [15 U. S.] 396; U. S. v. Howland, 4 Wheat. [17 U. S.] 108; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 387. It is not here, as it is in England, where the sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown. Com. Dig. "Prerogative," D, 86; Id. "Debt," G, 8, G, 9. Four classes of cases only are provided for by Act March 3, 1797, c. 74, § 5 [1 Story's Laws, 465; 1 Stat. 515]; and the same are in substance re-enacted in the revenue collection act of 1799 (chapter 128, § 65 [1 Story's Laws, 630; 1 Stat. 676]. First, cases where the estate and effects of any deceased debtor in the hands of his executors or administrators, are insufficient to pay his debts. Secondly, cases where the debtor, not having property sufficient to pay all his just debts, has made a voluntary assignment thereof for the benefit of his creditors. Thirdly, cases where the estate and effects of an absconding, concealed, or absent debtor, have been attached by process of law. And, fourthly, cases where the debtor has committed a legal act of bankruptcy. The debtors, in the present case, do not fall within either of these predicaments. But the case of Prince v. Bartlett, 8 Cranch [12 U. S.] 431, is directly in point, to the very case of conflicting attachments; and decides, that in such a case the private creditor, having the prior attachment on the property, is entitled to a preference over the subsequent attachment of the United States.

In the next place, the question arises, whether an attaching creditor is entitled to satisfaction, out of the real estate of his debtor, against a bona fide purchaser of the same estate, for a valuable consideration, without notice, whose deed is not recorded in the registry of deeds, until after the attachment is made. As an original question, I should have entertained very great doubts, whether the attaching creditor had any such right; at least, unless the purchaser fraudulently, or by gross negligence, withholds his deed from being recorded until after the attachment, and thereby designedly misleads, or actually injures the other creditors of the debtor. My opinion upon this subject, independent of authority, would be, that an attaching creditor, in all cases, except cases of such fraud, or gross negligence, can entitle himself only to the same interests and rights in the estates attached, as the debtor himself has, or would have, at the time of the attachment, against the purchaser. But I understand that, under the local laws of Massachusetts and Maine, (which upon this subject are the same,) it has been held, that the attaching creditor is entitled to a prior satisfaction, out of the real estate attached, if he has not, at the time of the attachment, any notice of the prior unrecorded deed; or if the purchaser has not, with all reasonable diligence procured his deed to be recorded. See Farnsworth v. Childs, 4 Mass. 637; Davis v. Blunt, 6 Mass. 487; Prescott v. Heard, 10 Mass. 60; Priest v. Rice, 1 Pick. 164; Cushing v. Hurd, 4 Pick. 253. See, also, Briggs v. French [Case No. 1,871]; Stanley v. Perley, 5 Greenl. 369. In the present case, it is not suggested, that Hinkley's deed might not, with reasonable diligence, have been recorded, before the attachment of the tenants was made. Following, therefore, the local decisions upon this subject, which, as a rule of real property, governing many titles in the state, and also as a construction of the nature and operation of local statutes, ought, in my judgment, to be followed, I have no difficulty in saying, that the attachment of the tenants has a priority over the conveyances to Hinkley.

Then, in the next and last place, does it make any difference, that the United States are attaching creditors of Hinkley, and have levied their execution upon the demanded premises? In my opinion it does not. Generally speaking, an attaching creditor is

deemed to be in the same situation as a second purchaser, according to the decisions in Massachusetts and Maine; and we all know, that a second purchaser is not affected with the title of any third persons in the property, of which he has no notice. In the present case, Hinkley's title was subordinate to that of the tenants, under their prior attachment, and the United States can properly claim, against the tenants, the same rights only that Hinkley himself might claim; for the title of the United States is but a derivative title under Hinkley. The case is not like that of Coffin v. Ray, 1 Metc. [Mass.] 212, where the grantee, under whom the attaching creditor claimed, had notice of the unregistered deed of a prior grantee, and the court held, that as the attaching creditor had no notice of such prior deed at the time of his attachment, although he had before the levy of the execution, he was entitled to hold against the grantee of such prior deed. Here, the United States, at the time of their attachment, either knew, or might have known, of the prior attachment of the defendants, and that Hinkley's deed was not, at that time, recorded. But whether the United States did know, or might have known, of the prior attachment of the tenants, or not, is immaterial, since such knowledge in Hinkley could not have given validity to his title, against the prior attachment of the tenants. And if the United States are to be treated as purchasers at all, they must be treated as purchasers of all Hinkley's rights in the premises, subject to the prior incumbrances thereon. The case of Coffin v. Ray, supra, certainly goes very far, and places the attaching creditor in a better situation, than that of the grantee, under whom he claims title. But it is distinguishable from the present case in the material circumstances, that in that case, the notice created a mere personal equity, affecting the grantee alone, and thus would deprive him of the right to set up his title, as a bona fide purchaser, without notice, against the prior grantee; whereas, in the present case, the attaching creditor, by his prior attachment, acquired a right in rem, and no personal equity whatsoever applies to him, founded upon notice of Hinkley's deed, of which the United States could avail themselves.

Judgment for the tenants.

Case No. 14,716.

UNITED STATES v. CANAL BOAT NO. 68.

[See Case No. 16,027.]

Case No. 14,717.

UNITED STATES v. The CANDACE.

[The case reported under above title in 9 Int. Rev. Rec. 177, is the same as Case No. 2,379.]

Case No. 14,718.

UNITED STATES v. CANOE.

[5 Hughes, 490.]

Circuit Court, D. Maryland. Nov. 22, 1867.

APPEAL—FINAL DECREE—WAR—PROHIBITION OF COMMERCIAL INTERCOURSE—SEIZURE OF GOLD COIN.

[1. Certain merchandise, together with some gold coin, was seized during a period of insurrection and libeled for condemnation, as about to be transported into the enemy's country. A decree was entered by which the merchandise was condemned and ordered to be sold. The court, in delivering its opinion, stated that the gold could not be condemned, and the decree directed that it should be deposited in the registry, to await further orders. Over two years later, on the petition of a claimant, the gold was ordered to be paid over to him. *Held*, that the original decree was not final in respect to the gold, and that, consequently, an appeal from the subsequent order might be taken, notwithstanding the fact that more than two years had elapsed since the date of the former decree.]

[2. The act of July 13, 1861, providing for the forfeiture of all "goods and chattels, wares and merchandise" coming from, or proceeding to, the insurrectionary districts, includes gold coin.]

[Appeal from the district court of the United States for the district of Maryland.]

CHASE, Circuit Justice. This cause comes before us on appeal from the district court. The libel charges that a canoe called the "Lapwing," with a lot of goods and chattels, consisting of two canvas sails, seven barrels of borax, and seven hundred and seventy dollars in gold, was, on or about the 20th of July, 1862, proceeding from parts of the United States not in insurrection to a part of Virginia which was in insurrection, and that the canoe and cargo including the gold, were seized by the proper officers for the violation of the act of July 13, 1861 [supra], and the act of May 20, 1862 [12 Stat. 404], prohibiting commercial intercourse between the loyal and rebel states, and thereupon the libel brought for condemnation. No claim was put in on the hearing below for any part of the property seized.

The first decree of the district court recites the facts proved. From this recital it appears that the canoe, with the borax on board, was found lying in a creek in St. Mary's county, in Maryland, and seized on behalf of the United States by a party of cavalry. No person was on board the canoe, but in the woods at a little distance, a man was captured who admitted that he was the owner of the canoe and cargo; that he was a physician residing in Virginia, and that he intended to take the borax to Virginia for sale. The gold was found upon his person. Upon these facts the district court expressed the opinion that all the property except the gold was liable to condemnation, but that the gold was not so liable, and thereupon at the March term, 1864, a decree was made condemning the canoe, the borax and the canvas sails, and directing that the gold be deposited in the registry to await further orders. The decree further di-

rected the sale of the property condemned and the deposit of the proceeds, after payment of costs, in the registry to await further orders. Subsequently in June, 1866, Daniel W. Vowles presented a petition claiming to be the person from whom the gold was taken, and praying an order that it should be paid over to him. The identity of the claimant was admitted, and an order was made for the payment of the money agreeably to his prayer. From this order the United States appealed.

The record does not exhibit the evidence upon which the district court acted, but counsel on both sides admit the correctness of the statement of facts made by the district judge. It is also admitted by the appellee, and this admission is the only evidence before us in addition to what was before the district court, that the gold seized upon his person, along with himself was proceeding to an insurrectionary state without a legal permit.

This is the case, and the first question arises upon a motion to dismiss the appeal on the ground that the decree at the March term, 1864, was final, and was not appealed from within the time allowed by law. If this be so, the present appeal must, without doubt, be dismissed. But was the decree of March term, 1864, a final decree as to the gold? It is true that the learned district judge in his opinion stated quite distinctly that in his judgment the gold could not be condemned. But the decree makes no final order concerning it. On the contrary its direction is that the gold be deposited in the registry to await final order. We cannot doubt that after this order it was quite competent for the district court, had the judge changed his opinion, to make an order condemning the gold and directing its payment into the national treasury either directly or after conversion into national currency by sale. There can be no final decree concerning a fund which remains in the custody of a court subject to further orders except one which terminates that custody. The only final decree in this case therefore relating to the gold was that made upon the petition of Vowles, and directing its payment to him. It is not questioned that the appeal from this final order was in time. The motion to dismiss must therefore be overruled.

This brings us to the merits of the controversy. The fifth section of the act for the collection of duties and for other purposes, approved July 13, 1861, prohibits all commercial intercourse between the citizens of states and parts of states in insurrection, and citizens of other parts of the United States, and provides that "all goods and chattels, wares and merchandise" "coming from" an insurgent state or "proceeding to" such state "by land or water" shall be "forfeited to the United States," unless protected by the license or permission provided for in the act. It is clear upon the evidence that the gold was "proceeding to" an insurgent state; indeed the fact is expressly admitted. The only question before us therefore is, do the words "goods and chattels, wares and merchandise" include gold coin? Now, nothing can be more certain than that in general these words do include money, whether of gold or of any other kind. Bouv. Law Dict. 224. The word "goods" has the same signification as the word "bona" in the civil law, under which name (Wheaton's Law Lexicon, 441) is comprehended almost every species of personal property. Tisdale v. Harris, 20 Pick. 13. It is true that according to some authorities money cannot be taken in execution upon a fieri facias against the goods and chattels of a judgment debtor; but the reason is, not that money is not included under the ordinary sense of the words "goods and chattels," but that it is not vendible. Lord Mansfield called this "a quaint reason" (Doug. 231), and it deserves a harder name. The contrary doctrine is expressly declared by the supreme court of the United States in Turner v. Kendall, 1 Cranch [5 U. S.] 133. There is, to be sure, a citation by Mr. Justice Story in Citizen's Bank v. Nantucket Steamboat Co. [Case No. 2,730], of a case from 1 Carr. & P. 310, to the effect that an indictment for embezzlement of money alleged to be the money of certain directors vested by statute "with all the goods, chattels, furniture, clothing, and debts" of the corporation was not sustained by proof that the money belonged to the corporation, for the reason that the words "goods and chattels" did not include money. But on referring to the book I do not find that the point was passed upon by the court. It was only made by counsel and reserved with other points by Baron Parke for decision by the twelve judges, and the case was finally adjudged (1 Moody, Crown Cas. 15) on one of the other points without the expression of any opinion on the question supposed by Judge Story to have been decided. It is possible that the learned judge did not examine the case. He cited it by a wrong name, Rex v. Burrell. That Mr. Justice Story did not himself adopt the doctrine that "goods" do not include money is apparent from the case of U. S. v. Moulton [Case No. 15,827]. In that case he held expressly that "personal goods" include not only coin but bank notes. The same doctrine was affirmed in U. S. v. Murray [Id. 15,842].

On the whole it seems clear upon authority and upon sound reason that the prohibition in the act of congress extended to coin. It were strange indeed, if an act, intended to prevent all unlicensed commercial intercourse between the loyal and the insurgent parts of the country permitted the unrestricted carrying of coin, the chief instrument of such commerce, to the latter from the former. No such construction of the act can be allowed unless required by clear words. And the mode of conveyance cannot affect the legal consequences of the fact. The most valuable goods are very often carried upon the person, es-

pecially when the object is to elude the vigilance of guards and officers, or to escape the consequences of being engaged in prohibited traffic. Daily experience during the late Civil War then illustrated and daily experience in the revenue service now illustrates the truth of this observation.

It has already been observed that it is part of the case here, not so clearly if at all established in the district court, that the gold coin in question was proceeding to a part of Virginia then in insurrection. A decree must therefore be made condemning it as forfeited to the United States.

Case No. 14,719.

UNITED STATES v. CANTER et al.

[2 Bond, 389.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1870.

ELECTIVE FRANCHISE — CONSTITUTIONAL AMENDMENT—NEGROES—INTERFERENCE WITH VOTERS.

1. The amendment to the constitution of the United States, securing to all persons born here all the rights of citizenship, is now in full force and valid as a part of the constitution, and includes the African race.

2. The right of suffrage is included in the guaranty of the constitutional amendment.

3. Section 4 of the act of congress of May 31, 1870 [16 Stat. 141], prohibits and punishes all interference in the exercise of the right of voting, by threats, intimidation, or violence, which hinders or prevents the free exercise of the right.

4. The acts and conduct of the defendant, Lewis Canter, as proved, are within the scope and operation of said section 4.

5. Individual views, adverse to the policy of the extension of the right of suffrage as provided for in the constitutional amendments, should have no influence with the jury, as the act of congress, under which the indictment is framed, is a valid act, passed in pursuance of the constitution, and obligatory upon every citizen.

At law.

Lewis H. Bond, for the United States.
Cassius K. Brenneman, for defendants.

LEAVITT, District Judge (charging jury). The defendants, Lewis Canter and Henry Canter, father and son, are jointly indicted for a violation of the act of congress of May 31, 1870 [supra], securing to all persons, entitled by law to the right of voting at elections, the peaceful and unobstructed exercise of that right There are three counts in the indictment. The first charges that at the annual election held in Washington township, Lawrence county, Ohio, on October 11, 1870, the defendants, by threats, violence, and intimidation, hindered and prevented one Jacob Stuart from voting. The second count is similar to the first, with the exception that it is alleged said Stuart and one Jupiter Wilson were prevented from voting at said election by the same means averred in the first count. The third count charges an attempt to hinder and prevent the persons named from voting.

The indictment is framed under section 4 of the act of congress before referred to, which, in substance, provides that any person who, by bribery, threats, intimidation, or violence, shall hinder or prevent any qualified voter from the exercise of that right, shall be subject to punishment by fine or imprisonment. Several witnesses have been sworn, whose testimony in detail I shall not detain the jury by reciting. It is claimed that the evidence shows that Jacob Stuart and Jupiter Wilson both colored men of the African race, went to the place of voting at the election in Washington township, Lawrence county, Ohio, on October 11, 1870, for the purpose of voting for state and county officers, and also for a representative in congress for the district in which Washington township was situated; that there was a crowd about the place of voting, and as the two colored men approached the place, there were loud and violent words used to the effect that they would not be allowed to vote, and that the defendant, Lewis Canter, said to them they need not go to the polls, for no colored man should vote; that he would die first, and would cut the heart out of any one who would protect them. And that intimidated by the violence and threats used, the colored men were prevented from voting, and retired peaceably from the place. There can be no doubt that, if such is the evidence before you, it brings the defendant, Lewis Canter, within the scope and terms of the act of congress referred to. If his conduct, and the words used by him, did intimidate the colored men, and hindered and prevented them from voting, it was the precise result which it was the intent of the law to prevent. As to the defendant, Henry Canter, the son, though in company with his father, there is no evidence implicating him in the use of any words, or as guilty of any act subjecting him to the penalty of the law; and as to him it will be the duty of the jury to return a verdict of not guilty.

In commiting this case to the jury, I have only to remark that the act of congress of May, 1870, under which this indictment is framed, was enacted to carry into effect a recent amendment of the constitution of the United States, guarantying to all native-born male persons the full rights of citizenship, irrespective of race, color, or previous condition. This implies obviously the right of suffrage and includes clearly the African race, though not specially named in the constitutional amendment referred to. To secure to all persons their rights under the amendment, the legislation of congress was expedient and necessary; and that body had an undoubted right to pass the act of May 31, 1870. The clause on which this indictment is based, in the most explicit terms, prohibits and punishes all interference with the exercise of the right of voting by all persons entitled to that right, which in its ef-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

fect hinders or prevents its free and unobstructed enjoyment. The persons named in the indictment as having been prevented from voting through the violence and threats of one of the defendants, though colored persons, had an undoubted right to vote at the election referred to; and if the jury find from the evidence that they were hindered or prevented from voting by the defendant and by the means averred in the indictment, they will have no hesitancy in returning a verdict against him.

I will here take occasion to remark that whatever may be our individual views as to the policy and expediency of the extension of the right of suffrage resulting from the constitutional amendment adverted to, it is now a part of the constitution, and all laws passed in pursuance of it are obligatory upon every citizen. It must be admitted that the guaranty of the right of citizenship to all not disfranchised by crime, is in strict accordance with the great principles which underlie our free republican government. And there is good reason to hope that the experiment will work auspiciously to the promotion of the stability and success of our free institutions. If there is a race among us, who, from the adverse circumstances with which, without their fault, they have been heretofore surrounded, may not be now fitted for the enlightened exercise of all the rights of citizenship, there are good reasons for the hope that the bestowment of these rights will stimulate them to such efforts in the acquirement of knowledge and intelligence, as will result in their moral and intellectual elevation, and qualify them fully for the right discharge of all their duties and obligations as free and independent members and citizens of our country.

The jury returned a verdict of not guilty as to Henry Canter, and guilty as to Lewis Canter; and the latter was sentenced to six months' imprisonment in the jail of Lawrence county.

Case No. 14,720.

UNITED STATES v. CARBERY et al.

[2 Cranch, C. C. 358.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

ELECTIONS—COMMISSIONERS OF ELECTION—VOTES—PAROL EVIDENCE.

1. The election of a mayor of the city of Washington must be held in each ward by three commissioners of election. If the three are present the acts of the majority are, in law, the acts of the three. The return of two is sufficient, if the three were present The return of the commissioners is not conclusive, but is prima facie evidence that the votes were good, and throws the burden of proof on the relator to show that bad votes were given for the incumbent. If the election be held by two commissioners only, in any of the wards, the whole election is void.

2. A certificate of the result of the election must be returned by the commissioners to the boards of aldermen and common council. Parol evidence is competent to show that all the commissioners were present.

A writ of mandamus nisi, was obtained by Mr. Roger C. Weightman, one of the candidates for the office of mayor of Washington at the late election, held on the first Monday in June, 1822, against Mr. Thomas Carbery, who had been returned as duly elected; and against the commissioners of election; commanding the said Thomas Carbery immediately to cease and forbear to hold, claim, or execute, the place, or office of mayor, and to admit the said Roger C. Weightman into the said place and office; and commanding the said commissioners to return him as mayor of the said city duly elected at the said election, or show cause to the contrary. To this writ there was a special return, concluding with an averment that the said Thomas Carbery was duly elected mayor, &c., and that the said R. C. Weightman was not. Upon this traverse, an issue was joined; which came on to be tried on the 2d of January, 1823.

Mr. Jones, for relator, contended, 1st, that the return of the election of mayor must, under the 3d section of the charter of 1820 (3 Stat. 583), be made by all the commissioners of election. A return by part of them is insufficient. It is different in the case of the election of members of the boards of aldermen and common council; for by the 6th section the return by a majority, as to their election, is expressly authorized. 2d. That the election must be holden by three commissioners in each ward; although a return by two should be deemed sufficient. All must be present acting, or ready to act; and this must appear by their return. Parol evidence is not competent to prove that fact. The return of the first ward is by two of the commissioners only; and they do not certify, that they are a majority. If one of the commissioners is present and refuses to act, there are in law only two present. The reason for having three present, is, that all questions may be promptly decided. The general principle that in corporations aggregate, the act of a majority is the act of all, does not apply to the commissioners of election. They have only a joint power.

Mr. Swann and Mr. Ashton, for respondents. The return by a majority is sufficient; and it is competent to show by parol evidence that all the commissioners were present, and that those who made the return were a majority. In all cases of a public nature, and where the power is given for the public good, the act of the majority is the act of all. Green v. Miller, 6 Johns. 39, 41; Grindley v. Barker, 1 Bos. & P. 229; Rex v. Beeston, 3 Term R. 592; Withnell v. Gartham, 6 Term R. 388; Vin. Abr. tit. "Authority," p. 418, § 6; Co. Litt. 181b. Suppose one of the commissioners should be taken suddenly ill, or should die, or seeing that the election was going against his wishes, should retire, or refuse to act—would the whole election be void?

[1] [Reported by Hon. William Cranch, Chief Judge.]

This surely could not be the intention of the legislature. In the case of corporations aggregate, it is not necessary that all should be present, if all had notice.

THE COURT (THRUSTON, Circuit Judge, absent,) decided, 1st. That it was competent to give parol evidence to show that the whole number of commissioners were present at the election in the First ward. 2d. That the election in each ward must be holden by three commissioners. 3d. That if the three commissioners were present, the acts of the majority were in law the acts of the three. 4th. That the return of two is sufficient if the three were present.

Mr. Jones and Mr. Key, for relator, then offered evidence to show that votes had been given, for Mr. Carbery, by unqualified voters.

Mr. Swann and Mr. Ashton objected, and contended that the several returns of the ward commissioners is conclusive on that point, they being the sole judges of the qualifications of the electors; and as the choice is required to be by ballot, no voter can be compelled to disclose for whom he voted. No power is given, by the charter, to any person or tribunal to decide upon the election of mayor. The boards of aldermen and common council have the sole and exclusive right, by the 6th section of the charter, to "judge of the legality of the elections, returns, and qualifications of their own members," but not of the mayor. By the 3d section the commissioners are to certify to the boards of aldermen and common council "the result of the election of mayor;" in order to do which, they must decide upon the qualification of the voters at the time of voting. It is not necessary that the certificate of the election of the mayor should be the joint act of all the eighteen commissioners of election. If each set of commissioners of the several wards, respectively certify the number of votes taken in their respective wards, it is equivalent to a certificate of the result of the election by the eighteen commissioners; for if the number of votes in each ward is ascertained, the result of the election is that he is chosen who has the greatest number of votes. It is not necessary that the result should be certified by the commissioners where they have certified the facts from which that result must necessarily follow. The return of the commissioners as to the election of mayor is to be made in the same manner as that for the election of the members of the boards of aldermen and common council; that is, "the commissioners for each ward, or a majority of them, shall count the ballots, and make out, under their hands and seals, a correct return of the persons having the greatest number of legal votes," "together with the number of votes given to each person voted for." In order to do this they must necessarily decide upon the legality of the votes. This court has no jurisdiction to decide upon the validity of the election.

Mr. Jones. The jurisdiction of this court is general, and is unlimited by the subject-matter. It has an inherent jurisdiction to compel all the corporations in the district to do their duty. In this respect there is no difference between the corporation of Washington and the banks and insurance companies. This court has compelled the Bank of Alexandria to open its subscription; has set aside the election of the officers of the Union Bank of Alexandria, and of the Columbian Insurance Company. The commissioners have no authority to judge of the qualification of the electors. By the 5th section of the charter, the register of the city is to furnish the commissioners with "a list of the persons having a right to vote." The register, therefore, and not the commissioners, is to judge of the qualifications of the voters. The boards of aldermen and common council have the exclusive right of judging of the election of members of their own bodies, and consequently of the qualifications of the electors; and the mayor is to be chosen by the same electors. No power is anywhere given to the commissioners upon that subject. They are to receive the votes of such voters as are on the register's list.

Mr. Key, on the same side, cited Johnston v. Corporation of Charleston, 1 Bay, 441; Brosius v. Reuter, 1 Har. & J. 557, 558.

Mr. Swann, contra, cited Symmers v. Regem, Cowp. 498.

THE COURT (THRUSTON, Circuit Judge, absent,) said that the return of the commissioners was not conclusive, but was prima facie evidence that the votes were good, and threw the burden of proof on the relator to show that bad votes were given for the incumbent.

THE COURT also decided that the return from the 5th ward was void because the election was holden by two only of the three commissioners; and that the whole election was void for that reason; as well as because no certificate of "the result of the election of mayor" was ever returned by the commissioners to the board of aldermen and board of common council, agreeably to the 3d section of the charter.

Notwithstanding this opinion of the court the jury found a general verdict "for the defendants," thereby, in effect, affirming the election to be valid.

THE COURT (THRUSTON, Circuit Judge, absent,) ordered a new trial to be had at the present term, without costs. The issues were informal, there being a double traverse, namely, the election of Mr. Weightman traversed by Mr. Carbery; and that of Mr. Carbery by Mr. Weightman.

The new trial came on, January 8, 1823, when Mr. Swann, to show that upon a mandamus the defendant cannot be amoved unless for the purpose of admitting the relator, cited Rex v. Mayor of Colchester, 2 Term R. 259; Rex v. Bishop of Chester, 1 Term R. 396; Geter v. Commissioners for Tobacco Inspection, 1 Bay, 356.

THE COURT gave the same instructions to the jury as upon the former trial; and added, further, that upon the evidence, the jury ought to find a verdict for the relator.

Mr. Swann, prayed the court to instruct the jury that it was competent for them, upon that evidence, to find a verdict for the defendant; but the court refused.

Verdict for the relator; who thereupon filed an information in the nature of a quo warranto, in the name of the attorney of the United States, but it was never prosecuted, as the term for which the mayor was elected expired on the first Monday of June, 1824, and it could hardly be expected that the proceedings upon the quo warranto would be terminated before that day.

Case No. 14,720a.

UNITED STATES v. CARD.

[2 Hask. 469.] [1]

District Court, D. Maine. Jan., 1881.

INFORMER—PROSECUTOR—MAINE STATUTE—APPORTIONMENT OF REWARD.

1. An informer, under section 11, c. 121, of the Revised Statutes of Maine, is one who first gives important information to the proper authorities that in fact leads to the conviction of a criminal.

2. A prosecutor, under that statute, is one who procures the arrest of the guilty party.

3. The reward given by that statute should be apportioned by the court between the informer and prosecutor according to their respective merit.

Indictment against William R. Card for passing counterfeit notes of the United States. He had been convicted and sentenced to prison.

Morrill Goddard and Charles W. Horton each petitioned the court to certify to the governor and council of Maine that he was entitled to the reward allowed prosecutors and informers under section 11, c. 121, of the Revised Statutes of that state.

Thomas H. Haskell and Nathan Webb, for Goddard.

Wilber F. Lunt, for Horton.

FOX, District Judge. It appears that Morrill Goddard, a lad of about fourteen, in September last was a student at the Cumberland Greely Institute. On the 30th of that month, he was present at a fair in West Cumberland, and, from the conduct of one Record, was led to watch him with some care and shrewdness; finding that Record was making many small purchases and always paying by a bill that was apparently new, receiving back the change, on an examination of some of the bills, Goddard decided they were counterfeit and so informed Bridges, city marshal of Portland, who was present at the fair. After hearing Goddard's account, Bridges concluded to arrest Record who was pointed out to him by Goddard. After his arrest, similar bills were found upon Record, and he also redeemed some of the bills he had passed. He was taken by Bridges to the lock-up in Portland, and the same evening disclosed to Black, a deputy marshal, that he had obtained these bills from Wm. R. Card.

Bridges that night informed Smith, the United States deputy marshal, of Record's arrest, and that he would probably disclose from whom he received those bills, and requested Smith to take charge of the case in behalf of the United States. Smith, therefore, requested Charles W. Horton, who had been a government detective under the internal revenue department, but who was not then in the service of the government, to go with him to the lock-up and have an interview with Record in order to ascertain from whom he obtained these notes. They went there and were informed by Black that Record was willing to disclose all he knew about the notes. They went into the corridor upon which was the cell in which Record was imprisoned. Horton stood at the door of the cell and conversed with Record, Smith being a few feet distant, but within hearing of all that was said. Record then informed them that he had received a large number of these bills from Card, and also where a parcel was concealed.

That same night, Horton made formal complaint before Commissioner Rand against Card for this offense, and caused him to be arrested the next morning, and he was bound over and subsequently convicted. Horton found in the place described by Record the package of bills which were produced by him at the hearing before Commissioner Rand.

It is very certain that it was entirely owing to the sagacity and perseverance of Goddard that Record was arrested for the offense for which he has since been indicted, but on account of his insanity has not yet been put on trial. While thus under arrest, at the instigation and procurement of Goddard, Record first disclosed to Black that Card had furnished him with the counterfeit notes, and this was before Horton knew anything of the matter. The city officers, thinking that it was the duty of the United States officials to carry on the prosecutions for these offences, so informed Deputy Marshal Smith, at whose request Horton accompanied him to the city lock-up, to be present at the interview with Record. At this interview, Horton ascertained from Record nothing which he had not already disclosed to Black, and which Black was ready to communicate to them if Record did not repeat the confession as he had informed Black he was ready to do.

Under these circumstances, it is certainly very questionable whether Horton should be deemed the informer as against Goddard, who had been the occasion of Record's disclosure. Goddard subsequently by letter notified the United States district attorney that

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

he claimed to be the informer and prosecutor of Record, and that he was ready to furnish the testimony for his conviction.

In U. S. v. One Hundred Barrels of Distilled Spirits [Case No. 15,946], Judge Lowell defines an informer as "he who first gives to a person authorized to receive it, important information which, in fact, leads to the desired result; and the offer is not necessarily confined to persons who should expose the details of the fraud. * * * It is enough, if the result is in fact reached, primarily through his means."

In my opinion, Goddard should be deemed primarily the informer in Card's case, as well as in that of Record; but, as he took no steps to institute a prosecution against Card, and this was all done by Horton, and the arrest of Card was by his procurement, I hold he, rather than Goddard, may properly be deemed the prosecutor of Card.

The claim of Goddard is much the most meritorious; and as the statute authorizes the court to apportion the reward between the parties, I allow to Morrill Goddard three-fourths part of the reward to be paid by the state, and to C. M. Horton one-fourth part thereof.

Case No. 14,721.

UNITED STATES v. CARGO OF SUGAR.

[3 Sawy. 27.] [1]

District Court, D. California. April, 1874.

FORFEITURE — SEIZURE — BOND FOR VALUE — APPRAISEMENT.

Where property under bonds for duties is seized in a warehouse, the bond for value under the 89th section of the act of 1799 [1 Stat. 695] should represent its full market value, duties included.

At law.

Delos Lake, U. S. Atty.

Milton Andros, of counsel for the United States.

Doyle & Barber, for claimants.

HOFFMAN, District Judge. An application is made by the owner and claimant of the goods proceeded against in this suit, that the appraisers be instructed to appraise the goods at their cash market value, less the duties legally chargeable upon them, and that upon giving bond for the value so ascertained, and producing a certificate of the collector that the duties have been paid, the goods be delivered to the claimant.

This application is opposed by the district attorney, who contends that the goods should be appraised at their full market value, without deducting the amount of the duties.

It appears that two separate entries at the custom-house were made of the goods—a part was entered for consumption, the usual deposit made to cover the duties, and a delivery order obtained by the importer. Before this order was executed the goods were seized. For the remainder of the goods a warehouse entry was made, and the bond required by the acts of August 30, 1842 [5 Stat. 548], and August 6, 1846 [9 Stat. 53], duly executed. They were still in the warehouse when seized.

The question presented to the court is important. It has been very fully discussed by the learned judge of the Southern district of New York, who has delivered a long and elaborate opinion, in which the whole subject is reviewed.

The conclusions at which he arrives are, that the bond for value under the 89th section of the act of 1799 [supra] should represent the full value of the property to the importer at the time of seizure.

That when the property is seized in his hands, after the duties are paid, its value to him is its market value, which necessarily includes the duties.

But where property under bonds for duties is seized in a warehouse, its full value to the importer at the time of seizure is its market value, less the duties; and for this amount the bond on delivery must be given.

I have been unable to assent to the correctness of these conclusions.

It is observed by the learned judge that "the interpretation uniformly given to the 89th section of the act of 1799 is, that the sum at which the property seized is to be appraised, is its value, as of the time and place of seizure."

No authorities are cited in support of this position. With great deference it appears to me to involve a fundamental error.

The government on a seizure of forfeited goods acquires a right of property, which it enforces by a condemnation and sale. As until condemnation the fact of forfeiture is unascertained, the claimant is allowed to obtain his goods on substituting in their stead a bond for their value. The sum for which this bond is to be given should obviously be a sum equal to the value of the goods to the government at the time they are delivered to the claimant, or the equivalent of the amount which might then be realized from them by a sale in the market. Nothing less will put the government in the same position as if it had retained the goods, or prevent its being a loser by the pretended substitution of an equivalent in value.

To estimate this value as of any other time than that of the appraisement and delivery might, according to circumstances, be a hardship and injustice either to the government or to the claimant. The seizure may have been made months previously. If in the meantime the price of the goods has declined, or their value otherwise been impaired, it would be unjust to demand of the claimant a bond for a larger sum than he can obtain for them in the market. If, on the other hand, their price has appreciated, he has no right to ask the government to surrender goods which have be-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

come its property by the forfeiture without receiving a bond of an amount equal to their full value when it surrenders them. This value is evidently the price which the goods then command in the market.

When the claimant applies to the court for a delivery of the goods seized, on payment of the duties and giving a bond for their value, he, in effect, asks that the property be delivered to him, on which, as soon as it reaches his hands, the whole market value can be realized. This is its true value, both to him and to the government. If he be permitted to give a bond for a less amount he will obtain his goods at less than their true value, and the government will part with them on a security representing a smaller sum than the goods would be worth if retained in its possession.

It is plain that in cases of seizure, as in all other cases where property in the possession of the law is surrendered on substituting a bond for its value, the bond should be for a sum equivalent to the value of the goods, at the time of the delivery, to the party who surrenders, and to the party who receives. This is evidently a sum no greater and no less than the market value of the goods at the time of the delivery.

But even if it were true that the basis of appraisement is the value of the goods to the importer at the time and place of seizure, I do not perceive why that value is to be taken as the market value less the duties.

The importer has given bond for the duties, and this bond he is liable for, unless the goods be re-exported. If the goods perish in the warehouse he still remains liable for the duties, and his loss is the amount of their market value. If he forfeits the goods in consequence of his crime he must still pay the duties, and the loss he sustains is the market value of his goods. This loss the government alleges he has incurred, and if while the question is undetermined he seeks to obtain his goods he must give bond in the sum they were worth to him when his ownership of them was divested by the forfeiture and seizure.

Even then, on the hypothesis that the appraisement is to be as of the time and place of seizure, it is clear that the basis of appraisement must be the full market value or the goods at that time without deducting the duties.

But, for the reasons assigned above, I think it evident that the value must be fixed as of the time the appraisement is made and the goods delivered to the claimant.

But it is said, in the opinion referred to, that "in case such a bond as the government claims to receive in this present case be given, the importer will lose if the property is condemned, in the suit, not only what was the value to him of the property in warehouse at the time of its seizure, but in addition a sum equal to the amount of the duties chargeable thereon; and if after thus bonding the property, he withdraws it for consumption, he must pay the duties on it in cash to the collector, notwithstanding the amount has been included in such delivery bond. He will thus, in case of condemnation, lose more than he would if the property was not delivered to him on bond, but was to remain in the hands of the government and be sold by it. In each case the same offense is charged and has been committed, for which the property is forfeited. In each case the property is in warehouse under bond for duties. The merchant is equally guilty in each case; but if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so according to the views urged by the government without imposing upon himself a liability in case the property is condemned, which he will not incur if he leaves the property in the hands of the government. Such a result is opposed to the spirit and intent of the eighty-ninth section of the act of March 2, 1799. * * * To require from him such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then if the property is condemned in the suit the importer will lose the same amount as if he had not bonded the property and no more, and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding provided for by the eighty-ninth section of the act of 1799."

I have cited this passage at length, for it contains a full statement of the grounds on which the learned judge based his opinion. The fallacy of the fundamental idea on which it rests appears to me evident.

The penalty attached by law to the offense charged is the forfeiture of the goods seized, or their value.

The payment of duties is not exacted as any part of the penalty. The obligation to pay them attaches absolutely as the consequence of the importation, and this payment is exacted, whether the goods be forfeited or not, as a condition precedent to the delivery of them to the importer. If the goods be entered for warehouse the importer has the right within a limited time to re-export them and procure the cancellation of his bond; but in all cases where the goods are delivered to the importer, as the claimant now asks the court to order, the duties must first be paid.

If the goods are condemned the loss to him is precisely the same, whether he bonds them, as the government now claims he must do, or whether he suffers them to remain in the custody of the court and be sold under its decree.

In either case he must pay the duties, for

his bond for duties can only be canceled by the exportation of the goods, and this by his own crime he has put it out of his power to do. Besides the duties, he loses in either case the value of his goods, and no more.

If he suffers them to be sold this is evidently the amount of his loss. But if he obtains their delivery to himself on giving bond for their full market value the bond will represent only what they are worth to him, and the sum he can obtain for them in the market If the goods are subsequently condemned he pays over their proceeds in satisfaction of his bond, and his liability is thus precisely what the statute creates—liability to pay the duties. and as a penalty for his offense the loss of his goods or their proceeds.

The fallacy of the argument so often urged, that by exacting a bond for the full market value, including duties, and also requiring the duties to be paid, the court obliges the importer to pay duties twice, is also apparent.

He pays duties but once, and he gives bond for the amount which the property is worth to him when delivered, and which, if the appraisement be just, he realizes from its sale. If he be permitted to take his goods on giving bond for their market value, less the duties, the inevitable consequence will be that he will save, and the government will lose, a sum equal to the amount of the duties.

For though he pays duties in the first instance, he can sell the goods at their market price, and thus be reimbursed the duties he has paid, while the balance of the proceeds will be sufficient to satisfy the bond he has given. The goods will thus have gone into consumption in effect without payment of duties, or, to speak more accurately, the government will, though it has received the duties, recover less by precisely their amount than the value of the property, the ownership or which it had acquired by the forfeiture.

The circumstance that the goods have been seized in a warehouse can in no way affect the matter, for the claimant asks, not that the goods be suffered to remain in warehouse, and the seizure be superseded, but that they be delivered to him and go into consumption. This the court can order only on payment of duties.

He thus puts himself precisely in the position of one who withdraws goods for consumption, and the value he should give bond for is the value of the goods he receives, which is their market price, or the sum he can obtain for them.

Even if the importer whose goods have been seized in a warehouse, can on applying to bond them be considered as retaining any right to avoid payment of duties by re-exporting them, a single illustration of the possible results of the mode of appraisement suggested will expose its erroneousness. Let us suppose the market value of the goods to be equal to or less than the amount of the duties

Such is said to have been until recently the case with regard to whisky.

Their market value, less the duties, will, in such case, be nothing—and the claimant can procure their delivery to him on giving bond in a nominal sum.

If, then, he can omit to pay the duty, and re-export the goods. or recover the duty back by way of drawback (as he may possibly do in this case under the fourteenth section of the act of August 30, 1842), he may, by a sale in a foreign market, realize from them a sum which though less than the duties, may be considerable—while the government, which has established its title by forfeiture to the goods, will have neither duties, goods, nor a bond.

In view of the late ruling market prices of whisky the case suggested does not seem an extreme one, but the principle is illustrated in all cases where the amount of the duties bears any considerable proportion to the market value of the goods.

It is observed by the learned judge of the Southern district of New York, that "uniformity of principle and equal justice to importers, in all cases, can be carried out only by varying the basis of appraisement in the manner indicated in cases of delivery bonds, on seizures of property in warehouses."

With all deference I must be allowed to observe that the proposed variation seems to me to introduce a discrimination between importers of different classes not justified by reason or law.

It is admitted that if the duties have been paid, and the goods are seized in the hands of the importer, he can only obtain them by giving bond for their full market value—or, in other words, by securing the repayment in case of condemnation of the value he receives when the goods are delivered to him. On what ground should the importer, who has made a warehouse entry, be put in a better position?

He also asks for and receives property which he can at once convert into money, and for which he can obtain by sales the sum he is required to pay in case of condemnation. The goods are worth that sum to the government, and what right has he to ask the government to surrender them without receiving a bond for their full value?

I confess, that after the fullest consideration, I have been able to discover nothing, either in the warehouse laws or the provisions of the eighty-ninth section of the act of 1799, which can give any color to such a pretension.

I regret exceedingly to be obliged to dissent from any opinion entertained by the distinguished judge of the Southern district of New York, especially when it is sustained by that of his eminent predecessor.

But I cannot avoid announcing the conclusions which, after the best consideration

I can give the subject, I have reached. My belief in their correctness is strengthened by the fact that they seem to be in accordance with the views entertained by the learned judge of the Pennsylvania district, whose decision which I have not had the advantage of seeing, is referred to in the opinion of the district judge of the Southern district of New York.

An order must be entered directing the goods seized to be delivered to the claimant, on his executing a bond for their appraised value, without deducting the duties, and on the production of the collector's certificate that the duties have been paid.

[For subsequent proceedings in the case of forfeiture, see Case No. 14,722.]

Case No. 14,722.

UNITED STATES v. CARGO OF SUGAR.

[3 Sawy. 46.] [1]

District Court, D. California. 1874.

FORFEITURE—ENTRY OF GOODS—FRAUDULENT APPLIANCE—COLORED SUGARS—GOOD FAITH.

1. The term "entry," as used in section 1 of the act of March 3, 1863 [12 Stat. 738], must be understood to include the series of acts done by the importer at the custom-house necessary to the introduction of his merchandise into the United States, in compliance with the forms of law.

2. If in the performance of these acts, and as a means of making the entry, the importer is guilty of any false or fraudulent practice or appliance, or uses any false or fraudulent document, he comes within the law.

3. Whether the agent who makes the entry had knowledge of the fraud is immaterial. The guilty knowledge of the owner is sufficient.

4. Where charcoal had been mixed with sugar above No. 12 Dutch standard in color, for the purpose of reducing its grade, and making it appear to be below No. 12 Dutch standard in color, and the importer failed to disclose that fact to the customhouse authorities, *held*, that the color of the sugar was not thereby altered. It was merely disguised, and the concealment and suppression of that fact by the importer at the time of taking his oath and making his entry, and the oath taken by him, constituted "a false and fraudulent practice and appliance" within the meaning of the law; and this notwithstanding that the law does not require that the color of the sugar be stated in the invoice or entry.

5. Whether the collector was deceived by the attempted fraud, is immaterial.

6. The belief on the part of the importer that he might lawfully put charcoal into his sugar, and thus alter its grade, and enable himself to lawfully enter it as of a lower grade, and that he might lawfully withhold from the custom-house authorities knowledge of the facts, will be no protection to him.

[Suit by the United States against a cargo of sugar. For prior proceedings, relating to the appraisal of the goods for release to the claimant upon bond for value, see Case No. 14,721.]

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

Delos Lake, U. S. Atty. (Milton Andros, of counsel), for the United States.

Doyle & Barber, for claimants.

HOFFMAN, District Judge (charging jury). The counsel for the claimants has presented to me instructions, thirty-six in number, with the request that I would give them to you as the law of this case. I have not, according to the state practice, marked upon the margin of each, "Granted" or "Refused," but they may be all treated as refused, except so far as they are contained in what I am about to say.

I approach, gentlemen, the discharge of my duty in this case with a sense of responsibility, not only because of the importance of the proceeding, but because, in the view I take of it, its determination must depend upon the instructions given to you on the matter of law. I have been unable to discern any matters of fact that are seriously controverted, and upon which you are called upon to pass.

In the first place, I desire to say that whether the law on which this proceeding is based be harsh or just, is no concern of yours, nor is the disposition that is to be made of the proceeds in case of confiscation, or whether the collector or the consul has acted well or ill, or whether the officers have been animated by a rapacious spirit or simply by zeal to detect fraud and to discharge their duties. All these considerations are wholly foreign to the purpose. You are called upon simply to decide whether certain matters of fact to which by law the consequence of forfeiture of the goods is attached, have been established by proof. What, then, is the law? The section under which this prosecution is brought provides: "If any owner, consignee or agent of any goods, wares and merchandise shall knowingly make or attempt to make an entry thereof by means of any false invoice, or false certificate of any consul, vice-consul or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such goods, wares or merchandise, or their value shall be forfeited."

You will perceive that the offense to which the penalty of forfeiture is annexed is the making or the attempt to make an entry of goods, wares and merchandise "by means" of any false document, or false practice or appliance.

What, then, is an entry? The term entry in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry: the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction: a series of acts which are nec-

essary to the end to be accomplished, viz., the entering of the goods. In the latter sense it is used in this statute. The language is: "If any owner or consignee shall make or attempt to make an entry by means of false documents, false invoice or any other false or fraudulent appliances." It is the fraudulent use of means in the attaining of an object and accomplishing of a result, to wit, the entry of the goods, which the statute here denounces. The acts which accomplish this result, and which, taken together, constitute an entry, must have a beginning and an end. There is a moment when the entry is attempted to be made or begun; there is a moment when it is accomplished. The entry may be said to be commenced, or attempted, when the merchant presents his declaration or bill of entry. When this bill of entry has gone to the requisite clerks' desks, when accompanied by the certificate of the consul, the invoice and the oath, it is delivered to the collector and accepted by him, then the goods may, in a just sense, be said to be admitted to entry and the entry to be accomplished. If in the performance of any of those acts, and as a means of making the entry, any false document, appliance or practice is resorted to, then this statute applies and the goods so entered are forfeited to the United States.

Whether, in the course of the proceedings one document is used, or two or three are used, can make no difference. It is also immaterial whether there are one or two bills of entry indicating the dispositions which the importer desires to make of the goods; as of some to the warehouse and some to be withdrawn for consumption, or whether he takes one oath or two oaths. The entry consists of the series of acts required by law to be done to effect that object, and if in the course of them the importer is guilty of any false or fraudulent practice, or uses any false document whatsoever, he comes within the law.

It is urged in this case, on the part of the government, that in making the entry the merchant, in judgment of law, may be said to present himself to the collector with his documents in one hand, and his goods in the other, and if the character of the goods themselves is fraudulently disguised, if any false appliance with respect to them is used, it may justly be said he has effected his entry "by means" of that appliance. I think, gentlemen, it would perhaps be straining the statute to say that any false practice with reference to the goods themselves would be a "means" of making the entry. He does not make his entry "by means" of that false practice or disguise. But he does make his entry "by means" of any false document he may use or any false oath he may take, if such document or oath be requisite and necessary as a means and condition precedent to the goods being admitted to entry. Therefore, if this invoice, the certificate of the consul, or the oath the importer has taken, be false or fraudulent, then he has made use of a fraudulent means necessary to effect the very object he had in view, to wit, the procuring his goods to be admitted to entry.

It is alleged that the oath of Mr. De Ro was false. It is not pretended that Mr. De Ro knew the facts of the case, or was himself, personally, either morally or legally culpable in any point of view. But the knowledge of his principal is his knowledge for such purposes, and that it must be so is evident. For otherwise, any fraud could be perpetrated with impunity by procuring an innocent broker or agent, through whom parties not innocent could effect the entry of their goods. It is, therefore, not the innocence or guilty knowledge of the agent, but it is the knowledge of the owner himself who has devised the fraud which carries with it the consequence of condemnation.

Treating, therefore, Mr. De Ro's oath as if it were made by the owner, it is claimed by the prosecution that it is false. He swears, gentlemen, that he has not concealed or suppressed any fact whereby the revenue of the United States might be defrauded.

It is argued, with the ingenuity which has characterized counsel throughout the whole case, that the suppression or concealment of any fact which the law does not call upon him to disclose is not wrongful, and that inasmuch as, in this case, it was not requisite that in the entry, or the invoice, the color of the goods should be stated, the suppression or concealment of the true color could not be an offense. It is true, gentlemen, that the color of the sugars is not required to be stated in the invoice, but from the nature of the oath that is required to be taken it appears to me plain that congress intended by imposing so searching an oath that there should be disclosed at the time, and not suppressed or concealed, any fact, whether required to be stated in the entry or invoice or not, which it was important to the interests of the revenue to be known, or whereby the revenue of the United States might be defrauded. Had it been intended that the importer should merely swear that the invoice, bill of lading and entry were true, the oath would have been to that effect and nothing more. But it goes further. The importer swears "that the invoice and bill of lading now presented by me to the collector of —— are the true and only invoice and bill of lading by me received of the goods, etc.; that the entry now delivered by me contains a just and true account of said goods, etc., according to said invoice and bill of lading, and that nothing has been, on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on said goods,' etc.

It appears to me, that when that oath was

required by congress it was intended to cover just such a transaction as this, and that though the statements of the invoice might be true, though it might contain all that the law required to be stated therein, yet, if from the nature of the transaction by any fraudulent device or contrivance there was something which, if concealed or suppressed, might tend to defraud the revenue of the United States, it was then to be disclosed, and the suppression of and failure to disclose that fact made the oath to that extent a false oath, thus constituting it a false document and appliance "by means" of which the entry was made.

It has been argued, gentlemen, that it is essential that the collector of the revenue should be deceived. But the effect upon the mind of the collector, of the false or fraudulent appliances, is wholly immaterial; whether or not he believed in the statement, whether he was colluding with the party entering the goods, or knew, in advance, that a fraud was intended or was to be attempted, is wholly immaterial. As well might it be said of one indicted for perjury that the magistrate before whom he had appeared, and before whom he was required to take his oath, did not believe the story or knew he was swearing falsely. Such a defense could not for a moment be admitted, and the case is nearly identical with this. The charge here is, the production or use and employment of a false document or the use of false and fraudulent means to accomplish a certain object. If the party has used those means he is clearly guilty of the offense, whether the collector knew of the commission of the offense at the time it was committed, or only discovered it afterwards. In either event the statute operates, and confiscation follows as a consequence of the employment of the fraudulent means to effect an entry of the goods. Nor does the character of the device, whether flimsy or transparent, or readily or with difficulty to be detected, provided it be fraudulent, affect the question. The degree of skill, ingenuity or cunning with which the fraud is contrived, can make no difference. Nor, gentlemen, is it true, as contended, that the forfeiture in such case is limited to the mere goods in relation to which such fraudulent practice is used. The language of the statute is too explicit to admit of any doubt as to its meaning: "If any owner or consignee of any goods, wares and merchandise shall knowingly make, or attempt to make entry thereof by means of any false invoice or fraudulent practice, such goods, wares and merchandise shall be forfeited."

What are the goods, wares and merchandise thus to be forfeited? Plainly, the goods entered or attempted to be entered at the custom-house. There was but one entry, but one invoice in this case. The acts done, taken together, constitute an entry of the goods; an entry of this whole invoice or importation of sugar. If, in the attempt to effect that object, fraudulent means have been used, the goods so entered are forfeited. It is therefore the whole invoice that is forfeited, or nothing.

Having disposed of these matters, we approach, gentlemen, to the more serious part of the case and the real merits of this transaction. It will strike you as curious that the government should affirm that a practice has been resorted to here, which is morally and legally fraudulent, and that this practice or contrivance should be admitted to have been used, and should be defended and justified on legal, and I believe, moral grounds. It is not often that counsel of distinguished ability and high character are so totally at variance upon moral as well as legal questions. It becomes our duty, therefore, to consider what is the true view to be taken of this transaction.

You are aware that congress has established color as a standard of duty, or the standard, rather, whereby to determine the duty upon sugar. It has been stated to you, and the fact is not disputed, that the adoption of this mode of assessing the duties was the result of very many experiments and attempts to establish other rules by which to determine the amount of duties to be placed on this species of merchandise.

Mr. Bridge informs us that he thinks this standard is, upon the whole, the best and most satisfactory ever adopted, and such seems to be the fact. What, then, was the motive of congress in adopting the standard of color? It is plain, gentlemen, that except so far as protection is concerned, color could only be rationally adopted as indicative of value—not as invariably indicating it, but as generally doing so, and as affording, upon the whole, the best, most convenient and most appreciable test of the value and the quality of the article. That it is so in this case, has been established by the witnesses; for, though they state that color is not the sole criterion of value, and that there are other considerations of great importance to be borne in mind, yet they all admit that color is a very important circumstance to be regarded in determining the value or quality of sugar. It has been shown that sugar in its pure state is colorless, and it would seem to follow that the degree or depth of the color which a particular article of raw sugar possesses must vary with the amount of impurities it contains; and the amount of impurities contained must have a very important effect on the value of the mass. It is said there can be no such thing as disguise in color; that color addresses itself to the senses, that that which appears to be of a certain hue is of that hue; that there is no difference between a real and an apparent color.

The language of the acts of congress in relation to the tariff is used in a commercial and popular sense. It is addressed to practical men of business, and intended to gov-

ern them in the daily affairs of life. There is some plausibility undoubtedly in the assertion, that there is no distinction between real and apparent color; that when an object is presented to the eye and produces a certain effect upon the optic nerve, the effect so produced constitutes, to all intents and purposes, its color. But let us consider. It is admitted that if the government were to impose a duty according to the color of a horse, you could not whitewash him and so change his color within the meaning of the law; or if congress should impose a high duty upon rosewood logs of a certain color, you could not, by staining their surface, give to the logs a darker or lighter hue in order to evade the duty. To this it has been answered that a horse, or log of rosewood, has a natural color, which may be disguised but cannot be altered. But this admits that there may be an apparent color disguising the true color.

But it is said that sugar has no natural color, but only an artificial color; that its hue is the result of its manufacture; that it depends upon the mode in which the manufacture has been conducted, and upon the ingredients that are put into or removed from the sugar, and therefore it cannot be said to have a natural color like a horse or a log of wood. Let us see. Suppose wines were valued according to their clearness and lightness of color, and suppose there were a drug that would give to the light-colored wine a murky, clouded appearance, without, however, injuring the wine; and that after passing through the custom-house, the wine could be restored to its former clearness by the addition of another ingredient which would precipitate the coloring-matter; could it be said that such a practice would be lawful? Do we not feel that the introduction of the first drug, by which there was imparted to the vine a color different from its real color, would be a fraudulent attempt to disguise and conceal the color of the article? True it is, that it would have to the eye a dark color, but it would not be the color legitimately resulting from the ordinary course of manufacture, to which it has been subjected. I have used this illustration, for the color of wine, like that of sugar, may, in a great degree, depend upon its treatment or mode of manufacture.

What, then, is "color" in regard to sugar, as the term is used in the statute? It appears to me, gentlemen, that it is the hue or degree of lightness which the sugar has attained in the ordinary course of its manufacture, and which indicates the degree of perfection to which the process of clarification has been carried. Undoubtedly while the sugar, or while the cane-juice rather, remains in the manufacturer's hands, he may omit to take out the impurities, or may put in impurities if he so desires, for as yet it has not become sugar. The hue of the sugar—that is, the result of his operations—will be determined by the degree to which he has abstracted the impurities or foreign substances from it, or the amount of such foreign substances as he may have introduced into it. But when it has passed out of his hands and gone into the hands of the importer, or the proposed importer, or the merchant, then the hue it has acquired is the "color" that congress had reference to when it established color as the standard of classification. If, then, by the admixture of some foreign and totally different substance, such as caramel, or, as in this case, charcoal, this color be changed, the color so acquired cannot be considered the color to which congress referred as a standard for assessing the duties. It is contended here that the color has been really altered, not disguised; that the mass is of a color below No. 12 Dutch standard of color; that is, that the sugar really possesses the color which you see in that bottle. Is this strictly true? I observe that the lumps of any considerable size, upon being crushed, reveal the color of the sugar as it was before the admixture, and that, in fact, there was only a slight coating of charcoal upon the surface of the lumps, the sugar itself being entirely unaltered; that is, the sugar in the interior of the lumps. Can it make any difference whether the lumps are small or large? The eye perceives in the larger lumps that the charcoal only covers the surface, and that the mass of the sugar in the interior of the lump is unchanged and is of the original color. If our vision were more perfect we would perceive the same phenomenon in the small microscopic particles. It appears to me, under such circumstances, that the color of the sugar cannot, in any sense, be said to have been changed, but rather that it has been disguised.

One other observation will, I think, expose the true nature of this transaction. I am not aware that the obligations of citizens to the government are less solemn or less imperative than those of one citizen to another. Suppose, gentlemen, that a contract had been made and the money paid down, by which one of you agreed to deliver sugar above No. 12 Dutch standard in color, and suppose that, as has been proved here, it were possible to impart to sugar of a dark hue a lighter appearance by putting into it gypsum or chalk, or some other coloring-matter: your contract in the case supposed would (like the obligation of the importer to pay so much to the government, in case his goods are above No. 12 Dutch standard) be to give to the purchaser sugar above No. 12 Dutch standard in color. In both cases the same mode of classification is referred to. In both cases the same phrase is used to indicate the kind of sugar that is the subject-matter of the obligation. The obligation is, in the one case, to pay the duty specified in the act, if the sugar be of a certain color; in the other, to deliver, for a price already paid, sugar of a certain specified color. Would you conceive yourselves at liberty to take sugars of No. 6 in color, and put into them gypsum or chalk, and tender them to the party with whom you had contracted, as

sugars above No. 12? Would you expect him to listen to you, if you should say, "I contracted to give you sugar above No. 12 Dutch standard in color; but what is the Dutch standard of color? You can only know by looking at it through a glass bottle. You can go to the appraiser's office and compare the sugar I offer with sugar above No. 12 Dutch standard, and if the colors are the same I claim the right to tender it, notwithstanding it is in fact No. 6 sugar, and I have used chalk or gypsum to make it appear of a lighter color." Can any man mistake as to the propriety of such a course? It appears to me that there is no difference between the two cases, and the device by which a seller would give a false appearance of lightness is of the same character, and must have the same legal effect, as the device by which the importer would give to these sugars a false appearance of darkness.

If that view be correct, then, gentlemen, in this case the importer, consignee or agent, has mixed charcoal with these sugars in order to disguise the true color, and make them appear to be below No. 12 Dutch standard of color, when in point of fact they were above No. 12 in color, with intent to pass them at the custom-house as sugars of the lower grade; and if he has suppressed and concealed from the officers of the customs the fact that he has tampered with and sought to disguise the color of his goods, then, in my judgment, he has been guilty of a false appliance and fraudulent practice within the meaning of the statute, and must abide the consequences which the law imposes.

It may appear to some of you, gentlemen, that there has been but an innocent mistake as to the law,—a false construction given to the statute. That for this mistake the confiscation of the goods is too severe a penalty, especially as the consequences of that confiscation fall, in great part, upon innocent parties, and to a considerable extent upon the representatives of a gentleman, now deceased, well known for his public spirit, his great mental activity and varied attainments. But you are not at liberty to be influenced by these considerations. Mr. Gordon's ignorance of, or mistake as to the law, cannot excuse him. He did this act at his peril; and if the act be an offense under the statute, the penalty of the law attaches. I will read to you in this connection, from the same authority which one of the counsel has cited, and then shall conclude my remarks.

In the case which I am about to read, congress had enacted that where refined sugars were exported, a drawback or return of duty might be claimed. The law further provided that if any goods should be entered by means of any false denomination, they should be forfeited, unless it were shown that such false denomination happened by accident or mistake, and not from any intention to defraud the revenue. The party in this case entered the goods as "refined sugars;" and claimed the drawback. They were, on the part of the government, alleged to be not refined sugars, but what are called "bastard sugars," and were seized as having been entered under a false denomination. The first point to be decided was whether the sugars were or were not refined sugars. The court held they were not. The claimant then urged that he thought they were, and that he had merely made a mistake in the construction of the law. The question thus arose whether this was such a mistake as brought him within the proviso of the statute exempting the goods from confiscation when the false denomination was shown to be the result of mistake or accident.

Now, upon this state of facts, which I hope you will bear in mind, as it closely resembles the state of the facts with which we have to deal, Judge Thompson, one of the most eminent judges that ever sat upon the bench of the supreme court of the United States, says:

"The first inquiry which seems naturally to arise is, What is the nature and character of the mistake which will save the forfeiture? Is it restricted to some matter of fact, or does it include mistake as to the application of the law to the subject thus falsely denominated, the qualities of such sugars being fully known to the person making the entry? I cannot think that, upon any sound construction, the proviso can cover mistakes of the latter description. Such are purely mistakes of law, and it is a principle too well settled to admit of being drawn in question, that ignorance or mistake of law furnishes no excuse in any case, civil or criminal. * * * And if the term 'mistake' does not include error of judgment as to matter of law (as I think it does not), I am unable to discover any ground upon which the false denomination can be said to have happened by mistake or accident; and the only remaining question is, whether this was done with an intention to defraud the revenue, within the sense and meaning of the proviso; and it appears to me that it follows as a matter of course that if the entry was by design, and not by mistake or accident, the legal consequence is that it was done to defraud the revenue. * * * Admitting that he himself honestly believed that his sugars were refined sugars, within the meaning of the law, and that he was entitled to the drawback, still it amounts to no more than a mistake or error of judgment upon the law, and does not protect the sugars from forfeiture."

If that be the law, gentlemen, and I see no reason to doubt it, for the same principle is affirmed in a case decided by the late judge of the Southern district of New York, then the circumstance that the owner of these goods believed that he might lawfully put charcoal into them and lawfully withhold the knowledge of that fact from the custom-house authorities, and that he thereby and within the meaning of the law degraded the sugars and lowered their color, and converted them from sugars above No. 12 to sugars below No. 12 in color, and that he might lawfully enter them as of the lower grade—though he honestly believe all this; such erroneous belief

and mistaken construction of the law afford him no excuse, and the goods are subject to forfeiture.

If, therefore, in conclusion, gentlemen, you believe from the evidence that this sugar, after it reached the purchaser's hands, was mixed with charcoal for the purpose of reducing its grade and making it appear to be below No. 12 Dutch standard in color, when in point of fact before the introduction of such charcoal it was above No. 12 Dutch standard in color, and if you believe that Mr. De Ro, when he took his oath and made the entry, suppressed and concealed that fact, or did not disclose it to the custom-house officer, then that suppression and concealment, and the oath so taken by Mr. De Ro, were, in my judgment, a false appliance and practice within the meaning of the law, of which the consequence is a forfeiture of the goods contained in the invoice.

Case No. 14,723.

UNITED STATES v. CARICO.

[2 Cranch, C. C. 446.] [1]

Circuit Court, District of Columbia. April Term, 1824.

FALSE PRETENCES—BOOKS OF ACCOUNT.

It is not an indictable offence at common law, to obtain and take "by means of false and fraudulent pretences" from the compting-house of a merchant, sundry of his books of account.

This indictment charged that the defendant [James Carico], with force and arms, falsely and fraudulently, by means of false and fraudulent pretences, did obtain and take from the compting-house of one N. B. Vanzandt, two books of account of the value of five dollars, of the goods and chattels of the said N. B. V. against the peace and government of the United States. The defendant was found guilty.

Mr. Wallach, for defendant, moved in arrest of judgment, and contended that it was only a private injury, and not indictable at common law, or under any statute; and, if it were, the pretences should have been particularly set forth, and averred to be false. Rex v. Wheatly, 2 Burrows, 1125.

Mr. Swann, for the United States.

THE COURT (nem. con.) was of opinion that it was not an indictable offence, and arrested the judgment.

Case No. 14,724.

UNITED STATES v. CARLISLE.

[4 Am. Law T. Rep. (U. S. Cts.) 231.]

Circuit Court, E. D. Michigan. Nov., 1871.

CONTRACTS — CONSTRUCTION — ACCEPTANCE — INJUNCTION—PLEADING.

[1. The prosecutor of a qui tam action (as to which there had been an agreement between him and the government relative to payment, out of any judgment obtained, of the expenses of the action, including "25 per cent. of a moiety of the judgment" to an informer, and division of the balance between him and the government) wrote the postmaster general, after judgment was obtained, asking for his views and instructions as to how the 25 per cent. was to be paid,—whether it was to come out of the moiety going to the government, or from the entire amount received, the balance to be divided between the government and him according to the terms of the law. In answer the postmaster general wrote, "The 25 per cent. must first be deducted," and then, after referring to certain expenses to be deducted, said: "The remainder can then be distributed according to the terms of the law." *Held*, that the prosecutor's reply (taking no exception to the terms stated in the postmaster general's letter, but reciting the fact that a decree for distribution had been entered without deducting the 25 per cent., and suggesting that the clerk be authorized to pay 25 per cent. of the sum recovered and going to the government to satisfy the informer's claim, and then, after reciting that his expenses would be 16 per cent. of his moiety, stating that he proposed, when he received it, to pay into the treasury 12 per cent. of his moiety, after deducting 16 per cent. for expenses, and adding that this would be more favorable for the government than "the terms indicated by your letter") contained a recognition of "the terms indicated" as the true terms, and a proposition in lieu thereof.]

[2. The acceptance of the prosecutor's proposition by the postmaster general did not give the government a mere personal claim against the prosecutor for the 12 per cent., but vested in it an interest to that extent in his moiety of the judgment fund; so that, the decree for distribution having provided for payment to him of a moiety, without any deduction on account of the 25 per cent., he will be treated as a trustee of the fund for the government, to the extent of the 12 per cent.]

[3. The sending by the postmaster general, to the clerk of the court in which the qui tam action was pending, of a letter directing him to pay the 25 per cent. to the informer, from the moiety going to the government, "as suggested in C.'s (prosecutor's) letter," which was inclosed, was an acceptance of the prosecutor's proposition.]

[4. Where the answer to a bill for injunction admits that defendant wrote certain letters, a denial therein that the construction given thereto by complainant is correct will not entitle defendant to a denial of the injunction, the construction thereof being for the court.]

This was a bill in equity filed by complainants to recover from defendant Carlisle a portion of a certain judgment fund to which the United States set up equitable rights by virtue of certain agreements between the postmaster general and Carlisle. The facts are as follows: In November, 1868, a judgment was recovered in a qui tam action, wherein Carlisle was qui tam prosecutor against Calvin F. S. Thomas and others for frauds committed in furnishing supplies to the post office department. Indictments had also been found against the parties who committed the frauds, and the qui tam actions were subsequently brought to recover the penalties and damages under the fraud act of March 2, 1863 (12 Stat. 696). It was averred in the bill that Carlisle, who was then special agent of the treasury, agreed to reimburse the United States for all expenses incurred, advances made, and assistance rendered in the prosecution of these qui tam ac-

[1] [Reported by Hon. William Cranch, Chief Judge.]

tions, out of such judgment as should be recovered in those cases; that certain sums paid for assistant counsel to aid the district attorney, and for the salary of an assistant in the investigation of the cases and other outlays, together with 25 per cent. of a moiety of the judgment to be recovered, which was to be paid to an informant for important information, should be first deducted from the gross amount of the judgment, and the remainder be divided in equal portions between the government and the prosecutor. The existence of this understanding between the government and the defendant Carlisle was evidenced by the correspondence between the late Postmaster General Randall and Carlisle. Tacitly admitting the facts above stated, Carlisle writes, under date of November 25, 1868, to "learn the views and receive the instructions" of the department relative to the disposition of the judgment fund. The reply of the postmaster general directed such a disposition of the fund as was contemplated in the agreement averred in the bill and given above. Carlisle again, on February 10, 1869, writes the postmaster general, and without excepting to the terms of distribution proposed, requested that authority may be given to the clerk to pay the 25 per cent. of one moiety of the judgment from the moiety of the government, and proposes on his part, in case this advance is made by the government "to pay into the treasury, when he receives it, twelve (12) per cent. of the moiety going to him (the prosecutor), after deducting sixteen per cent. for expenses." To this offer no answer was given directly to Carlisle, but he admitted, and it was further in proof, that the letter containing Carlisle's proposition was sent to the clerk of the district court for the E. D. of Michigan, by the postmaster general, with instructions to pay the money to the informer in accordance with the letter of Mr. Carlisle, "herewith sent," and such money was accordingly paid. The bill averred and the answer admitted the receipt by Carlisle of forty-three thousand five hundred and seven and $^{27}/_{100}$ dollars, parcel of his moiety of said judgment, and also the payment by the United States of the 25 per cent. to the informer —some $12,615. Carlisle refused payment of the 12 per cent. agreed to be paid and the bill was filed, praying to have him declared a trustee for complainants of 12 per cent. of his moiety of said judgment after deducting 16 per cent. for costs and expenses, and asking that he be compelled to pay to complainants 12 per cent. of 84 per cent. of the portion of his moiety which he had received, and to enjoin him from receiving, and the clerk from paying, any further portion of said moiety until satisfaction of complainant's rights in the premises. The motion for a temporary injunction was argued and granted. On final hearing on pleading and proofs, the injunction was made perpetual, as appears in the opinion of the court. The decision upon the motion is given first in order.

A. B. Hayward, U. S. Dist. Atty., and H. H. Swan, Asst. U. S. Dist. Atty.

Alfred Russell, for defendants.

LONGYEAR, District Judge. The decision of this motion depends almost entirely upon the construction to be given to Carlisle's letter of February 10, 1869, Schedule C of the bill, and the question of acceptance by complainant of the proposal therein contained. In order to arrive at a true construction of that letter it is necessary to go back and examine the preliminary steps leading to it and constituting the consideration for the proposition contained in it. If it be true, as alleged in the bill, that the 25 per cent. reward paid to Brown by complainant out of its moiety, was, by the original agreement, to be deducted from the whole amount recovered, before distribution, then it (the amount so paid) was to come out of the judgment found, and as between these parties constituted a claim upon it of which the moiety of each was to bear its part, and the letter of February 10, 1869, proposing to complainant that it pay the whole amount going to Brown out of its moiety, and that Carlisle would pay to complainant 12 per cent. of his moiety after deducting 16 per cent. for expenses, was simply a proposition to charge his moiety with said 12 per cent. in favor of complainant, in lieu of the charge which was before upon it in favor of Brown; the consideration for the proposition being, that the complainant would assume and pay and thus relieve defendant's moiety from the entire charge in favor of Brown. Was there any such original agreement then, as stated in the bill in relation to the manner in which the 25 per cent. going to Brown was to be paid? The answer positively denies any such agreement, and if that was all, the motion should no doubt be denied. But when the question appears first to have suggested itself to defendant, as to what fund the 25 per cent. to Brown was to be paid from, he seems himself to have been in doubt, and in his letter of November 25, 1868 (Schedule B to bill) he says, "I desire to learn the views and to receive your instructions as to how and the manner in which the 25 per cent. is to be paid; whether it is to come from the moiety going to the government or whether it is to be paid from the entire amount received and the balance divided between the Government and prosecutor, according to the terms of the law." In reply to this letter he is informed, under date of January 7, 1868 (Schedule A of the bill), as follows: "In reply you are informed that the 25 per cent. must first be deducted," and thereafter mentioning certain other matters which will be noticed hereafter, adds: "The remainder can then be distributed according to the terms of the law." It seems that before the letter was received by defendant a decree of distribution had been entered without deducting the 25 per cent. On receipt of it, however, defendant in reply wrote his letter of February 10, 1869.

In this letter he takes no exception to the terms proposed, but on the contrary, after reciting the fact of the entry of decree of distribution as above stated, and making some observations in regard to it, he says, "In this view of the case I would respectfully suggest, in order to cancel the claim which is made by the person giving the information" (meaning Brown) "that the clerk be authorized to pay 25 per cent. of the sum recovered and going to the government," and then after stating that his expenses over and above his taxable costs will be 16 per cent. of his moiety, adds (speaking of himself in the third person as the prosecutor) as follows: "He proposes, however, to pay into the treasury, when he receives it, 12 per cent. of the moiety going to him, after deducting 16 per cent. for expenses;" and the letter closes as follows: "By this ruling of the court and the proposal of the prosecution it will be seen that the government gains more than it would under the terms indicated by your letter of the 7th ult;" thus clearly indicating that, 1st, "the terms indicated" by the letter to defendant of January 7, 1869, directing that the amount going to Brown should be deducted from the whole sum recovered before distribution, were recognized as the true terms, and, 2nd, that the proposition of February 10th, 1869, was in lieu of such terms.

I hold, therefore, with the light I now have, that the proposition contained in the letter of defendant Carlisle of February 10th, 1869, if accepted by complainant, would vest in complainant an interest in defendant's moiety of the judgment fund in controversy equal to 12 per cent. thereof after deducting 16 per cent. therefrom for his expenses; and that such interest, standing upon the record as it does, in defendant's name, he must be treated for the purposes of this motion as a trustee of the fund to that extent for complainant. It is true it is denied in the answer that the construction above given to the letters referred to is correct. But he admits that he wrote the letters, and the letters being so admitted their construction is for the court. Denials in an answer, in order to entitle a defendant to a denial or dissolution of an injunction, must be of facts, and not of conclusions where the facts are admitted.

Some stress was laid upon the use of the words "when he receives it" in the proposition of defendant of February 10, 1869, and it was argued that the use of the words create if anything a mere personal obligation to pay the 12 per cent. when he should receive it, and does not create any interest in complainant in the fund itself, and therefore there is a complete remedy at law, and this court as a court of equity has no jurisdiction in the premises. I think that, in view of all the antecedent and surrounding circumstances, these words "when he receives it," must be deemed to mean, as I have no doubt the writer did mean, "when the same shall be paid in." In support of this construction it is to be observed that the 12 per cent. proposed to be paid into the treasury was "of the moiety" going to defendant, that is, part and parcel of such moiety, eo nomine.

The only question that remains to be considered is, whether the defendant's proposal of February 10th, 1869, was accepted by complainant. No notification of acceptance seems to have been given direct to the defendant. On receipt, however, of defendant's letter of February 10th, or soon thereafter, under date of February 27, 1869, the postmaster general, who had charge of the matter for complainants, and with whom all the transactions and correspondence in the matter was had, enclosed defendant's letter of February 10, to the clerk of the court, and instructed him in substance to pay the 25 per cent. going to Brown from the moiety going to complainant "as suggested in Mr. Carlisle's letter," and the same has been paid accordingly, so far as received by the clerk. This was an acceptance in fact, and from the fact that defendant's letter containing the instructions was sent with the instructions, and in express terms made the basis of them, it would seem that it was anticipated that the clerk would retain the 12 per cent. after deducting 16 per cent. and pay the same into the treasury, holding defendant's letter of February 10 as his voucher therefor as against defendant, which, as the case now stands, I think he was fully authorized to do. The clerk's office is a public office. The matters concerned were matters appearing by the public records in his office. The instructions of the postmaster general to the clerk, inclosing defendant's letter, became a part of those records. Those records are notice to all the world of what they contain, especially to parties to them. I think, therefore, there was a sufficient acceptance to make the proposal binding upon the parties. I have therefore said nothing about the amounts alleged in the bill to have been advanced by complainants to defendant Carlisle, to aid him in the prosecution of the suit, because if there was anything of that, it was all merged in the compromise based upon Carlisle's letter of February 10, 1869, and as that compromise has sufficient foundation to stand upon without those items, they are of no consequence in the present consideration. Being of opinion, therefore, that at least a prima facie case is made out against the defendant Carlisle, and that therefore, so much of the moiety of the fund in question going to Carlisle as is necessary to meet the claim of complainant upon that moiety should be retained in the clerk's hands until the case can be presented and fully heard upon its merits, an injunction will be allowed to issue as against him. The defendant Davison is clerk of the court in whose hands as such a portion of the fund in dispute now is, and the residue will eventually come. The object of making him a party defendant was solely to restrain him from paying over the fund to

Carlisle until the merits of the case can be litigated between him and the complainant. The whole object sought would probably be accomplished by the injunction against Carlisle alone; but inasmuch as Davison admits that he threatens to pay over the fund to Carlisle, regardless of the claims set up by complainant, I think complainant is entitled to an injunction against him also. The motion for injunction is granted as against both defendants, but it must be so modified as to restrain Carlisle from receiving and the clerk from paying over to him only 12 per cent of the whole amount of the moiety decreed to Carlisle, less 16 per cent. thereof.

The case was subsequently heard on pleadings and proofs and taken under advisement by the court. The opinion of the court on the final hearing, was as follows:

LONGYEAR, District Judge. When the case was before the court on the motion for a preliminary injunction, the questions involved, as presented by the pleadings, were fully considered. In the light in which the case was thus presented it was held "that the proposition contained in the letter of defendant Carlisle of February 10th, 1869, if accepted by complainant, would vest in complainant an interest in defendant's moiety of the judgment fund in controversy, equal to 12 per cent. thereof after deducting 16 per cent. therefrom for his expenses; and that such interest standing upon the record, as it does, in defendant's name, he must be treated * * * as a trustee of the fund to that extent, for complainant." It was also then further held, that a sufficient acceptance by complainant of Carlisle's proposition in his said letter of February 10th, 1869, to make the terms of that proposition binding upon the parties appeared by the pleadings. I can see nothing in the proofs which have since been taken that tends to change or modify the conclusions thus arrived at upon the pleadings; on the contrary, I find much in those proofs tending to confirm those conclusions. The proofs show that the transactions between the postmaster general and Carlisle, out of which this suit has arisen, were contracted in a very loose and bungling manner; and if they were left to stand entirely upon the proof of what took place between them, without the light thrown upon those transactions by their letters, it would be very difficult to say just what those transactions were, and what rights and liabilities, if any, were created. By the letters, however, it appears that the postmaster general and Carlisle never had any doubts whatever upon those points, but on the contrary, that they understood each other perfectly well. The only doubt Carlisle seems to have entertained at any time was that expressed in his first letter to the postmaster general (Nov. 25th, 1868), relating to the reward of 25 per cent. to be paid to Brown, and that was (quoting his language) "whether it should come from the moiety going to the government, or whether it should be paid from the entire amount recovered, and the balance be divided between the government and the prosecutor, according to the terms of the law." In this letter Carlisle says to the postmaster general: "I desire to learn the views, and to receive your instructions, as to how and the manner in which the 25 per cent. is to be paid." In reply to this the postmaster general, in his letter of January 7th, 1869, says: "The 25 per cent. referred to must first be deducted, as also must the sum paid assistant counsel ($500), and the amount paid Louis Brush ($853.12), your assistant, for services and expenses." So well satisfied was Carlisle with this reply that we find him filing a copy of it in the case in which the judgment to which it relates was recovered, with an indorsement in his own handwriting, as instructions to the clerk, as follows: "The proportions, I think, in which distribution will be made, as indicated by the within, would be: Costs, 83 per cent.; informer's share, 25 per cent.; balance equally between government and prosecutor." It is this reply of the postmaster general to which Carlisle also alludes in his letter of February 10, 1869, in which the new arrangement which constitutes the basis of this suit was proposed. It is difficult to conceive of a more complete or conclusive recognition or admission of an existing arrangement or agreement than what is shown by the above facts. Here then was a full and valid consideration for the proposition contained in Carlisle's letter of February 10, 1869. In fact the new arrangement, or agreement, which resulted from the proposition, was but a substitution for the former arrangement.

When this case was before the court on the former occasion alluded to, it was held that the filing of Carlisle's letter of February 10, 1869, with the clerk of the court, by the postmaster general, with instructions to him to comply with so much of the terms as related to conditions to be performed on the part of the government, was such an acceptance of the propositions contained in said letter as made it binding in all its parts, on both parties. In addition to this we now have Carlisle's express admission in his testimony, that he knew the above facts and that the postmaster general was acting upon the said letter. Thus the substituted arrangement was made as complete and binding as it could be. It will not do to say that because the postmaster general in his instructions to the clerk of the court, accompanying Carlisle's letter, said nothing about the 12 per cent., but merely instructed the clerk to pay to Brown the 25 per cent., from the moiety going to the government, it was no acceptance of the proposition in all its parts. The instructions accompanied the letter and had express reference to it. All that was needed as

between the government and the clerk of the court, one of its own officers, was to confer upon the latter authority to do on the part of the government what was to be done by it under Carlisle's proposition. What was to be done by Carlisle in consideration of such performance on the part of the government would follow as a matter of course. A decree must be entered in this case making the injunction heretofore issued perpetual, and for the payment to complainant by the clerk of the district court out of the moiety of the judgment against Thomas and others described in the bill of complaint, adjudged to the defendant Carlisle, a sum equal to 12 per cent. of said moiety, after deducting from said moiety 16 per cent. for expenses, etc., and for costs to complainant as against the defendant Carlisle, but without costs as against the defendant Davison.

Case No. 14,725.

UNITED STATES v. CARLTON.

[1 Gall. 400.] [1]

Circuit Court, D. Massachusetts. May Term, 1813.

PRACTICE AT LAW—QUESTION OF LAW—APPEAL—IMMATERIAL ERROR.

1. It is error for the court to declare a question of law to be a question of fact.

2. Although an error appear on the record, yet, if in distinct pleadings, a complete bar is shown to the action, the judgment must be affirmed.

[Cited in McNulty v. Batty, 2 Pin. 58.]

[In error to the district court of the United States for the district of Maine.

[This was an action by the United States against William Carlton.]

STORY, Circuit Justice. What constitutes an importation is, when all the facts are given, a question of law. Under the circumstances of the present case, the judge in the court below ought to have instructed the jury, at what time the importation in point of law took place, so as to attach the right to duties thereon, if they believed the evidence; and not have left the whole as a matter of fact for their consideration. There was error, therefore, in deciding that it was a mere question of fact proper for the consideration of the jury, as the judge below seems to have held. I say "seems to have held," for the language is singularly obscure, and can have no other rational interpretation. This error would, in general, be a sufficient ground for a reversal of the judgment. But it appears from the pleadings (on the technical accuracy of which we give no opinion), that the defendant, on the day the bond became due, tendered the full sum contained in the alternative of the condition of the bond, in discharge thereof. This we have held in U. S. v. Thompson [Case No. 16,486], to be a legal discharge thereof; and as therefore in no event could the United States have had judgment on the facts admitted by the pleadings, we are bound to affirm the judgment, notwithstanding the error in the opinion of the court.

Judgment affirmed.

[1] [Reported by John Gallison, Esq.]

Case No. 14,726.

UNITED STATES v. CARNOT.

[2 Cranch, C. C. 469.] [1]

Circuit Court, District of Columbia. May Term, 1824.

LARCENY — BANK-NOTES — WITNESS — INTEREST — JURY DE MEDIETATE LINGUAE.

1. The owner of the goods stolen, after having released to the United States and to the prisoner, all his interest in the fine, is a competent witness for the United States, and may be examined generally.

2. A foreigner in Virginia is entitled to a jury de medietate linguæ.

3. Bank-notes are not goods and chattels, and cannot be the subject of larceny at common law.

The prisoner [Alexander Carnot] was indicted at common law, for stealing certain bank-notes, the property of W. B. Stewart, to wit, two bank-notes of the Bank of Virginia, and one ten-dollar bank-note of the Bank of the United States. W. B. Stewart, the owner of the notes, was called to testify for the United States, and stated that he had collected $95, which he had laid by in his desk to pay a particular debt; that he had not seen it for two or three days, when going to his desk, he missed $60. That he asked his wife, who denied she had taken it, and said it must have been taken by the Frenchman, (meaning the prisoner.)

THE COURT here interposed and stopped the witness, and, asked if it was agreed that he should be examined generally.

Mr. Taylor, for the prisoner, objected to the witness because he was entitled to one half of the fine which the court might impose.

Mr. Swann, the district attorney, obtained a release from the witness to the United States, and to the prisoner of all right to the fine; and the court permitted the witness to be examined generally.

Mr. Ramsay, for the prisoner, in argument to the jury said that the prisoner might have required a jury de medietate linguæ.

THE COURT (THRUSTON, Circuit Judge, absent) intimated a doubt upon that point, as it was not allowed in Maryland.

Mr. Herbert afterwards produced "The Richmond Inquirer" of November 4, 1823 (volume XX., No. 52), in which it is stated that in the case of U. S. v. Cartacho [Case No. 14,738], in the circuit court of the United States, before Mr. Chief Justice Marshall and Judge St. George Tucker, "the court, ac-

[1] [Reported by Hon William Cranch, Chief Judge.]

cording to the motion of the prisoner's counsel, directed the discharge of the jury that had been previously summoned, and that a new array should be impanelled, one half of which to be foreigners, who were not citizens of the United States." See, also, the Revised Code of the Virgina Laws (page 101. § 13), that "juries de medietate linguæ may be directed by the courts respectively."

Verdict, guilty.

But THE COURT (THRUSTON, Circuit Judge, absent) arrested the judgment, upon the authority of the case of U. S. v. Bowen [Case No. 14,628], at April term, 1817; banknotes not being goods and chattels at common law.

UNITED STATES v. The CAROLINE. See Case No. 15,854.

Case No. 14,727.

UNITED STATES v. CARPENTER.

[20 Int. Rev. Rec. 137.]

District Court, N. D. Georgia. Oct. 21, 1874.

INTERNAL REVENUE—OWNERSHIP OF ILLICIT DISTILLERY—BOND—RECORDS—HOW PROVEN.

1. Where the statute does not require a copy of a bond to be made and preserved, or the bond to be recorded or otherwise chronicled in a book or other place, the testimony of the proper officer that no bond has been given, as required by law, is to be taken as evidence of the fact without the production of the records of his office, which would not be admissible as evidence.

2. Whoever aids in the act of illegal distilling is to be held responsible under the law without regard to ownership of the still or its product.

[This was an information against W. W. Carpenter. Heard on motion for a new trial.]

H. P. Farrow, U. S. Atty., and Geo. S. Thomas, Asst. U. S. Atty., for the Government.

Mr. Payne and W. F. Wright, for defendant.

ERSKINE, District Judge. The United States attorney filed a criminal information against the defendant for carrying on the business of distiller without having given bond. The grounds relied upon for a new trial are, (1) That the court erred in permitting the witness, Holtzclaw (the collector of internal revenue), to prove by parol, over the objections of defendant, that he had examined the books and papers in his office, and he had been unable to find the bond of the defendant on file there. Defendant's counsel insisting that the legal mode of proving the facts would be, by the production, in open court, of the books and papers, or by showing, after diligent search, their loss or destruction, or that they were otherwise inaccessible to the court or defendant; and that parol evidence was not admissible, "because the witness testified that the papers were in his office in Atlanta, and could" (therefore) "have been reached by subpœna duces tecum." (2) "Because the court erred in ruling out that part of the evidence of Randolph Jones which proved that James Carpenter, who was present with defendant and exercising acts of ownership, and while in possession and exercising acts of ownership, and in presence of said defendant, declared that the still was his, the said James Carpenter's, and not defendant's, the declarations being made while he was engaged in the acts constituting him, the said James, a distiller.

The testimony was as follows, to wit: Holtzclaw testified: "Have examined the books and papers in my office back to the first of January, 1874, and found no bond executed by defendant as a distiller; have made a pretty thorough examination. No such paper in my office, no bond filed, none given. Books and papers in my office." Randolph Jones sworn: "Saw defendant and his son, James Carpenter, at a still-house in this district; saw defendant assist James in pouring some warm water upon some meal." Cross-examination: "James Carpenter, while at the still-house, told witness that he (James) owned the still-house, and that he made this declaration while in the still-house and exercising acts of ownership."

When the statutory prerequisites are complied with (see the arts. passim), the applicant must make a bond with sureties, conditioned that he will faithfully comply with the law, etc. It is the duty of the collector to approve the bond, after which the party may begin distilling. It was not questioned that the collector is the proper custodian of the bond, after it has been approved by him, or that his office is the place to lodge and preserve it. But it was urged that the legal mode of proving that no bond had been given, was by the production, in court, of the books and papers, or by showing their loss or destruction, or their inaccessibility; and that parol evidence was inadmissible because Holtzclaw testified that the papers were in his office and could be reached by subpœna duces tecum. Holtzclaw swore that he had examined the books and papers in his office back to the 1st of January, 1874, and found no bond of defendant's—no such paper there; no bond filed, none given.

It seems to me that the testimony disposes of the first objection taken; for as the statute does not require a copy of the bond to be made and preserved, or the bond to be recorded or otherwise chronicled in a book or other place, the production of books or papers would not be admissible as evidence. Indeed, if the objection and its legal effect be fairly tested, it, in its consequences, goes to this extent; if no bond could be discovered in the collector's office, and the books and papers of his office were produced under a subpœna duces tecum, in court, and no evidence could be found in them, showing that defendant had given the bond as required by

law, or if given and approved, that the bond had since been lost or destroyed, the burden of proof would be shifted from the prosecutor to the defendant. But as already remarked neither the books nor papers would be legal testimony. So then, the burden of proof was changed when the witness, Holtzclaw, testified that no bond could be found in his office; that none had been filed; further, that none had been given. See Elkins v. State, 13 Ga. 435.

As to the second point, that the court erred in ruling out the admissions of James Carpenter made in the presence of the defendant, that he, James Carpenter, and not the defendant, owned the still, (still-house says the evidence); and that this declaration was made while said James was exercising acts of ownership, and engaged in acts which constituted him a distiller; the court was of the opinion that this testimony was irrelevant. It will be remembered that, in misdemeanors, all contrivers, aiders and procurers are principals. And the statute does not make it an ingredient, that the party carrying on a distillery shall be the owner or part owner of the still. The admission was made while James Carpenter was doing acts which constituted him a distiller and the defendant was assisting by pouring warm water upon meal. Therefore, if the defendant did, in the least degree assist in procuring or contriving the committing of the illegal act, he would not in anywise be excused because the still belonged to another. And it may be remarked that the evidence is, that James Carpenter, in the defendant's presence, said that the still-house was owned by him, (James) and not by defendant; which language, if taken in a general sense, would not, strictly speaking, mean the vessel and apparatus, but simply the house. But as the expression "still-house" may have been intended, before used by James Carpenter, to include the still, the defendant should have the doubt resolved in his favor. And this might have been favorable to a new trial, if the act of congress had made ownership an element in constituting a person a distiller.

Motion for a new trial overruled.

UNITED STATES v. CARPENTER. See Case No. 15,121.

Case No. 14,728.

UNITED STATES v. CARPENTIER.

[Hoff. Dec. 81.]

District Court, N. D. California. 1864.

MEXICAN LAND GRANT—DECREE OF CONFIRMATION—OBJECTIONS TO SURVEY.

[Act May 6, 1864 (13 Stat. 69), giving persons claiming lands within the San Ramon rancho the right to test the correctness of the location of the lands confirmed to the claimants of that rancho, notwithstanding any official or approved survey under said decree of confirmation, and notwithstanding any stipulation or consent given by the district attorney authorizing such location, does not give the district court power to revise a decree of confirmation rendered by it, under an agreement between the claimant and the district attorney, in conformity with which the location was made, no mistake having occurred, and the consent of the United States authorities being deliberately given.]

[This was a claim by H. W. Carpentier for the rancho San Ramon in Contra Costa county.]

HOFFMAN, District Judge. This case comes up on objections to the survey, filed on the part of the United States and of certain persons intervening in the suit. The circumstances of this case are, in some respects, peculiar. A statement of the various proceedings had in it is therefore necessary. The grant under which the land is claimed was made by Governor Figueroa on the 10th June, 1833, to Bartolo Pacheco and Mariano Castro. Under this grant two claims, each for an undivided half of the land, were presented to the board. One of these claims was in the name of Rafaela Soto de Pacheco, and in the other that of Domingo Peralta. The claim of Pacheco was rejected by the board, for some defect in the mesne conveyances; but that of Peralta was confirmed. Both cases were appealed.

The board had confirmed the claim of Peralta to "one-half of the tract called 'San Ramon' containing two square leagues of land, more or less." In the decree the boundaries of this tract were set forth, and reference was made to the diseño which accompanied the expediente On the hearing of the cause in this court it appeared that the calls of the grant and the delineation on the diseño described the tract with much certainty, and as the quantity included within these limits was understood to be but slightly in excess of two leagues, the claim was confirmed to one-half of the tract within the boundaries, but without limitation as to quantity. This decree was entered on the 2d day of March, 1857. From this decree the United States appealed, April 1, 1857. On the 5th January, 1858, the district attorney having been advised by the attorney general that the United States did not desire to prosecute the appeal, filed the usual consent that the order granting the appeal be vacated, and that an order be entered allowing the claimant to proceed on the decree of this court as on final decree. This order was accordingly made on the same day. On the 13th of the succeeding month, the claim of Pacheco, for the other moiety of the rancho, was confirmed without opposition, and on the 15th a decree was entered in which the tract was described by metes and bounds in the same terms as in the decree entered in favor of Peralta. As the attorney general had already abandoned the appeal in the latter case, no appeal was taken from the decree in favor of Pacheco. On the 10th March, 1858, a notice was given by the dis-

trict attorney of a motion to open the decree in the Peralta case. In support of this motion affidavits were filed, showing that the land included within the boundaries was of the extent of about four leagues, instead of two leagues, as had been previously supposed. On the 3d December, 1859, an amended decree was entered. The opinion of the court, delivered at the time, sets forth the reasons for its determination, but its attention does not appear to have been called to the fact that more than two terms had elapsed since the entry of the decree which was thus set aside and amended. No similar amended decree was entered in the Pacheco case, although a motion was made to the effect, which was overruled, probably because the proper notices had not been served. The motion however, was not renewed.

To this amended decree the claimant in the Peralta case strenuously objected, contending that, by a just interpretation, the grant was for a tract with fixed boundaries, and not for a certain quantity of land, and, moreover, that the decree of this court, and the dismissal of the appeal taken by the United States, with the consent of the district attorney, that the decree should be deemed final, deprived this court of all authority to alter or amend it. The claimant accordingly appealed from the decree as amended, and the proceedings were pending until June 4, 1862. On that day Mr. Della Torre, former district attorney, and who, by appointment of the attorney general, represented the interests of the United States, by an agreement with Mr. Carpentier, who represented the claim of Peralta, submitted a decree to the court to which both parties consented. By the terms of this decree the claimant was to be restricted to the quantity of two leagues of land, but he was to be allowed to select that quantity anywhere within the exterior boundaries provided it was in one tract. In consideration of this Mr. Carpentier consented to abandon the appeal he had taken from the second decree of this court, and to forego any rights he had acquired under the first decree, the dismissal of the appeal from it, and the consent to its finality by the United States. On the same day, June 4th, a similar amended decree was entered in the Pacheco case. Under the decree in favor of Mr. Carpentier, who had been substituted as claimant in place of Peralta, a survey was made, which on application of certain parties holding under Romero, the claimant of an adjoining tract, was ordered into court.

Numerous depositions were taken on either side, and the case was still pending when, on the 6th May, 1864, a special act of congress [13 Stat. 69] was passed, the effect of which has now to be considered. By this act it is in substance provided, that any persons claiming, whether as pre-emptors, settlers or otherwise, any of the lands included within the exterior boundaries of the San Ramon rancho, shall have the right "in all courts" to test the correctness of the location of the lands confirmed to the claimants of that rancho, notwithstanding any official or approved survey thereof, now or hereafter to be made, under said decree of confirmation, and notwithstanding any stipulation or consent given by the district attorney authorizing such locations. It is unnecessary to consider whether by this act there is given to the persons described in it the right to contest in the state courts, at any time, the correctness of any location which may hereafter be made, and approved by this or the appellate court. It is enough to say that, at least, the right to contest in this court the correctness of the survey which has been made is clearly conferred, and this notwithstanding any stipulation or consent given by the district attorney, authorizing such locations.

Bound as I am to give effect to the will of the legislature, I have, nevertheless, felt great difficulty in determining how, and to what extent, the right proposed to be conferred shall be exercised. On two points involved in this cause there can be no reasonable doubt: (1) If the claimants are entitled to only two leagues, the survey and location that have been made are clearly not such as this court could approve, or as the surveyor, acting under the general instructions of the land office, would have made. (2) The survey that has been made is admitted on all hands to be in strict conformity with the decree. It is in conformity not merely with the terms of the decree, but with its intent and meaning, and in accordance with the understanding embodied in the decree, by which the claimants agreed to relinquish their claim to have the whole tract within the exterior boundaries included within the survey, and to be limited to the precise quantity of two leagues, in consideration of being permitted to select the two leagues anywhere within the boundaries, provided they were in one tract. This arrangement was deliberately made by the representatives of the United States more than two years ago, and embodied in a consent decree. The survey that has been made is admitted to be such as the decree was intended to authorize. Under these circumstances, the contestants dispute the "correctness of the location." It is evident that congress was under the impression that the only obstacle which prevented settlers and others from bringing this survey before the courts for correction and reform was a stipulation and consent by the district attorney, authorizing the survey to be made in this form. They do not seem to have been aware that that consent was embodied in a final decree of this court, and that, so long as that decree stands, the survey must be held to be correct, for it conforms to the decree. That this court, in passing upon the correctness of a survey, is limited to the inquiry whether it conforms

to the decree, has been explicitly decided by the supreme court. In the case of Fossat v. U. S. [2 Wall. (69 U. S.) 649], recently before the supreme court, the decision of this court was reversed in part, on the ground that the survey approved by this court did not conform to the decree of confirmation.

In speaking of the action of this court, the supreme court says: "This direction of the court not only reformed the survey of the tract, as made by the surveyor general, but reformed the decree itself of the court, entered on the 18th October, 1858, in pursuance of which the survey had been made. The court assumed that the survey and location of the tract was not to be governed by the decree, but, on the contrary, that it was open to the court to revise, alter, and change it at discretion, and to require the surveyor general to conform his survey to any new or amended decree. * * * The duty of the surveyor general under all these acts is to survey and locate the confirmed tract in conformity with the decree. It is the only guide furnished him, and one of the first instructions from the land office is as follows: 'In the survey of finally confirmed land claims, you must be strictly governed by the decree of confirmation,' etc." It is to be remembered that in the case of U. S. v. Fossat, the original suit had been between the United States and the claimant alone. The location of the common line of division between the Fossat rancho and the adjoining rancho of Berreyesa was disputed. But Berreyesa was not a party to the suit, nor had he, as the supreme court had expressly decided, any right to intervene in the proceeding. The decree of confirmation, therefore, of the Fossat claim, was made in a suit to which Berreyesa was a stranger, and by the terms of the act of 1851 [9 Stat. 631], it was not to affect the rights of third persons. Under the provisions of the act of 1860 [12 Stat. 22], Berreyesa appeared for the first time as a contestant of the correct location of the dividing line between himself and his neighbor.

It would be hard to imagine a case where the rights of a party intervening, to have the common boundary of his own and a neighbor's rancho fixed as might appear to be just, and irrespective to the terms of any decree obtained by the latter in a suit between himself and the United States, would be stronger. The supreme court, however, determined that this court had no authority to alter or amend its first decree, and that the inquiry into the correctness of the survey and location by the surveyor general, was merely an inquiry whether the survey was in conformity with the decree, from which, even on the intervention of a colindante, under the act of 1860, neither the surveyor general nor the court was at liberty to depart. The language of the supreme court on this point is clear and unmistakable. It has almost the air of a rebuke to this court for departing from what was supposed to be its former decree. To the same effect is the decision of the supreme court in the case of U. S. v. Folsom (not reported), and in a recent act of congress by which the power of reforming and correcting surveys, conferred on this court by the act of 1860, is withdrawn, the surveyor general is required in all cases to strictly conform to the decree of confirmation.

From the foregoing it is plain that, even if the parties objecting to this survey were, like Berreyesa, persons for the first time heard in the cause, the court could only inquire whether the survey conformed to the decree, and it would not be at liberty, on hearing new allegations and proofs, to locate the land in any other manner than that prescribed in the decree, notwithstanding that, on an examination of the original papers, and hearing proofs adduced by the intervener, it might believe the decree to be in some respects erroneous. A fortiori, it follows that, where the parties contesting claim under the United States, they are bound by the terms of a final decree entered by consent of the United States. This case is said to involve great hardships to a large number of most respectable persons. But I am unable to perceive how, under the law as expounded by the supreme court, this court can pronounce a survey to be incorrect which is admitted to be in strict conformity with the final decree of confirmation. It may be said, however, that the decree itself should be vacated and set aside. But the recent act of congress gives no such power to this court. It admits certain parties to contest the correctness of the survey, notwithstanding any stipulation by the district attorney, authorizing such survey; but it gives no power to the court to vacate or alter a final decree entered more than two years ago. That the court had no such power independently of the statute, the decision of the supreme court, already cited, conclusively shows; and it will be noted that the reasons for its exercise were far stronger in that case than in this. For in this case the United States, and people claiming under them, may not unreasonably be held bound by a decree in a suit to which the United States was a party; while in the Fossat Case, the person intervening was not a party to the suit when the decree was entered. If it be suggested that the court has the same power to set aside the last consent decree, as it had to alter and amend its first decree, the answer is plain.

In assuming authority to amend its first decree, the court proceeded on two grounds: (1) The decree sought to be amended was founded on a mistake of facts. It was supposed that the land embraced within the exterior boundaries was but slightly, if at all, in excess of two leagues. It was subsequently ascertained to be more than four leagues in extent. The court therefore, by amending

its decree, merely entered such a judgment as, had it been apprised of the facts, it would have entered in the first instance. But, with the consent decree, no mistake has occurred. All the facts were well known to the representatives of the United States. The consent was deliberately given, and the decree, which was thought to secure a great advantage to the United States, was formally entered, with full knowledge of its effect and operation. I know not on what ground the United States, or persons claiming under them, can now ask that it be set aside. (2) At the time the decree was amended, the supreme court, by its then latest decision, was supposed to have declared that all decrees of confirmation were simply interlocutory, and that the jurisdiction of the court over the case remained until a patent was issued. Under this view, it was natural to suppose that this court had, soon after the expiration of the term, power to amend its decree, especially where it had been mistaken as to matters of fact. But, in the last decision rendered by the supreme court, the decree of confirmation is, as we have seen, declared to be a final and conclusive determination of the boundaries and location described in it. And this, not only as between the United States and the claimant and parties their privies, but as between the claimant and a neighbor who was not a party to the cause when the decree was entered, and when the boundary established by the decree is the common boundary line between his rancho and that of the claimant. But, even if this court had authority to set aside or disregard the decree under which this survey has been made, it by no means follows that it could now direct the quantity of two leagues of land to be located as might appear to be just.

It has already been stated that, by the first decree of this court, there was confirmed to the claimant the entire tract. This decree was afterwards amended, so as to restrict the claimant to two leagues, and no more. But this amendment was made, not only after the expiration of the term, but after an appeal which had been taken by the United States had been dismissed by the order of the attorney general, and a consent given that the decree rendered should be final. Whether, under these circumstances, this court had any authority to enter a new decree presented a difficult and doubtful question.

The claimants, having appealed from this amended decree, had a right to the judgment of the supreme court whether (1) he had not, as he contended, by the terms of the original grant, a right to all the land within his boundaries, whatever might be its extent; and (2) whether, by force of the first decree of this court, the dismissal of the appeal by the United States, and the consent that the decree should be final, his right to the whole tract was not res adjudicata beyond the power of this court to disturb. When, therefore, the claimant consented to abandon his appeal, and to accept a decree restricting him to two leagues, and the United States on their part agreed that the two leagues might be located at his election, it is clear that if, by force of subsequent special legislation, or in any other way, the claimant is deprived of the consideration for his agreement, the whole agreement should be annulled, and he should be restored to his former position, with his right of appeal to the supreme court unimpaired. But the special act referred to gives no authority to this court to effect so extensive and important a change in the whole posture of the case. It authorizes the parties named to "contest the correctness" of the survey, but it gives no authority to the court to vacate its decree, or to determine the correctness of the survey by any other rules, or on any other considerations than those by which it is governed in ordinary cases.

Under the law as laid down by the supreme court, I am compelled to pronounce any survey made in conformity with the decree of confirmation to be correct. As this survey is admitted to be in conformity with the decree of confirmation, it must therefore be confirmed. It is a satisfaction to me to know that, if this decision be erroneous, the recent law by which appeals from this court, in survey cases, are to be taken to the circuit, and not to the supreme, court, affords to the parties interested an easy and expeditious remedy.

Case No. 14,729.

UNITED STATES v. CARR.

[2 Cranch, C. C. 439.] [1]

Circuit Court, District of Columbia. Nov. Term, 1823.

CRIMINAL PRACTICE—INDICTMENT—INDORSEMENT OF PROSECUTOR'S NAME—RECOGNIZANCE.

In cases of misdemeanor, the court in Alexandria will not compel the traverser to plead to the indictment, until a prosecutor's name be indorsed; and the recognizance will be respited; unless the attorney of the United States shall satisfy the court that it is a case which ought to be excepted out of the general rule.

[Cited in U. S. v. Helriggle, Case No. 15,344.]

Indictment for selling spirituous liquors without license. No name of a prosecutor was written at the foot of the indictment, as required by the Virginia statute of November 13, 1792, c. 74, §§ 24, 25. Nor had the offence been presented by the grand jury, upon the knowledge of two of their body, nor upon the testimony of a witness called upon by the court, or the grand jury, according to the provisions of the Virginia statute of December 2, 1795, c. 188, § 2.

Mr. Taylor, for defendant [David Carr], objected to pleading until a prosecutor's name should be indorsed.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT (THRUSTON, Circuit Judge, absent,) said that they would not compel the defendant to plead to the indictment until a prosecutor's name should be indorsed, and that the recognizance should be respited.

Mr. Swann, for the United States, stated that the recognizance had been returned by a justice of the peace, with the names of the witnesses, and he sent them to the grand jury; and that he could satisfy the court that it is a case which should be excepted out of the general rule, and a day was assigned to hear the witnesses. See the general rule of November term, 1807.

Case No. 14,730.

UNITED STATES v. CARR.

[3 Sawy. 302.][1]

District Court, D. Oregon. March 23, 1875.

EXTORTION UNDER COLOR OF OFFICE—COLLECTOR OF CUSTOMS — CRIMES COMMITTED IN ALASKA—JURISDICTION.

1. Section 12 of the act of March 3, 1825 (4 Stat. 118), defining the crime of extortion under color of office, so far as officers of the customs are concerned, is an act relating to customs, and was therefore extended over Alaska by section 1 of the act of July 27, 1868 (15 Stat. 240).

2. Alaska being a place without the limits of any state or judicial district of the United States, within the meaning of section 14 of the act of March 3, 1825 (4 Stat. 118; Rev. St. § 730) this court has jurisdiction to try a person charged with the commission of a crime therein; provided such person is found in the district of Oregon or first brought here.

[Cited in U. S. v. Williams, 2 Fed. 62.]

3. Section 5481 of the Revised Statutes, being passed June 22, 1874, after the cession of Alaska, is in force there from the time of its passage.

[These were indictments against John A. Carr.]

Rufus Mallory, for the United States.

Joseph N. Dolph, for defendant.

DEADY, District Judge. Two indictments (Nos. 420 and 444) have been found against the defendant, the collector of customs at Fort Wrangel, Alaska, charging him with the commission of the crime of extortion under color of office. The defendant demurs to the indictments.

In support of the demurrer, it is maintained: (1) That section 12 of the act of March 3, 1825 (4 Stat. 118), defining the crime of extortion under color of office was not extended over Alaska by section 1 of the act of July 27, 1868 (15 Stat. 240), which only included "the laws of the United States, relating to customs, commerce and navigation;" (2) that upon the cession of territory to the United States, as in the cession of Alaska, the laws of the United States are not extended over it proprio vigore; and (3) that if the act of 1825, defining the crime of extortion, was extended over Alaska upon its acquisition by the United States, still this court has no jurisdiction to try the defendant for a violation thereof, because the jurisdiction of this court over offenses committed in Alaska is conferred by the act of 1868 aforesaid, which only gives such jurisdiction for violation of that act and the laws relating to customs, commerce and navigation.

To this it is replied by the prosecution: (1) That the act of 1825 defining extortion, so far as the defendant, a deputy collector of customs, is concerned, is an act relating to customs—a revenue law—and therefore in force in Alaska by means of the act of 1868 aforesaid. (2) That said law being a general one for the punishment of extortion by any officer of the United States, was in force in Alaska proprio vigore from the time of its cession to the United States. (3) That by section 5481 of the Revised Statutes of the United States, passed June 22, 1874, the crime of extortion by an officer of the United States is defined, and that said act being passed since the cession of Alaska is in force there from the time of its passage, which was prior to the commission of the crime charged in the indictment No. 444. (4) That although this court would not have jurisdiction of these offenses for the sole reason that they were committed in Alaska, unless the act defining the crime of extortion was pro tanto an act relating to customs, and therefore extended over Alaska by the said act of 1868; yet under section 14 of said act of 1825 (Rev. St. § 730), if the law punishing extortion was otherwise in force in Alaska, this court would have jurisdiction to try the defendant upon the charges, if it appears that this is the district in which he was found or first brought, because Alaska, the place where the alleged crimes were committed, is without the limits of any state or district of the United States.

The demurrers must be overruled. The act defining the crime of extortion, and providing for its punishment, includes officers of the customs, and so far it is an act "relating to customs," and is, therefore, in force in Alaska by virtue of section 1 of the act of July 27, 1868, extending "the laws of the United States relating to customs, commerce, and navigation" over that country, if not proprio vigore.

Besides section 12 of the act of 1825, defining extortion, having been re-enacted on June 22, 1874, as section 5481 of the Revised Statutes,—after the cession of Alaska to the United States,—was, therefore, in force in that country proprio vigore at the time the crime charged in No. 444 is alleged to have been committed. This being so, the facts stated constitute a crime, of which this court has jurisdiction, it also appearing that it was committed without the jurisdiction of any particular state or district (section 14 of act of 1825; Rev. St. § 730); and that the defendant was first brought into this district, independent of the jurisdiction specially confer-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

red upon it by section 7 of the Alaska act of 1868 (Rev. St. § 1957).

The demurrers are overruled, but the defendant may be heard upon the same questions in arrest of judgment if a verdict should be given against him on the trial.

The defendant afterwards pleaded guilty and was fined.

[For application for writ of habeas corpus, see Case No. 2,432.]

Case No. 14,731.

UNITED STATES v. CARR et al.

[3 Sawy. 477.] [1]

Circuit Court, D. California. Sept. 27, 1875.[2]

PUBLIC LANDS—CALIFORNIA—TITLE—APPROPRIATION FOR PUBLIC USES—DEDICATION—GRANT.

1. The title of the city of San Francisco, under the Mexican law, was so far subject to the control of the former government, previous to the conquest and cession of the country, and of the United States subsequently, that portions of the lands within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become, by action of the authorities of the city, vested in private parties.

2. As against parties having no title in themselves, holding by intrusion, mere trespassers, the possession of the government for a hospital for infirm and disabled seamen, of a part of the four lots in the city of San Francisco, upon which the hospital is situated, under a deed from the city authorities, with claim to the remainder of the lots for the same purposes, and the assertion of that claim by the removal of the intruders, is an occupation for public uses of the whole premises, within the meaning of the act of congress of 1864 [13 Stat. 333], which excepts from the grant to the city "all sites or other parcels of land" which had been or were then occupied for such uses by the United States.

[Cited in People v. Monk, 28 Pac. 1116.]

3. The setting apart of the premises for a hospital by direction of the government, with the appropriation by congress of moneys to the support of the institution, the construction of buildings thereon, and inclosure of the land, show a dedication of the premises for a public use within the meaning of the decree and confirmatory act of March 3, 1866 [14 Stat. 4], both of which excepted from confirmation to the city parcels of land which had been previously reserved or dedicated to public uses.

This suit was brought to quiet the title to four fifty-vara lots, situated within the city of San Francisco, upon two of which stands the United States Marine Hospital.

In June, 1851, commissioners for the construction of public buildings in San Francisco, appointed by the secretary of the treasury, selected a place on what is known as "Rincon Point" in the city, as a suitable site for a marine hospital. Previous to the selection, and on the thirtieth of September, 1850, congress had appropriated the sum of fifty thousand dollars for the construction of a marine hospital, to be located by the secretary of the treasury at or near San Francisco. In August, 1852, and in August, 1854, further appropriations were made for the completion of the building, and the arrangement and inclosure of the grounds upon which it is situated. But previous to the commencement of the building the commissioners applied to the city authorities of San Francisco for a conveyance of the city's interest in the land which had been selected. In accordance with this application an ordinance was passed by the common council of the city, directing the mayor to execute a conveyance of the right, title and interest of the city to a block of land consisting of six fifty-vara lots, four of which constitute the premises in controversy. Subsequently the hospital was erected on two of the lots, numbered one and two of the blocks; and outstanding buildings connected with the hospital were constructed on two others of the lots, numbered three and four of the block; and these two were inclosed by a high fence connecting with the building. It is upon this deed and the subsequent use of the lots for a marine hospital that the United States rely. At the time the United States took possession of lots three and four there were several persons upon them, some of whom voluntarily left, and others were removed by the marshal of the United States. The defendants claim under parties thus dispossessed, and assert title to the premises under an ordinance of the city of San Francisco, known as the "Van Ness Ordinance," from its author, passed on the twentieth of June, 1855. By that ordinance the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process. This ordinance was ratified and confirmed by the legislature of California on the eleventh of March, 1858. On the first of July, 1864, congress passed an act entitled "An act to expedite the settlement of titles to land in the state of California," by the fifth section of which, all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined by her charter of April 15, 1851, were relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinance of said city, there being excepted from this relinquishment and grant "all sites or other parcels of land" which had been or then were "occupied by the United States for military, naval, or other public uses." 13 Stat. 333. At the time the Van Ness ordinance was passed, the city of San Francisco asserted title, as successors of a Mexican pueblo, to four square leagues of land covering the site of the present city, and

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[2] [Affirmed in 98 U. S. 433.]

had exhibited her claim to the board of land commissioners created under the act of March 3, 1851 [9 Stat. 631]; and the board had confirmed the claim to a portion of the land, and rejected it for the residue. The city not being satisfied with the portion adjudged to her, prosecuted an appeal from the decision of the board to the United States district court, from which court the case was transferred to the circuit court of the United States for the district of California. That court adjudged the claim of the city to be valid to four square leagues of land subject to certain exceptions and reservations; and on the eighteenth of May, 1865, its final decree in the case was entered, which is as follows:

"Final Decree Confirming the Claim of the City of San Francisco to its Pueblo Lands, 1865. The City of San Francisco v. The United States. The appeal in this case taken by the petitioner, the city of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the state of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the Northern district of California pending said appeal—the said case having been transferred to this court by order of the said district court, under the provisions of section four of the act entitled 'An act to expedite the settlement of titles to lands in the state of California,' approved July 1, 1864—and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged and decreed, that the claim of the petitioner, the city of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed. The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust, for the benefit of the lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city. Field, Circuit Judge. San Francisco, May 18, 1865."

From this decree the United States and the city of San Francisco appealed—the United States from the whole decree, and the city from so much thereof as included certain lands reserved for public purposes in the estimate of the quantity confirmed. Whilst the appeal was pending in the supreme court of the United States, congress passed the following act: "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco: Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the state of California, confirmed to the city of San Francisco by the decree of the circuit court of the United States for the Northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are, hereby relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof. Approved March 8, 1866." At the December term of the supreme court of the United States for 1866—the term following the passage of the above act—the appeal of the United States and the appeal of the city of San Francisco, in the Pueblo Case, were both dismissed, by stipulation of counsel of the respective parties. See Townsend v. Greely, 5 Wall. [72 U. S.] 337, and Grisar v. McDowell, 6 Wall. [73 U. S.] 379.

Walter Van Dyke, U. S. Atty.
William Matthews and J. E. McElraith, for defendants.

FIELD, Circuit Justice. This is a suit on the equity side of the court to quiet the title of the United States to four fifty-vara lots constituting the southeasterly half of the block bounded by Harrison, Spear, Folsom and Main streets, in the city of San Francisco. And the principal question for determination is, whether these lots were excepted from the confirmation to the city by the decree of the circuit court of the United States in the Pueblo Case, and the legislation of congress. It is unnecessary to go into any examination of the character of the city's title under the Mexican law; that subject has been elaborately considered in several adjudications of this court. It is sufficient for the purposes of this case to state that the title was so far subject to the control of the former government, previous to the conquest and cession of the country, and of the United States subsequently, that portions of the lands within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become, by action of the authorities of the city, vested in private parties. It was, therefore, competent for the United States to set apart the premises in question, if not thus vested in private parties, for the erection of a hospital for disabled and infirm seamen, or for any other public purpose, at any time previous to the decree of the circuit court in the Pueblo Case, and the confirmatory act of congress of March 8, 1866, unless their right was relinquished by the fifth section of the act of July 1, 1864. That act relinquished and granted to the city the interest and right of the United States to lands within the charter limits of 1851, for the uses and purposes of the Van Ness ordinance; but it expressly excepted from its operation "all sites or other parcels of land" which had been or were then occupied by the United States for public uses.

The decree of the circuit court in the Pueblo Case also excepted from confirmation to the city, parcels of land which had been previously reserved or dedicated to public uses; and the confirmatory act of congress of 1866 provided for the same reservations.

It is clear from the evidence presented in the case, and from the whole history of the action of the government with respect to the Marine Hospital, that the United States have claimed the right to the four lots in controversy since the deed of the city, executed in December, 1862; and that at the date of the decree in the Pueblo Case, and the confirmatory act of congress, they were in possession of the premises under their deed, or at least of a part of them, using such part for the hospital, with claim to the balance for the same purpose. As against parties having no title in themselves, holding by intrusion, mere trespassers, this possession of the government of a part of the lots with claim to the balance under the deed, and the assertion of that claim by the removal of the intruders, is an occupation of the whole premises for a public use, within the meaning of the act of congress of 1864. And the setting apart of the premises for a hospital by direction of the government, with the appropriation by congress of moneys to the support of the institution, the construction of buildings thereon, and inclosure of the land, show a dedication of the premises for a public use within the meaning of the decree and confirmatory act.

The defendants rest all their claim upon rights acquired by possession under the Van Ness ordinance. But that ordinance could not apply to lots covered by the previous deed of the city, executed in December, 1862. That deed, it is true, was inoperative against a previous conveyance of the city to the commissioners of the funded debt, or grantees from them, but it was operative against any further disposition of the premises by the city, if any interest remained in the corporation. The Van Ness ordinance could not embrace lands in which the city's interest had been thus disposed of, for that ordinance only purported to give such interest as the city held. Of necessity, it could give no more. Hubbard v. Sullivan, 18 Cal. 508. The defendants had, therefore, no standing even under the Van Ness ordinance, but were simple intruders whose possession, if it existed as claimed, was, whilst it lasted, illegal and tortious.

The United States must have a decree to quiet the title, and declaring that the claim and assertion of an adverse interest by the defendants in the premises in controversy is without any just right and wholly invalid. And it is so ordered.

[Affirmed by the supreme court. 98 U. S. 433.]

Case No. 14,732.

UNITED STATES v. CARR.

[1 Woods, 480.] [1]

Circuit Court, S. D. Georgia. Nov. Term, 1872.

HOMICIDE—ARMY—KILLING BY MEMBER OF GUARD—MILITARY ORDERS—SUPPRESSING DISORDER—USE OF FORCE—DEADLY WEAPON.

1. The willful killing of a soldier by the sergeant of the guard, while on duty, is not necessarily a justifiable homicide.

2. The order of a superior military officer to an inferior will not, of itself, justify the willful killing of another

3. A soldier is bound to obey only the lawful orders of his superior officers.

4. In the suppression of a disorder or mutiny among soldiers, the means used should be proportioned to the end to be gained. Violent meas-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

ures, clearly unnecessary, will not be justified. But officers, charged with the good order of a camp or fort, will not be required to weigh with scrupulous precision the exact amount of force necessary to suppress disorder.

[Cited in U. S. v. Clark, 31 Fed. 716.]

5. No mere words, applied by one man to another, will justify the use of a deadly weapon; nor can they be the lawful occasion of that "heat" which would reduce the act of killing from murder to manslaughter.

[6. Cited in U. S. v. Meagher, 37 Fed. 878, to the point that in all criminal cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment.]

Robert E. Carr was indicted and tried, at the November term, 1872, of the circuit court for the Southern district of Georgia, for the willful murder of Harmon A. Jordan. The case was this: Both the prisoner and the deceased were soldiers in the 3d artillery, United States army, and were stationed at Fort Pulaski, on Cockspur Island, near the mouth of the Savannah river, in Georgia. On the 13th of July, 1872, the prisoner was the sergeant of the guard at the fort. About seven o'clock in the evening, a drunken quarrel occurred between some of the soldiers in the fort. Sergeant Bell, attempting to suppress the disorder, was taking Corporal McKinley to the guard house, when he was set upon by other soldiers and knocked down and left insensible upon the ground. A call was then made for the sergeant of the guard. The prisoner and three men of the guard at once crossed the parade to the scene of the disorder. The prisoner gave Sergeant Shirer, who was one of the disorderly soldiers, in charge of two men of the guard to convey him to the guard house. Shirer had lost his cap, and, when he asked leave to get it, the prisoner struck him with the butt of his musket and knocked him down. At this point, the deceased approached the prisoner and said to him, "You are a mean man," or "You are a damned mean man to knock a man down in that way." The prisoner then made an attempt to run his bayonet into deceased, who avoided the thrust, and turned and commenced running toward his quarters. Prisoner raised his piece to fire. It was at half-cock. He brought it down, cocked it, raised it again, and fired at deceased, who was at the time running from prisoner toward his quarters. The ball entered the back of deceased near the spine, passed through his body, coming out near the left nipple; passed through his left elbow and then struck the wall of the fort beyond. At the time he was shot, the deceased was eight or ten yards from prisoner. He died in about ten minutes. It was a disputed question of fact, upon the trial, whether the deceased was engaged in, or was trying to suppress, the disorder among the soldiers at the time the prisoner came up. There was also some evidence tending to show that the musket of the prisoner was discharged accidentally and not purposely, and that prisoner acted under the orders of the ranking sergeant in the fort. There was no commissioned officer within the fort at the time of the homicide.

George S. Thomas, Asst. U. S. Atty.

Julian Hartridge and M. J. O'Donohue, for defense.

WOODS, Circuit Judge (charging jury). The prisoner stands at the bar of this court charged with the crime of willful murder. The indictment is based upon the third section of the act of congress, approved April 30, 1790 (1 Stat. 113), which reads as follows: "That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on conviction thereof shall suffer death." It charges that the prisoner, on the 13th of July, 1872, at and within Fort Pulaski, on Cockspur Island, within the Southern district of Georgia, the said fort being at that time under the sole and exclusive jurisdiction of the United States, did, upon the person of one Harmon E. Jordan, commit the crime of willful murder by shooting him with a musket. To this indictment the prisoner has pleaded not guilty, and has put himself upon the country. He comes to the bar under the protection of that humane maxim of the law, that every man is presumed to be innocent until the contrary is shown. In other words, the burden of proof is on the United States to establish the prisoner's guilt. Until this is done, in the eye of the law he is innocent. The prosecution must prove to your satisfaction every material ingredient of the offense of willful murder, before you would be justified in returning a verdict of guilty.

Counsel for prisoner do not deny that on the 13th of July last at Fort Pulaski, within the Southern district of Georgia, Harmon E. Jordan was killed by a shot fired from a musket held in the hands of the prisoner. Nor do they deny that the United States has sole and exclusive jurisdiction over Cockspur Island, on which Fort Pulaski is situate. There is therefore no question raised as to the jurisdiction of this court to try the accused.

It is not every killing of a human being that is criminal. Many homicides are of such a nature as to be no crimes at all. This makes it necessary for the court to instruct you what constitutes the crime of willful murder as known to the law. Murder is defined to be "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, express or implied." 3 Co. Inst. 47. In the case on trial it is not denied that the deceased, Harmon E. Jordan, was killed by a musket ball fired from a musket held in the hands of the prisoner, nor is it denied that the prisoner was of sound memory and discretion at that time, nor that Jordan was under the peace and protection of the

law, so that the willful killing of him would be a crime. Therefore, according to the definition just quoted, the only points for you to pass upon in deciding whether the prisoner at the bar is guilty of murder are: First, was the killing unlawful? and second, was it done with malice aforethought, express or implied?

Upon the point whether or not the killing was unlawful, you will first inquire whether the act of the prisoner which resulted in the death of Jordan was intentional or unintentional. If it was unintentional, if the prisoner had no purpose to fire his piece, but it was discharged by him accidentally, and at the time of its discharge the prisoner was engaged in no unlawful act, then the act of killing is a homicide by misadventure, and is no crime. Therefore, if you shall be of opinion that the musket of the prisoner was accidentally discharged, and he was at the time engaged in no unlawful act, it would be your duty without further inquiry to return a verdict of not guilty. If, however, on the other hand, you believe the prisoner discharged his piece purposely, you will then inquire further whether the killing was lawful or unlawful. The simple fact, if such you find to be the fact, that the prisoner, on the 13th of July last, was sergeant of the guard at Fort Pulaski, and the deceased was at the same time and place a private soldier, does not of itself make the killing a lawful homicide. The willful killing of a soldier by a guard may be as clearly murder as the willful killing of one citizen by another. Nor will any order of a superior officer to an inferior in rank justify the willful killing of a person under the peace and protection of the law. A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder, both in the officer and soldier. It was the duty of the prisoner as officer of the guard to preserve the peace within the fort, and to suppress disorderly and mutinous conduct. He was authorized to use all proper and reasonable means to accomplish this end. But the means used and the force applied should be measured by the necessity of the case. For instance, the law would not justify the killing of a single unarmed soldier, even though drunken, riotous or even mutinous, when he could be arrested without resort to such extreme means. The means used must be proportioned to the end to be accomplished. In order to determine whether the homicide, now under investigation, was lawful or unlawful, you should consider what, under the circumstances of the case, would appear to a reasonable man to be the demands of duty. Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. But if on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required.

If you shall reach the conclusion under these instructions that the homicide under consideration was lawful, it will be your duty without further inquiry to return a verdict of not guilty. If however you shall be of opinion that the killing was unlawful, you will then proceed to inquire whether it was attended with malice aforethought, express or implied. "Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart; a purpose to do a wicked act, and it may be either express or implied in law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause." 4 Bl. Comm. 198. "Although the malice in murder is what is called 'malice aforethought,' yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or do other great bodily harm is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period." 2 Bish. Cr. Law, § 677.

If you are satisfied that the prisoner at the

bar when he fired upon the deceased intended not to kill him, but only to do him some great bodily harm, if his act was unlawful and was done with malice aforethought, as it has been explained to you, still he is guilty of murder. A recent act of congress declares that in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. Section 9, Act June 1, 1871 (17 Stat. 198). We instruct you that the crime of manslaughter is included in the crime of willful murder, with which the prisoner is charged in the indictment. So that if after a careful investigation, you should conclude that the prisoner is not guilty of willful murder, you may still find him guilty of manslaughter. "Manslaughter is defined to be the unlawful killing of another without malice, express or implied, which may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act." 4 Bl. Comm. 191. If you shall be of opinion that the killing of the deceased was unlawful, you must decide whether the offense of the prisoner is murder or manslaughter.

It is not claimed in this case that the firing of the prisoner's musket was done involuntarily while the prisoner was in the commission of an unlawful act. So that if the prisoner is guilty of manslaughter at all, it must be because he is guilty of a killing voluntarily upon a sudden heat. No words applied by one man to another will justify the use of a deadly weapon, nor can they be the lawful occasion of that "heat" which would reduce the act of killing from murder to manslaughter. If a man returns provoking language by a blow from an instrument calculated to produce death, and death follows, the act will be murder. State v. Merrill, 2 Dev. 269; 1 Bish. Cr. Law, §§ 872, 873. If you find the killing of the deceased was unlawful, but without malice, as we have defined malice, if it was done upon a sudden heat, not caused by the words merely of the deceased, but by an assault, then the prisoner is guilty of manslaughter and not of murder, and such should be your verdict. Before you can find the prisoner guilty of either murder or manslaughter, you must be satisfied beyond reasonable doubt, that every ingredient necessary to the offense has been established by the proof. A reasonable doubt is not a remote and far fetched or fanciful doubt. It must be suggested by the evidence in the case, and of such strength as would influence a reasonable man in the conduct of his own affairs.

If you are satisfied beyond any reasonable doubt of the guilt of the prisoner of either murder or manslaughter, you will return a verdict of guilty accordingly. If on the other hand you are convinced of the prisoner's innocence, or have reasonable doubt of his guilt, it will be your pleasant duty to say, "Not guilty." In your retirement, remember the great magnitude of this case to the public and the prisoner; bring your best ability to bear upon the investigation, and acquit yourselves of your solemn duty like good and lawful men.

Case No. 14,733.

UNITED STATES v. CARRICO.

[2 Cranch, C. C. 110.] [1]

Circuit Court, District of Columbia. June Term, 1815.

EVIDENCE—CONTENTS OF PAPERS—NOTICE TO PRODUCE.

Upon an indictment for selling a free person as a slave, under the Maryland law of 1796, c. 67, parol evidence may be given of the contents of papers delivered by the witness to the defendant, without a previous notice to produce them.

The witness stated that he delivered to the defendant [James Carrico] the papers which he had received with the woman who was sold, which papers showed that she was bound to serve only three years and nine months.

Mr. Key and Mr. Van Horne, for defendant, objected to parol evidence of the contents of the papers without previous notice to the defendant to produce them; and cited Peake, Ev. 110, 111, Am. note, which refers to Com. v. Messinger, 1 Bin. 273; State v. Orsborn, 1 Root, 152; and State v. Blodget, Id. 534.

THE COURT (MORSELL, Circuit Judge, not sitting, having been of counsel for the defendant) overruled the objection. Quære?

A special verdict was found, upon which judgment was arrested.

Case No. 14,734.

UNITED STATES v. CARRICO.

[5 Cranch, C. C. 112.] [1]

Circuit Court, District of Columbia. March Term, 1837.

WITNESS—COMPETENCY—WAGER UPON RESULT OF TRIAL.

1. A witness cannot be rejected in consequence of having been provoked to bet upon the event of the trial.

2. A wager upon the event of the trial is void in law.

Indictment [against Lucretia Carrico] for assaulting and beating a Mrs. Collard. Mary Hutchinson, a witness for the United States, upon cross-examination, admitted that one James C Deneale, who had irritated the witness, and by whose advice the defendant had cowhided Mrs. Collard, told the witness, before the trial, that he would bet her five dollars that Mrs. Collard would be cast; and the witness agreed to the wager.

W. L. Brent, for defendant, objected, and contended that the testimony which the witness had given should be rejected.

THE COURT said, that the wager was void in law, and that the witness, not being, in

[1] [Reported by Hon. William Cranch, Chief Judge.]

fact, interested, could not be excluded; but that the circumstances attending the wager would go to the credit of the witness.

Case No. 14,735.

UNITED STATES v. CARRIGO.

[1 Cranch, C. C. 49.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

JURY — PEREMPTORY CHALLENGE — EVIDENCE — GENERAL BAD CHARACTER.

1. Peremptory challenge allowed only in capital cases, in Alexandria.

2. The United States cannot give evidence of the general bad character of the prisoner, unless the prisoner should first bring evidence to support his character.

[Cited in U. S. v. McPherson, Case No. 15,703.]

Indictment, under the act of congress of 1790 (1 Stat. 112), for stealing.

Edward J. Lee, for prisoner [Michael Carrigo], contended that he had a right to a peremptory challenge. He contended that the prisoner was charged with felony; and by the law of Virginia (Rev. Code, 110) "no person charged with murder or felony shall be admitted to a peremptory challenge of more than twenty," which implies the right peremptorily to challenge that number. A felony is such an offence as by the common law worked a forfeiture of goods or chattels, or both. If a statute changes the punishment and takes away the forfeiture, the offence does not thereby cease to be a felony.

Mr. Mason, for the United States, cited 2 Hawk. P. C. pp. 580, 581.

THE COURT decided that in cases not capital the prisoner has not a right to the peremptory challenge.

THE COURT refused to permit the attorney for the United States to bring evidence of the general bad character of the prisoner, unless the prisoner should first bring evidence in support of his general character.

Case No. 14,736.

UNITED STATES v. CARILLO.

[Hoff. Dec. 40.]

District Court, N. D. California. Sept. 7, 1859.

MEXICAN LAND GRANT—SURVEY—OBJECTIONS BY SETTLERS.

[1. Under Act June 14, 1860, settlers can object to the location of the grant only through the United States district attorney.]

[2. On a petition for a sobrante lying between various ranchos, a grant was made by the governor of "three square leagues, a little more or less, as the respective diseño explains." On the diseño a considerable tract was delineated, but a smaller space was enclosed in yellow lines, and marked "What is solicited." *Held*, that this reference in the grant to the diseño did not necessarily indicate that it included only the space so marked, but the presumption rather was that three leagues was granted to be taken anywhere within the tract bounded by the ranchos named.]

[Claim by Joaquin Carillo to a certain tract of land.]

HOFFMAN, District Judge. The survey in this case having been made and duly published, it was, on the motion of the district attorney, ordered into court. A monition was issued in this court, and at the return day various parties intervened in the proceeding, under the provisions of the act of June 14, 1860 [12 Stat. 33]. Among these interveners were several parties who had purchased lands from the claimant which were not included in the survey. The claimant also appeared, while settlers, whose lands were, as alleged, erroneously embraced within it, appeared, by the district attorney, in the name of the United States.

On the hearing, the claimant admitted that the tracts sold by him should be included in the survey, and further consented that the location might be so modified as to exclude all lands in possession of settlers, provided three leagues, (the quantity granted,) were embraced in the survey and within the limits of the original grant. A decree to this effect was entered, with the consent of all parties, and a new survey, made in pursuance thereof, has been approved and adopted by the final decree of the court. A motion is now made on behalf of certain other settlers whose lands are included in the last survey to open the decree, and relocate the grant. The effect of this relocation, if made as desired, will be to include a large number of settlers, who are now excluded, and to exclude perhaps an equal number who are now included in the survey.

The district attorney, after examining into the merits of the case, came to the conclusion that the location ought not to be disturbed. He accordingly refused to move to open the decree, on behalf of the United States, and the motion is now made by private counsel, employed by that portion of the numerous settlers on the rancho who are dissatisfied. There would seem, at first sight, no reason for admitting these persons to become parties to the proceeding after so long a delay, and a neglect to bring their rights to the notice of the district attorney, or the court. The monition, advertisements, and proclamations gave them ample notice that the survey might be modified so as to include their lands; nor could they have been ignorant that the chief ground of objection to it was the fact that several tracts, long since sold by the claimant to bona fide purchasers, were not embraced within it. If the survey were modified, so as to include their tracts, it was evident that their own settlements must also be embraced within it, or if not necessarily so embraced, that a contest would arise as between various settlers, some of whom would neces-

[1] [Reported by Hon. William Cranch, Chief Judge.]

sarily be included, and others left out. As against those settlers, therefore, who had made known their rights to the district attorney, and in whose behalf he intervened, the others, who slept on their rights, would seem to have no equities. But the statute presents an insuperable obstacle to allowing these parties now to intervene.

By the 3d section of the act of 1860, it is provided that "all parties claiming interest by preemption, settlement or other right or title derived from the United States, shall not be permitted to intervene separately, but the rights and interests of such parties shall be represented by the district attorney of the United States, aided by counsel acting for such parties jointly, if they think proper to employ such counsel." Under this provision the parties claiming under the United States, who brought their claims to the notice of the district attorney, have been heard, and as that officer now declines to appear in the name of the United States for other parties, I cannot perceive how, under the act of congress, I can permit them "to intervene separately," and in their own names.

But it is urged that the Appwood survey is clearly without the exterior limits of the tract originally granted, and that the court, on being so informed, should, on its own motion, open and set aside its decree. But this statement is denied, as a matter of fact. To ascertain whether or not it be true the decree must be opened, and, if necessary, further testimony taken. But the decree has already determined that the survey is of the proper quantity and within the limits of the grant. It is difficult, therefore, to see how the court, at the suggestion of counsel, who, in this view, is a mere amicus curiæ, and represents no party who has a standing in court, or is entitled to be heard, can proceed to re-examine and set aside its own final adjudication. But it is said that as this decree was by consent, it ought not to be treated like a deliberate determination, by the court of contested questions. It is true that the decree was by consent—that is, that the claimant admitted the justice of all the objections urged, and consented to any modification of the survey which might be desired, provided that the quantity granted were given to him, and the lands sold to him were included. And in this proposition all parties acquiesced. Under such circumstances it is at least doubtful whether the court can make itself the representative of persons not parties to the cause, and who, the statute declares, shall be represented by the district attorney intervening in the name of the United States. If the decree be opened, the survey which has been approved will still be objected to by any party to the proceeding, and all objections to it must be urged by the court, or by an amicus curiæ who represents its views. Certainly, to justify so anomalous a proceeding, a very clear case ought to be shown, where the court has been induced by the parties to make a palpably erroneous decree,—a case extremely improbable where the interests of the United States, and all parties claiming adversely to them are represented by numerous and intelligent counsel. I have, however, examined the objections presented, to see whether, as alleged, so clear an error has been committed by the court as would induce the existence of a doubtful jurisdiction to rectify it.

The original petition of Carillo was for a sobrante lying between various ranchos, and extending in width from the hills of Mayacanes as far as the law permitted, which he supposed to be five or six leagues, but subject to the boundaries of the adjoining ranchos, when they should be measured. Those measurements not having been made, the proceeding was suspended, and the applicant in the meantime allowed to occupy, but not build upon, the land. In the succeeding year the claimant renewed his petition, and apprised the governor that, owing to the neglect of the colindantes, no measurements had yet been made. He therefore prayed for an immediate grant of the land. Jimeno, to whom the petition was referred, reported that there seemed no objection to making the grant, subjecting the petitioner to the measurements of the colindantes, and not allowing him to occupy more than three square leagues, which was all that remained vacant. The grant was, accordingly, issued. The land granted is described as bounded "by the rancho de Cotate, by that of D'a Mar. Ignacio Lopez, by the Lagunas, by the rancho of Don Juan Cooper, by that of Don Marcos West, and by that of Don Juan Wilson, subject to the measurement of the colindantes when possession shall be given them of the lands they actually possess." The fourth condition is in the usual form: "The land donated is three square leagues, a little more or less, as the respective diseño explains." On the diseño a considerable tract of country is delineated, but a smaller space is enclosed by yellow lines, and marked "What is solicited." The lines of the survey do not, in all respects, conform to the yellow lines thus delineated; and the question arises, did the governor, by referring to this diseño, mean to concede that particular tract, or did he, as the grant declares, intend to concede three leagues of land, to be taken out of a tract of which the boundaries were to be the boundaries of the adjoining ranchos, when the same should be established, and to which the grant to the claimant should be subordinate. It appears to me that the latter was more probably his intention. The expediente discloses that the governor was indisposed to make any grant to Carillo until the neighboring lands had been measured; and though he finally consented to do so, it is not to be presumed that, without any knowledge of the true location of those boundaries, he determined to grant a specific tract, which might very possibly encroach upon them.

Nor would such a proceeding have been just to the claimant; for, if the land granted was precisely that contained within the yellow lines, and if it in part included—as was, in fact, the case—lands belonging to an adjoining rancho, the claimant would have no means of making up the deficiency, for the yellow lines would circumscribe him on all sides. It seems to me far more reasonable to suppose that the governor intended to grant three leagues to be taken within the tract bounded by the ranchos named; and the diseño was drawn by the petitioner, and referred to by the governor, as indicating the supposed lines of the colindantes, but not as designating, by the natural objects delineated, the precise location of lines which were as yet unascertained. If this view be correct, it follows that within the boundaries of the adjoining ranchos, as subsequently established, the claimant had a right to elect where his three leagues should be taken; and, having sold portions of the tract to bona fide purchasers for value, he would not be at liberty even if disposed to make a location which would not include their lands.

It is not pretended that the survey is without the limits of the tract bounded as has been stated. The only objection urged is that it is in part without the limits of the tract delineated by yellow lines. That objection being disposed of, and found to be of very doubtful validity, I see no reason for the court to interpose, as has been suggested, of its own motion, to correct a manifest error. The motion is therefore denied.

Case No. 14,737.

UNITED STATES v. CARRILLO.

[Hoff. Land Cas. 96.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF CLAIM.

No reason for doubting the entire validity of this claim.

Claim [by Joaquin Carrillo] for three leagues of land [the rancho Llano de Santa Rosa] in Sonoma county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellee.

HOFFMAN, District Judge. It appears from the expediente in this case that the claimant, on the twenty-second of June, 1843, petitioned Governor Micheltorena for a grant of land on the plain adjoining the rancho of his mother. The governor, however, suspended action on the subject, as no judicial measurement had been made of the adjoining ranchos, and the extent of the sobrante or surplus reserved was not ascertained. On the twelfth of March, 1844, the claimant applied to the alcalde of the district for permission to sow, and build a house upon the land, during the pendency of his application to the governor for a grant. The alcalde granted him leave to sow the land, holding himself responsible to the owners of the lands if there should be any damage, but he refused him permission to build the house. On the twenty-sixth of March, 1844, the claimant renewed his application to the governor, stating that his petition still remained unacted upon on account of the neglect of the colindantes or adjoining proprietors to have their lands measured according to law.

The secretary, to whom this second petition was referred, reported favorably to it, and advised a grant of not more than three square leagues, subject to the measurements of the adjoining proprietors. In accordance with this report, the grant now produced was made; and it appears in evidence that he built first a small house and afterwards a very large one on the land, on which he has continued ever since to reside. He has also cultivated from one to three hundred acres of it with corn, barley, wheat, &c. The handwriting of the grant in the possession of the party is fully proved, and there seems no reason to doubt the entire validity of this claim. The map and the designation in the grant of the colindantes or conterminous owners abundantly show the locality of the tract granted; and the claimant's title to the land solicited must be confirmed to the extent of three leagues, subject to the measurement of the land previously granted to the colindantes. The decision of the board must, therefore, be affirmed.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 14,738.

UNITED STATES v. CARTACHO.

[Richmond Inquirer, Vol. 22, No. 52.]

Circuit Court, D. Virginia. November 3, 1823.

TRIAL FOR MURDER.

[On the prosecution of a foreigner for murder the court may direct that half of the array shall be foreigners.]

[Cited in brief in U. S. v. Carnot, Case No. 14,726.]

A special session of the circuit court of the United States for the district commenced at Norfolk, October 27, 1823, pursuant to public notice, for the trial of Manuel Cartacho upon a charge of piracy; Chief Justice JOHN MARSHALL presiding, Hon. ST. GEORGE TUCKER, associate judge.

The Chief Justice having delivered his charge to the grand jury, the jury retired, and about two hours after came into court with a true bill.

The clerk being about to call the petit jury summoned to try the issue, Albert Allmand, Esq., of counsel for the accused, moved the court to set aside half of the array, and allow

to the prisoner the substitution of the like number of foreigners,—a privilege, sometimes accorded to alien criminals by our courts, with whom it is discretionary, but in regard to which there is no act of congress, although the state laws have a provision to that effect. The court held the motion under advisement, and adjourned till the next day, when it acceded to the motion of the prisoner's counsel, and directed the discharge of the jury that had been previously summoned, and that a new array should be empanelled, one-half of which should be foreigners who were not citizens of the United States. The jury being sworn, the examination of witnesses on the part of the United States and for the prisoner commenced, and did not close until 5 o'clock p. m., when the court adjourned to October 31st, having previously directed that the jury should be kept together in custody of the marshal until the meeting of the court. By consent of counsel the case was committed to the jury without argument, and in a short time they returned into court with a verdict of guilty, but recommending the prisoner to the clemency of the president of the United States, and on November 3d the Chief Justice pronounced upon the prisoner the sentence of death, and appointed Friday, the 5th of December, for his execution.

Case No. 14,739.

UNITED STATES v. CARTER.

[2 Cranch, C. C. 243.] [1]

Circuit Court, District of Columbia. May Term, 1821.

FORGERY—UTTERING—DELIVERY OF SEALED LETTER—KNOWLEDGE OF CONTENTS—ORDER FOR MONEY.

1. If a person, knowing the contents of a forged letter, and with intent to obtain money thereupon, deliver it, although sealed, to the clerk of the person to whom it is addressed, and whom he supposes to be authorized to open it, this is evidence of uttering it.

[Cited in brief in Smith v. State, 20 Neb. 284, 29 N. W. 924.]

2. The act of knowingly uttering as true a false and forged letter requesting the person to whom it is addressed to pay to the bearer a sum of money, with intent to defraud any person, is an offence at common law.

The grand jury found two indictments against the prisoner [Jesse Carter] at common law. 1st, for knowingly uttering as true a false and forged letter purporting to be from T. Bayley, and addressed to Mr. Jonah Thompson, requesting him to pay to the prisoner $400, with intent to defraud Mr. Thompson. There was another count charging the same as being done with intent to defraud Mr. Bayley. The 2d indictment was for uttering a similar letter purporting to be from Israel Janney, and addressed to John Janney, requesting him to pay money to one John Preston.

THE COURT (nem. con.) at the request of Mr. Swann, for the United States, instructed the jury, that if they should be satisfied by the evidence that the prisoner knew the contents of the letter, and presented it to a person who he supposed was authorized to open it, and with intent to obtain money thereupon, it was evidence of uttering it.

The jury found the prisoner guilty upon each indictment.

Mason & Taylor, for prisoner, moved in arrest of judgment, and contended that the indictments did not show any offence at common law. That it was only an attempt to defraud by false pretences, which is only a statute offence. That no person has been actually defrauded, and that an unsuccessful attempt to defraud a person is not an offence at common law. If the attempt had been punishable at common law, there would have been no necessity for the statute of false pretences. They cited 1 Chit. Cr. Law, 421; Rex v. Wheatly, 2 Burrows, 1127; Young v. Rex, 3 Term R. 104; 2 East, 817; 3 Chit. Cr. Law, 428; St. 33 Hen. VIII. of False Tokens, and the Virginia Statute of False Tokens (November 18, 1789, p. 45); 1 Hawk. P. C. p. 182, c. 70; Id. p. 187, c. 71.

Mr. Swann, contra, cited Ward's Case, 2 Ld. Raym. 1461; Com. v. Searle, 2 Bin. 332; Savage's Case, Styles, 12.

THE COURT (THRUSTON, Circuit Judge, absent,) overruled the motion, and entered the judgment.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,740.

UNITED STATES v. CARTER.

[3 Cranch, C. C. 423.] [1]

Circuit Court, District of Columbia. April Term, 1829.

CONTEMPT—THREATENING WITNESS IN PRESENCE OF COURT.

1. It is a contempt of court in an acquitted female prisoner to threaten vengeance, in the presence of the court, against the witnesses; and the court will fine her, and order her to give security for good behavior.

2. A contempt in the piazza of the court house, into which the windows of the court room open, is a contempt in the presence of the court.

[Cited in U. S. v. Anon., 21 Fed. 770.]

Indictment for larceny. Verdict, "Not guilty."

Clara Selden and Mary Stuart, who were witnesses in the cause, made affidavit, that while in the piazza of the court room, immediately after the verdict, the prisoner [Louisa Carter], retiring from the court, spoke certain opprobrious words, (which were stated in the affidavit,) and threatened one of them that she would give her her dose, and that she would be revenged of them both; that the prisoner is a violent tempered woman, and that they are really afraid that she will do them some personal and bodily injury.

Mr. Swann, the district attorney, thereupon moved for an attachment of contempt.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. Hewitt, for the prisoner, objected.

THE COURT, (THRUSTON, Circuit Judge, absent,) considering it as a contempt in the presence of the court, it being within the possibility of the hearing of the court, and in the piazza immediately adjoining the court room, (the windows of which opened into the piazza,) ordered the attachment without a previous rule to show cause. And upon being brought in upon the attachment, and having, upon interrogatories, confessed the said threats, and repeated them in the face of the court, and avowed her determination to carry them into effect,

THE COURT fined her one dollar, and ordered her to give security for her good behavior in 100 dollars, and in default thereof committed her to prison until, &c.

Case No. 14,741.

UNITED STATES v. CARTER.

[4 Cranch, C. C. 732.] [1]

Circuit Court, District of Columbia. Oct. Term, 1836.

COURTS—DISTRICT OF COLUMBIA — JURISDICTION OVER OFFENCES BY NEGROES—VIRGINIA STATUTE.

An indictment at common law, in the county of Alexandria, will lie against a free negro or mulatto for assault and battery upon a white man; notwithstanding the Virginia statute of December 17, 1792, § 17.

To an indictment at common law for assault and battery upon William Ball, a white man, the defendant, [George Carter,] by his counsel, Mr. Neale, filed the following plea:—"And the said George Carter in his own proper person comes and says that the said United States ought not, neither ought the judges of the United States for the county of Alexandria in the District of Columbia, to have or take further cognizance of the indictment aforesaid; because he says that the cause or causes of action by indictment, and each and every of them are out of the jurisdiction of the honorable the judges of the circuit court of the District of Columbia held for the county of Alexandria. Because, he further says, 1. That he is a freeman of color. 2. That even if he was guilty of the offence as charged in the indictment, still it is not such an offence as this court can entertain by indictment, at common law, or under any other law; "because, by the act of assembly of Virginia, now in force in this county, (Alexandria,) entitled 'An act to reduce into one the several acts concerning slaves, free negroes, and mulattoes,' passed the 17th of December, 1792, such offence, if committed by 'any negro or mulatto, bond or free,' shall be tried before a justice of the peace of the county or corporation where such offence shall be committed; and, if convicted, shall receive such punishment as the justice shall think proper, not exceeding thirty lashes on his or her bare back. That there is no law in the District of Columbia or in the county of Alexandria which gives this honorable court jurisdiction in this case, and this he is ready to verify. Wherefore he prays judgment if the said United States, or the honorable the judges of the United States for the District of Columbia and county of Alexandria, will or ought to take further cognizance of the indictment aforesaid." To this plea was appended the usual affidavit.

THE COURT (nem. con., but THRUSTON, Circuit Judge, doubting,) overruled the plea.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,742.

UNITED STATES v. CASE.

[8 Blatchf. 250.] [1]

Circuit Court, N. D. New York. Feb. 17, 1871.

RECOGNIZANCE—POWER OF COMMISSIONER TO TAKE.

A commissioner appointed by a circuit court of the United States for a district within the state of New York, has no power to take a recognizance for the appearance before himself, at a future day, of a person charged with a criminal offence against the laws of the United States, and a recognizance so taken is void.

[Cited in note to U. S. v. Horton, Case No. 15,393; U. S. v. Martin, 17 Fed. 155; Ex parte Perkins, 29 Fed. 909; Strong v. U. S., 34 Fed. 21; Re Manning, 44 Fed. 276; Marvin v. U. S., Id. 410; U. S. v. Keiver, 56 Fed. 425; Hallett v. U. S., 63 Fed. 822.]

[Cited in Re Mantz, 8 Mackey, 596, 598; U. S. v. Eldredge, 5 Utah, 161, 13 Pac. 679.]

[In error to the district court of the United States for the Northern district of New York.]

This was an action, brought in the district court, by the United States, on a recognizance taken by a commissioner appointed by the circuit court, on the arrest and examination of a person charged with perjury, conditioned for the appearance of the accused before the commissioner on a future day, to which the proceeding was adjourned, for his further examination. The instructions given to the jury, on the trial of the action in the district court, were, in substance, that the plaintiffs were not entitled to recover, and a verdict was rendered for the defendant [Alfred Case]. The judgment thereupon, with the bill of exceptions to the rulings of the district judge, was brought, by writ of error, to this court.

William Dorsheimer, U. S. Dist. Atty.

J. Thomas Spriggs, for defendant in error.

WOODRUFF, Circuit Judge. I concur in the conclusion of the court below, that a commissioner has no authority to take bail for the appearance of a party accused, for examination before himself at a future day. It is unnecessary to repeat the reasoning contained in the opinion of the district judge

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

upon that point. It may be conceded, that a commissioner, under the statutes of the United States in virtue of which he is appointed, has, in the matter of taking bail, the same power as a judge of the supreme, circuit, or district court, or a justice of the peace, and, therefore, the question is—has either of the officers last named such power?

It is quite clear, I think, that the 33d section of the judiciary act of 1789 (1 Stat. 91) was rightly construed by Judge Curtis, in U. S. v. Rundlett [Case No. 16,208], and that, in a state where a justice of the peace has power to take a recognizance to appear from day to day pending the examination of an accused, there a United States commissioner has such power. There seems no good reason why the officers of the United States should not have the same power in this respect in whatever state they exercise their jurisdiction; but, congress having seen fit to direct, that a party accused may, "agreeably to the usual mode of process against offenders" in the state "where he may be found," "be arrested, and imprisoned, or bailed," the court cannot say that a recognizance not warranted by the laws of the state, nor by any other act of congress, is of any validity. Indeed, in the case above referred to, the doubt considered in the opinion of Judge Curtis was, whether the terms, "agreeably to the usual mode of process" in the state, could be so construed as to confer power to take such bail even in a state where such bail was authorized. The statutes of New Hampshire authorizing the taking of such a recognizance, it was held that a commissioner, by virtue of his powers as commissioner, and of the act of congress of 1789, might do so.

The case of Potter v. Kingsbury, 4 Day, 98, shows, also, that, in Connecticut, a bond or recognizance for such appearance might be taken pending an examination; but the court refer the power solely to the statute.

No such statute exists in New York, and I am referred to no decision of her courts affirming the power of her magistrates to take such a recognizance. Unless the power can be inferred from the general authority given to take bail, it cannot be affirmed at all; and, in considering that question, it is not material whether the statutes of the state of New York are referred to, or the broad language of the acts of congress. Section 33, of the act of 1789, declares, quite as broadly as any statute of the state of New York, that, "upon all arrests in criminal cases, bail shall be admitted." Whether such language is to be construed to require the judge, justice, or commissioner to take bail for appearance from day to day, may be ascertained by inquiring what was the meaning of the term "bail," as understood and used, either at common law, or in the statutes of England, by which the subject was chiefly regulated in that country. I have searched in vain to find any authority for giving it the construction contended for. It meant, at that early day, when the sheriff of the county, as a peace officer, exercised the power of holding to bail, the taking of security for the appearance of the party accused at the court, at the time and place for trial. It has that meaning, and, indeed, is so described, in terms, in the statutes which were passed restricting, regulating, and finally withdrawing that power from sheriffs, and conferring it exclusively upon courts, justices, or other magistrates. See English Statutes at Large, 3 Edw. I. c. 15; 6 Edw. I. c. 9; 1 Rich. III. c. 3; 3 Hen. VII. c. 3; 19 Hen. VII. c. 10; 1 & 2 Phil. & M. c. 13; 1 Edw. IV. c. 2. I have noticed no English statute which warrants the taking of any other bail than above described, until the enactment of 1 & 2 Geo. IV. c. 218, which specially authorizes constables in the Metropolitan police district, attending the watch-houses between 8 o'clock in the afternoon and 6 in the forenoon, to take bail, from parties arrested without warrant for petty misdemeanors, for their appearance before the justice in Bow street, at 10 in the morning.

It cannot be said, I think, that the power to take such security for attendance for examination from day to day exists at common law, or that it is a necessary incident to the power and duty to enquire whether there is ground for holding the accused for trial. The duty of the justices to examine, and to complete such examination within a reasonable time, is often affirmed in the early English cases, and the power, also, to commit pending the examination; and it has been held, that, for unreasonable detention, for the purposes of examination, justices are liable to an action. The duty to examine speedily, and to discharge, if no sufficient proof of guilt appears, to justify holding for trial, is stringently maintained, and, no doubt, because, the accused being lawfully held in actual custody until such examination is had, due regard to the liberty of the subject demands that no unreasonable delay be permitted. It may, also, be suggested, that, until the official enquiry into the probable guilt of the accused, and the degree of enormity of the offence committed, the magistrate has no guide by which to determine what amount of security for appearance would be justly required. True, where the power has been expressly conferred, the magistrate may be governed by the charge made, and, for the purpose of fixing the security to be given to appear from day to day, may assume the guilt of the accused, and that the offence is as charged in the complaint; and a party arrested may prefer to give such security, if able to do so, rather than remain in custody. Nevertheless, the theory, and the just theory, was, that, until examination by the magistrate, he could not, in justice to the accused, or to the state, by any safe guide, determine whether bail ought to be required, or fix its amount; and, hence,

justice required, that he should proceed without unreasonable delay to the investigation of the matter charged, that the accused might be speedily relieved, if no sufficient cause for holding to trial appeared.

I conclude, therefore, that the duty and power to admit to bail, declared by the acts of congress, as well as by the constitution of the United States, no less than by the constitution and statutes of New York, relate to the acceptance of bail for appearance at the proper court, to answer there for the offence charged.

In the sense in which bail for appearance at the next court is spoken of, the commissioner holds no court. He acts as an arresting, examining, and committing magistrate. It may seem to be a hardship—no doubt, it may often be, in fact, a great hardship—where, from circumstances wholly beyond the control either of the prosecutor or the accused, the examination consumes many days, that the accused is not entitled to demand a relief from actual custody, on tendering good security for due attendance from day to day; but a remedy for this must, I think, be sought in such legislation as has already been had in some of the states, whose example congress may deem it wise to follow. At present, I think a commissioner has no power to take such security, and that the recognizance sued upon in this action is void. The judgment must be affirmed.

Case No. 14,743.

UNITED STATES v. CASE et al.

[25 Int. Rev. Rec. 56.]

District Court, N. D. New York. 1879.

PRINCIPAL AND SURETY — MODIFICATION OF CONTRACT—RELEASE OF SURETY.

A surety is released from his obligations under a contract guaranteed by him where any modification is made in that contract without his consent, even though it be by mutual agreement between the principals, and in a particular not deemed essential by either of them.

Richard Crowley, for the United States.

Lansing & Lyman (Wm. C. Ruger, of counsel), for defendants.

WALLACE, District Judge. The defendants are sued upon a guaranty whereby they undertook that one Van Wagenen, who was a bidder for a contract to furnish stone about to be let by the plaintiff, would, in case the contract was awarded to him, enter into the contract with sufficient sureties within ten days after the acceptance of his bid to furnish the materials in conformity to the terms of the advertisement under which the bid was made, and in case of his default the defendants agreed to make good the difference between the offer of Van Wagenen and the next lowest bidder, or the person to whom the contract might be awarded. The contract was awarded to Van Wagenen. He failed to execute it, and it was then awarded to another bidder; the difference in the bids being $7,290, which sum this action is brought to recover.

The facts material to the case are these: Under the authority of the acts of congress in that behalf the government of the United States were improving the St. Mary's Falls Canal, the work being under the immediate supervision of Major Weitzel as engineer in charge, and a contract was about to be let for furnishing the stone to be used in the improvement, pursuant to the terms of an advertisement. A copy of the advertisement, together with the specifications, a form of proposal and form of guaranty, all in print, and all annexed together, were forwarded to parties proposing to bid. The specifications, among other things, provide that the stone to be furnished shall be "of some good quality, approved by the engineer in charge," and require the bidder "to send to the office of the engineer, free of charge, a sample of the kind of stone proposed to be delivered," of a designated size, "one face left in the rough and the other faces picked, sawed or hammered to show how the stone will work." The proposal reads, that the bidder will furnish stone agreeably to the terms of the specification, which shall be "of a quality shown by an accompanying sample." Among the bids received by the engineer was one from Van Wagenen. The blanks left in the bids for dates, names, and prices, and those in the guaranty for the names and places of residences of the guarantors, were filled out, the proposal being signed by Van Wagenen and the guaranty by the defendants, while endorsed upon the paper following the guaranty was a notice addressed to the engineer, and signed by Van Wagenen, as follows: "I refer you for samples of stone to be furnished under this bid to samples sent by me to your office at the time of former bid by me on same work, and will agree to furnish like stone or such stone as the engineer in charge shall require." This notice was not upon the papers when defendants signed the guaranty, nor was it in any way known or assented to by them. By the terms of the advertisement, bids were to be received up to three o'clock p. m. of March 31st. March 31st the engineer telegraphed to Van Wagenen, "What kind of stone and from which quarries do you propose to furnish under your bid of this day?" To which on the same day Van Wagenen answered by telegram: "Limestone from the following quarries: Marblehead and Kelly's Island, Ohio; Chaumont, New York; Queenstown, Ontario." The next day the engineer telegraphed to Van Wagenen: "If contract is awarded, you must furnish Marblehead or Kelly's Island stone. Chaumont will not be accepted; Queenstown is prohibited by law." It would seem that Van Wagenen assented to these conditions, and on April 26th the engineer notified Van Wagenen that his bid was ac-

cepted and the contract awarded. May 3d Van Wagenen notified the engineer that he could not get the stone required. No contract was tendered to Van Wagenen for execution, and the contract was let to another bidder.

Upon these facts it is insisted by the defendants that they are not liable because the contract proposed by the engineer and which Van Wagenen failed to enter into was not the contract, the execution of which the defendants had guaranteed, but one by which a different kind of stone from that originally provided for was to be substituted. If the contract proposed for execution to Van Wagenen differed in any material particular from that called for by the advertisement, specifications and proposal, it must be held that defendants are not liable upon their obligation; and this result will follow although the contract was modified by the mutual consent of Van Wagenen and the engineer in charge, and in a particular which was not deemed substantial by either of them. The defendants are sureties, who are bound to the extent and in the manner and under the circumstances pointed out in their obligation, and no further. It is not sufficient that a surety may sustain no injury by a change in the contract he has guaranteed. Even if the change will inure to his benefit, he is still absolved. He has a right to stand upon the strict terms of his contract, and any material variation made without his assent is fatal. These propositions are so well settled that no citation of authorities is required to support them. Cases peculiarly in point, however, are Barns v. Barrow, 61 N. Y. 39; Whitcher v. Hall. 5 Barn. & C. 269; Grant v. Smith, 46 N. Y. 93; U. S. v. Corwine [Case No. 14,871]; U. S. v. Tillotson [Id. 16,524].

Applying these rules, it will first be necessary to ascertain what contract the defendants undertook Van Wagenen should enter into, and, second, whether the contract proposed for his execution and which he failed to enter into varied in any material particular from that originally provided for. Reading the advertisement, specification and proposal together, the fair interpretation of their language is that a contract shall be executed to furnish stone of a description designated by a sample which is to accompany the proposal. It is not contemplated that the sample shall be annexed to the proposal; the sample need not be in existence when the proposal is signed; it suffices if the sample accompany the proposal in any manner which will enable it to be identified when the bids are opened, so that the engineer may pass judgment upon it and compare it with the samples of other bidders. The guarantors cannot insist that they undertook that Van Wagenen would enter into a contract to furnish stone like a sample existing when their guaranty was signed. They saw fit to sanction a proposal which permitted the bidder to build them by any sample he might choose to forward. Inasmuch as at any time before the period for receiving proposals might expire the proposal could be withdrawn and delivered again with a new sample, any sample finally delivered with the proposal would be the sample accompanying the proposal. On the other hand, the specifications and proposal cannot be construed to authorize a contract for stone of any description required by the engineer. While one clause in the specifications states that the stone "shall be of good quality, and subject to the approval of the engineer," this clause is controlled by that one relative to the sample, and, read together, the meaning is manifest that the bidder is to furnish stone according to the sample, but unless it is of good quality it may be rejected by the engineer.

The original contract having been ascertained, it remains to inquire whether the one proposed for execution was the same or a different contract. As appears by the notice endorsed upon the proposal of Van Wagenen he designated as the sample of stone to be contracted for a sample which he had theretofore delivered to the engineer. He stated also in this notice that he would contract to furnish any other stone the engineer might desire. If this notice had been brought to the attention of the defendants prior to their signing the guaranty, it would seem clear that they intended to authorize Van Wagenen to contract to furnish such stone as he might select at the time of signing the contract. But, as the proof stands, the notice cannot be regarded as part of the contract sanctioned by these defendants. The effect of the notice, therefore, was only to make the sample of stone which Van Wagenen had theretofore delivered the sample accompanying the proposal.

It does not distinctly appear whether the telegram from the engineer to Van Wagenen inquiring what kind of stone the latter intended to furnish under his bid, or the answer of Van Wagenen specifying the kind of stone and the quarries from which it would be obtained, were sent before or after the bids were opened. It seems they were sent on the day for opening the bids, and nothing more is shown But, however the fact may have been, is not important in my view of the case, because it was not until the next day that Van Wagenen was notified that if the contract was awarded to him, stone from three of the quarries he had specified would not be accepted, and that stone from two specified quarries must be furnished by him. This was a distinct notification that the contract would only be awarded him on the condition that he should furnish stone from one or both of two quarries. Assuming that the sample which he had delivered to the engineer could have been furnished from any one or from all of the five quarries mentioned in the telegram of the day before, and assuming that this telegram was sent by

him and received by the engineer prior to the opening of the bids, nevertheless a condition was required which was not contemplated by the bid. It was a condition the tendency of which necessarily was to restrict his sources of supply and which because of this might render it more difficult or less profitable for him to undertake the performance of the contract. It is true he did not so regard it, and was satisfied to accede. It does not follow, however, that the defendants would have assented to the change, and in the absence of any evidence that they did assent it must be held that the contract proposed for execution was not the one which defendants guaranteed Van Wagenen should execute.

Stated briefly, the result of the communications between Van Wagenen and the engineer was that the latter should enter into a contract to furnish stone from the Marblehead or Kelly's Island quarry, while the contract which defendants were responsible for was one to furnish stone like a sample designated at or before the opening of the bids. Either Van Wagenen had designated the article by a sample at the time the bids were opened, or he had not. If he had, the contract tendered for his execution should have called for stone like the sample and without any restrictive conditions relative to the place from which it should be obtained. If he had not designated the articles, the undertaking of the defendants was inoperative because one of the conditions which entered into it had not been fulfilled, and what was subsequently agreed upon between Van Wagenen and the engineer was a new contract and not that which defendants had guaranteed.

Implications against the good faith of Van Wagenen, and which tend to show that he never intended to enter into the contract pursuant to his bid, arise from the evidence in the case. Whether these are well founded or not is not material They do not derogate from the right of the defendants to insist upon the strict letter of their obligations. The recovery cannot be sustained and a new trial is granted.

Case No. 14,744.

UNITED STATES v. CASHIEL.

[1 Hughes, 552.] [1]

District Court, D. Maryland. 1863.

CRIMINAL LAW—TWICE IN JEOPARDY—ACQUITTAL BEFORE COURT-MARTIAL.

An acquittal before a court-martial cannot be pleaded in defence of an indictment in a court of law; even though the offence charged in either case be substantially the same.

In the month of June, 1863, the accused [Hazel B. Cashiel] had at pasture on his farm, in Montgomery county, Md., some five hundred head of cattle, which, with some five hundred others, belonging to the United States, were driven away, on the morning of the 28th of that month, for their protection from the Confederate cavalry, then approaching. Soon thereafter, the invading forces riding up to where several persons, including the accused, were standing, demanded in what direction the cattle had gone. One person pointed them in a direction opposite to the true one. In a few minutes one of the cavalrymen returned from the pursuit, and repeating the demand, the accused is alleged to have indicated to him the road which the cattle had taken, their number, and the fact that they were driven without any guard except their ordinary herdsmen. This information did not result in any benefit to the enemy, as the cattle were driven safely within the Federal lines. Shortly after this occurrence Mr. Cashiel was arrested, taken to Washington, and there tried by a court-martial, on the charge of conveying intelligence to the enemy, contrary to the 57th article of war. The court which tried him, after maturely considering the evidence adduced, found the accused of the specifications and charge guilty, but say "that, although the accused answered certain questions put by rebels, which, in a strict literal sense conveyed intelligence to the enemy, it has not appeared in evidence that the information was volunteered, nor does the court perceive that such intelligence was given with that criminal design which the law contemplates as the animus of a breach of the 57th article of war; and the court, therefore, affixes no penalty to the offence beyond an admonition, that in future he will be more on his guard in answering inquiries addressed to him by an enemy." The secretary of war approved of the findings of the court, upon the specifications and charge, and disapproved of the sentence; and, after a review of the testimony and proceedings of the court, in an order from the war department, dated July 29th, 1863, says: "Although the accused has been relieved of all responsibility under the 57th article of war, he is still liable to be prosecuted under the 2d section of the act to suppress insurrection, etc., approved July 17th, 1862 [12 Stat. 589], for giving aid and comfort to the rebellion, and that the prosecution for this offence may be proceeded with he will be handed over to the civil authorities." After the passage of this order Mr. Cashiel was again arrested, and an indictment afterwards found against him in the United States district court of Maryland, September term, under the act of July, 1862. When the case was called for trial at the present term of the court, the counsel for Mr. Cashiel put in the plea of autrefois convict, averring that as he had been before tried by the proper tribunal, he could not be again impeached and put in jeopardy for the same offence. To this plea the United States demurred, and the questions involved in the case were

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

argued by William Schley, Esq., of Baltimore, and Charles Abert, Esq., of Montgomery county, for the traverser, and William Price and Nathaniel L. Thayer, Esqs., for the government.

GILES, District Judge. The 2d section of the act of 17th of July, 1862, under which the traverser stands indicted, is as follows: "That if any person shall hereafter incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any existing rebellion or insurrection, and be convicted thereof, he shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court." The trial and conviction which forms the subject-matter of the plea filed in this case, was had before a general court-martial, held in the city of Washington, in pursuance of orders from the war department. The charge against the traverser before that court was for a violation of the 57th section of the article of war, which article is as follows: "Whoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of the court-martial." See act of 1806 (2 Stat. 366). Two questions have been presented in the argument of this case: 1st. Had the court-martial, whose record is referred to in the plea filed in this case, jurisdiction of the offence there charged and over the person of the traverser? And if so, 2d. Is the said charge the same offence (within the meaning of the fifth amendment to the constitution of the United States) for which the traverser now stands indicted?

I shall discuss the second question, for if that be answered in the negative, it overrules the plea filed in this case; and it becomes unnecessary to consider and decide the first. They have both been argued with great ability, and the first question, touching the jurisdiction of courts-martial, presents at the present time a painful interest. It is a question with which our previous reading had not made us familiar, for, until the present widespread insurrection, the administration of our general government had been known to us only by the exercise of its peaceful civil powers, and by its laws executed and enforced by the national judiciary. But our constitution was made for all time—a time of war as well as a time of peace; and what is the extent and limit of the war power it imparted to the government, presents a problem of no easy solution, but one which is now engaging the attention and careful consideration of the statesmen and jurists of the land. As the view I take of this case relieves me from the consideration at present of so grave a question, I will only add, before I pass from it, that the more I study the constitution of our country the more am I impressed with the wisdom, the forethought, and the experience of the great men who framed it. And my firm conviction is, that our only pathway of safety and hope for the future lies in a strict observance of all its provisions. Now, what is meant by the word "offence," as used in the fifth amendment to the constitution? This is settled by the supreme court in the case of Moore v. Illinois, reported in 14 How. [55 U. S.] 17, where Justice Grier says, in delivering the opinion of the court, "An offence in its legal signification means the transgression of a law."

In this case we have two laws—the articles of war, as contained in the act of 1806, and the law of 1862, which I have before cited—and their provisions are different. The 57th article of war punishes the holding of any correspondence or the giving of any intelligence to the enemy. For in a time of war (when alone this article operates) it might be prejudicial to the discipline and good order of the army that any correspondence should be held by any of its members with the enemy, although the intelligence given might be in no manner in furtherance of that enemy's views and designs. Whereas, no conviction could be had under the act of 1862, unless the intelligence given was of such a character as to give aid and comfort to those engaged in the insurrection. It might very well be, then, that facts which would warrant a conviction under the 57th article of war could produce no such result in an indictment under the 2d section of the act of 1862. And many facts would warrant a conviction under the law of 1862 which are not punishable under the 57th article of war. These are laws to be administered by different tribunals, and they create distinct offences. And there was no law of the United States punishing by indictment corresponding with the enemy or giving them intelligence (unless it amounted to treason under the act of 1790 [1 Stat. 112], or as giving aid and comfort to the rebellion under the act of 1862) until the act of the 25th of February, 1863 [12 Stat. 696], and that only punishes correspondence, either written or verbal, where it is carried on with "intent to defeat the measures of the government, or to weaken, in any way, their efficacy." When congress, in 1806, was framing the articles of war, they provided, by the 33d article, that whenever an officer or soldier should be accused of a capital crime, or of having committed any offence against the person or property of any citizen, such as is punishable by the known laws of the land, he should be delivered over to the civil magistrate for punishment. And although by article 9 they provided a punishment for an officer or soldier striking or drawing a weapon upon, or offering any violence to his superior officer, it could

not be contended that this provision debarred the civil courts from punishing the offence as an assault and battery. And although the act of 1806 does not contain the provision to be found in the mutiny acts of Great Britain, "That nothing in it shall be construed to exempt any officer or soldier whatsoever from being proceeded against by due course of law," yet it appears to me that that is its true construction; that the military law, as it exists in the United States, is an exceptional code, applicable to a class of persons in given relations, but not abrogating or derogating from the general law of the land, but that the latter is left in full force and virtue. Tytler, in his treatise on Military Law, says: "The martial or military law, as contained in the military law and articles of war, does, in no respect, either supersede or interfere with the civil and municipal law of the realm." He is an Englishman, and treating of the laws of that country. But what say the two most approved writers on military law in this country? Benet, on page 100 of his treatise, says: "A former acquittal or correction of an act by a civil court, is not a good plea in bar before a court-martial on charges and specifications, covering the same act." And De Hart, on page 140, says: "A former acquittal or conviction pleaded, must have reference to a trial by a court-martial. The same acts, as they may offend against the rights of private persons, may also violate the proprieties of military discipline, and as such may be investigated by both civil and military courts. This is a principle perfectly well established in the military service, and has been acted upon and approved by the highest authority." And both these accomplished writers cite the case of Captain Howe. In May, 1842, Captain Howe, of the 2d dragoons, was tried upon a charge for "conduct prejudicial to good order and military discipline," in having beaten or caused to be beaten, in a cruel and inhuman manner, a private of his company. Upon arraignment, Captain Howe pleaded, in bar of trial, that he had been tried and acquitted for the said act upon an indictment for manslaughter in the civil court. But the court would not admit the validity of such plea, and proceeded to trial. Captain Howe was convicted upon the charge and sentenced to be suspended from rank, pay and emoluments for twelve months. The proceedings and decision of the court were approved and confirmed by the war department, by general order No. 34, in 1842. John C. Spencer, of New York, was then secretary of war, himself a lawyer of considerable reputation in his day. Now the civil court before whom Captain Howe had been tried and acquitted was not, as the learned counsellor for the traverser supposed, a court of a different sovereignty, a court of a state; but Florida was then a territory, and the trial took place before the superior court for the territory of East Florida, a court established by congress by the act of May 26th, 1824 [4 Stat. 45]. The judge, district attorney and marshal of said court were appointed by the president, by and with the advice and consent of the senate, and their salaries were paid out of the treasury of the United States. It was a court whose only power was derived from the authority of the United States, and which possessed the usual jurisdiction belonging to the district and circuit courts of the United States, in addition to a jurisdiction to administer the local laws of the territory of Florida. And the opinion of Mr. Legare, the then attorney-general (one of the most accomplished lawyers of the day), sustained the course of the court-martial in this case. It is therefore an authority entitled to great respect. It was not until 1845 that Florida was admitted into the Union. If this be a sound law, then it must follow that an acquittal before the court-martial could not be pleaded to an indictment before the civil court. And, as the supreme court say in the case [Moore v. Illinois] 14 How. [55 U. S.] 17, "it cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punishable." The great principle that in the administration of criminal justice no person should be twice put in jeopardy of life or limb for the same offence is much older than our constitution. It existed as a fundamental rule of the common law from a very early period, and is recognized by all English writers on common law. But it is limited to forbid a second trial for one and the same offence. Blackstone (Comm. vol. 4, p. 336), says, "that the pleas of autrefois acquit and autrefois convict must be upon a prosecution for the same identical act and crime."[2] And although an acquittal on an appeal was a good bar to an indictment, yet he informs us on page 313 that an appeal was a prosecution for some heinous crime, demanding punishment on account of the particular injury suffered, rather than to vindicate the public justice. The view I take of the provision in the fifth amendment to the constitution does not, therefore, conflict with this humane principle of the common law. Under each, a former trial, to be a bar, must be a trial for the same identical offence, or, in other words, for the transgression of the same law. As opposed to this view, I have found but two authorities, a dictum of Justice Woodbury, in the case of Wilkes v. Duncan, 7 How. [48 U. S.] 123, and a note on page 341, 1st volume of the 9th edition of Kent's Commentaries. The case in 7 How. [48 U. S.] was an action of trespass, brought by a marine against Commodore Wilkes, for some punishment inflicted on plaintiff while on board one of the vessels of the exploring expedition. A court-martial which was convened after the return of the expedition had acquitted the defendant of this charge. On the trial of this case in the court below the record of the proceedings of the court-martial had been offered as evidence, but rejected by the court. The pro-

priety of this rejection having been considered by the supreme court, Justice Woodbury, in delivering the opinion of the court, says: "We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offence." Now no such point was presented in the case, and no contingency could ever arise as to crimes committed on a ship-of-war, for the reason I shall state in reviewing the other authority. I have very great respect for the memory of Judge Woodbury, whose judicial life was illustrated by great legal learning and patient, untiring industry, but the language I have quoted was an obiter dictum, and is overruled, I think, by the subsequent decision of the supreme court to which I have referred. The commentator in Kent's Commentaries discusses the proposition that the district and circuit courts of the United States have no criminal jurisdiction but what is expressly conferred upon them by statute, and have not, therefore, any jurisdiction over offences committed on board of one of our national ships-of-war, as no such jurisdiction is given by any statute. Judge Betts so held in the Case of Captain Mackenzie [Cases Nos. 15,630 and 15,691], and that the jurisdiction of the naval court-martial in his case was exclusive, he being then on his trial before a naval court-martial for murder on board the United States sloop-of-war Somers. The commentator goes on to say, "If they (the civil courts) had jurisdiction, an acquittal by a court-martial would be a bar to any criminal proceeding in any other court." But he cites no authority to sustain this position; and as no notice is made of the decision in 14 How. [55 U. S. 17], I think the note must have been written before that decision was made by the supreme court. As instances in which a man may be punished twice for the same act where it constitutes two offences, I cite the case of General Houston, who, having assaulted a member of the house of representatives, was punished by the house for the contempt, and was subsequently indicted and convicted for the same assault in the criminal court in the District of Columbia [Case No. 15,398]. The opinion of Mr. Benjamin F. Butler, the then attorney-general, was taken upon the subject, and he held the subsequent trial and conviction legal. In his opinion he says: "The act committed by General Houston was one and the same, and it constituted but one indictable offence, and he was liable therefore to only one conviction on indictment." But it was not the same offence for which he was punished by the house of representatives.

I also cite the case of State v. Yancy, reported in 1 N. C. Law Repos. 519. In this case it was decided that for an assault committed in the presence of the court, and for which contempt the court punished by a fine, the party could be afterwards tried for the assault and battery. It appears to me, therefore, that before I can decide a charge to be "the same offence" within the meaning of the fifth amendment to the constitution, it must appear that the offence was the same in law and in fact. In the case at bar, the traverser is charged with a violation of the act of 1862 by giving aid and comfort to those in rebellion. The charge on which he was tried before the court-martial was for giving intelligence to the enemy, in violation of the articles of war. I consider that identity wanting which would make his trial on this indictment a violation of the constitution of the United States. The demurrer is sustained, and the traverser's plea of autrefois convict is overruled, with leave to him to plead over.

Case No. 14,745.

UNITED STATES v. CASSEDY et al.

[2 Sumn. 582.] [1]

Circuit Court, D. Massachusetts. May Term, 1837

SEAMEN—INDICTMENT FOR REVOLT—COMBINATION TO RESIST AUTHORITY—SUBSTITUTED MASTER—CONTRACT OF SERVICE.

1. To sustain an indictment for an endeavor to commit a revolt under the act of congress of 1835 (chapter 40, § 2 [4 Stat. 776]), a confederacy or combination must be shewn between two or more of the seamen, to refuse to do further duty on board the ship, and to resist the lawful commands of the officers.

[Cited in U. S. v. Peterson, Case No. 16,037; U. S. v. Huff, 13 Fed. 637.]

2. The contract of seamen for the voyage is not suspended or extinguished by the death, removal, or resignation of the original master; but they are bound to perform the voyage under any person, who is lawfully substituted in his stead.

[Cited in U. S. v. Nye, Case No. 15,906.]

3. If a person, substituted as master, be grossly incompetent to the duties of his station, from want of skill or bad habits, or profligate and cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship.

[Cited in U. S. v. Nye, Case No. 15,906.]

Indictment for an endeavor to commit a revolt on board of the ship Amethyst, on the high seas, against Act 1835, c. 40, § 2. Plea, the general issue.

At the trial it appeared in evidence, that the Amethyst was an American ship, registered in New Bedford. She sailed from thence on a whaling voyage in the Pacific in August, 1836, under the command of Capt. Warren Howland. In consequence of ill-health, Capt. Howland was obliged to leave the ship at St. Helena, in January, 1837, and with the advice of the American consul at that port, he appointed the chief mate to the command for the residue of the voyage. The crew, upon receiving information of the substitution of the mate to the command, refused to do any further duty on board, although the mate was experienced, and they were urged to do so by the consul. On the next day, Capt. Howland and the consul went on board and examined the crew sep-

[1] [Reported by Charles Sumner, Esq.]

arately The defendants [Alfred] Cassedy, Bowditch and Jenkins still persisted in their refusal; and said they did not like to proceed on the voyage, with the mate as master. They were then taken on shore, and put into prison. Two days afterwards the consul, together with two American masters, went on board to persuade the crew to go to sea. The mate, by direction of the consul, ordered the ship to be got under weigh for sea. Half of the crew refused at first; but finally all of them then on board, except the defendants Allen, King and Hopp consented. These three last were then also sent on shore, and put in prison with the others, who had been put in prison two days before. The ship afterwards proceeded to sea without them; and they were sent home in another American ship, the Octavia, for trial, and arrived at New Bedford.

Mr. Mills, Dist. Atty., for the United States.

STORY, Circuit Justice, in summing up to the jury said: Upon the facts stated in the evidence, which indeed, is not in its general bearing disputed, the question arises, whether the defendants, or any of them, are guilty of the offence charged in the indictment. And that depends upon another question, whether there was among the defendants, or any two or more of them, a common confederacy or combination to refuse to do further duty on board the ship, and to resist the lawful commands of the officers in regard to the sailing or preparations for the voyage. If there was any such confederacy or combination, or any encouragement by the defendants of each other in such acts of refusal and disobedience, then the offence, in contemplation of law, has been committed, unless some justification of the refusal and disobedience is made out. The defendants seem to have proceeded upon the ground, that they were not bound to service on board after the original master ceased to be such; and that they were not bound to serve under the mate, acting as master, under a regular substituted appointment. This is a sheer mistake of the law. The contract of seamen for the voyage is not suspended or extinguished by the original master's ceasing to be such, by death, by removal, by resignation, or otherwise. They are bound to perform the voyage under any person, who is lawfully substituted master for the voyage; for their engagement is, in substance, an engagement with the owners for the voyage, and not with a particular master, so long as he remains such. It is true, that if a person, substituted as master, is grossly incompetent to the duties of his station from want of due skill or from grossly bad habits, or from profligate and cruel behavior, that may furnish a suitable excuse for a refusal to do duty, or to remain by the ship. But such a case must be clearly made out, beyond all reasonable doubt, and it is not to be presumed, or inferred. There is no such proof in the present case; and, therefore, it cannot be insisted on. The evidence, so far as it goes, is decidedly favorable to the competency, skill, and good character of the mate. The question then resolves itself into a mere question of fact, upon which the jury will pass their opinion.

Verdict against all the defendants, guilty.

Case No. 14,746.

UNITED STATES v. CASTILLERO.

[See U. S. v. Castillero, 2 Black (67 U. S.) 17, dissenting opinion of Mr. Justice Swayne.]

Case No. 14,747.

UNITED STATES v. CASTILLERO.

[Nowhere reported; opinion not now accessible.]

Case No. 14,748.

UNITED STATES v. CASTOR.

[Cited in U. S. v. Watkins, Case No. 16,649. Nowhere reported; opinion not now accessible.]

Case No. 14,749.

UNITED STATES v. CASTRO.

[Cal. Law J. & Lit. Rev. 56.]

District Court, N. D. California. Oct. 30, 1862.

MEXICAN LAND GRANT—SURVEY.

[Where a survey based on a Mexican grant appears to be incorrect, it will be rejected, and a new one ordered.]

It appears, by the expediente in this case, that on the twelfth of June, 1834, there was granted to the successors of Francisco Ma. Castro, then deceased, the lawful ownership of a tract of land known by the name of "San Pablo," and bounded by the ranchos of San Antonio and El Pinole, and by a portion of the Bay of San Francisco. For this tract Francisco Castro had previously, on the twenty-third of April, 1823, obtained a concession from the territorial deputation. The fourth condition of the grant of 1834 declares the land granted to be three square leagues, a little more or less, according to the diseno which accompanies the expediente. On the twenty-third of June of the same year, Joaquin Castro, the son and representative of Francisco Ma. Castro, addressed a petition to the governor, in which he states that, through inadvertence, he neglected in his first petition to ask for the extent included in the diseno annexed, and "only claimed the three square leagues which we formerly occupied. That, as this piece of land is rather too small for the number of cattle grazing on it, he solicits, in the names of the other heirs, and as their agent, that the said petition be understood to include the augmentation of land described in the aforesaid plan." This petition was refer-

red by the governor to the secretary for an informe. By the report of that officer, it appears that he proceeded to measure a tract of land of which he gives the boundaries, and which he delineates on a plan annexed to his report, and marked by him "No. 2," to distinguish it from the original diseno presented by Castro, marked "No. 1." The report further states that it results from the measurement that from the hill of San Antonio to the northeast there is a distance of one league and 500 varas, from that point to the north-northwest, one league and 1,500 varas, and from that point to the north-northwest, one league and 100 varas. "Reducing these land and sea boundary lines to the right lines of a quadrilateral figure, and performing the measurement of the same, I find a tract of land measuring four square leagues and nearly one twenty-fourth of a league, setting aside and not counting the inequalities or unevenness of the ground, which do not appear on the plan marked 'No. 2,' but are shown on the plan No. 1, though inaccurately, because the height of the hills does not appear, as they ought to do, to arrive at a correct conclusion as to the dimensions of the tract."

On the 14th August, 1835, the governor made a decree of concession, as follows: "Having seen the petition with which this expediente begins, the concession which was obtained from the most ex. territorial deputation on the 15th April, 1823, and the petition dated June 23d of this year, soliciting the amplification of a little more than one square league, as is exhibited on the diseno No. 2, with whatever else was necessary and convenient, I declare Don Francisco Maria Castro, and by his decease his heirs and successors, lawful owner and owners of the tract known as San Pablo, bounded by the ranchos of San Antonio and Pinole, and by a part of the Bay of San Francisco," etc. On the 20th August of the same year, the formal title issued. In this are recited the grant to Francisco Castro by the deputation, the subsequent application by his heirs for the lawful ownership, and their recent petition for the surplus of a little more than one square league. The fourth condition states that the land of which mention is made is "of the extent of a little more than four square leagues ('cuatro sitios de ganado mayor, poco mas'), including the amplification which was conceded by the decree of the 14th August of this year, and as is explained by the diseno which accompanies the expediente. The judge who shall give the possession will cause it to be measured, designate the boundaries, and reserve the surplus to the nation for its convenient uses."

It is apparent from these documents that the governor intended to grant to the successors of Francisco Castro an addition of a little more than one league to the tract of three leagues already conceded, and that the boundaries of the whole tract, as augmented, were those designated on the diseno of Negrete, No. 2, which is expressly referred to in the decree of concession, as indicating the amplification solicited. The quantity of land ascertained by Negrete to be included within the sea boundaries and the land lines run by him is designated in the 4th condition as to the quantity granted, and the surplus or sobrante is reserved. It cannot be pretended that the governor meant to grant all the land included within the first diseno, or within the exterior boundaries mentioned, viz. the ranchos of El Pinole, San Antonio, and the bay, for those boundaries contain nearly double the quantity granted. The extent of the first grant to his father is mentioned by Joaquin Castro, in his last petition, as three leagues. The extent of the tract, as augmented, is reported by Negrete to be four leagues and one twenty-fourth of a league, and he annexes a map showing its boundaries, and marked No. 2. The governor, in his decree of concession, states the amplification solicited to be of the extent of a little more than one square league, "as explained by the diseno No. 2"; and of this and the tract of three leagues already conceded he declares the heirs of Castro the owners. And finally, in the formal title, the land is declared to be of the extent of a little more than four square leagues, "as shown by the map" (clearly meaning the map No. 2), and the sobrante is reserved.

On reference to the diseno of Negrete, there would seem to be no difficulty in locating the land with reasonable certainty. On two sides the land fronts on the bay. On the south, the dividing line between the ranchos of San Pablo and San Antonio has already been determined by this court, after full argument by the representatives of both ranchos. If, then, that line be adopted, from the crest of the hills to the bay, thence along the shores of the latter, and including the Potrero, up to the point marked on Negrete's map as the termination of his northern line, there will be no difficulty in running the remaining lines so as to include the quantity of four leagues and about one twenty-fourth of a league; conforming the courses and lengths of said lines as nearly as may be to the northern and northeastern dotted lines as laid down on the diseno of Negrete. The survey must therefore be rejected, and a new survey made, conformably to this opinion.

[For the opinion confirming the grant in this case, see Case No. 14,751.]

Case No. 14,750.

UNITED STATES v. CASTRO.

[Cal. Law J. & Lit. Rev. 137.]

District Court, N. D. California. Dec. 10, 1862.

MEXICAN LAND GRANT — OBJECTIONS TO SURVEY.

[1. Where the owners of adjacent ranchos have acquiesced in, adopted, and recognized for nearly 20 years, as the boundary between the ranchos, a certain line established by a government official in the discharge of his duties, and in conformity to which buildings have been erected, and the land cultivated for a long series of

years, one of such owners cannot assert that such line is erroneous.]

[2. The mere execution by a grantee from the Mexican government of deeds of parts of the tract within the exterior boundaries does not show a location of the grant as including the land so conveyed, to be adopted by the court in preference to an election of location shown by the previous erection of a house and corrals on another part of the tract, and by the cultivation of the adjacent land, and residence thereon for a number of years.]

The principal controversy in this case is as to the location of the dividing line between the ranchos of Mariano Castro and Jose Pena. It appears from the expediente that in February, 1841, Jose Pena presented a petition to the governor, alleging that from the year 1837 he had solicited the Rincon de San Francisquito, but that, by various proceedings, which he details, a part of it, and also an augmento he had solicited, had been conceded to other parties. He therefore prays for a new augmentation of his land "from the arroyo de las Yeguas, which is its limit, as far as the first sausal toward the east," and he submits a diseño indicating the boundaries of the tract with the augmento. The augmento thus solicited was included within the general limits of the rancho of "Pastoria de las Borregas," which had been applied for by Francisco Estrada, but had not yet been granted. The inchoate right thus acquired by Estrada was so far respected as to make it necessary that his assent to the grant to Pena should be obtained. The administrator of the mission, to whom the petition was referred, accordingly reports that, "As respects the piece of land, 'Pedazo de Tierra,' which the applicant desires as an augmento, it may be conceded, without prejudice to any one, since, although it is included in the diseño of Don Francisco Estrada, he has agreed, in my presence, to cede it to Don Jose Pena." This agreement Estrada embodied in a written declaration, signed by himself, and attached to the expediente, wherein he obliges himself to cede to Pena "the piece in addition (el pedazo mas de augmento,) as described in his map, and shown on his diseño."

On the 29th March, 1841, the grant issued,—no express reference is made to the augmento,—but the land is described as bounded by that of Don Francisco Estrada. Estrada did not obtain his formal title until the succeeding January. It describes his land as bounded by that of Pena "on the side of the sausal de las Borregas." On the 19th of June, 1843, Ynigo, an Indian of Santa Clara, addressed a petition to the governor, alleging his right to a portion of the land included within the grant to Estrada, for which, as he averred, he had already received documents which had been lost. The governor, with the view of ascertaining how much land was included within the boundaries of the Estrada grant, ordered Sunol, the sub-prefect of the district, to measure the land, after previously notifying Estrada and the Indian Ynigo. This order was complied with by Sunol. His report to the government is found in the archives, and the actual location of the lines run by him is proved by his own testimony, and that of his assisting witnesses He appears to have fixed some of the boundaries, especially towards the south, arbitrarily, and as convenience dictated,—adopting a road and the crossing of the arroyo Cupertino as part of the boundary, without attempting to run to the line of the rancho of Prado Mesa, with which Estrada's tract is declared in the grant to be "colindante." The western boundary, or the line between Pena and Estrada, he seems to have run with care. It was pointed out to him by Estrada as the line of the augmento which he had agreed to cede; and, though Pena was not present, his son was aware of the proceeding, and witnessed the running of the line.

The testimony is conclusive and uncontradicted that from that day until recently the line thus established has been recognized by both parties, and been notorious among all the neighbors, as the dividing line between the ranchos. At the time this measurement was made Pena had already erected a house to the east of the Yeguas creek, which had been the original western boundary of the Estrada tract. A house had also been erected by Castro, the father-in-law of Estrada, and to whom the latter subsequently ceded all his rights in the immediate vicinity. This house, or rather another, erected in 1849, has continued to be occupied by the family of Castro ever since, and his widow resides in it to this day. The common boundary line of the ranchos was therefore run between the two houses, leaving Pena's house to the west, and within his limits, and that of Castro to the east. The boundary thus established in 1843 remained undisturbed and undisputed until very recently, when certain parties claiming an interest in the Pena grant, derived through the Robles, the assignees of Pena, for the first time urged the pretension that the line is not in accordance with the "linea del augmento" indicated on the diseño.

It is contended that if that line be drawn as there laid down, it will pass far to the eastward of the Sunol line. The quantity thus added to the Pena grant, in addition to that bounded by the Sunol line, will be about 3,000 acres. The line claimed by counsel will be drawn about 2¾ miles to the eastward of the Yeguas creek, and the total augmento, which, on this location we must suppose Pena to have solicited out of the Estrada tract, and Estrada to have consented to cede, would be not less than 4,000 acres, or nearly one square league. In support of this claim, the only evidence appealed to is the "linea del augmento," as drawn on the diseño of Pena. This diseño represents a tract of land bounded on the north by the bay, and on the west by the arroyo de Francisquito; on the east the arroyo de las Yeguas is laid down.

running from the hills toward the bay on the north. The "linea del augmento" appears to commence at a point in the hills to the west of the Yeguas, but, deflecting towards the east, it crosses that creek, intersects a road some distance to the eastward of where the same road is crossed by the Yeguas, and continues in the same direction to the bay. The road referred to is represented as running parallel with the bay, and east and west, from the San Francisquito creek to the eastern limits of the diseño.

BY THE COURT. In the foregoing description the directions referred to are approximately those indicated by actual survey, the compass marks on the diseño being, as usual, incorrect. Along the "linea del augmento" toward its southern end, near the hills, are written the words "Arastradero y Limites." The part of it beyond the point where it crosses the Yeguas is inscribed "Linea del Augmento." It is claimed that the line thus indicated is the line of the arastradero road, which, it is alleged, still exists, and can readily be traced. That that road, or a line nearly coincident with it, was intended to be adopted as far as the Yeguas creek, appears to me plain from the grant and diseño. The point of beginning, viz. "la punta del arastradero," is called for in the grant, and the direction of the line toward the Yeguas does not materially vary from that of the existing road, which Mr. Matthewson, the surveyor, declares to have the appearance of being an old road of the country, and the location of which could not, from the nature of the ground, have been materially altered. But the point where the dividing line crosses the main San Jose road, and its direction thence to the bay, are the real subjects of controversy. It is suggested that this point may be ascertained by comparing the distance along the main road, as indicated on the diseño, from the crossing of the Yeguas to the crossing of the dividing line, with the distance from the crossing of the Yeguas to that of the San Francisquito creek. The diseño seems to show that the dividing line crossed the road at a distance east of the crossing of the Yeguas a little more than one-third as great as the distance along the road between the two creeks.

It is apparent that to determine the location by a measurement of this kind is to attribute to the diseño an accuracy and justness of proportion rarely to be found in the rude map submitted to the governor, and certainly not characteristic of this diseño as is shown by comparing the relative length and width of the tract represented on it with its actual length and width as determined by the natural objects called for.

With a view, however, of ascertaining what, on the theory proposed, would be the location of the dividing line, I have procured, at the surveyor general's office, the measurement to be made. The distance between the Yeguas and San Francisquito creeks is determined by actual survey. If, then, the dividing line be run at the proportionate distance east of the Yeguas, it will be found not very considerably to differ with the Sunol line. It will certainly fall far short of the line contended for by counsel. Another mode suggested of determining the point in question is by comparing the length of the dividing line as indicated on the diseño from the hills or the "punta del arastradero" to where it crosses the Yeguas with the distance from the latter point to where it is represented as crossing the road. I have not attempted accurately to make this comparison. I have no doubt, however, that the result would be to carry the eastern line considerably to the eastward of the line run by Sunol. The method is obnoxious to the objection referred to,—that it attributes to the diseño a correctness which it evidently does not possess; and, though indications such as these are sometimes necessarily resorted to in the absence of all other modes of determining boundaries, in this case they are evidently not to be followed. But while thus appealing to obscure and doubtful indications of the diseño, the counsel has strangely overlooked the explicit language of Pena's petition and of the grant to Estrada. In the petition the augmento solicited is "from the Yeguas," which is the present boundary, as far as "the first sausalito toward the east." In the grant to Estrada, the ranch of the latter is described as bounded by the lands of Don Jose Pena on the side of the "sausal de las Borregas." On the diseño this sausalito is laid down, and the dividing line is represented as running at a very short distance to the east of it. This sausalito now exists upon the ground, and is readily identified as the first sausal to the east of the Yeguas. It is immediately adjacent to the sheep corral from whence the ranch derived the name of "Pastoria de las Borregas." It is evidently the sausal de las Borregas mentioned in the Estrada grant.

The language of Pena's petition might be construed as intended to exclude the sausalito from the augmento, for he asks only for the land "from the Yeguas as far as the "first sausalito." The diseño, however, would seem to indicate that it was intended to be included. The line run by Sunol passes through the sausal, leaving the larger portion on the side of Pena. As the houses of Pena and Castro were already built, and contiguous to each other, the line was run between them by Sunol, and the intention of the parties, no doubt, substantially carried into effect. The family of Castro have continued to reside in their house to the present day, and the acquiescence of both parties in the dividing line thus established is proved by uncontroverted testimony. If, then, the question were new, and the line were now for the first time to be located by the calls in the grant and diseño, it would not, to any considerable degree, depart from the line estab-

lished by Sunol in 1843. But, even if this latter location were clearly erroneous, yet, on the plain principles of justice and law, it ought not now to be disturbed. It has been established, recognized, and adopted as a boundary line for nearly twenty years. Neither at the time it was run by Sunol, nor at any time afterwards, did Pena make any objection or complaint with regard to it. It was notorious among all the neighbors as the established and admitted line of division between the ranchos. It does not appear that the Robles, who have acquired Pena's interest, even now dispute this line. It is stated in the brief of the counsel for Castro that they acknowledge the line run by Sunol to be the ancient and true boundary between the ranchos. The objection is urged solely by a party who claims to have derived some interests in the rancho through the Robles. That the line, whether or not in precise accordance with the indications of the diseño, was substantially that intended by the parties, is evident from the fact that the house and principal cultivations of the Estrada rancho are immediately adjacent to it. It cannot be supposed that Estrada would have consented voluntarily and without consideration to cede to Pena part of his rancho including his house, his corrals, and comprising, if the line be run as contended for, more than four thousand acres of land, and this under the designation of 'un pedazo de tierra," or piece of land,—a term evidently implying a tract of no great extent. That the parties have acquiesced in, adopted, and recognized this line is evident, not only from the direct testimony to the fact, but from the circumstance that in 1849 Castro built a new house near his old one, in which his family have ever since resided. It will not be pretended that he built this house on land which he supposed he had ceded to Pena. The manifest injustice of disturbing a boundary, fixed by long acquiescence and adoption, has been recognized in numerous cases.

In Jackson v. Dieffendorf, 3 Johns. 269, Van Ness, J., says: "Shall a possession of thirty-eight years be disturbed because from a recent survey it appears not to correspond with partition deeds executed sixty years before?" In Jackson v. Van Corlaer, 11 Johns. 123, the parties who owned the land nineteen years before the trial agreed upon the line of division which had repeatedly been acquiesced in, and within ten years they had mutually supported the division fence thus agreed upon. The court refused to disturb the line so established. In Jackson v. Freer, 17 Johns. 31, Spencer, C. J., says: "The patents were issued on the mutual agreement of those interested in the whole tract to secure their common rights, and thus the agreement was carried into complete effect. The survey of the lots and the actual location of them by the joint act of all the parties must control. The map was intended to represent the relative situations and localities of the lots as regarded each other; the actual survey was the practical location." In McCormick v. Barnum, 10 Wend. 104, Chief Justice Savage says: "The line was acquiesced in for more than twenty years. The defendant had early built a house on the premises in question, and the plaintiff's agent must have seen it. This is clearly such a recognition and acquiescence as should bar the plaintiff's claim." In Jackson v. Murray, 7 Johns. 5, the court says: "In all cases of any uncertainty in the location of patents and deeds, courts hold the party to his actual location;" and Chief Justice Thompson, in Jackson v. Wood, 13 Johns. 346, says: "In grants of great antiquity, where the description of the land is vague and the construction somewhat doubtful, the acts of the parties, the acts of the government and those claiming under adjoining patents are entitled to great weight in the location of a grant."

The close analogy which the above cases (and many more might be cited) bear to the case at bar is apparent. With the exception that Pena was not himself present when the line was established by Sunol, the case at bar is at least as strong as any of those cited. That Pena and those claiming under him have for nearly twenty years acquiesced in and recognized the line cannot be doubted. It was established by a government official in the discharge of a duty imposed upon him by the governor. It was treated as fixed by the governor when determining how much land out of the Estrada grant should be given to Ynigo, and Pena or his grantees have suffered a house to be built, and the land to be cultivated for a long series of years, without complaint or objection. This house, and land to the extent of more than three thousand acres beyond the Sunol line, it is now sought to include in the Pena grant. It appears to me that the pretension is wholly inadmissible, and that the boundary between the ranchos as fixed by Sunol is not only in reasonable conformity with the calls of the grant and diseño, but even if it departed from them it ought not now, under the circumstances, to be disturbed. On the part of the claimants it is contended that the measurement by Sunol was a judicial delivery of the possession of the tract, and that the survey should now be made so as to include all the land within those boundaries. The circumstances under which the measurement was made by Sunol have already been adverted to. It is apparent that this measurement had few of the characteristics of, nor was it intended to operate as, a judicial delivery of possession. It was not made by a judge, but by an executive officer. The witnesses were not sworn, the colindantes were not summoned, no judicial record of the proceeding was made, and, what is conclusive, no delivery of the possession with the usual or with any formalities was given. Its object was merely to inform the governor of the extent of

the tract in order to enable him to determine what portion might be conceded to Ynigo, and leave to Estrada sufficient to satisfy his grant for two leagues, a little more or less. The measurement was effected and a grant to Ynigo of much less than he solicited, and supposed to be about one-half of a league in extent, was made. I can see nothing in this proceeding to authorize the extension of the Estrada grant to the exterior boundaries run by Sunol, in great part arbitrarily, and, as he admits, without reference to quantity; i. e. without any intention of measuring off to Estrada the two leagues granted to him, but merely, as the order directs, to ascertain how much land was within the exterior limits. But whether or not this conclusion be right, the point is res adjudicata. The same claim was made to this court when the Estrada grant was before it on appeal from the board of commissioners. It was expressly decided, after argument, that the claim was valid to the extent of two leagues and no more. The validity and effect of Sunol's proceedings as a judicial delivery of possession were discussed at length in the opinion of the court, and the decree restricting the claim to two leagues has since been affirmed by the supreme court. [24 How. (65 U. S.) 346.] It is, therefore, the law of the case.

The recent discovery among the archives of the order to and report of Sunol in no respect alters the legal aspect of the question. But, even if it were otherwise, those records are at most newly discovered evidence, to be submitted to the court in a bill of review, which, under the act of 1851, this court has no jurisdiction to entertain. The decree, therefore, which confirms the claim to two square leagues of land and no more, is final and conclusive.

The location of the two square leagues within the exterior boundaries remains to be determined. It appears that in 1850, Castro conveyed to Jones, who had been acting as his attorney and counsel, a piece of land on the extreme eastern border of the rancho. An attempt has been made to show that this conveyance was merely a grant of the sobrante over and above two leagues, and that it was intended merely as a relinquishment by Castro of his rights in the surplus, in case he should be adjudged to possess any. But the evidence on this point is by parol, and, even if admissible, it is unsatisfactory. At the time of the conveyance there is no reason to suppose that either party doubted the rights of Castro to the whole tract included within what has been called the judicial possession given by Sunol. The deed was, therefore, accepted by Jones as an absolute conveyance in fee simple, and he has conveyed to subpurchasers portions of the land. If, then, Castro were now seeking to make an election so as to exclude the lands sold, it is quite possible that he would be estopped by his deed to declare that the land conveyed should not be included, notwithstanding that the deed seems to have been made and received under a mistaken notion of his rights. But in fact his election had been made long previously to the date of the deed to Jones. As early as 1843 he had built a house and corrals, and had cultivated lands on the extreme western portions of the tract. In 1849 a new house was erected, and we have seen that as early as 1843 he was present with Sunol, when the latter ran upon the ground his extreme western boundary. In the opinion delivered by this court in the case of U. S. v. Sutter [Case No. 16,424] it is said: "As against a grantee, or purchasers under him, seeking to exercise the right of election subsequent to and differing from a location already constructively elected by deeds of conveyance, the above reasoning would seem conclusive. But it commonly happens that soon after obtaining his grant, and prior to any conveyance of any portion of the land, the grantee has erected a dwelling house, corrals, etc., and has cultivated portions, more or less extensive, of his land. Ignorant of the dimensions of the tract within his exterior boundaries, or supposing, as was formerly not uncommon, that the whole tract within his exterior boundaries would be confirmed to him, he may have conveyed away portions remote from his houses and cultivations—the purchaser, perhaps, taking the risk of having the land purchased included in the survey—and, it may be, paying a price less than its value by reason of the uncertainty as to the location. But the grantee, or a subsequent purchaser under him, might, notwithstanding such a conveyance, insist that no location should be made so as to exclude his ancient dwelling house, his corrals, and his cultivated fields. He might urge, with great force, that it would be absurd to confirm his claim, because he had settled upon and improved it, and afterward to declare that his house and improvements were not upon his own, but upon public land. He might also urge that the erection of a house and corrals, the cultivation of the adjacent lands, especially when effected at great expense, and followed by a residence of many years, are acts which indicate an election far more unmistakeably and emphatically than any conveyances could do—and that subsequent purchasers of remote parts of the tract are affected with notice of the fact that, so far as his homestead and adjacent lands are concerned, the election is already made, and the location fixed. So, too, the purchaser of his house and improvements might reasonably claim that wherever the grant might finally be located, it ought, at all events, to include what the grantee had, by acts so notorious and unmistakeable, averred it to embrace; and that the location thus originally made by the grantee should not be affected by the execution of deeds, perhaps quit-claim, and without consideration, of which he, the pur-

chaser of the house and improved land, neither had nor could have had notice. If, in addition, we consider how readily frauds upon the purchaser of the homestead, or even upon settlers, (who naturally look to the house and settlement as determining the location of the grant,) might be committed by means of antedated conveyances, it will, I think, be apparent that the mere execution of deeds to purchasers cannot, in all cases, be accepted as an election by the grantee of the location of the land which is to be adopted by this court, by causing the survey to be made of the tracts so conveyed, including them successively, in the order of their dates until the whole quantity be obtained."

I have found no reason to doubt the correctness of these views, expressed more than eighteen months ago. It may be observed, in addition, that the duty of the United States is to locate this land, as nearly as may be, in the same manner as the magistrate called upon to give a judicial possession would or ought to have done, with such modifications only as are necessary to adapt it to the lines of public surveys, and to prevent the location from being unreasonably injurious to the public interests. It cannot be doubted that if a judicial possession of this rancho had been given, Castro would not only have the right, but would have been required to include within it his house and cultivations; and any sobrante that might have resulted would probably have been cut off on the side of the Mission of Santa Clara, so as to leave the remaining lands of that establishment, to which the Estrada tract originally appertained, in a compact form.

A portion of the two leagues granted to Estrada has been conveyed to Murphy by metes and bounds, who has presented his claim and obtained a separate confirmation for the tract conveyed to him. The confirmation to Castro was, therefore, for two leagues, excepting therefrom the land conveyed and confirmed to Murphy. There must, therefore, be surveyed to Castro, within his exterior boundaries, a tract sufficient to make up, with the lands of Murphy, the quantity of two leagues; such tract to be located so as to include his house and cultivations, and to be in a compact form.

[See Case No. 14,753.]

Case No. 14,751.

UNITED STATES v. CASTRO.

[Hoff. Land Cas. 105.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF CLAIM.

No opposition to the confirmation of this claim.

Claim [by Joaquin Y. Castro, administrator of Francisco Maria Castro, deceased] for about four leagues of land in Contra Costa county [the Rancho San Pablo], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Saunders & Hepburn, for appellee.

HOFFMAN, District Judge. This case has been submitted to this court on appeal without argument or the statement of any objection to its validity. We have, however, as in other cases, examined the transcript, which is unusually voluminous, and have perceived no obstacle to its confirmation. The first application for the land appears to have been made by Don Francisco Castro in 1823, and to have been addressed to the deputation. On the same day a degree was made granting the place solicited, and directing the military commander of the presidio of San Francisco to put the petitioner in possession. This seems, from various causes, not to have been done, nor does the title to the land appear to have issued to Francisco Castro during his lifetime, although, as appears from the expediente, he had gone upon the land, placed cattle upon it, and from time to time solicited of the governor the formal title. On his death, his son and the administrator of his estate, Joaquin Ysidro Castro, petitioned the governor on the twenty-sixth of May, 1834, for the land occupied by the family, stating it to be three leagues in extent, and annexing to his petition a map of the land solicited. The governor, after having caused the documents on file in the case of the previous application of Francisco Castro to be produced, acceded to the petition, and on the twelfth of June, 1834, the formal title issued to the successors of Francisco Castro. In this title the boundaries of the land are mentioned, and reference is made to the map which accompanies the expediente. The extent of the land granted is stated to be three square leagues, more or less. On the twenty-third of June, 1835, Joaquin Ysidro Castro presented another petition to the governor, in which he states that he had through inadvertence neglected to ask for all the land included in the boundaries indicated on the diseño, and he solicits an augmentation of the previous grant so as to include the whole tract designated on the map. By the report of Negrete, the secretary to whom the governor referred this petition, it appears that the land comprised within the boundaries referred to had been ascertained to be of the extent of four and one twenty-fourth square leagues. On the fourteenth of August, 1835, the governor granted to the successors of Francisco Castro the augmentation solicited, and on the twentieth of August, 1835, the formal title was issued for the land as originally bounded, and in the fourth so called condition of the title, the extent of the tract is declared to be "four square leagues and a little over, including the surplus which by the decree of the fourteenth of August of the present year was granted to them, and as shown by

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

the map which accompanies the expediente and already conceded to them." It is this tract of four square leagues and a little over that is now claimed by the appellees.

All the above recited facts appear from the expedientes on file. The authenticity of the original documents produced by the interested parties is fully proved, and their long continued occupation and extensive improvements of the land for more than thirty years clearly established. It also appears that the grant was approved by the departmental assembly. We are of opinion therefore that this claim is valid, and that the decision of the board should be affirmed.

[For the rejection of a survey subsequently made, see Case No. 14,749.]

Case No. 14,752.

UNITED STATES v. CASTRO et al.

[Hoff. Land Cas. 125.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—NONPRODUCTION OF GRANT—LONG AND NOTORIOUS OCCUPATION.

The nonproduction of the grant in this case does not affect the validity of the claim, the loss of the grant being proved, and long and notorious occupation of the land established.

Claim [by Rufina Castro and others] for two leagues of land in Santa Clara county [the Rancho Solis], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.
Stanly & King, for appellees.

HOFFMAN, District Judge. The only doubt that can be raised with regard to the validity of this claim arises from the fact that the original grant is not produced. The board, however, after considering the evidence taken to show that the grant had been delivered to the deceased grantee, as well as its subsequent loss, arrive at the conclusion that it duly issued as represented in the petition. The fact that the list of grants in the archives contains this amongst others, the parol testimony of several witnesses who have seen it and known that it was produced and referred to, to settle disputed boundary lines, and the still more conclusive fact that the grantee and his family have resided upon the land for more than twenty years, are sufficient to remove any suspicions which the nonproduction of the grant might otherwise suggest. An occupation so long continued and so notorious, with a claim of ownership so universally recognized, might of itself be deemed sufficient evidence of ownership. The claim was unanimously confirmed by the board, and we see no reason for reversing their judgment; nor has any been suggested on the part of the United States. A decree of confirmation must therefore be entered.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 14,753.

UNITED STATES v. CASTRO.

[Hoff. Op 57; Hoff. Dec. 97.]

District Court, N. D. California. 1859.

MEXICAN LAND GRANT—BOUNDARIES—QUANTITY IN GRANT.

[Under a grant of land "of the extent of two square leagues, a little more or less," the judicial officer has no power to confirm a tract of three and one-half leagues.]

[Claim by Mariano Castro for a certain tract of land called "La Pastoria."]

HOFFMAN, District Judge. The claim in this case was confirmed by the board. The genuineness of the grant is not disputed. The only question raised is, whether the grantee shall take the whole tract which Sunol deposes he measured off to him, or shall be confined to the quantity mentioned in the grant. By the expediente it appears that the land was originally applied for by Jose Estrada, in 1840. In this petition no boundaries are mentioned, but the place in Santa Clara, known as "La Pastoria," is asked for with the understanding that the said tract should "consist of two leagues, a little more or less." On this petition various informes were obtained, and on the 27th February, 1841, Gov. Alvarado directed the expediente "to be passed to the actual trustee of the establishment of Santa Clara, the party interested to annex thereto a design of the tract asked for." This diseño appears to have been presented, for it is found in the expediente. In the decree of concession Estrada is declared "the owner in property of the land called Pastoria de las Borregas, bounded by the land of Don Jose Peno, by that of Don Prado Nesa and La Punta del Roblar, to the extent of two leagues, as shown by the annexed diseño." In the grant the land is described in the same terms, but in the second condition it is stated "that the land of which mention is made is of the extent of two square leagues, a little more or less," and the judge who shall give the possession is directed to "cause it to be measured according to the ordinances, the surplus thereof to be left to the nation for its convenient uses." The third condition directs, in the usual form, that the judge giving the judicial possession shall mark out the boundaries, on the limits of which the grantee shall put besides the landmarks some fruit or other useful trees.

It appears by the testimony of Antonio Sunol, that in 1842, acting as subprefect, and in pursuance of an order of the governor, he measured the land of which the grantee was in possession—that he made a written report of his proceedings in the matter, which he transmitted to the government and recorded

them in the book of proceedings kept by him as subprefect. Neither the report nor the book can now be found, and we are compelled to resort to parol testimony to ascertain what were the measurements made by Sunol. He swears that subsequently—but when he does not state—he accompanied a surveyor to the land, and pointed out to him the limits which he had just established—although he did not see the actual survey of the land. On being shown a map, or sketch of the tract, he states that so far as he saw the land the sketch appears to be correct, and he proceeds to describe the lines run by him when he gave the possession. He appears to have run five lines, the first two of which are not marked on the map, and would seem not to have been intended as boundaries. The first was run at the eastern end of the ranch, parallel to the creek of Las Yeguas, but at some distance from it; and the second nearly at right angles to it, and passing from the house of Robles through the centre of the rancho to the laguna on the western extremity. From this laguna he ran a line to the bay on the north, and another to the edge of the chemisal on the southwest—and from the end of this latter a fifth line was run to Arroyo de San Jose, as shown on the map.

On comparing the tract of land which appears to have been intended to be included within these boundaries with indications of the diseño it is found impossible to identify the two tracts. The diseño is drawn with extreme wideness. No boundaries seem to be delineated, and the only objects which I have been able to recognize are four lines—two of which are marked as caminos, or roads; the third as the Arroyo de las Yeguas; and the fourth as the estero, or bay. The laguna is not laid down, nor is the creek of San Jose, which Sunol seems to have taken for a boundary, but the word "Roblar" is inscribed on the diseño apparently at a place near where, by the survey since made, the lands of Prada Meso are situated. I have not been able to find on either of the diseños, on the map, or in the testimony of any witness any information as to the situation of the lands of Pena, by which, as the grant mentions, the lands of the claimant are bounded. From an endorsement on the original grant, signed by Gov. Micheltorrena, and dated Feb. 14, 1844, it appears that by a resolution of the departmental assembly of that date the concession to the Indian of Santa, called Yingo, of the land then occupied by him, was ordered to be issued. This land is comprised within the limits of the claimant's rancho as measured by Sunol in 1842. The board therefore directed that the lands of Yingo, as well as those sold by the claimant to Martin Murphy, and which have been separately confirmed to him, should be excepted from the lands confirmed in the case.

The question then arises, to what extent of land is the claimant entitled? It appears in evidence that the lands embraced within the measurement of Sunol are from three to four leagues in extent. It cannot be contended that the grant is for a tract of land by metes and bounds. As already stated, the grant merely mentions the names of two persons on whose lands the tract borders, and the third boundary, if it can be called such, is a point and not a line. The diseño fails to afford any intelligible indication whatever as to the limits of the tract intended to be granted. It is clear, therefore, that under the grant the claimant would be entitled to two leagues. In the case of U. S. v. Fossatt [21 How. (62 U. S.) 445], the supreme court refused to attach any significance to the words "more or less," or to extend the grant beyond the quantity clearly expressed. Yet in that case three boundaries were distinctly mentioned in the grant, and the fourth was supposed by this court to be clearly indicated by the diseño, the petition and the name of the place granted. The excess within the boundaries was only a fraction of a league—the usual unit of measurement.

Under this ruling of the supreme court, it is of course impossible to construe the grant in the present case as conveying more than two leagues. To confirm, then, to the claimant a tract of 3½ leagues in extent, on the ground that it was measured off to him by the judicial officer, would be to attribute to that officer the granting power. The measurement made by him seems to have been to some degree loose and informal. No record of the act of giving judicial possession, such as is often found attached to the expediente, appears to have been made. He recorded his proceedings he says, in his book; but the nature and formality of that record does not appear. It is not shown that the lines run by Sunol were measured by him. Their length is not given, nor does he appear to have estimated the quantity of the land of which he gave the possession. The lines, moreover, do not disclose any tract, for the second appears to have been run nearly through its centre; though it seems probable that he intended the estero to be the northern boundary. So far as appears either from the grant, the diseño or the evidence in the case, the land was laid off at the mere discretion of the judicial officer; nor is it apparent why he might not have fixed the boundaries in any other manner, or included within them a far greater quantity of land. I cannot discover that in his location of the land he has attempted to ascertain it by reference to the boundaries of Don Jose Pena, or to the point called "Punta del Roblar," both of which are called for as boundaries in the grant; and it is even suggested that the only remaining boundary called for, viz. the lands of Don Prado Mesa, has not been observed. To affirm that under a grant of this kind, which from its own indefiniteness, as well as by the law as laid down by the supreme court, must be construed to convey only two leagues, the claimant is, nevertheless, by virtue of a possession given by a judicial officer—such as that given in this

case—to be allowed a tract from three to four leagues in extent, is, as before observed, virtually to recognize in that officer a power to grant land, rather than measure and locate them, and to ascertain the sobrante.

I therefore think that there should be confirmed under this grant only two leagues of land, to be laid and measured within the boundaries mentioned in the grant. Reference for the more precise ascertainment of said boundaries to be made to the diseño, accompanying the expediente, and to the deposition of Sunol, and the map annexed thereto on file in this case—said two leagues to be surveyed and located after the first ascertaining and measuring off the lands granted to the Indian Migo. For a description of which last mentioned lands, reference to be had to the opinion of the board of commissioners on file in this case, and to the note made by Gov. Micheltorrena on the back of the original grant herein. It being understood that the said lands so granted to the said Indian shall first be measured off, and then that the quantity of two leagues shall be measured within the boundaries above mentioned, and the said quantity of two leagues is hereby confirmed to the claimant, excepting, nevertheless, from said confirmation the lands conveyed by him to one Martin Murphy, which lands have been separately confirmed to the said Murphy; and for a description of said lands of Martin Murphy, reference is to be had to two deeds executed by the claimant to said Murphy, and filed in case No. 90, on the docket of the board of commissioners.

[See Case No. 14,750.]

Case No. 14,754.

UNITED STATES v. CASTRO.

[5 Sawy. 625.] [1]

Circuit Court, D. California. July 26, 1868.

PRACTICE IN EQUITY—TERM—MISTAKE—MEXICAN LAND GRANT—INVESTITURE OF TITLE—BOUNDARIES DESIGNATED IN GRANT—SURVEY.

1. The doctrine that the jurisdiction of the court over a cause, after final decree, ceases with the term in which the decree is rendered, does not apply to decrees entered by mistake. Accordingly, where a decree was rendered by the district court of the United States, affirming on appeal a decree of the board of land commissioners, confirming a claim to land under a Mexican grant, and afterwards overlooking the fact that such decree had been rendered, upon a stipulation entered into between the attorney of the United States and the attorney of the claimants, an order was entered by the district court dismissing the appeal, and subsequently at another term this last order was vacated: *Held*, that the order was properly vacated, although a term of the court had elapsed since the order was made.

2. After a grant had been issued by the governor of California, under the Mexican law, and such grant had received the approval of the departmental assembly, it was essential to a complete investiture of the title that there should be an official delivery of possession to the grantee by the magistrate of the vicinage, which proceeding required a measurement and segregation from the public domain of the specific quantity granted.

3. The magistrate of the vicinage in officially delivering possession was required to measure off the quantity within the boundaries designated in the grant. Any passing beyond such boundaries vitiated his whole proceeding.

4. When the district court, under the act of June 14, 1860 (12 Stat. 33), had ordered a survey of a confirmed claim to land under a Mexican grant into court for examination, its jurisdiction over it continued, and over any new survey directed by it, until the survey of the claim was finally disposed of, notwithstanding the passage of the act of July 1, 1864 (13 Stat. 332).

This was an appeal [by the United States] from a decree of the district court of California, approving the survey of a confirmed claim under a Mexican grant [to Guadalupe Castro.]

Isaac Hartman, W. W. Crane, and McCullough & Boyd, for appellant.

Delos Lake and Patterson, Wallace & Stow, for the United States.

FIELD, Circuit Justice. We do not deem it important to consider at length the several objections urged by the appellants to the decree of the district court, approving the survey of the rancho confirmed to the claimants. A brief notice of them will be sufficient.

It is evident, from an examinaton of the original title papers, that the Mexican government intended to cede to Castro only a tract of two square leagues. The conditions annexed to his grant state that the land ceded is of this extent, and require its measurement, and reserve any surplus for the national use. The designation of the tract ceded by a particular name, and the specification of the outboundaries, must yield to the limitation of quantity as thus expressed. Such has been the uniform ruling of the federal courts in cases of this kind. It is only where this limitation is omitted that the concession is held to embrace the entire quantity within specified boundaries. Where this is wanting, the extent of the grant is only restricted by the boundaries named, and the provisions of the colonization law of 1824. U. S. v. Pico, 5 Wall. [72 U. S.] 539.

The decree of the district court entered in February, 1857, affirming the decision of the board of land commissioners, contains a similar limitation. It adjudges the claim of the parties to be valid, and confirms it to "the extent of two square leagues and no more." Previous to the rendition of this decree, the attorney-general had transmitted a notice from Washington that the appeal would not be prosecuted by the United States; but the notice was not received at San Francisco until some time in March following. Yet, notwithstanding the decree of the district court, a stipulation was entered into between the district attorney and the attorney of the claimants, more than a year afterwards—in June, 1858—that the notice of intention to prosecute the appeal

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

on the part of the United States would be withdrawn and the appeal be dismissed, and that the claimants have leave to proceed upon the decree of the board as upon a final decree; and upon that stipulation the district court ordered the appeal to be dismissed, and gave the claimants the leave stipulated.

It is very evident that this latter decree was inadvertently entered without the attention of the district court being called to its previous decree. The notice of the attorney-general had ceased to be of any effect, by the decree rendered during its transmission from Washington to San Francisco. It was no longer applicable to any pending appeal. We think, therefore, the proceeding subsequently taken to vacate the decree, was eminently proper, and within the jurisdiction of the court, notwithstanding the lapse of time since its entry.

The doctrine that the jurisdiction of the court over a cause after final decree ceases with the term in which the decree is rendered, is intended to protect parties from disturbance and litigation after the merits of their cases have been fully heard and determined. It was not intended to protect them in decrees entered by mistake, any more than in decrees obtained by imposition or fraud upon the court. We must regard, therefore, the original decree of the district court entered in January, 1857, which in terms has never been set aside, as the decree which must determine the extent of the land confirmed to the claimants. That decree, as we have already stated, limits the quantity to two square leagues.

The position of the appellants, that their title had been perfected under the Mexican government, and required no further action on the part of the United States, rests upon the supposed validity of the proceeding taken for the measurement of the land ceded, and the delivery of its possession. The grant had received the approval of the assembly of the department, and had thus become definitively valid. The only subsequent proceeding essential to a complete investiture of the title was an official delivery of possession by the magistrate of the vicinage, a proceeding which required a measurement and segregation from the public domain of the specific quantity granted. Malarin v. U. S., 1 Wall. [68 U. S.] 289. The attempted proceeding for this segregation and delivery taken by a justice of the peace in January, 1846, assuming that he was a magistrate of the rank required in such cases, was clearly invalid. The Cañada del Cerbo was the boundary between the grant to Castro and the subsequent grant to Amesti. This was expressly so declared by Micheltorrena in this latter grant. The record of the proceedings of the justice shows that he passed beyond this boundary, and not only included in his measurement a much larger quantity than that granted to Castro, but also a portion of the land granted to Amesti. This he had no authority to do. His authority was limited to the measurement of the specific quantity granted, and the delivery of its possession. His departure from this course vitiated the whole proceedings.

The objection to the jurisdiction of the district court over the survey, is untenable. In December, 1860, the court had ordered the survey previously made into court. In January, 1862, it had allowed the exceptions taken to it, and had ordered a re-survey of the premises by the surveyor-general. The act of July 1, 1864, to expedite the settlement of titles in California, whilst restoring to the surveyor-general and the general land-office, the jurisdiction over surveys of lands confirmed under Mexican grants, which they had previous to the act of June, 1860, provides, that where proceedings for the correction or confirmation of surveys are pending at the time of its passage in the district court, it shall be lawful for that court to proceed and complete its examination and determination of the matter. The order calling in the original survey was the initiative of a proceeding for its correction, and the proceeding could not be considered ended because the surveyor-general was subsequently directed to make a re-survey in accordance with certain directions. The order for a re-survey did not bring the case within the provisions of the last paragraph of the third section of the act of 1864. That paragraph applies only to new surveys which may be ordered by the circuit court, upon the decision of appeals from the district court; but the order directing a re-survey was itself subsequently set aside, which left the survey before the court upon the original order.

After careful consideration of the several objections urged by counsel of the appellants in their very elaborate brief, we find nothing which would justify interference with the decree of the district court. The case appears to have received great consideration from the learned judge of that court, and we are satisfied with his conclusions.

Decree affirmed.

UNITED STATES (CASTRO v.). See Cases Nos. 2,508 and 2,509.

Case No. 14,755.

UNITED STATES v. The CATHARINE.

[2 Paine, 721;[1] 3 Law Rep. 255.]

Circuit Court,[2] New York. 1840.

SLAVE TRADE—EMPLOYMENT—CONFISCATION—DELIVERY OF VESSEL—PREPARATIONS OF VESSEL AND CARGO.

1. An American vessel, on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is, before any slaves are received on board, "employed or made use of," within the act of congress of May 10th, 1800 [2 Stat 70], "in the transportation or carrying of slaves from one foreign country or place to another."

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District not given.]

2. To be employed in anything, means not only the act of doing it, but also to be engaged to do it, to be under contract or orders to do it.

3. And if the outward voyage under the American character and ownership be planned and undertaken with a view and under an arrangement that the ownership and national character are to be changed on the arrival of the vessel on the coast of Africa, and that she is then to be employed in the transportation of slaves, she comes clearly within the mischief and within the true intent and meaning of the act of congress.

4. And, in such a case, the confiscation is not limited to the American interest held in the vessel at the time she is engaged in the actual transportation of slaves. It is not the true construction of the act that the whole adventure must be performed whilst the vessel retains her American character and ownership. The penalty is incurred and the forfeiture attaches from the very inception of the voyage. The vessel becomes tainted with the offence wherever she may go, or into whatever hands she may fall, and the forfeiture attaches upon all interests concerned.

[Cited in U. S. v. Greathouse, Case No. 15,254.]

5. But a bona fide sale of a vessel, to be delivered at any given place on the coast of Africa, unconnected with the ulterior employment of the vessel, and not in aid of an employment in the transportation of slaves, would not subject her to forfeiture within the act of congress.

6. Where a voyage to the coast of Africa is commenced and prosecuted under strongly suspicious circumstances, accompanied with preparations and a cargo taken, such as are usually employed in voyages in the slave trade, it is incumbent on the claimant to explain and remove such suspicious circumstances by clear, explicit and unequivocal proofs.

This was an appeal from a decree of the district court of [the United States for] the Northern district of New York, awarding restitution of a vessel captured as a slaver, and libelled by the United States. The libel contained several articles, but the following was the only one on which condemnation was sought at the trial: "Fifthly, that a certain schooner or vessel called the Catharine, being the property, wholly or in part, of a citizen or citizens of the United States, or of persons residing within the United States, to the said libellant unknown, was heretofore, to wit, on or about the first day of July, in the year of our Lord, 1839, employed and made use of by some person or persons being a citizen or citizens of the United States, or being a person or persons residing within the United States, to the said libellant unknown, in the transportation and carrying of slaves from some foreign country to the said libellant unknown, to some other foreign country or place to the said libellant unknown, contrary to the form of the statute in such case made and provided, being the act of congress, entitled 'An act in addition to the act entitled An act to prohibit the carrying on the slave trade from the United States to any foreign place or country,' approved May 10th, 1800." The libel prayed the forfeiture and condemnation of the vessel.

A claim was put in by Charles Tyng, setting up the following facts, viz.: That he was a native citizen of the United States, but that he had resided at Havana as a ship broker and commission agent since October, 1837. In May, 1839, the Catharine, a registered vessel of the United States, built and owned in Baltimore, arrived at Havana, under the command of William J. Wedge, a citizen of the United States. He represented himself as the agent of R. W. Allen and John Henderson, citizens of Baltimore, the owners of the vessel, to effect a sale of her; and had a power of attorney from them for that purpose. He employed Tyng to sell her; and the latter, in June following, sold her, as he supposed, to Martinez & Co., of Havana, for $7,750, and delivered possession of her to them. Wedge being anxious to return in a vessel sailing for the United States, Tyng advanced him the price of the vessel before he had received it himself, and took from Wedge a power of substitution, to enable him to transfer the vessel. About ten days afterwards, however, the purchasers having discovered some objections to the vessel, refused to complete the purchase and pay the price. But in the interval, the sale being supposed complete, one of the house who had purchased her, desired Tyng to effect a charter of the vessel to John S. Thrasher, a citizen of the United States, which he accordingly did. The charter party was between Tyng, as agent of the owners, and Thrasher, and was for a voyage to Principe or other ports on the coast of Africa, of eight months, at three hundred dollars per month; and if the vessel should be at sea at the expiration of the eight months, the charter to continue until she arrived in port. By the terms of the charter party, Thrasher was to victual and man her. Finding that he could not compel Martinez & Co. to pay for the vessel without a lawsuit, which he wished to avoid, Tyng sold the vessel, about the 25th of June, to one Teran, of Havana. By the contract of sale, which was reduced to writing, Teran agreed to purchase the vessel for $10,000, provided she should be delivered to him at the port of Bona, on the coast of Africa, on or before the first of October, and to pay in advance $7,500, and the balance at Havana on receiving satisfactory evidence of the delivery of the vessel at Bona; and Tyng was to be at liberty to load or charter the vessel until the day of her delivery at Bona, and was to refund the sum advanced in the event of failing to deliver her. Previous to effecting the contract of sale to Teran, Tyng applied to Thrasher to modify the charter party, representing to him the hardship of the case; and the latter, induced by such representations, thereupon agreed, in writing, to modify his charter party so as to enable Tyng to deliver the vessel at Bona by the first of October, relinquishing his right to her after his cargo should be landed at Principe. Thrasher loaded the vessel with a cargo which appeared, by the bill of lading and invoice, to be worth about $6,000. The principal articles were one hundred half-pipes of brandy, valued at $1,500, and two thousand

two hundred and seventy-five bales of leaf tobacco, valued at $2,275. There were also fourteen large hogshead shooks, ten long do. do., one boiler for clarifying, one thousand five hundred feet of white pine boards, and eleven pieces of joist. The rest of the invoice was ordinary merchandise. The cargo was consigned to one Pereyra, and the vessel sailed for Principe under the command of one Peterson. About the 30th day of August the vessel was forcibly seized and taken possession of by the Dolphin, a foreign armed vessel; and Robert H. Dundas having been placed in command of her, she was brought by him into the port of New York. The pretence for the seizure was that she was a slaver; and though sailing under American colors, was, in reality, owned by Spaniards. The claim of Tyng concluded with averring, that he had been sued by Martinez & Co., at Havana, to recover back their advance; that Allen & Henderson had refused to repay the money advanced by him, on the ground that he had made the vessel his own; and that she was, in fact, his property, and at the time of the capture under his control, and had not been engaged in the slave trade; and that he had never intended to employ her in such trade.

Petitions were also filed by Michael, the mate, and Foxcroft, one of the mariners, alleging that the vessel was engaged on a lawful voyage, or that they supposed it to be so; and that if it was broken off, it was not their fault, but the fault of the master and owners, and praying their wages.

The following facts were proved by the deposition of Robert H. Dundas, a mate or passed midshipman in the British navy, examined on the part of the United States: On the 13th of August, 1839, he was serving on board the brigantine Dolphin, a British national vessel, commanded by Lieutenant Holland, and cruising off Cape St. Pauls, on the coast of Africa. On that day, while sailing in a north-east direction towards the land, they fell in with and gave chase to the Catharine, which was then about three or four miles off the cape, steering south-west, off the land. She showed no colors, but hoisted American colors after about two hours' chase, and after the Dolphin had fired several shots. When they first saw her she was distant, at north-west, about three or four miles, and the wind was at W. N. W. They finally compelled her to heave to, and Dundas boarded her as examining officer, and found Peterson in command. He demanded the register, crew-list, invoice of cargo, American log-book, and some other papers, which Peterson delivered to him. In about one hour Lieut. Holland came on board and searched Capt. Peterson, and found the following paper concealed on his person: "The main thing for you to do on this voyage is to be ready, in case you are boarded by a man-of-war, to show your log-book, which must be regularly kept from the time you leave here, your ship's papers, your charter party for the voyage, your ship's roll and instructions; and you are, in that event, to take all command with your American sailors, according to your roll; all the others are to be passengers. You are to be very careful that, in any cross questions, you do not commit yourself, but always stick to the same story. When the vessel is discharged, you must at once cut your register in two pieces; one piece you must enclose direct and send to Messrs. Thomas Wilson & Co., Baltimore; the other piece you will bring with you and give to me when you return here. You must be very particular about that, and do not let any time pass after the cargo is out before you cut the register in two pieces, and be careful to keep them separate. Throw one piece overboard if you are obliged to by being boarded by a man-of-war." Peterson, who was very drunk, resisted the search, and it took several persons to hold him; within half an hour afterwards they found a Spanish log-book of the voyage, kept cotemporaneously with the American log-book, from the 29th of June to the 12th of August, and several other papers in Spanish and English. The Spanish log-book was found in the trunk of one of the Spaniards, some of the other papers in trunks of the other Spaniards, and some were found loose forward. They picked up every paper they could find. Among the papers was a letter of instructions from Thrasher to Peterson, dated June 28th, the only material part of which was as follows: "As soon as your vessel is ready for sea, you will proceed to the Isle of Principe, and on your arrival there you will consign your vessel and cargo to Joseph Pereyra, Esq., and deliver him the certified invoice herewith enclosed. Should he wish you to proceed to any other port or ports on the coast of Africa, with or without a cargo, you will implicitly obey his instructions, as he has my full power to act as he may see fit for my interest. You will be particularly careful, however, not to receive on board said schooner any cargo that is contraband, or that is not allowed by the laws of the United States to be laden on board American vessels. A number of persons having applied to me for passage out in the schooner, I have consented; but you will take care that their passports are in order, and that there are no circumstances attending them which will be likely to bring you into the least difficulty." Among the papers were also the shipping articles, headed, "No ardent spirits allowed on board," and signed by four seamen purporting to be native Americans, and two foreigners; the crew list corresponding with the shipping articles; the charter party, bill of lading and invoice the same as set forth in the claim of Tyng; American protections for the four seamen shipped as Americans; a register of the vessel taken out at Baltimore; a list of twenty-four persons, Spanish or Portuguese, with designations showing them to compose

the officers and mariners of a ship's company, at the head of which was Pereyra as master; the plan of a slave deck drawn on paper; and several papers in Spanish and Portuguese not deemed material. There was also the following agreement signed by Pereyra: "It is mutually agreed between F. A. Peterson and Joseph Pereyra, the former master and the latter supercargo of schooner Catharine, of Baltimore, now bound on a voyage to the coast of Africa, that said F. A. Peterson shall go out master of said schooner on her present voyage, for the sum of one hundred dollars per month and three hundred dollars gratification, the wages to continue until his return here, should he return in the vessel, or any other vessel belonging to the house for which J. Pereyra is agent. But should said Peterson wish to leave the vessel on the coast, said Pereyra binds himself hereby to pay unto said Peterson three hundred dollars gratification, and his wages up to the day he leaves the vessel, less one hundred dollars received here as one month's advance. Jose Pereyra. Havana, June 28th, 1839."

The deposition of Dundas further proved that the crew consisted of eight persons with American protections, including the captain. There were also on board twenty or twenty-five foreigners, mostly Spanish or Portuguese; six or eight men would be quite sufficient to navigate the vessel in a lawful trade; witness came over to New York in her with six men. They found on board a large boiler or cooking apparatus sufficient to cook for three hundred people; a quantity of lumber which was marked and numbered for laying a slave deck, and could easily have been put up in a few hours as a slave deck after the cargo was discharged; a number of wooden vessels, some made up and some in shooks; about nine were made up and there were materials for about six more; each would have contained from four to six hundred gallons. They also found five hundred and seventy wooden spoons, similar to those used in slave vessels, and thirty-six large tin dishes and a number of small ones. These equipments are generally found in slave vessels, and witness had never seen them anywhere else. They found no irons, but they are generally concealed in the lower part of the vessel. All the persons found on board, with the exception of Capt. Peterson, the American mate, one American seaman, and Pereyra, were landed at Quitta, a port a few miles east of Cape St. Pauls, and much resorted to by vessels for water and provisions. Witness then took the vessel to Sierra Leone, and laid the papers before the mixed commission, but they refused to take jurisdiction of the case on the ground that the Catharine was sailing under an American register. He then, pursuant to orders, brought her to the United States, and arrived here the 6th of October, 1839. The day after their arrival Pereyra committed suicide. The cargo found on board corresponded with the invoice, and was such an one as an honest trader would have on board trading with the coast of Africa; it was also such an one as a slaver would have on board; the lumber and large boiler would excite witness' suspicion; the vessel was not in a condition to receive slaves until her cargo was discharged, and a slave deck could not have been put up until then; had the vessel been condemned at a port where a mixed commission was sitting, witness would have had a share as prize-money of the vessel and cargo; if she should now be condemned he would not say whether he would be entitled to anything or not; he had done nothing to assert or relinquish any claim he might have.

Michael the mate, who had filed a petition for wages, was also examined on the part of the libellants. The only material parts in his deposition not otherwise stated, are the following: He entered on board the Catharine, on the 26th June, at Havana. He entered and signed the articles or shipping-list by the name of Ebenezer Tucker, of Salem, Massachusetts, and as an American citizen; he was, however, a native of Scotland. He so entered because he could not enter without an American protection. This was suggested to him by the shipping-master, who furnished him with a protection in the name of Ebenezer Tucker. The vessel sailed from Havana on the 28th of June; she had on board about twenty-eight or thirty persons; the majority were Spanish or Portuguese; Capt. Peterson and not witness kept the log-book; the Spaniards or Portuguese used to lend a hand in working the vessel; as far as he knew they were passengers; some of the crew were employed in making sennett; it is yarns plaited together, and is used in putting around ropes and rigging to prevent chafing; a good deal of it was made on board, but it was all used in putting round the rigging, to the best of his knowledge; he did not know what cargo they had on board, nor that there was any intention of going to any other place than the Island of Principe; he did not ship for the purpose or with the intention of engaging in the slave trade; when the Dolphin boarded the Catharine she was about five miles from Quitta; being short of water and provisions they had been there to get a supply, and were bound to Principe when they were captured; they were at Quitta only a few hours.

Foxcroft, who had filed a petition for wages, was examined as a witness, both for the claimants and libellants. His deposition contained no material facts, except the following:—He shipped on board the Catharine, at Havana, as a seaman, and signed the shipping articles by the name of Joseph Mackie; he had an American protection when he shipped; Capt. Peterson knew nothing of his shipping under a wrong name; he did not ship for the purpose or with the intention of being engaged in the slave trade, and there

was not, to his knowledge, any such purpose or intention on the part of any on board; the reason of his shipping under a wrong name, was because he could not ship on board an American vessel without an American protection, and there was no other vessel in which he could ship; the protection was given him by the shipping-master, at Havana; he was not an American citizen, but a British subject; witness, while on board the Catharine, was engaged in making sennett, under the directions of the boatswain's yeoman, who told him it was to be used in tying slaves; they made a very great quantity; many were engaged in making it, and more was made than was necessary for the use of the vessel; there was a good deal on board unused at the time of the capture, as much as one hundred fathoms.

The counsel for the libellants admitted all the facts set forth and averred in the claim of Tyng.

The district court dismissed the libel, and ordered the vessel to be delivered up to the claimant. It also dismissed the seamen's petitions for wages, on the ground that the vessel was not under arrest thereupon, and there being no proceeds or avails in court upon which said petitions could attach. On pronouncing it, the district court delivered the following reasons for its decree:

This is a prosecution in rem, seeking the forfeiture of the vessel for being engaged in the slave trade. The bill articulates upon various acts of congress, charging against the vessel the circumstances which incur a forfeiture by the provisions of these acts. On the hearing, however, the contestation between the parties was limited to the fifth article alone. That allegation is, that the schooner being the property, wholly, or in part, of a citizen or citizens of the United States, or of persons residing within the United States to the libellant unknown, was, on or about the first day of July, 1839, employed and made use of by some person or persons residing within the United States to the libellant unknown, in the transportation and carrying of slaves from some foreign country or place to the said libellant unknown, to some other foreign country or place to the libellant unknown, contrary to the act of congress of May 10th, 1800. It is admitted that the ownership of the vessel is in citizens of the United States, and it is unnecessary, under the view the court takes of the case, to enter upon the question whether the claimant has shown a lien or privilege in respect to his advances to the owner, which would be protected in case of the condemnation of the vessel. On the 15th of June, 1839, the claimant, as agent of the owners, chartered the vessel to John S. Thrasher, for a voyage from Havana to the Isle of Principe, or other part or parts of Africa, as the agent of the charterer may direct. The vessel was laden and despatched by the charterer, and was captured on the 13th of August, in the prosecution of her voyage, by a British cruiser near the coast of Africa. The supreme court having decided, in the construction of this statute, that "the vessel in question was employed in the transportation of slaves within the meaning of the act, if she was sailing on her outward voyage to the African coast, in order to take slaves on board to be transported to another foreign country," I should have no difficulty, upon a careful review of the facts and circumstances, in deciding that the charge of the libel had been fully sustained against the vessel, if the charter party, and her outfit and the proceedings under it, were the controlling facts of the case.

Looking at the case in this point of view, I am not able to discover that it can be distinguished favorably to the claimant, from the case of The Butterfly [unreported], recently decided in this court. The pertinency and weight of a similar class of facts and circumstances were fully considered by the court in that case, and it may be added that some particulars exist here which would probably be regarded as rendering the inferences and presumptions then recognized and adopted, still more direct and conclusive. It seems to me, however, that the enterprise assumes a new character subsequent to the execution of the charter party, and so far as the charge in the libel now under consideration may be made to affect it. On the 25th of June the claimant contracted to sell the vessel to one Teran, for $20,000, and to deliver her at Bona, on the coast of Africa, on or before the first day of October thereafter, and received $7,000 of the consideration-money in advance. On the same day the charterer made in writing a modification of his charter party, and engaged to relinquish the vessel "after the cargo I have now on board is landed at the Isle of Principe in accordance with the bill of lading," to enable the claimant to deliver the vessel to Teran, at Bona, according to his contract. It is not to be concealed that this whole arrangement bears the semblance of being a common concern between Thrasher and Teran, in respect both to the charter and purchase. A scrutiny of the evidence cannot fail to make the impression that the two acts were preconcerted parts of the enterprise; that the vessel should wear her American character to the coast of Africa, with a view probably to avoid the application of the treaty between England and Spain, and the hazard of interception by British cruisers; and that when there, she should become Spanish, before venturing on her return voyage, lest the officers and crew might be declared pirates under the act of congress of May 15, 1820. If this be so, it would tend to confirm the verity of the representation that this was an actual contract of sale, and that the vessel at Bona was to become wholly Spanish property. This particular is of great importance in determining the application of

the act of congress to the case. There is certainly nothing in that act inhibiting an American vessel from carrying any description of cargo to the coast of Africa. She may be legitimately let on freight or chartered for such a voyage. If everything she undertakes to do as a vessel of the United States, be to carry out and deliver a cargo, she would not, in fulfilling such an engagement, come within the prohibitory enactments of the statute. The statute reaches her only when the evidence shows that her outward voyage is only in part fulfilment of her employment as an American vessel, which is to be continued and consummated by transporting slaves into some other foreign country. The broadest latitude the supreme court gives to the term "employment," as evidence of such illegal voyage, falls short of being satisfied by the mere transportation of an outward cargo. The decision requires that it shall further appear that the vessel was on such outward voyage for the purpose of taking on board a cargo of slaves, as part and parcel of the adventure. In a prosecution of persons serving on board such vessel, it may be of no importance whether the vessel was to retain or change her national character after reaching the outward port, provided the whole enterprise was to be regarded as one voyage.

But it is apprehended a prosecution under the first section against the vessel, cannot be sustained without showing that the whole adventure contemplated by her, is to be performed by her in her American character. The terms of the section are these: "That it shall be unlawful for any citizen of the United States, or other persons residing within the United States, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying slaves from one foreign country or place to another, and any right or property belonging as aforesaid shall be forfeited," &c. The penalty of this act is plainly levelled against American property employed as inhibited, and the confiscation is limited to the American interest held in a vessel at the time she is employed in the slave trade. There is nothing in this statute to reach the case of an American vessel built and fitted out for the slave trade, but actually sold to a foreigner and employed by him. What, then, is the application of the act to the facts of this case? Upon the proofs, I am satisfied the vessel was chartered, fitted out and laden at Havana, with intent to be employed in the slave trade, prohibited by this act, and it is settled by the decision of the supreme court upon the import of the term "employed," as used in this act by congress, that "to be employed in anything, means not only the act of doing it, but also to be engaged to do it," and, accordingly, the chartering and fitting out the vessel at Havana, with design to have her perform the voyage then arranged, brought the transaction within the prohibition of the act; and had the seizure been made under that state of facts, the condemnation of the vessel must have been pronounced by the court. The proof, however, is equally strong that in this incipient state of the enterprise, the voyage was changed, and the vessel was then put under "contract and orders," to carry out a cargo and freight, and deliver it at Principe, to the charterer, in fulfilment of the contract of sale. There is nothing beyond vague suspicions to warrant this ulterior change of the destination of the vessel with the voyage first contemplated. St. Thomas and Principe are near the equator; if the Bona to which the vessel was directed, be the port in Algiers, the great distance of the two points apart would strongly denote an entire disconnection of the undertaking. No evidence was offered that there was any place of that name in the vicinity of Principe, nor other fact evincing the object of the voyage to be continuous and identical, and I am, accordingly, bound to hold, upon the testimony, that the vessel sailed from Havana to deliver a cargo at Principe, and was then wholly discharged and separated from that employment, and was after that to be taken to Bona, and delivered to the purchaser. This adventure, prosecuted with such intent, cannot be brought within the interdiction of the statute, and I shall, therefore, decree that the libel be dismissed, and the vessel delivered up to the claimants.

I am aware that this is a point of importance and difficulty. My duty, however, is to express the result of my own reflections upon the subject, and this I do with the greater promptitude, because, from the magnitude of the question and interests involved in the decision, the judgment now pronounced will be submitted to the review of the appellate courts.

There being no condemnation of the vessel, the petition of the seamen for wages out of the proceeds must be also determined.

Ordered, that the libel be discharged, and the schooner Catharine, her tackle, &c., be delivered up by the marshal to the claimant.

From this decree the libellants appealed. On the trial in this court, in addition to the proofs taken in the court below, only one witness was examined. He stated, on behalf of the libellants, that in the month of September, 1840, on taking out the cargo of the Catharine which had not before been removed, there were found near the bottom of the hold two bags containing iron manacles or handcuffs. The witness stated that the manacles in one of the bags were counted, and were found to be one hundred and seventy-five in number; and that the other bag was about the same size, and appeared to contain about the same number, but its contents were not counted.[3]

[3] See note 2 at end of case.

B. F. Butler and M. S. Bidwell, for appellants.

C. O'Conor and F. B. Cutting, for respondents.

THOMPSON, Circuit Justice. This case comes up on an appeal from the district court for the Southern district of New York. The proceeding in the court below was for an alleged forfeiture of the vessel, for a violation of the act of congress of the 10th May, 1800 (3 Story's Laws, 382 [2 Stat. 70]), which declares that it shall be unlawful for any citizen of the United States, or other person residing within the United States, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any right or property belonging as aforesaid, shall be forfeited. The supreme court, in the case of U. S. v. Morris,[4] 14 Pet. [39 U. S.] 473, have given a construction to the term "employed" as here used in this act. The question, say the court, in this case is, whether a vessel on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is "employed or made use of" in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board? To be "employed," say the court, in anything means not only the act of doing it, but also to be engaged to do it, to be under contract or orders to do it. And this is not only the ordinary meaning of the word, but has frequently been used in that sense in other acts of congress. That the vessel in question was employed in the transportation of slaves within the meaning of the act of congress, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to another foreign country. That the Catharine was an American vessel, sailing under the American flag, and documented as an American vessel, is not denied; and the claimant, Charles Tyng, who interposes his claim as owner, was an American citizen. This would seem to bring the case directly within the prohibition in the act, and subject the vessel to forfeiture; and, indeed, the district judge in the court below, declares that he should have no difficulty, upon a careful review of the facts and circumstances, in deciding that the charge of the libel had been fully sustained against the vessel, if the charter party and her outfit, and the proceedings under it, were the controlling facts in the case. That the pertinency and weight of a similar class of facts and circumstances were fully considered by the court in the case of The Butterfly [unreported], recently decided in this court, where the vessel was condemned; and the learned judge adds, that some particulars exist here which would probably be regarded as rendering the inferences and presumptions then adopted and recognized, still more direct and conclusive; but that it seemed to him that the enterprise assumed a new character subsequent to the execution of the charter party. That there is nothing in the act inhibiting an American vessel from carrying any description of cargo to the coast of Africa; she may be legitimately let on freight or chartered for such a voyage. If everything she undertakes to do as a vessel of the United States, be to carry out and deliver a cargo, she would not, in fulfilling such an engagement, come within the prohibitory enactments of the statute. The statute reaches her only when the evidence shows her outward voyage is only in part fulfilment of her employment as an American vessel, which is to be continued and consummated by transporting slaves into some other foreign country.

I am not disposed to give a construction to this act which will interdict an American vessel from carrying out a cargo, and delivering it upon the coast of Africa, if unconnected with the subsequent employment of the vessel in the transportation of slaves; but I am not prepared to admit that such subsequent employment must be in the character of an American vessel, in order to bring her within the prohibition in the act. If the circumstances are such as to warrant the conclusion that the outward voyage, under the American character and ownership, was planned and undertaken with a view, and under an arrangement, that the ownership and character were to be changed on the arrival of the vessel on the coast of Africa, and there to be employed in the transportation of slaves, such vessel would clearly come within the mischief, and, I think, within the true intent and meaning of the act of congress.

There can be no doubt but that a bona fide sale of a vessel, to be delivered at any given place upon the coast of Africa, unconnected with the ulterior employment of the vessel, and not in aid of an employment in the transportation of slaves, would not subject her to forfeiture within this act of congress; but where the voyage is commenced and prosecuted under strong and suspicious circumstances, accompanied with preparations, and the vessel laden with a cargo such as are usually employed in voyages of this description, it imposes no unreasonable hardship upon a party to call upon him to explain and remove such suspicious circumstances. If the adventure is innocent, it may easily be shown to be so. The language of the supreme court, in the case of The Josefa Segunda, 5 Wheat. [18 U. S.] 356, is very strong on this point.[5] In the execution of these laws (the suppression of the slave trade), no vig-

[4] See note 3 at end of case.

[5] When any act is done, which of itself, and unexplained, is a violation of law, and a party to extricate himself, or his property, from the consequences of it, resorts to the plea of necessity or distress, the burden of proof is not only thrown upon him: but when the temptation to in-

ilance can be excessive, and restitution ought never to be made but in cases which are purged of every intentional violation by proofs the most clear, the most explicit and unequivocal. But let us look a little at the circumstances of this case, and see whether they are not such as call upon the party to give a more satisfactory explanation. The claimant, Charles Tyng, alleges that he is a citizen of the United States, residing in Havana since the year 1837, and engaged in the business of a ship-broker and commission agent; that some time in the latter part of May, 1839, the schooner Catharine, an American vessel, arrived at the Havana, under the command of William J. Wedge, a citizen of the United States, who applied to him, and represented that he was authorized by R. W. Allen and John Henderson, citizens of Baltimore, and owners of the Catharine, to effect a sale thereof, and employed him for that purpose. That he succeeded in effecting a sale to the house of Don Pedro Martinez & Co.; which sale, however, owing to some misunderstanding, fell through. He, however, feeling confident that the bargain would be consummated, had advanced the purchase-money to Wedge, and he had returned to Philadelphia, after having made him his substitute under the letter of attorney from Allen & Henderson. He afterwards effected a sale of the vessel to Don Teran, of Havana, but had previously chartered her to one Thrasher, who agreed so to modify his charter party as to meet the terms of sale to Don Teran. Under these circumstances, the Catharine sailed from the Havana, on her voyage to the coast of Africa, and was captured by the Dolphin, a British armed vessel, and brought into the port of New York.

These are the general outlines of the case; but a more particular examination of the various circumstances are necessary to a proper understanding of the transaction.

It is proper, in the first place, to notice, that although the claimant, Charles Tyng, was originally an authorized agent to sell the vessel for Allen & Henderson; yet they, having received the purchase-money from him, through Capt. Wedge, refused to refund it, and threw the vessel upon his hands. He, therefore, interposes his claim as owner, and alleges himself to be such. His sale to Teran bears date the 25th of June, 1839, and was for the consideration of $10,000, provided the vessel was delivered to him at the port of Bona, on the coast of Africa, on or before the 1st day of October. Part of the purchase-money was to be paid in advance, and the balance on receiving satisfactory evidence of the delivery of the vessel at Bona; the said Charles Tyng being left at liberty to load or charter the vessel until her delivery at Bona; the money advanced to be refunded to Teran, in case of failure to deliver the vessel at Bona on or before the 1st of October. The vessel having been captured before her arrival on the coast of Africa, the sale and transfer of the property in the vessel was never consummated, but remained in the original owner; and whether that ownership was in the house in Baltimore or in Tyng, is immaterial; though Tyng asserts himself to be the owner, and must be dealt with as such. He was the owner on the outward voyage, and at the time of the capture. If he was such owner, and the vessel was employed in the transportation of slaves, according to the decision of the supreme court in the case of U. S. v. Morris [14 Pet. (39 U. S.) 464], how does the act of congress affect his interest in the vessel? It declares that it shall be unlawful for any citizen of the United States, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the carrying or transportation of slaves from one foreign country or place to another; and any right or property belonging as aforesaid, shall be forfeited. The forfeiture attached upon the violation of the prohibition—and that violation occurred the instant the vessel was employed in the transportation of slaves, or, in other words, at the commencement of the voyage, if such voyage was prosecuted with the view, and for the purpose of transporting slaves from one foreign country or place to another foreign country or place. That such was the purpose for which this vessel was purchased by Teran, and was proceeding to the coast of Africa, admits of but little doubt. It was intimated on the argument, that there was no such place as Bona on the west coast of Africa, where the slave trade is carried on; and if the vessel was to be delivered at Bona, on the coast of Algiers, it afforded no ground of suspicion. But this suggestion was so utterly improbable, that it was not pressed there, and is entitled to no consideration. That there is such a place as Bona, (as known and understood by the parties,) on the west coast of Africa, cannot admit of a doubt.

The charter party entered into between the claimant and Thrasher, bears date on the 15th day of June, 1839, for a voyage from Havana to Isle of Principe or other port or ports on the coast of Africa, as the agent of the charterer may direct; the charterer to provide a crew, and furnish them with all necessary provisions, &c., for their maintenance during the voyage, and to pay all port charges; the charterer to pay $300 per month for eight months, and if the vessel should be at sea at the expiration of said term, the charter party to continue until her arrival, and the cargo shall be discharged. The charterer gave to Capt. Peterson, the master of the vessel, instructions to proceed to the Isle of Principe, and on his arrival there, to consign the vessel and cargo to Joseph Perey-

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fringe the law is great, and the alleged necessity, if real, can be fully and easily established, no court should be satisfied with anything short of the most convincing and conclusive testimony. Livingston, J., in The Josefa Segunda, 5 Wheat. [18 U. S.] 338.

ra, and deliver to him the certified invoice enclosed in the letter of instructions, and giving him directions implicitly to obey the instructions of Pereyra. And in his letter of instructions he says: "A number of persons having applied to me for passage out in the schooner, I have consented; but you will take care that their passports are in order, and that there are no circumstances attending them which will be likely to bring you into the least difficulty." Pereyra, the consignee of the charter, was at Havana, and went out as supercargo. It appears, from the deposition of Robert H. Dundas, mate of the Dolphin, that when the Catharine was captured, the witness demanded of the captain his papers, and a number were delivered up, which are unimportant to be noticed here. Soon after, Lieut. Holland came on board the Catharine, and Capt. Peterson was searched, and there was found concealed on his person a certain paper, which among the exhibits is marked No. 33, and which will be hereafter noticed. From this deposition of the mate, it appears that the crew of the Catharine consisted of eight persons, with American protections, including the captain, and about twenty or twenty-five foreigners, mostly Spanish and Portuguese; that six or eight men would be quite sufficient to navigate the Catharine in a lawful trade; that there was found on board a large boiler or cooking apparatus, sufficiently large to have cooked for three hundred people; a quantity of lumber, which was prepared and numbered for laying a slave-deck, and could easily have been put up as a slave-deck in a few hours after the cargo was discharged; a number of leagers were found on board, some made up and some in shooks—about nine were made up, and materials for about six more; each would contain five or six hundred gallons. There were found on board about five hundred and seventy wooden spoons, similar to those used in slave vessels; there were thirty-eight large tin dishes, and a number of small ones; that the equipments above mentioned are such as are usually found on board of slave vessels, and he has never seen them elsewhere. They found no irons, but they are generally concealed in the lower part of the vessel; and from the evidence taken in this court upon the appeal, it appears that two bags of iron manacles were found concealed under the cargo; one was counted and contained one hundred and seventy-five, and the other appeared to be about the same size. The mate further testified, that the Catharine was captured three or four miles from Cape St. Pauls; that the cargo found on board was such an one as an honest trader would have on board, trading with the coast of Africa, and it was also such an one as a slaver would have on board; that the lumber and large boiler would excite suspicion. The document before referred to, which was found on the person of the master, although without date or signature, is deserving of notice; it is as follows. "The main thing for you to do on this voyage is to be ready, in case you are boarded by a man-of-war, to show your log-book, which must be regularly kept from the time you leave here, your ship's papers, your charter party for the voyage, your ship's roll and instructions; and you are, in that event, to take all command with your American sailors, according to your roll, all the others are to be passengers. You are to be very careful that in case of any cross-questions you do not commit yourself, but always stick to the same story. When the vessel is discharged, you must at once cut your register in two pieces. One piece you must enclose direct, and send to Messrs. Thomas Wilson & Co., Baltimore; the other piece you will bring with you, and give to me when you return here. You must be very particular about that, and do not let any time pass after the cargo is out before you cut the register in two pieces, and be careful to keep them separate. Throw one piece overboard if you are obliged to by being boarded by a man-of-war."

It is not very certain from whom this document emanated. It must have been from some person having an interest in the vessel or in the voyage, and most probably either Thrasher, the charterer, or Teran, the conditional purchaser. The language as to the disposition of the register would seem more appropriately to come from Teran, who was to become the owner. But from whomsoever it came, being found on board the vessel, and forcibly taken from the master, it was a document connected with the voyage, and bears evident marks of suspicion that the adventure was not in reality what it purported ostensibly to be, a fair and legal voyage to the coast of Africa. If it had been, no disguise would have been necessary. The direction, in case of being boarded by a man-of-war, to take all command with the American sailors, and all the others to be passengers, shows that they were not in reality passengers, but connected with the vessel, and were to assume the character of passengers as a disguise. It is, in the first place, highly improbable that any persons should be going out to that part of the coast of Africa as mere passengers. But considering them connected with the ulterior employment of the vessel in the transportation of slaves, their being on board is easily accounted for. When a cargo of slaves was taken on board, it would require the vessel to be manned by a greater number than would be required for the mere navigation of the vessel. From a careful examination of the proofs in this case, I am satisfied that this vessel was chartered, fitted out and laden at Havana, with intent to be employed in the slave trade, prohibited by the act of congress of the 10th of May, 1800. And the circumstances connected with and attending the outward voyage, in my judgment, lead irresistibly to the conclusion that the arrangement made with respect to the

conditional sale of the vessel, and the delivery of the possession at Bona, was a part of the contrivance to avoid the interruption of the adventure by capture. If this was a real and bona fide sale of the Catharine, it is a little remarkable that no person is designated to whom possession was to be given at Bona. Teran, the purchaser, was in Havana, and would not himself take the possession. It appears by the letter of instructions to Capt. Peterson, from Thrasher, the charterer, that the vessel and cargo were to be consigned to Pereyra, who went out as supercargo. But there is nothing showing any connection between him and Teran. If the outward voyage of this vessel to the coast of Africa was unconnected with the subsequent employment of the vessel in the transportation of slaves, it certainly requires explanation why she was so peculiarly fitted, in every respect, for the transportation of slaves; and, unexplained, they lead irresistibly to the conclusion that the whole was one connected scheme to send out this vessel to be employed in the transportation of slaves. If this was a concerted plan between Thrasher and Teran in the purchase and charter of the vessel, the more easily to elude capture and condemnation, it is difficult to conceive how Tyng, the claimant, could have been ignorant of the object and purpose for which this arrangement was made, and he must, therefore, be considered a party to it, and the whole must be taken to be one continuous enterprise; and if so, the mere change of property in the vessel after her arrival on the coast of Africa, could not legalize the transaction. The penalty was incurred, and the forfeiture attached from the very inception of the voyage, if it was commenced for the purpose of taking on board and transporting slaves. It is true that the penalty of this act of congress is levelled against American property employed in the manner prohibited. But I cannot think that the confiscation is limited to the American interest at the time she is engaged in the actual transportation of slaves. If such is the construction to be given to this act, it may be evaded with the utmost facility in every case. I cannot yield to the construction that the whole adventure must be performed whilst the vessel retains her American character and ownership. Where the change of ownership is a part of the scheme, the forfeiture attaches upon all interests concerned. The vessel becomes tainted with the offence wherever she may go, or into whatever hands she may fall. The ownership of this vessel, on her outward voyage, was certainly American The transfer of the title never did take place, the vessel never having arrived at Bona. The American interest was, therefore, forfeited, within the express terms of the law; and if the arrangement made with Teran, the purchaser, was for the purpose of evading the penalty of our law, he cannot claim any protection of his interest in the vessel in the courts of this country.

I am, accordingly, of opinion that the vessel became forfeited under the act of congress, and that the decree of the district court must be reversed, and a decree of condemnation entered.

Under the view of the case taken by the district judge, it did not become necessary to pass upon the question, whether the claimant, Tyng, has shown a lien in respect to his advances to the owner, which would be protected in case of condemnation of the vessel. But although, according to my view of the case, a decree of condemnation has passed against the vessel, I cannot conceive on what grounds the claimant can be entitled to his claim for advances. His whole claim rests upon his setting himself up as the sole owner of the vessel, which has been thrown upon him by her former owners, by reason of the first sale made by him to Martinez & Co.; the purchase-money having been paid over by him to them. It is the interest, therefore, of the claimant which has been adjudged forfeited; and a decree in his favor for the advance made by him, which was the whole purchase-money, would be directly repugnant to the decree of condemnation. The grounds upon which condemnation has been pronounced is, that he was an offending party, and implicated, in the whole arrangement made touching the adventure; and if so, he comes with an ill grace to ask for the protection of his interest, after being defeated in his illegal undertaking.

Nor do I see how the seamen's claim for wages can be sustained as a lien upon the vessel, according to the view taken by the supreme court of this law, in the case of U. S. v. Morris [supra]. Although they have in their claim denied having any knowledge that the vessel was to be engaged in any unlawful enterprise, yet nothing has been shown by them in any manner supporting this denial; and the circumstances disclosed, certainly show a prima facie case leading to a contrary conclusion. The two seamen who have petitioned for an allowance of their wages, are William Michael and James Foxcroft. I do not find their names on the crew-list, or in the shipping articles; but assuming them to have been a part of the crew, they must have known that the vessel was going on a voyage to the coast of Africa. There is no pretence of any misrepresentation to them in this respect. The shipping articles describe the voyage to be from Havana to the Isle of Principe, or to trade to other ports on the west coast of Africa, and for a voyage not to exceed eight months. No mention is made of a return of the vessel to Havana or elsewhere. But, from anything appearing on the face of the articles to the contrary, their services were to terminate on the coast of Africa, and they left there, or that they expected to be retained on board the vessel, in whatever service she might be engaged at the end of the eight months. This latter expectation was most likely what they hoped

to realize; and this affords very strong presumptive evidence that they understood, or had reason to believe, that the vessel was to be employed in the transportation of slaves; and if so, they were guilty of a criminal offence within the act of congress, now under consideration. Their claim for wages must, accordingly, be denied.

NOTE 1. For a full discussion of the intent of the act of congress of 1820, relative to the slave trade, see U. S. v. Battiste [Case No. 14,545].

NOTE 2. The statutes of the United States, on the subject of the slave trade, are as follows:—Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that no citizen or citizens of the United States, or foreigner, or any other person coming into or residing within the same, shall, for himself or any other person whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare any ship or vessel, within any port or place of the said United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; or for the purpose of procuring from any foreign kingdom, place or country, the inhabitants of such kingdom, place or country, to be transported to any foreign country, port or place whatever, to be sold or disposed of as slaves; and if any ship or vessel shall be so fitted out, as aforesaid, for the said purposes, or shall be caused to sail, so as aforesaid, every such ship or vessel, her tackle, furniture, apparel and other appurtenances, shall be forfeited to the United States; and shall be liable to be seized, prosecuted and condemned, in any of the circuit courts or district court for the district where the said ship or vessel may be found and seized. 1 Stat. 347–349, § 1. That all and every person, so building, fitting out, equipping, loading or otherwise preparing or sending away any ship or vessel, knowing or intending that the same shall be employed in such trade or business, contrary to the true intent and meaning of this act, or anyways aiding or abetting therein, shall severally forfeit and pay the sum of two thousand dollars, one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same. Id. § 2. That the owner, master or factor of each and every foreign ship or vessel, clearing out for any of the coasts or kingdoms of Africa, or suspected to be intended for the slave trade, and the suspicion being declared to the officer of the customs, by any citizen, on oath or affirmation, and such information being to the satisfaction of the said officer, shall first give bond with sufficient sureties, to the treasurer of the United States, that none of the natives of Africa, or any other foreign country or place, shall be taken on board the said ship or vessel, to be transported or sold as slaves in any other foreign port or place whatever, within nine months thereafter. Id. § 3. That if any citizen or citizens of the United States shall, contrary to the true intent and meaning of this act, take on board, receive or transport any such persons, as above described in this act, for the purpose of selling them as slaves, as aforesaid, he or they shall forfeit and pay, for each and every person so received on board, transported or sold as aforesaid, the sum of two hundred dollars, to be recovered in any court of the United States proper to try the same; the one moiety thereof to the use of the United States, and the other moiety to the use of such person or persons who shall sue for and prosecute the same. Approved, March 22, 1794. Id. § 4. Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that from and after the passing of this act, it shall not be lawful to import or bring, in any manner whatsoever, into the United States, or territories thereof, from any foreign kingdom, place or country, any negro, mulatto, or person of color, with intent to hold, sell or dispose of any such negro, mulatto, or person of color as a slave, or to be held to service or labor; and any ship, vessel or other water-craft, employed in any importation as aforesaid, shall be liable to seizure, prosecution and forfeiture, in any district in which it may be found; one-half thereof to the use of the United States, and the other half to the use of him or them who shall prosecute the same to effect. 3 Stat. 450, § 1. And be it further enacted, that no citizen or citizens of the United States, or any other person or persons, shall, after the passing of this act, as aforesaid, for himself, themselves, or any other person or persons whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negro, mulatto or person of color, from any foreign kingdom, place or country, to be transported to any port or place whatsoever, to be held, sold or otherwise disposed of, as slaves, or to be held to service or labor; and if any ship or vessel shall be so built, fitted out, equipped, laden or otherwise prepared for the purpose aforesaid, every such ship or vessel, her tackle, apparel, furniture and lading, shall be forfeited, one moiety to the use of the United States and the other to the use of the person or persons who shall sue for said forfeiture and prosecute the same to effect; and such ship or vessel shall be liable to be seized, prosecuted and condemned in any court of the United States having competent jurisdiction. Id. 451, § 2. And be it further enacted, that every person or persons so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done, with intent to employ such ship or vessel in such trade or business, after the passing of this act, contrary to the true intent and meaning thereof, or who shall in anywise be aiding or abetting therein, shall, severally, on conviction thereof, by due course of law, forfeit and pay a sum not exceeding five thousand dollars, nor less than one thousand dollars, one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture and prosecute the same to effect, and shall, moreover, be imprisoned for a term not exceeding seven years, nor less than three years. Id. § 3. And be it further enacted, that if any citizen or citizens of the United States, or other person or persons resident within the jurisdiction of the same, shall, from and after the passing of this act, take on board, receive or transport, from any of the coasts or kingdoms of Africa, or from any other foreign kingdom, place or country, or from sea, any negro, mulatto or person of color, not being an inhabitant, nor held to service by the laws of either of the states or territories of the United States, in any ship, vessel, boat or other water-craft, for the purpose of holding, selling or otherwise disposing of such person as a slave, or to be held to service or labor, or be aiding or abetting therein, every such person or persons so offending, shall, on conviction by due course of law, severally forfeit and pay a sum not exceeding five thousand, nor less than one thousand dollars, one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture and prosecute the same to effect; and, moreover, shall suffer imprisonment for a term not exceeding seven years nor less than three years: and every ship or vessel, boat or other water-craft, on which such negro, mulatto or person of color, shall have been taken on board, received or transported, as aforesaid, her tackle, apparel and furniture, and the goods and effects which shall be found on board the same, or shall have been imported therein in the same voyage, shall be forfeited, one moiety to the use of the

United States, and the other to the use of the person or persons who shall sue for and prosecute the same to effect; and every such ship or vessel shall be liable to be seized, prosecuted and condemned in any court of the United States having competent jurisdiction. Id. § 4. And be it further enacted, that if any person or persons, whatsoever shall, from and after the passing of this act, bring within the jurisdiction of the United States, in any manner whatsoever, any negro, mulatto or person of color, from any foreign kingdom, place or country, or from sea, or shall hold, sell or otherwise dispose of any such negro, mulatto or person of color, so brought in as a slave, or to be held to service or labor, or be in anywise aiding or abetting therein, every person so offending shall, on conviction thereof by due course of law, forfeit and pay, for every such offence, a sum not exceeding ten thousand nor less than one thousand dollars, one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture and prosecute the same to effect; and, moreover, shall suffer imprisonment for a term not exceeding seven years nor less than three years. Id. 452, § 6. And be it further enacted, that in all prosecutions under this act, the defendant or defendants shall be holden to prove that the negro, mulatto or person of color, which he or they shall be charged with having brought into the United States, or with purchasing, holding, selling or otherwise disposing of, and which, according to the evidence in such case, the said defendant or defendants shall have brought in aforesaid, or otherwise disposed of, was brought into the United States at least five years previous to the commencement of such prosecution, or was not brought in, holden, purchased, or otherwise disposed of, contrary to the provisions of this act; and in failure thereof, the said defendant or defendants shall be adjudged guilty of the offence of which he or they may stand accused. Id. 453, § 8. And be it further enacted, that any prosecution, information or action may be sustained for any offence under this act, at any time within five years after such offence shall have been committed, any law to the contrary notwithstanding. Id. § 9. And be it further enacted, that if any citizens of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district wherein he may be brought or found, shall suffer death. Id. 600, § 4. And be it further enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining on board such ship or vessel, any negro or mulatto not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall, on the high seas, or anywhere on tidewater, transfer or deliver over, to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold such negro or mulatto as a slave, such citizen or person shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death. Id. 601, § 4.

NOTE 3. The facts in the case of U. S. v. Morris, cited supra, together with the opinion of the court thereon, were stated by Chief Justice Taney, as follows:—"This case comes before us upon a certificate of division from the circuit court of the United States for the Southern district of New York, in the Second circuit. The defendant, Isaac Morris, is indicted under the second and third sections of the act entitled 'An act in addition to an act entitled "An act to prohibit the carrying on the slave trade from the United States to any foreign place or country,"' approved on the 10th of May, 1800. The first count of the indictment charges that the defendant did, on the high seas, from the 15th of June until the 26th of August, in the year 1839, voluntarily serve on board of the schooner Butterfly, a vessel of the United States, employed and made use of in the transportation of slaves from some foreign country or place, to some other foreign country or place, the said defendant being a citizen of the United States. The second count charges that the defendant did, on the high seas, from the 15th day of June to the 26th day of August, voluntarily serve on board of the schooner Butterfly, being a foreign vessel employed in the slave trade; the defendant being a citizen of the United States. It was proved on the trial, on the part of the prosecution, that the schooner Butterfly, carrying the flag of the United States, and documented as a vessel of the United States, sailed from Havana for the coast of Africa, on the 27th of July, 1839, having on board the usual and peculiar equipments of vessels engaged in the transportation of slaves from the coast of Africa to other places. Before she reached the African coast, and before any slaves were taken on board, she was captured by the Dolphin, a British brig-of-war, and carried into Sierra Leone; upon suspicion of being Spanish property, to be proceeded against in the mixed commission court at that place. At the time of her capture, Isaac Morris was in command of the vessel, and was described in the ship's papers and represented himself as a citizen of the United States. The court at Sierra Leone declined taking cognizance of the case, because the vessel was documented as an American vessel; and she was then sent to New York to be dealt with by the authorities of the United States as they might think proper.

"Upon the foregoing state of facts, the judges were divided in opinion upon the four following questions, which were presented on the facts aforesaid for their decision: (1) Whether it is necessary in order to constitute the offence denounced in the second section of the act of the 10th of May, 1800, above referred to, that there should be an actual transportation or carrying of slaves in the vessel of the United States, on board of which the party indicted is alleged to have served. (2) Whether it is necessary in order to constitute the offence denounced in the third section of the act of the 10th of May, 1800, above referred to, that there should be an actual transportation or carrying of slaves in a foreign vessel, on board of which the party indicted is alleged to have served. (3) Whether the voluntary service of an American citizen, on board a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed and made use of in the transporting or carrying of slaves from one foreign country or place to another, is in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said second section. (4) Whether the voluntary service of an

American citizen, on board a foreign vessel, in a voyage commenced with the intent that the vessel should be employed and made use of in the transportation and carrying of slaves from one foreign country or place to another, is in itself, and where no slaves have been transported in such vessel, or received on board her, an offence under the said third section. And these points having been certified to this court, we proceed to express our opinion upon them.

"The second section of the act of congress above mentioned, declares, 'that it shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any vessel of the United States, employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any such citizen or other person voluntarily serving as aforesaid, shall be liable to be indicted therefor, and on conviction thereof shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years.' The first and third points certified from the circuit court, depend on the construction of this section. In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled, that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 95. The question in this case is, whether a vessel on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is 'employed or made use of' in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board? To be 'employed' in anything, means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it. And this is not only the ordinary meaning of the word, but it has frequently been used in that sense in other acts of congress. Thus, for example, the second section of the act of March 3, 1825 [4 Stat. 103], entitled 'An act to reduce into one, the several acts establishing and regulating the post-office department,' declares, 'that the postmaster-general, and all other persons "employed" in the general post-office, or in the care, custody, or conveyance of the mail, shall, previous to entering upon the duties assigned to them,' take the oath prescribed by that section. Here the persons who have contracted to perform certain duties in the general post-office, are described as 'employed' in that department, before they enter upon the duties assigned them. So, also, in the twenty-first section of the same law, various offences, such as the embezzling or destroying any letter, are enumerated, and the punishment prescribed, when committed by any person 'employed in any of the departments of the post-office establishment.' Yet it cannot be supposed that the party must be actually engaged in transacting his official duties when the letter was embezzled or destroyed, in order to constitute the offence described in this section. Again, Act July 29, 1813, § 8 (2 Story's Laws, 1353 [3 Stat. 49]), declares, that certain vessels 'employed' in the fisheries, shall not be entitled to the bounties therein granted, unless the master makes an agreement in writing or in print, with every fisherman employed therein before he proceeds on any fishing voyage. Here the vessel is spoken of as 'employed' in the fisheries, before she sails on the voyage. So, also, Act March 3, 1831 (4 Story's Laws, 2256 [4 Stat. 492]), entitled 'An act concerning vessels employed in the whale fishery,' authorizes vessels owned by any incorporated company, and 'employed wholly in the whale fishery,' to be registered or enrolled, and licensed in a particular manner, 'so long as any such vessel shall be wholly employed in the whale fishery.' The register or enrollment and license, must be obtained before the vessel sails on her outward voyage to the whaling grounds; and, consequently, in that voyage she must be 'employed' in the whale fishery, in the sense in which these words are used in the act of congress; otherwise, she would not be entitled to the register or enrollment and license authorized by this law. In like manner, the vessel in question was employed in the transportation of slaves, within the meaning of the act of congress of May 10, 1800, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to another foreign country. In such a voyage, the vessel is employed in the business of transporting and carrying slaves from one foreign country to another. In other words, she is employed in the slave trade. And any citizen of the United States, who shall voluntarily serve on board any vessel of the United States, on such a voyage, is guilty of the offence mentioned in the second section of this act of congress. It is hardly necessary to add, that 'voluntarily,' in this section, means, 'with knowledge' of the business in which she is employed. And in order to constitute the offence, the party must have knowledge that the vessel was bound to the coast of Africa, for the purpose of taking slaves on board, to be transported to some other foreign country. The same reasoning applies to the third section of the law, under which the second and fourth points certified to this court, have arisen. The vessel is 'employed in the slave trade' when sailing to the African coast for the purpose of taking the slaves on board. We, therefore, answer the first and second questions in the negative, and the third and fourth in the affirmative; and it will be certified accordingly to the circuit court.

Case No. 14,756.

UNITED STATES v. CATHCART.

SAME v. PARMENTER.

[1 Bond, 556.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1864.

TREASON—SECESSION ORDINANCES—UNITED STATES CONSTITUTION—SUPREME LAW.

1. The seceding ordinances of a portion of the states did not abrogate the constitution of the United States, or release the citizens of any state from their obligation of loyalty to the government of the United States, and a citizen or resident of any state may, therefore, be indicted and punished for treasonable acts against that government.

2. The government of the United States is not a compact between the several states, from which any state may withdraw at pleasure, with or without cause.

3. The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but, as the preamble emphatically declares, by the people of the United States; and the government of the Union emanates from the people, and is a government for the people.

4. The government of the Union, though limited in its powers, is supreme within its sphere of action, and laws passed pursuant to the constitution, form the supreme law of the land.

[These were indictments against Charles W. H. Cathcart and against Catherine Parmenter. Heard on a demurrer, and on a motion to quash.]

Flamen Ball, U. S. Dist. Atty.

William M. Corry, for defendants.

LEAVITT, District Judge. In the first of these cases, a special demurrer to the in-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

dictment has been filed; and in the second, there is a motion to quash. The indictments in both cases are substantially the same in their structure; and the questions raised on the demurrer, and in the motion to quash, being the same, it will be unnecessary to consider them separately, as the judgment in one case will be decisive of the other. The views now stated by the court have special reference to the grounds of demurrer in Cathcart's case.

The indictment contains two counts. The first count avers that there is now existing an open and public war or rebellion, carried on with force and arms by the so-called Confederate States of America, against the government and laws of the United States; and that the defendant, owing allegiance to the government of the United States, in violation of such allegiance has levied war against the same by banding together with others in military array; and thus has committed treason against the United States. The second count, after reciting the existence of the rebellion or war, as averred in the first count, charges that the defendant knowingly and willfully conspired with others, and did assist and give aid and comfort to those in rebellion or war against the United States, and in the execution of his traitorous adhesion to the enemies of the United States, committed several overt acts of treason, which are specifically set forth, but which it is unnecessary here to recite.

The first count is based on the first section of the act of congress of July 17, 1862 [12 Stat. 589], to suppress insurrection, punish treason, etc., which provides that every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, or fine and imprisonment, as the court may direct. The second count is based on section 2 of said act, which declares "that if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, shall be liable to fine or imprisonment, or both, at the discretion of the court."

There are several exceptions to the indictment, which are set out in the special demurrer. The first one stated has been abandoned, and need not be noticed. The second exception is for duplicity in the second count in averring a conspiracy of several persons to aid in several distinct offenses. (3) Misjoinder of a count for felony, and for a misdemeanor. (4) No averment that the crimes charged were committed within any county in the Southern district of Ohio. (5) Repugnance in both counts in averring the crimes charged to have been committed against the government of the United States and also the people of the United States. (6) The crimes are charged to have been committed against the allegiance of the defendant, when they can only be against obedience, and because of the agreement of the state of Ohio, and of all the other states, to the constitutional compact binding on the citizens of Ohio and of each state, so long as the compact remained. (7) That treason or conspiracy against the United States after the refusal of some of the states to continue the constitutional compact, are no longer possible.

The sixth and seventh causes of demurrer, involved also in the motion to quash, are yet to be considered. They have been recited as set out in the demurrer, in a previous part of this opinion, and it is not necessary to restate them here. Both present substantially the same question, and may, therefore, be discussed together. They affirm, that from the facts alleged in the indictment, it is impossible that the crime of treason against the government of the United States can be committed. In a legal sense, the demurrer admits the truth of the facts alleged in the indictment. One of these facts is, that the United States is now engaged in a war for the suppression of a rebellion against the government by the people of certain states, aiming at the overthrow of the constitution and the establishment of another government. It is insisted that the states in rebellion have abrogated the compact by which they were bound to the Union, and that this compact being dissolved, by their ordinances of secession, neither a citizen of one of the states thus seceding, nor of any state not involved in the acts of secession, can commit the crime of treason against the government of the United States. In support of this position, certainly somewhat startling in its character, it is insisted that the constitution, instead of creating an actual and efficient government for the whole people of the United States, is a mere league or compact, from which any state, or any number of states, may at any time withdraw, with or without cause, and without or against the consent of the people of the other states, as caprice, passion, or interest may dictate; that the states, when they entered into the Union and became parties to this league or compact, were sovereign and independent; that the allegiance of the people of each state was due exclusively to the state in which the citizen had his domicile, and the allegiance being inalienable and indivisible, could not be and has not been transferred, in whole or in part, to the government of the United States, and remains, therefore, with the people of the individual states, whose obligations of allegiance are wholly due to the state in which they live; that when the people of a state, in any way they may see proper to prescribe, ignore, or repudiate such league or compact, they are thereby absolved from all obligation of obedience or allegiance to the government of the United States; and that, if they take the attitude of armed rebellion against it, with the avowed purpose of its overthrow, they can not be punished as rebels or traitors.

And as the necessary and logical result of this theory, it is urged that if a citizen or resident of a state, which has not seceded, but which remains faithful and loyal to the government, adheres to those thus in rebellion, and supports and sustains them in their criminal attempts, he is not guilty of treason and can not be held accountable for that crime, under the laws or authority of the United States.

These are in substance the points made by counsel in support of the two last grounds of demurrer. The argument has been greatly extended, and the domain of political metaphysics has been fully explored in its progress. I have listened patiently to the statement of the views of counsel, though not without some surprise that they should have been urged with such apparent gravity and earnestness, before this court, on a purely legal question, with the full knowledge that they were in direct conflict with the solemn and well-considered adjudications of the supreme court of the United Sates, and the views of numerous elementary writers of the highest reputation as jurists. I am at a loss to comprehend on what grounds counsel could have supposed this court would sustain a theory so entirely at variance, not only with the decisive authorities to which I shall refer, but with the uniform action of every department of the general government from its organization to the present day. It is obvious that the counsel throughout his argument has addressed himself to the question, what, in his judgment, the structure of our government should have been, and not what it is. It seemed, therefore, to the court, that however appropriate the peculiar views of counsel may have been, if urged in a popular assembly to rectify a supposed erroneous public sentiment, or in a convention to amend the constitution, or reconstruct the government, they were wholly out of place on the question, whether the averments and structure of the indictment in this case, were sufficient in law to put the defendant on trial before a traverse jury. The manner of counsel was, however, unexceptionably courteous, and his views were presented with seeming earnestness and sincerity. It is due, therefore, to the occasion, and to the position I occupy, that I should state some of the reasons why I can not assent to the principles he has urged upon the attention of the court. And, in the first place, I will refer to some of the adjudicated cases in which these principles have been discussed and settled by men whose intellectual power and profound knowledge of the structure of our government, entitle them to the highest measure of respect and veneration. And I may remark here, that in so far as these principles are embodied and propounded in the judicial decisions of the supreme court, they are positively authoritative on this court, as a subordinate court of the United States. In the case of Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 304, 3 Pet. Cond. R. 575, the supreme court says: "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States. There can be no doubt that it was competent to the people to invest the general government with all the powers, which they might deem proper and necessary, to extend or restrain those powers according to their own good pleasure, and to give them paramount and supreme authority." The opinion of the court in this case was delivered by Justice Story, and was concurred in by the whole court, including Chief Justice Marshall. In McCulloch v. State of Maryland, 4 Wheat. [17 U. S.] 316, Chief Justice Marshall delivering the opinion of the court, it is decided "that the government of the Union is a government of the people; it emanates from them; its powers are granted by them, and are to be exercised directly on them, and for their benefit." Again: "The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land."

Judge Story, in discussing the question whether the constitution of the United States is a compact between the several states, remarks that there is nowhere found upon the face of the constitution any clause intimating it to be a compact, or in any wise providing for its interpretation as such. On the contrary, the preamble emphatically speaks of it as a solemn ordinance and establishment of government. The language is: "We, the people of the United States, do ordain and establish this constitution for the United States of America." Commentaries on the Constitution (Abr. Ed.) 117. And again (page 119) the learned author says: "But that which would seem conclusive on the subject is the very language of the constitution itself. This constitution, says the sixth article, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." And he adds: "If it is the supreme law, how can the people of any state, either by any form of its own constitution or laws, or other proceedings, repeal, abrogate, or suspend it?" And again he says: "This of itself imports legal obligation, permanence and uncontrollability by any but the authorities authorized to alter or abolish it." And again, on this subject, the learned writer says (page 684): "It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet in the exercise of those powers should not be supreme."

I will add to these references a brief notice of the case of Ableman v. Booth, 21 How. [62 U. S.] 506, decided by the supreme court of the United States in 1858, which sustains fully the general doctrines affirmed by the prior decisions of that court. I make this reference

with the more satisfaction because the opinion was written and delivered by Chief Justice Taney, a judge eminent for his profound legal learning, and who has never been charged with extreme liberality in construing the constitution of the United States, and defining the powers of the general government. In that case, a judge of a state court in Wisconsin had discharged a party on habeas corpus who was in custody under the authority of the United States. The supreme court of the state sustained the action of the lower judge; and the case was removed to the supreme court of the United States by writ of error, in accordance with section 25 of the judiciary act of 1789 [1 Stat. 85]. I shall give but brief quotations from the opinion of the court, indicating their views on the subject under consideration. On page 516, the court say: "Although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye." Again, on page 517, the court say: "The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be obtained there would be little danger from abroad; and, to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state, or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established." And the court further say: "The language of the constitution by which this power is granted is too plain to admit of doubt, or to need comment. It declares that 'this constitution, and the laws which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'" On page 524, the court further say: "Nor is there anything in the supremacy of the general government, or the jurisdiction of its tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government nor the powers of which we are speaking were forced upon the states. The constitution of the United States, with all the powers conferred on it by the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another." And they add (page 525): "Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among the first and highest duties as a citizen, because free government can not exist without it. Nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. And certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes."

A still more recent decision of the supreme court, in the Prize Cases, as they are called, 2 Black [67 U. S.] 635, strongly affirms the doctrines previously declared by that court. In the very able and lucid opinion of Mr. Justice Grier, giving the views of the court (page 673), he says: "Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe also a qualified allegiance to the state in which they are domiciled." And it may be proper here to remark that the principles enunciated in the case just referred to, are pertinent to the questions before this court on this demurrer in another aspect. The argument of the counsel for the demurrant is, that a citizen of a state can not be guilty of treason against the United States by adhering to, or giving aid and comfort to those now in rebellion against the government, because it is a mere insurrection or civil war, waged by the seceding states against the government. But in the Prize Cases the doctrine is very impressively announced that the rebellion has all the attributes of a foreign or public war, and that all the duties, obligations, disabilities, and penalties incident to such a war attach to every citizen. In a word, that those who are particeps criminis in the rebellion are not the less traitors because they are rebels. In that case the court say: "It (the law of nations) contains no such anomalous doctrine as that which the court are now for the first time desired to pronounce—to wit: that insurgents who have risen against their sovereign, expelled her courts, established a revolutionary government, organized armies and commenced hostilities, are not enemies because they are

traitors; and a war levied on the government by traitors in order to dismember and destroy it, is not war, because it is an insurrection." And again the court say: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice can not be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land." And further on in the opinion, as descriptive of the true character of the present rebellion, the court say: "It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is held in possession by an organized, hostile, and belligerent power."

Such are some of the deliverances of the highest judicial tribunal of the Union. They repudiate emphatically the mischievous heresy that the union of the states under the constitution is a mere league or compact, from which a state, or any number of states, may withdraw at pleasure, not only without the consent of the other states, but against their will. They deny the assumption that full and unqualified sovereignty still remains in the states or the people of a state, and affirm, on the contrary, that. by express words of the constitution, solemnly ratified by the people of the United States, the national government is supreme within the range of the powers delegated to it; while the states are sovereign only in the sense that they have an indisputable claim to the exercise of all the rights and powers guaranteed to them by the constitution of the United States, or which are expressly or by fair implication reserved to them.

I might, perhaps close this opinion here. But the course of the learned counsel in his argument seems to justify, if it does not call for some additional views. And the first remark is, that apart from the light which the high judicial authorities to which I have referred has thrown on the subject under discussion, I should have arrived at the same conclusions which they announce. It is my strong conviction that the language of the constitution, in connection with the known history of its origin, formation, and adoption, leaves no room for a doubt as to the character and structure of the government which it created. Its history is well authenticated, and bears upon every page the indelible stamp of truth I can not, on an occasion like this, refer to or adduce the many facts which throw light upon the views and intentions of the eminent patriots and statesmen to whom we are indebted for our inimitable constitution. One thing is certain, the American people are in no danger of estimating their services too highly, or according to their memories a measure of honor which is not justly their due. With the illustrious Washington at their head, they entered upon the arduous duty of reconstructing the government under circumstances of deep depression and gloom. The confederation under which the Union had for some time existed, had proved a lamentable failure, and was on the verge of dissolution from its own inherent weakness. The hearts of the patriots who had toiled and bled in the revolutionary struggle for national liberty and independence, were stirred to their inmost depths, from an apprehension that their great achievements would prove fruitless of the results which they had anticipated. They felt deeply the truth that, in framing a new structure of government, they must avoid the rock on which the old one had foundered, and must, above all things, incorporate an element of power to bind the states in an indissoluble national union. This is plainly indicated in the preamble, which declares as one of the objects of the constitution, the formation of "a more perfect union," and is apparent not only from the debates in the convention, but from the language used throughout the entire instrument. After months of anxious toil and earnest deliberation, the present constitution was agreed to, and submitted to the people for their sanction and adoption. It was adopted by conventions in all the states, elected by the people for this purpose; and thus as the act of the people became the organic law. Its framers did not claim for it entire perfection; and contemplating the possibility that time would develop some necessary changes, wisely provided for its amendment by the same authority that had ordained and established it. It is not proposed to enter upon an extended discussion of the powers of the government, under the constitution thus framed and adopted. That it was designed to institute a government of the people, and for the people of the United States, and to confer upon it, within the powers granted or fairly implied, the attributes of sovereignty or supremacy, can not admit of a question. There is, in the language of the supreme court in a case before referred to, a qualified allegiance due to the state in which the citizen has his domicile, but it is subordinate to the allegiance due to the supreme government. The government, therefore, has a perfect right to exact, and has exacted from every one enjoying its protection, the duty of fidelity and allegiance. And it is certainly a fact, worthy of note, that there is not a word or phrase in the constitution of the United States which gives the least countenance to the theory that a state can obstruct or nullify the authority of the general government, exercised within its constitutional limits. Much less can the supreme folly of giving its sanction to the right of any state, or any number of states, to withdraw at will from the Union, be imputed to the constitution. Such a provision could not be viewed in any other light than as a solecism in the

structure of a government. It would be substantially a provision for its own dissolution, without the sanction or agreement of the power which created it.

But I am not at liberty to extend this discussion. I may remark, in closing, that there were those in the convention which framed the constitution, and in the conventions of the states which ratified it, who objected to it because it created a national consolidated or supreme government of the United States. There was no difference of opinion then as to the character of the government which the constitution created, but the ground of its opponents was, that it did not conform to their views of what it should be. The counsel has referred in his argument to the resolutions of the legislatures of Virginia and Kentucky, passed in 1798, as giving sanction to the doctrine of the right of a state, at any time, to interpose its authority to prevent or provide a remedy for the unconstitutional exercise of authority on the part of the general government, and that they sanction what is called the right of nullification, or even of secession. I can not assent to the proposition that, properly understood, they justify such a conclusion. The history of these resolutions is well known to the American people. They were designed for a special political object, which was effected, in part at least, through their instrumentality. They affirmed that the states, being parties to the constitutional compact, "in case of a deliberate, palpable, and dangerous exercise of powers not granted by the compact, have a right, and are in duty bound to interpose to prevent the progress of the evil." A distinguished statesman has well observed, in commenting on these resolutions, that "the sort of interposition intended was left in studied obscurity." But Mr. Madison, who was the author of the resolutions adopted by the Virginia legislature, in his report to that body in 1799, asserts distinctly that no extraconstitutional measures were intended. And thirty years later, during the administration of General Jackson, when certain prominent Southern politicians insisted that nullification was the proper remedy, in case of an invasion of the rights of a state, solemnly and earnestly protested against this construction of the Virginia resolutions. "He earnestly maintained that the separate action of an individual state was not contemplated by them, and that they had in view nothing but the concerted action of the states to procure a repeal of unconstitutional laws, or an amendment of the constitution." And in 1832, when Mr. Calhoun had succeeded in inducing South Carolina to pass an ordinance of nullification, on the avowed ground of the unconstitutionality of the laws imposing duties on imports, and that state was on the verge of open rebellion, the sturdy arm of Andrew Jackson was raised to crush it in the bud. Before resorting to force for this purpose, with a paternal anxiety for the people of that state who had been deluded by the false political teachings of their leaders, he issued his memorable proclamation, addressed to the people of that state. It is a document which well deserves to be cherished in the memories of the American people to the latest ages. It is alike remarkable for the earnest devotion of its author to the union of the states, the elevated patriotism which is exhibited in every line, and its able and unanswerable exposition of the true principles and theory of the government. The fallacies of the nullification party were held up as dangerous political heresies. Its effects upon the whole country were electrical. It was clothed with the power of truth, and carried conviction to the minds of all men of all political parties whose intellects were not so constructed as to be impervious to the voice of reason, or dead to the impulses of patriotism.

But though the iron will and sturdy sense of President Jackson had thoroughly rebuked and arrested the heresy for the time, the deadly poison was not wholly eradicated from the Southern mind. After the lapse of thirty years, its baleful effects have appeared in a new and more malignant form. That which was nullification in 1832, is secession in 1860. The political leaders in the Southern states, by means which I do not care to recite, have so far succeeded in their treasonable machinations as to induce those states madly to leap into the fiery vortex of secession. They have gone through the mockery of passing ordinances, in which they declare they are no longer parties of the solemn compact of government, and repudiate all allegiance to it. They have inaugurated war against that government and have been in armed rebellion against it for nearly three years. If successful, the overthrow of the government is the inevitable result, for secession, having no warrant in the constitution, is revolution. The authorities charged with the solemn duty of preserving and perpetuating the government, have found it imperatively necessary to meet force by force, and have adopted measures to repel and subdue the criminal designs of those in rebellion. The country is in a state of war—a war which the adjudications of the supreme court have declared to be lawful and constitutional. A struggle is in progress which, at one time, jeopardized the very life of the government. In such a crisis, it is now gravely urged in a court deriving its being and authority from a constitution which the judges are sworn to support, that a citizen of the patriotic and loyal state of Ohio, charged with criminal complicity in the rebellion, can not be guilty of treason, because the revolted states had a right to withdraw from the Union; and, as a logical and legal result, have virtually destroyed the entire fabric of the government, and absolved the people of the United States from all obligation of allegiance to it! As a judge, and as a citizen of the United

States, I am constrained to enter my protest against such a dangerous perversion of the principles of the constitution. To sanction such a position, under circumstances now existing in our country, implies, in my judgment, a most unenviable condition of intellect, and the possession of a measure of courage, physical and moral, to which I can lay no claim. The character and tendencies of this doctrine are not now to be settled by unmeaning abstractions and metaphysical speculations. The period when these could have been available has gone by, and the bitter fruits of this sad error are now fully developed in its practical results. It has plunged those who have been its deluded victims into one of the deadliest conflicts the world has ever witnessed. Its blighting influences are now frightfully apparent in the wide-spread suffering, desolation, and ruin, which it has brought upon the states which have so madly raised the banner of revolt. The loyal states, too, have laid liberal offerings on the altar of sacrifice. In their patriotic devotion to the government of their fathers, and impelled by a stern, unconquerable purpose of defending, preserving, and perpetuating it, they have cheerfully borne a severe trial of their energies, and profusely lavished their treasures and poured out their blood. The sacrifice, though costly, we may well hope, will be fully repaid by the end to be achieved.

I have now only to say, that upon none of the grounds urged, can the exceptions to this indictment be sustained. The demurrer, as also the motion to quash in the case of Catherine Parmenter, are therefore overruled.

Case No. 14,756a.

UNITED STATES v. The CATHERINE.

[See Case No. 14,755.]

Case No. 14,757.

UNITED STATES v. The CATHERINE.

[See Case No. 14,755.]

Case No. 14,758.

UNITED STATES v. CATON.

[1 Cranch, C. C. 150.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

CONTEMPT—REFUSAL TO TESTIFY BEFORE GRAND JURY.

It is a contempt of court in a witness to refuse to answer proper questions before the grand jury, for which he may be fined, and required to give security for his good behavior.

[Cited in U. S. v. Anonymous, 21 Fed. 770.]

Attachment of contempt on complaint of the grand jury, signed by their foreman, that Caton had refused to answer questions, and behaved in an insolent manner, and had threatened some of the grand jurors. Upon examining on oath two of the grand jurors, and the facts being proved, he was fined five dollars and ordered to give security for his good behavior for one year, himself and one surety in fifty dollars each—or himself in fifty dollars with two sureties in twenty-five dollars each.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,759.

UNITED STATES v. CAUSIN.

[1 Hayw. & H. 37.] [1]

Circuit Court, District of Columbia. May 1, 1841.

OFFICERS—TERMS OF OFFICE—JUDGE.

By the act of congress of May 25, 1838 [5 Stat. 229], the additional judge of the orphans' court appointed under that act held his office for life, and the office was not vacant on the death of the judge he was commissioned to assist.

The petitioners, Richard Wallach and others, by their counsel, J. M. Carlisle and Henry May, pray that a writ of quo warranto be awarded, and directed to Nathaniel P. Causin, commanding him to be and appear before the court to exhibit the right and authority under and by virtue of which he exercises the powers, functions, and authority of judge of the orphans' court.

The facts as stated in the petition are as follows: In 1838 the office of judge of the orphans' court of the county of Washington, District of Columbia, was held by Samuel Chase, who, by reason of his age and infirmities, became disqualified from performing the duties of the office. That congress, on the 25th of May, 1838,[2] provided for the appointment of an additional judge of the orphans' court; that under this act the president appointed and commissioned N. P. Causin to the office created by said act; that Samuel Chase since died. The petitioners hold that the office of the judge of said orphans' court has become vacant, and show that the

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

[2] Act May 25, 1838, c. 85: "Whereas, the judge of the orphans' court in, &c., is, by reason of age and infirmity, disqualified for the due and proper discharge of the duties of his office.

"Be it enacted, &c., That there shall be appointed in and for the county of Washington, an additional judge of the orphans' court, who shall take an oath for the faithful and impartial discharge of the duties of his office, and who shall have the same powers, perform the same duties and receive the same salary, as are exercised, performed and received by the present judge of the said orphans' court.

"Sec. 2. That during the life or continuance in office of the present judge of the said orphans' court, the powers of the said orphans' court shall be vested in the said two judges jointly, or may be exercised by the said additional judge separately, as provided in the foregoing section, and that after the death or resignation of the present judge, the said orphans' court shall consist of a single judge as heretofore."

public good requires that the question thus presented should be settled by the court.

The following rule was served on the respondent: That you show cause why a writ of quo warranto shall not be issued directed to Nathaniel P. Causin, commanding him to be and appear before this court, then and there to exhibit the right and authority of which he exercises the powers, functions, and authority of the judge of said orphans' court, and submit to such order or decree and judgment as the court shall deem right and proper in the premises.

The respondent answered that there is no tenure in the act of February 27, 1801 [2 Stat. 103], authorizing the appointment of a judge of said court, by which the judge shall hold his office, but the tenure of said office has always been understood from that time hitherto to be during good behavior, and the tenure of which is prescribed by the constitution of the United States (article 3, § 1), and the respondent relied on such contemporaneous exposition of the act organizing said court as well as on the uniform subsequent interpretation thereof for forty years, for the purpose of showing that the office is held under the constitution by the tenure prescribed by said article 3, § 1, of the constitution of the United States.

The counsel for the petitioners contended that under the act of 1838 the tenure of office was limited to the life of Judge Chase, and that his decease caused a vacancy in the office of judge of the orphans' court.

J. M. Carlisle and Henry May, for petitioners.

Joseph H. Bradley and Brent & Brent, for respondent.

THE COURT, without an argument from the counsel for the respondent, decided that there was no vacancy in the judgeship, and that the appointment of Nathaniel P. Causin as judge of the orphans' court of the county of Washington, District of Columbia, was during good behavior, or, in other words, for life.

Case No. 14,760.

UNITED STATES v. CAVE.

[3 Hall, Law J. 176.]

District Court, D Pennsylvania. Jan., 1809.

CUSTOMS DUTIES — FORFEITURE FOR EVADING — CONCEALED GOODS.

The proviso in the fifty-seventh section of the "Act to regulate the duties and tonnage" (4 Laws [Folwell's Ed.] 374 [1 Stat. 671]), does not protect from forfeiture goods which are found concealed on board, after the master has declared that the whole cargo is discharged.

This was an action of debt against the master of the schooner Two Brothers, to recover a penalty of $500 under the fifty-seventh section of the impost law, the goods on board not agreeing with the report or manifest delivered by the defendant at the customhouse, inasmuch as 25 bags of coffee, not reported, were found by the inspectors concealed in the vessel, some days after the master had declared that the whole cargo was discharged.

The disagreement was clearly proved at the trial, under such circumstances as excluded every idea that it arose from accident or mistake. But Mr. Condy, the counsel for the defendant, contended that, as the goods had never been landed until they were seized and sent to the custom house by the inspectors, the penalty, by virtue of the proviso to the section of the act of congress on which the suit was founded, could not be inflicted.

After a general answer from Mr. Dallas, the jury gave a verdict for the United States, subject to the opinion of the court on the point of law.

PETERS, District Judge. The point to be determined by the court arises on the meaning and construction of the fifty-seventh section of the "Act to regulate the duties on imposts and tonnage" [1 Stat. 671]. Twenty-five bags of coffee were found hidden on board the schooner Two Brothers, whereof the defendant was master, not included in the manifest delivered at the custom house, after seven bags had been before discovered under similar circumstances; for which latter a post-entry had been permitted, a caution given to the master that he must enter all on board, and asseverations by him that there were no others in the vessel. The whole circumstances were attended with strong suspicious appearances. But it is unnecessary to detail them, as the jury have passed upon the facts, and satisfied themselves, and, I must add, to the satisfaction of the court, so far as it has any opinion to give in that part of the case. I shall, however, detach my mind from such considerations, so, nevertheless, as to regard what is necessary to developing the intention of the act, and its spirit and meaning. For, though true it is that penal statutes are to be construed strictly, yet equally true is it that "such construction ought to be put upon a statute as does not suffer it to be eluded." 6 Bac. Abr. 391, and authorities cited. The question here is as to the 25 bags of coffee "not agreeing with the report or manifest delivered by the master" to the collector; that is, they were not contained in it, but concealed on board, and not delivered till the vessel was thought to be unladen, and the inspecting officer had left her. The penalty of $500 is indisputably incurred, unless saved by the proviso in the fifty-seventh section.

It is insisted on by the counsel for the defendant that the fact of their being so found on board (no matter what was the intent of the master) is sufficient to acquit him, under one of the provisos or savings in the fifty-seventh section, from being amenable to the penalty

imposed thereby. No construction is to be given to this (as it is contended) out of the very words, under the rule of interpretation of penal statutes. Now, these words are: "Provided it shall be made to appear to the satisfaction of the collector, etc., or, in case of trial for the said penalty, to the satisfaction of the court, that no part whatever of the goods, wares or merchandize of such ship or vessel has been unshipped, landed or unladen, since it was taken on board, except as shall have been specified in the said report or manifest, and pursuant to permits as aforesaid." It appears to me, then, that the very words of this proviso, in the strict construction contended for, do not relate merely, and cannot reasonably or on any rule of construction be confined, to the goods which shall happen to be found on board. The law certainly could not be so construed, with any rational attention to the intent of the legislature. And it is also a rule, in the interpretation of all statutes, penal as well as others, that they shall be so construed as to effectuate the intention of the legislature. It requires no further or other proof to satisfy the collector or court that these goods were not, at the time of discovery, "unshipped," etc., than that of their being actually on board. But proof is expressly required, when it is discovered that "the goods on board do not agree with the manifest," to satisfy the collector or court that not only these goods, but that "no part whatever of the goods, etc., of such ship or vessel, has been landed," etc.; clearly, in my opinion, embracing all other goods of the ship, and throwing (from the necessity of such suspicious cases) the proof on the party, that no goods, others as well as those discovered, had been landed, etc. If this construction is deemed strict, it is certainly warranted by the doctrine contended for as to penal statutes. But it appears to me not to be a rigid or forced construction. It is one perfectly in conformity with the rule before mentioned, to wit, that "the construction shall be such as not to suffer the statute to be eluded." And nothing could open a wider field for frauds and evasions than that the very fact which creates strong suspicions of other violations having been committed should be established by the legislature as an excuse, not only for the one in which the party was detected, but as a protection against a penalty imposed to compel proof that there had been no smuggling of other parts of the cargo. This would seem like "a saving in an act contrary to the body of it" (1 Coke, 47c), which Lord Coke declares to be void. It would be almost as extraordinary (I do not mean any personal allusions) as would be a law for punishing theft, but excusing a felon caught with the mainor, that is, with the goods in his hands, because he had not parted with them, though perhaps from want of opportunity, and permitting him to escape on delivery of them to the owner. So, here, a post-entry is to wipe away all the penalty, if the goods not being landed is not enough, and free the party from all obligations of proving what the law, in cases of disagreement of the cargo on board with the manifest delivered, requires. This never could have been the legislative intention.

Should this view of the subject be deemed irrelevant, the construction of the proviso contended for by counsel, who always makes the best defence his case admits, would at any rate give every encouragement and means of "eluding the statute" to those inclined to defeat the objects of the law. Among these objects, evidently, are those comprehended in the provisions which enforce the necessity of returning fair and true accounts of all goods, not only then on board, but of furnishing proof, when required, as to those which had been "any part whatever of the goods of such ship or vessel." No proof whatever had been adduced to make it appear that there were in the vessel or had been no goods landed, since they were taken on board, other than those entered, and those discovered after such entry. The captain's declarations on this subject have been proved to be false, by the testimony of witnesses and the discovery of the goods. I am, therefore, of opinion, that neither the words nor manifest intention of the proviso relied on justify the defence set up in this cause, in point of law; and, of course, judgment must be entered for the United States.

Case No. 14,761.

UNITED STATES v. CAZARES.

[Hoff. Land. Cas. 90.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY—NATURALIZATION.

The validity of this claim not doubted.

Claim [by Antonio Cazares] for two leagues of land in Marin county [the Rancho Cañada de Pogolome], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck,[0] Peachy & Billings, for appellee.

HOFFMAN, District Judge. It appears from the documentary evidence in this case that James Dawson, the deceased husband of the present claimant, on the twenty-seventh of December, 1837, presented a petition to the commanding general, setting forth that he, together with McIntosh and one James Black, had obtained a grant for the place called "La Punta del Estero del Americano;" that he had built a house upon it, and planted a large vineyard and an orchard with more than two hundred fruit trees, and had placed

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

upon it cattle, horses, &c. He further represented that the grant had been obtained in partnership with the two persons mentioned, but that McIntosh was attempting to eject him. He therefore prayed that he might be protected in his rights. The petitioner, though he had long resided in the country, does not appear to have been naturalized at the time of making this petition, but the documents show that letters of naturalization were obtained by him on the twenty-ninth of December, 1841. On the eighteenth of September, 1843, he renewed his application to be put in possession of the land, and the governor to whom this second petition was addressed referred it to the secretary for information. By the report of that officer it appears, that although the petition for the land had been in the name of the three applicants, yet the grant had been made to McIntosh solely, as he alone possessed the essential requisite of being a naturalized Mexican citizen. The secretary therefore suggests that although the request of Dawson cannot be granted, yet inasmuch as he had since been naturalized, and had married a Mexican woman, his application for another piece of land should be favorably considered. The governor, in accordance with this suggestion, on the twenty-first of October, 1843, ordered the proceedings to be returned to the party interested for his information. It is presumed that it was in this way that these documents came into the parties' possession, and are not now found among the archives. It does not appear that Dawson petitioned for a grant before his death, which occurred very soon after; but a grant is produced in which it is recited that his widow, the present claimant, having sufficiently proved the right of her deceased husband to petition for the land which she then occupied, and in consideration of the great losses sustained by her husband on separating himself from McIntosh, and the favorable reports, &c., the governor grants to her the land solicited, known by the name of the "Cañada de Pogolome," to the extent of two square leagues, a little more or less. It is this land which is now claimed by the appellee. This grant was issued on the twelfth of February, 1844, and it appears to have been approved by the departmental assembly on the twenty-sixth of September, 1845. The genuineness of the above documents is fully proved; and it is also shown that the land was long occupied by Dawson before his decease, and since then by the present claimant. Although the expediente for this grant is not among the archives, yet, as observed by the commissioners, "its notoriety, the long possession, and the circumstances surrounding it, relieve it from any suspicion of fraud or forgery." The boundaries, as well as the extent of the land, are specified in the grant, and indicated with evident precision on the map to which it refers. We think, therefore, that the claim is valid and ought to be confirmed.

Case No. 14,762.

UNITED STATES v. The C. B. CHURCH.

[1 Woods, 275.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1872.

ACTIONS—DEBT—PENALTY FOR CARRYING PETROLEUM ON PASSENGER STEAMER.

The penalty for a violation of the 4th section of the act approved February 28, 1871 (16 Stat. 440), which forbids a steamer engaged in carrying passengers from carrying as freight any burning and explosive fluid, cannot be recovered by a proceeding in rem. An action of debt against the offending parties is the proper action.

[Appeal from the district court of the United States for the district of Louisiana.]

J. R. Beckwith, U. S. Atty.

Given Campbell and Wm. Grant, for claimant.

WOODS, Circuit Judge. This is a libel of information for an alleged violation of the first and fourth sections of the act of congress, approved February 28, 1871 (16 Stat. 440). It is alleged in substance in the first count, that on the 28th day of September, 1871, the said steamer Charles B. Church, being a passenger steamer, and engaged in carrying passengers on the Mississippi river, between Cairo and New Orleans, carried on board, between said points, as freight, fifty barrels of refined petroleum, the same being an explosive and burning fluid. The second count, which seems to be based on the first section of the act, charges that the Church, being a vessel propelled by steam, and engaged in carrying passengers between the aforesaid points, was navigated without complying with the terms of the act of congress aforesaid, in this, that she carried as freight between said points fifty barrels of petroleum, the same being an explosive and burning fluid. The purpose of the libel is to enforce the penalty of five hundred dollars, prescribed by the act of congress for the violation of the sections named.

The claimant excepts to the libel, because the proceeding, being in rem, is not authorized by the statute, and the court has no jurisdiction in rem against the steamer for the causes alleged in the libel. This exception presents the only question for the decision of the court. The 4th section of the act of congress referred to provides, among other things, that no refined petroleum shall be carried as freight on any steamer carrying passengers, with an exception not necessary to notice here, but the section does not provide any penalty for the violation of the prohibition. The 68th section of the act declares that the penalty for the violation of any provision of the act not otherwise specially provided for shall be a fine of five hundred dollars, one-half for the use of the informer. If these were the only sections to which this libel could be referred, it would be clear that

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

the proceeding in rem would not lie. This would not be an admiralty cause, and without express authority an action in rem would not lie. Whenever a remedy in rem is given in the act, it is expressly provided. See section one. The usual and proper remedy for a penalty is the action of debt. Debt lies wherever a sum certain is due the plaintiff, or a sum which can readily be reduced to a certainty; a sum requiring no future valuation to settle its amount. Stockwell v. U. S., 13 Wall. [80 U. S.] 542. When a penalty is given by statute and no remedy for its recovery expressly provided, debt will lie. Jacob v. U. S. [Case No. 7,157]. And when a statute creates a new offense and affixes a pecuniary penalty, appropriating one-half to the informer, it adopts by implication those remedies by which alone the informer can sue. Rex v. Robinson, 2 Burrows, 803; U. S. v. Simms, 1 Cranch [5 U. S.] 252. The 4th and 68th sections have not provided for the collection of the penalty by a proceeding in rem, and as they have not expressly provided how the penalty should be enforced, I am of opinion that the action of debt is the proper remedy. But counsel for the United States claims that the averments of the libel bring it within the provisions of the first section of the act. This section declares that "no license register or enrollment shall be granted, or other papers issued by any collector or other chief officer of the customs to any vessel propelled in whole or in part by steam, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense." The 2d, 3d, 7th, 8th, 9th and 10th sections prescribe the equipment and furniture of the steamers referred to in the first section, declaring what pumps, buckets, axes, pipes, hose and life preservers they shall be supplied with, and regulating the stairways, tiller ropes and bell pulls. Section 4 names the hazardous kinds of freight that shall not be carried in such steamers, and it is claimed that the carrying of any of these forbidden articles would be a navigating of the vessel without complying with the terms of the act, and therefore a violation of the first section. But it seems to me this is a strained and unwarranted construction. The first section says that no license shall issue until the collector shall have satisfactory evidence that all the provisions of the act have been complied with, evidently referring to the equipment, etc., of the vessel, and when the section at once proceeds to declare, "and if any such vessel shall be navigated without complying with the terms of this act," the evident meaning is, without being equipped and furnished in such manner as would entitle her to registry and license, and without keeping up such equipment and furniture. I am satisfied that the punishment for a violation of section 4 is prescribed by section 68 and not section 1, and this opinion is strengthened by section 21, which provides that if the master or owner shall refuse or neglect to comply with the requirements of the local inspectors, or shall contrary thereto employ the vessel by navigating her, etc., the master and owners, and the vessel itself shall be liable to the penalty as prescribed by the first section of the act. If the law maker designed that a violation of section 4 should be punished in the manner provided in section 1, why did he not adopt the language used in section 21? Instead of doing this, no penalty whatever is provided in section 4, and it seems to be left to the operation of section 68. I am of opinion therefore, that an action in rem is not authorized for a violation of section 4 of the act; that the penalty and the mode of enforcing it prescribed by section 1 does not apply to the act, and things made unlawful by section 4; that the penalty for any of the acts forbidden by section 4 is prescribed by section 68, and must be recovered in an action of debt against the persons who are guilty. This action in rem is therefore misconceived and the libel must be dismissed.

Case No. 14,763.

UNITED STATES v. CENTRAL PAC. R. CO.

[4 Sawy. 341.] [1]

Circuit Court, D. California. Oct. 15, 1877.[2]

RAILROADS—CENTRAL PACIFIC—SUBSIDY BONDS—ACCEPTANCE OF ROAD.

The Central Pacific Railroad Company did not become liable to apply five per centum of the net earnings of the Central Pacific Railroad annually to the payment of the subsidy bonds and interest thereon, issued to said company by the United States in pursuance of the acts of congress authorizing the construction of the said road, till October 1, 1874, the date of the completion of the road as accepted by the president of the United States, and the day upon which it was in fact completed, in accordance with the requirements of said acts.

Action to recover five per centum of the net earnings of the Central Pacific Railroad Company from July 15, 1869. The case was tried by the court, without a jury, upon stipulation of the parties. The court found the following facts: By direction of the president of the United States, a board of engineers and men familiar with railroads was convened, to consider and report a standard for the construction of the Pacific railroads,

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

[2] [Reversed in 99 U. S. 449.]

by which the companies should be governed in building the roads, and the commissioners appointed under the acts of congress for the purpose, in their examinations and reports upon the roads constructed. In February, 1866, this board reported a standard, which was approved and afterward acted upon by the president. In their report, the board, among other things, say:

"Culverts and abutments for bridges and drains should be of stone, whenever a durable article can be obtained within a reasonable distance—say from five to eight miles—depending upon circumstances; provided that temporary trestles may be adopted upon assurances, to the satisfaction of the commissioners, that stone abutments will be substituted immediately after the line shall be opened, so that stone can be transported thereon. * * * A railroad cannot be considered complete until it is well ballasted. If composed of gravel or broken stone, it should be from twelve to twenty-four inches thick, depending upon the lower material. In view of the settling of new embankments, which require time and rains before ballasting can be properly placed, and also in view of the number of miles required by the law to be constructed annually, the perfect finish of the road-bed, in this respect, must be progressive and the work of time. Yet it is the opinion of the board that such work of perfecting the ballast must proceed as usual on first-class railroads; otherwise subsequent sections should not be accepted, because the whole work is not then being carried forward as a great Pacific railroad, such as the law contemplates."

The report also specifies what should be required as to location, grades and curves, embankments and excavations, cross-ties, rails, sidings, rolling stock, buildings, etc. The report recognizing the impracticability, as a business transaction, of completing a long line of road like the Pacific Railroad in sections of twenty miles each, so that each section shall be brought up to the standard of a first-class road as soon as constructed, clearly made a distinction between a provisional and absolute completion, and this distinction was recognized and acted upon by the president, subsequently, who accepted the sections when constructed up to the temporary standard provisionally, for the purpose of issuing the bonds to enable the companies to proceed with the work, but with the understanding that the deficiencies should be supplied so as to ultimately bring the whole road, as an entirety, up to the standard of a first-class road before a final acceptance as absolutely completed as a whole. As each section of twenty miles or more of the road was constructed, the president of the company filed a statement, under oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified, and that they might examine and report upon such section. Upon a favorable report by the commissioners, the president accepted the section provisionally, and issued to the company the bonds authorized by the statute. This was the course of proceeding till 1868, when it was found that the government might advance all the subsidies upon a road only provisionally accepted in sections, and have no security for its absolute completion, as a whole, up to the standard of a first-class road. The question of the propriety of this course was submitted to the attorney-general, who rendered an opinion on September 5, 1868, which was to the effect that the course before pursued by the government was in accordance with the law, and that the president had authority to appoint commissioners to review that portion of the road which had been accepted provisionally, and to refuse a final acceptance of the road, as a whole, until all deficiencies should be supplied; and that sufficient subsidies might be withheld, or other guarantees be required of the company, to secure absolute completion. The opinion is reported in 12 Op. Attys. Gen., at page 477, and is referred to as a part of this statement of facts. The president thenceforth acted upon this opinion of the attorney-general, and accepted each section when provisionally completed, leaving the question of the absolute completion of the road, as a whole, to be determined upon examination and report of commissioners to be specially appointed for that purpose.

On September 25, 1868, the president, in pursuance of the opinion of the attorney-general, appointed a commission of civil engineers to examine the entire road, so far as then provisionally completed, and report upon it in accordance with instructions to be furnished by the secretary of the interior. Instructions were prepared, in which, after referring to the standard adopted by the president, a pamphlet copy of which was furnished, the secretary of the interior says:

"This standard had obvious reference, in the first instance, to a provisional completeness, but assurances were given by the companies that the road, in structure, equipments, and every other particular, should be brought up with all practicable dispatch to the standard prescribed by congress. The rapid construction of this great national thoroughfare being deemed vitally important, it was not originally considered that in the early stages of the enterprise the standard of absolute completeness of each section should be exacted as a condition precedent to the payment of the subsidy. As the government has made such munificent advances, it becomes the duty of the executive, in the present advanced stages of the work, to require that all past omissions shall now be supplied, and that in lieu of temporary structures, those which are permanent and sub-

stantial shall be erected, and to secure from the companies a strict compliance with all the requirements in regard to the appurtenances of the road. It is believed that the time has now arrived for a thorough revision of the work. * * * It is proper to state, however, that the department expects that you will make a thorough personal examination of the road so far as it has been built. You will fully report in regard to its location, road-bed, cross-ties, track-laying, ballasting, rolling stock, repair-shops, station-buildings, culverts, bridges, viaducts, turnouts, and all other appurtenances, and what amount of expenditure will be required in order that the road, so far as built, may be rendered in these particulars equal to a full completed first-class railroad."

These commissioners, having completed their examination, made their report on May 14, 1869, in which they point out specifically many particulars in which the road, as constructed, fails to come up to the standard of a first-class road; and they report an estimate in detail showing that, in their opinion, to supply such deficiencies on five hundred and fifty-one miles of road eastward from Sacramento will require a further expenditure of $4,493,380. They say, in their report, with reference to one deficiency, that "east of Truckee station, and especially up the Humboldt valley, the road for almost its entire length is wholly without ballast." On April 10, 1869 (16 Stat. 56), congress passed a joint resolution by which the president was "authorized to appoint a board of eminent citizens, not exceeding five in number * * * to examine and report upon the condition of, and what sum or sums, if any, will be required to complete each of said roads (the Union and Central Pacific roads) for the entire length thereof to the said terminus as a first-class railroad, in compliance with the several acts relating to said roads." The president was thereby, also, "authorized and required to withhold from each of said companies an amount of subsidy bonds authorized to be issued by the United States, under said acts, to secure the full completion as a first-class road of all sections of such road upon which bonds have already been issued, or, in lieu of such bonds, he may receive as such security an equal amount of first mortgage bonds of such company." In default of giving such security, the president was authorized to direct the attorney-general to take such proceedings as might be necessary to protect the interests of the United States in such road, "and to insure the full completion thereof as a first-class road, as required by law and the statutes in that case made."

In pursuance of this joint resolution the president of the United States appointed a board, which has since been known and styled as in the resolution, the "Board of Eminent Citizens." The connecting rail uniting the Central and Union Pacific Railroads was laid on May 11, 1869, and soon thereafter regular through passenger trains between San Francisco and Omaha, carrying the United States mails, and through freight trains were placed upon said roads, and such trains have run regularly between said points ever since. Afterward, in the month of September, 1869, and subsequent to the provisional acceptance of the last section on July 15, as hereinafter stated, the said "board of eminent citizens" commenced the examination of said Central Pacific Railroad, in pursuance of said joint resolution and the instructions given by the secretary of the interior. The board, among other things, was furnished with a copy of the said instructions given to the said previous board of engineers and of their report, and directed to be governed thereby in their examinations, and were further instructed as follows: That you will "not only ascertain and report upon its condition, but will also state what sum or sums, if any, will be required to complete it, for the entire length thereof, as a first-class railroad, in compliance with the several acts of congress relating thereto." After completing their examination the board made its report on October 30, 1869, in which it gives a detailed estimate of the cost of work necessary to be done on the Central Pacific Railroad from Sacramento eastward, in order to complete it in accordance with the acts of congress, amounting in the aggregate to $576,650.

Pending the action of the said former "commission of civil engineers," on March 22, 1869, the secretary of the interior, to secure the proper completion of said railroad as required by law, issued an order to the commissioner of the general land-office to withhold all patents for lands to the defendant until further orders, and soon thereafter, as further security, required the said defendant to deposit with the secretary of the treasury $4,000,000 of its first mortgage bonds; which order the defendant complied with, in the months of May and June, 1869; and in connection with the deposit of said bonds on June 28, 1869, executed and delivered to said secretary an instrument in writing, wherein it is, among other things, agreed that "the four millions of dollars of first mortgage bonds of said company which it has this day deposited with the government * * * are and may and shall be held by the government as security for the completion of the structure and equipment of the road of said company, according to the provisions of the statute * * * until the president of the United States, on a proper examination of the actual completed road and equipments, shall be satisfied that the same are so completed as a first-class railroad according to law." And further, on failure to so complete the road, "the said bonds shall be held by the government, and shall be disposed of, and the proceeds thereof, if disposed of, applied to the proper completion of said road,

its structure and equipments, as the government of the United States shall by law direct and provide. And it is further agreed, that the lands granted as a portion of the subsidy of said company, for which patents have not been issued, shall also be held in like manner by the government of the United States as security for the completion and equipment of the said railroad as aforesaid," etc. [6]On July 15, 1869, the secretary of the interior transmitted to the president the report, dated May 15, 1869, of the commissioners appointed to examine and report upon a section of twenty and three-tenths miles of the Central Pacific Railroad, this being the last section constructed by said defendant. In his letter transmitting said report to the president for his action, the secretary says: "I respectfully recommend the acceptance of the same, and that bonds be issued to the company thereon in accordance with the agreement made with the company, which is to the effect that they deposit their first mortgage bonds with the secretary of the treasury to such amount as may be deemed necessary to secure the ultimate completion of the road agreeably to the provisions of the act approved July 1, 1862." The agreement referred to is the agreement hereinbefore referred to, of date June 28, 1869. Which letter and report were returned to the secretary of the interior by the president, with an indorsement thereon as follows, to wit: "The recommendations of the secretary of the interior are approved, and the secretary of the treasury and himself are hereby directed to carry the same into effect. U. S. Grant."

Recommendations in all respects similar to the last had been made by the secretary of the interior to the president, as to the reports made upon several preceding sections of the roads, and a similar approval was indorsed thereon by the president. Upon the same day, July 15, 1869, the secretary of the interior made a similar recommendation as to the section commissioners' reports upon the last sections of the Union Pacific Railroad, in which he recommends a similar provisional acceptance of the section, and adds: "Provided, however, that no bonds or patents shall in any event be issued until such security shall be deposited with the secretary of the treasury necessary to secure the ultimate completion of the road, agreeably to the acts mentioned in my letter to you of the 27th of May last." This recommendation was approved by the president, and the secretaries of the treasury and interior directed to carry the same into effect. These constitute the last conditional acceptances of sections as provisionally completed, and is the point of time at which the government now claims the roads to have been completed, for the purpose of entitling it to recover five per centum of the net earnings of the roads.

Subsequently, in September, 1869, the secretary of the treasury denied an application of defendant to withdraw the $4,493,380 first mortgage and government bonds deposited and withheld as security as aforesaid, and declined to surrender any security so held until the "board of eminent citizens should report." On November 3, 1869, the said board having in the meantime reported, and it appearing by their report that the amount required to supply deficiencies and complete the work up to the required standard had been reduced since the last commission's report from $4,498,380 to $576.650, the secretary of the interior so modified his order of March 22, 1869, suspending the issue of patents to land as to allow patents to one-half the lands —every alternate odd section—to be issued, and soon after allowed the withdrawal of said first mortgage and other bonds, still retaining as security the other half of the lands. On November 15, 1869, the secretary of the interior, in his annual report to the president, states the condition and circumstances of said railroads; points out particulars wherein deficiencies in the construction still exist; reports the amount necessary to be expended in completing the road up to the required standard; states the securities held for the purpose of insuring its completion, and adds: "It will thus be perceived that the government has ample means to secure from the companies the faithful performance of their respective engagements." On March 27, 1871, the secretary of the interior refused an application by defendant to modify the order of November 3, 1869, continuing the suspension of the issuing of patents to one-half the lands. He concludes his letter of denial as follows: "Before modifying the order suspending the issue of patents on one-half of the lands, I desire a report showing the erroneous location to have been corrected, and that the deficiencies have been supplied. Whenever the company shall express a desire for a further examination of the road, commissioners will be appointed for that purpose." There were other refusals to issue patents by the secretary of the interior.

In 1874 there was a bill pending in the senate which had passed the house, in response to demands of the people of the several states interested, providing that the title to the lands granted for railroad purposes should at once be vested in the grantees, in order that the states might tax them. On June 9, 1874, the chairman of the senate committee on railroads, by direction of the committee, transmitted a copy of said bill to the secretary of the interior, requesting his views and suggestions with reference to the advisability of the proposed legislation. On June 17, 1874, the secretary responded, setting forth the proceedings of the various commissions and the reports of deficiencies; the reservation of one-half these lands by Secretary Cox's order as security for completion of the road; that "the executive had no official information that the deficiencies had been supplied"; that the subsidy bonds had been received in full, and that "this moiety of lands

withheld is the only security of the government for the completion of the road as required by law." He then points out a provision in the bill, which, he says, "ipso facto repeals the said order of Mr. Cox," and suggests that it be so changed as to make the mandatory order of the commissioner of the land-office to issue patents "contingent on the executive being satisfied that all the deficiencies reported by the said 'eminent citizens' have been supplied, and that the roads are completed as required by law."

On August 2, 1874, the defendant addressed a communication to the secretary of the interior, in which it is stated that "the Central Pacific road is now completed and in successful operation," and it "requests that commissioners be appointed to examine the road with a view to its final acceptance by the United States government." In pursuance of said request, the president appointed commissioners, and in a letter of instructions to the commissioners, dated September 21, 1874, among other things, the secretary of the interior says: "On the 30th of October, 1869, 'five eminent citizens,' who were appointed commissioners by the president under joint resolution of the 30th of April, 1869, reported certain deficiencies in the construction of the Central Pacific Railroad. The vice-president of the company that constructed the road applied on the second ultimo for its re-examination to determine whether it has been completed as required by law and the report of said commissioners. * * * It will be your duty to examine said road with special reference to the deficiencies above referred to, and to report whether they have been substantially supplied. * * * If they have been, and the road is completed substantially, as required by the law and departmental instructions, you will ascertain as near as possible and report the date of the completion. * * * If it be not yet completed, you will state what, in your judgment, is necessary to such completion." Copies of the report of the preceding commissioners and of the pamphlet, showing the standard adopted by the department, were furnished the commissioners as a part of their instructions.

On November 2, 1874, the said commission reported that the defendant had completed its railroad in conformity to the requirements of the law, and that the date of such completion was October 1, 1874, and further reported that between the date of the report of the last preceding commission, October 30, 1869, and said October 1, 1874, said defendant had expended, in making the improvements specified, $5,121,037.23. On November 12, 1874, the secretary of the interior transmitted to the president the said report, together with a communication, stating the action of the several commissions, and closing as follows: "Regarding the order of Mr. Secretary Cox, of November 3, 1869, as a conditional acceptance of said road, and finding that the conditions have since been amply and fully complied with, I respectfully recommend that the secretary of the interior be authorized to issue patents to the company for the lands inuring to it, and that said order withholding them be revoked." Upon which communication the president, on November 14, 1874, made and signed the following indorsement: "The within recommendations are hereby approved, the authority asked for conferred, and the order of the 3d of November, 1869, is revoked." On November 18, 1874, in accordance with said order, the commissioner of the general land-office was informed by the secretary of the interior of the revocation of said order, and directed to issue to defendant patents to the remaining lands due.

Upon other evidence than the action of the government and its officials, and the report of said several commissions, the court also found, as facts, that the said Central Pacific Railroad was not, in fact, completed up to the standard of a first-class railroad till the 1st day of October, 1874; that five hundred and fifty-one miles of said railroad was built during the first five months of the year 1869, in a very hasty and imperfect manner; that cuts and embankments had to be subsequently widened; temporary structures replaced or perfected; the line straightened in some instances, and several new tunnels constructed; that this part of the road was unballasted; that ballasting up to the standard of a first-class railroad is a gradual, progressive work, requiring time to settle the road-bed, and rains to compact and consolidate it; and that to ballast this road, at that time, up to the required standard under the existing conditions, would have been wholly impracticable; and that no road can be called first-class until well ballasted. Also, that the defendant, between October 30, 1869, and October 1, 1874, in fact expended in construction, in bringing the road up to the standard of a first-class railroad, equipments, etc., $5,657,854. Of this sum $1,014,681.34 was for wharves and depot buildings at Oakland and San Francisco; $241,490.87 for improvements of depot grounds at Mission Bay, San Francisco, and $105,906.60 for steamer Thoroughfare for ferrying cars across the bay. The remainder was expended in various improvements along the whole line, additional equipments, and other work necessary to make it in all respects a first-class road.

John M. Coghlan, U. S. Atty.

S. W. Sanderson and S. M. Wilson, for defendant.

SAWYER, Circuit Judge (after stating the facts). Upon the facts of the case as found and stated, two questions have been raised and fully argued: (1) At what point of time was the road so fully completed as to make it obligatory upon the defendant to apply five per centum of the net earnings of the road to the payment of the bonds issued by

the government, and the interest thereon? (2) What constitutes net earnings within the meaning of the act?

Upon the first question the government insists that the road was completed, and the obligation to set aside five per centum of the net earnings arose on July 15, 1869, the date of the provisional acceptance of the last section; while the defendant maintains that the road was not completed as a whole until October 1, 1874, the date at which the whole road was accepted by the president as having been fully completed.

The act of congress, and the acceptance by the defendant constitute a contract between the parties by the terms of which the defendant was required to build and complete such a road as is prescribed in the act—a road "supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad;" in other words, in all respects a first-class railroad, with all appropriate equipments and appurtenances. Such a road the defendant was bound to build and fully complete, and until so built and completed as a whole, it was not entitled to be discharged from the obligations of the contract to complete the road, or to receive the full consideration which the government, on its part, undertook to give. So, also, in addition to constructing the road, another obligation was imposed on defendant; for the act provides that "after the said road is completed, until said bonds (bonds issued by the government) and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." And this is the clause under which this action is brought. It is plain that the point of time at which the defendant becomes liable to thus apply five per centum of the net earnings, is the point of time when it has fully completed the construction of the road as a whole, as an entirety, so that its contract is fully discharged so far as the construction is concerned, and the defendant has thereby become entitled to receive all the consideration therefor which the government undertook to give —the point of time when it becomes entitled to all the lands granted and all the bonds and other subsidies promised. The clause is "after said road is completed"—not a part or section, but said road. When the road is completed for the purpose of casting the obligation upon defendant of applying five per centum of the net earnings of the road to the payment of the government bonds and interest, it is also completed for the purpose of entitling it to have the road accepted, and of exonerating it from any further liabilities for construction, and for the purpose of entitling it to receive all the lands and other aid given by the government. The construction of the statute as to the time when the road is completed, must be the same when it operates in favor of the defendant as when it operates in favor of the government. If the road was completed on July 15, 1869, so as to make it the duty of the defendant to apply five per centum of its net earnings to the payment of the subsidy bonds and interest, it was completed for the purpose of exonerating the defendant from expending further sums in the construction of the road, and for the purpose of entitling it to all the lands granted.

But the statute authorized the president, upon the report of commissioners appointed by him, to determine when the road should be deemed completed. Upon the completion of a section of forty, afterward twenty miles of road, the president of the United States was authorized by section 4 of the act "to appoint three commissioners to examine the same, and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed," etc., "patents shall issue conveying the right and title to said lands to said company," etc. The commissioners were to report "to him"—the president—for his information, and if "it shall appear to him" that the section is completed, then the defendant is to be entitled to the corresponding part of the subsidy. This provision clearly devolves the duty upon the president of determining when the road is completed. This was so held by Mr. Attorney-General Evarts, in an elaborate opinion given to the president for his guidance in 1868, and I think correctly. 12 Op. Attys. Gen. 477. And this determination of the president I think conclusive, at least, upon the government. If so, it settles the question, for there can be no dispute as to what the action of the president and of the secretary of the interior, acting under his directions, actually was. The acceptance of sections from time to time, as constructed, was manifestly provisional—all the later ones being expressly so in terms upon their face. The whole action of the government is in harmony with this view, and utterly inconsistent with any other, as will be seen by a brief recapitulation of the facts, which speak for themselves. So early as September 25, 1868, the president appointed a commission of civil engineers to examine the entire road so far as then provisionally accepted, and to report wherein it was not completed up to the standard required by the statute. This commission made a thorough examination, and on May 20, 1869, which is subsequent to laying the connecting rail uniting the two roads, made a minute and exhaustive report, showing that it would require $4,493,380 to bring the five hundred and fifty-one miles of the provisionally completed road examined by them up to the required standard. Without waiting for the action of the commission, the secretary of the interior, on March 22, 1869, for the purpose of withholding the lands as security for the completion of the

road according to the statute, issued an order suspending the issue of all patents to lands due on completion of the road. At this time but a small portion of the lands belonging to the sections provisionally completed had been patented to the defendant, so that this order, in fact, withheld nearly all the lands to which the defendant was entitled, provided the road was so far completed.

In April, also, congress authorized the appointment of another commission of eminent citizens to re-examine the road and report deficiencies, and in express terms authorized the president, as further security for the completion of the road, to withhold subsidy bonds, or require the delivery of first mortgage bonds, or the return of subsidy bonds already received, sufficient to insure a full performance of the contract. Under this authority, so late as June 28, 1869, more than six weeks after the laying of the connecting rail, and after the favorable report of the section commissioners upon the last section constructed had been made, and only two weeks before its conditional acceptance by the secretary and approval by the president, the secretary required the defendant to deposit $4,000,000 of its first mortgage bonds, and to enter into an agreement that the bonds, together with the lands still unpatented, should be held as security for the completion of the road, and it was upon this deposit and agreement that the last section was conditionally accepted, and the subsidy bonds issued, as expressly appears in terms in the recommendation of the secretary, which was approved by the president. In this condition matters stood till the "board of eminent citizens" re-examined the road and reported October 30, 1869, that it would require only $576,650 to complete the road according to the acts of congress. After this report, the secretary of the interior deeming one-half the lands ample security for the completion of the road, on November 3, 1869, modified the order of March 22, 1869, so as to permit the alternate sections of lands granted to be patented, retaining the other alternate sections as security; and soon after delivered to defendant the said bonds deposited and withheld as security. Subsequently, on March 24, 1871, the secretary of the interior denied an application of the defendant to modify the order of November 3, 1869, whereby one-half of the land was withheld as security for the completion of the work, on the ground that it did not yet appear that "the erroneous locations have been corrected and that the deficiencies have been supplied;" but he offered to appoint another commission whenever the defendant should desire it. Other applications for patents were denied. Again, so late as June 17, 1874, the secretary of the interior objected to any legislation by congress affecting his right to withhold these lands as security, until the executive should be "satisfied that all deficiencies reported by said 'eminent citizens' have been supplied, and that the roads are completed as required by law." Upon application of the defendant another and, as it proved to be, a final commission was appointed September 21, 1874, to report upon the road, and if completed, the date of such completion, which commission examined the road, and on November 2, 1874, reported the deficiencies supplied and the road completed; and that the date of its completion was October 1, 1874. Upon the recommendation of the secretary of the interior, the president, on November 14, 1874, approved this report and the secretary's recommendation, and thereupon vacated the order of November 3, 1869, suspending the issue of patents to one-half the lands. This recapitulation of the facts shows that at the times mentioned, neither congress, nor the secretary of the interior, nor the president, regarded the road as completed; that the acceptance of sections was conditional and provisional only, for the purpose of issuing bonds and enabling the companies to proceed with the work; that the government required a subsequent completion up to the standard required by the statute, and at all times retained in its possession and under its control ample security for the completion of the road; that it was not accepted as completed up to the standard required by the statute till November 14, 1874; and that the date of the completion as fixed by the report of the commission accepted and approved by the president, is October 1, 1874. No argument can add force to this simple statement of the facts, or shake or qualify the conclusions resulting therefrom. If the road was completed on July 15, 1869, as now claimed by the government for the purposes of this action, then the government wrongfully withheld from the defendant all the lands granted to it (except the small portion before that date patented) from July 15, 1869, till November 3, 1869, together with $4,498,380 first mortgage and subsidy bonds deposited in May and June, and otherwise withheld; and further wrongfully withheld, thereby depriving the defendant of their use, one-half or every alternate section of the lands due, till November 14, 1874—a period of more than five years after the completion of the road, as now claimed by the government. This is the necessary result, unless we adopt one rule of construction as to what constitutes a "completion of the road," when it is beneficial to the government, and another when the rights of the defendant are considered. It results, then, that if the president of the United States was authorized to determine the question as to when the road was completed, that determination was not made till November 14, 1874, and the time of the completion was October 1, 1874, at which time the liability of the defendant to be called upon to apply five per centum of the net earnings of the road commenced.

But if the decision of the president and action of the government are not conclusive upon the United States upon this point, it is still found as a fact that the said railroad

was not, in point of fact, completed and equipped up to the standard of a first-class railroad, as required by the statute, till October 1, 1874. Five hundred and fifty-one miles of railroad were constructed eastward from the Sierra Nevada Mountains during the five months ending May 11, 1869, to a great extent through a desert, and during the greater part of the year, including all except the earlier part of the period of construction, a rainless region. The testimony of the engineer shows, as also does the report of the engineers appointed by the president to recommend a standard for the construction of the road, that to bring a railroad up to first-class, as a practical business proceeding, requires time after the mere laying of the rails; that a road of one or two thousand miles' length cannot, as a practical business transaction, be completely ballasted, equipped and supplied with all the conveniences and accommodations of a first-class road as a whole, in sections of twenty miles each, hastily constructed, so that each section, when so constructed, shall be so complete in construction, equipment and appointment, as to fill its place as a part of the whole completed first-class road; that in such cases ordinary practical business economy requires temporary structures to be gradually replaced as they become unfit for use; and ballasting to be a progressive work, affording time for the embankments to settle by use, and to be rendered compact by rains. As a practical business undertaking it would manifestly be preposterous to expect that five hundred and fifty-one miles of road should be constructed up the Humboldt river, through a rainless desert, in the year 1869, and prior to the fifteenth day of July of that year, and be properly ballasted, and "supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture and all other appurtenances of a first-class railroad;" and no such feat was in fact performed. It is true that this number of miles of road was constructed, so as to be capable of use; and it was in fact in constant use from that time on; but the law requires something more than a road capable of use. It requires in all particulars a first-class road, and the government was not bound to accept anything short of a first-class railroad.

The construction of this road was pushed forward with unprecedented energy and haste for the purpose of getting it open for traffic. When this object was accomplished, the defendant, subsequently, acted upon sound, practical, economical business principles, and brought the road up to the standard required, by correcting locations, widening cuts and embankments, substituting permanent for temporary structures, ballasting, furnishing water stations, depots, sidings, equipments, etc., by degrees, in the same mode as the testimony shows is usual in the construction and equipment of other extensive first-class roads. The defendant was at that time under no legal obligation to make any greater haste in bringing the road up to the proper standard than was required by sound, practical, economical business principles. The law gave defendant nearly seven years after July 15, 1869, within which to complete the road; and the government held in its own hands ample securities to insure its completion, and lost by the delay nothing to which it was entitled under the law or the contract; and the road is, doubtless, better for being gradually brought to the required standard. The road was finally completed and accepted nearly two years before the time required by the statute, and the government cannot complain that the completion was not in due time. It is earnestly urged on behalf of the government that the road was so far completed as to enable the defendant to make a profitable use of it, and, since this is so, it ought to be held to be completed, for the purpose of requiring the defendant to apply five per centum of the net earnings to the payment of the subsidy bonds and interest. Unfortunately for the argument and the government, the statute does not make the point of time at which the road is capable of use the one at which the liability of the defendant to apply five per centum of the net profits to the payment of the subsidy bonds attaches; but the completion of the road—such a road, and no other, as the statute required and the defendant undertook to build—such a road as the government was bound to accept in full satisfaction of this part of the contract. And the defendant is entitled to stand on the terms of the contract. A very inferior road is capable of use, and sometimes of a profitable use, and this road, although as good as could reasonably be expected under the circumstances at that stage of its progress toward completion, was certainly in many particulars an imperfect one on July 15, 1869, and for a considerable time thereafter. It was not then completed up to the standard required by the act of congress, and was not such a road as the government was bound to accept as completed. It was not, in fact, a road completed in any just sense. It is manifest, from the testimony, that the report of the "eminent citizens," of October 30, 1869, is extremely favorable to the defendant; yet this report required the sum of $576,650 to be expended to complete the road; and the government very properly insisted upon the expenditure being made before it would accept it as completed; and it retained in its hands ample means to insure a full performance of the contract on the part of the defendant.

That this report was not unjust to the defendant is evident from the circumstance that defendant did in fact, between the date of said report and October 1, 1874—the date at which the road was accepted by the government as complete—expend the sum of $5,657,854.40, being more than four millions over the sum reported. It is by no means probable that this large sum was unnecessarily expend-

ed, and the testimony shows that is was, in fact, required to bring the road up to the standard of a really first-class road, as required by the statute. This is much more than the amount sought to be recovered by the government, and so far as the mere discharging of the contract to build the road is concerned, independent of other considerations, the defendant might well have afforded to pay the $1,800,000, now claimed as five per centum of net profits, if the government had accepted the road as completed on July 15, 1869, and relieved the defendant from the payment of these five millions of dollars and over to complete the road, and had delivered up the bonds and patented the lands withheld as security, to which it would then have been entitled. It was manifestly not contemplated by the statute that the defendant should be called upon to apply five per centum of the net earnings of its road to the payment of the subsidy bonds, so long as it required any portion of its resources to be expended in the work of construction so as to complete the road up to the standard required by the act. The fact that the defendant, by an energetic prosecution of the work, so far constructed the road as to enable it to be used profitably several years before the time provided for its completion, and before its actual completion up to the required standard, has no bearing upon the question at issue. If it did, it would, also, be found that the government was equally benefited, for it had the use of the road for all the purposes contemplated by congress in passing the act during the whole time it was available to the defendant, and as an entirety for more that six years earlier than was called for in the act of congress; and this direct pecuniary profit to the government, by reducing its expenditures in various ways, if the official reports of the railroad committees of congress are to be relied on, amounted to several millions of dollars per year—nearly or quite enough to pay the interest on the subsidy bonds. The government, therefore, has lost nothing by this early use of the incompleted road, but, on the contrary, has been the gainer of several millions of dollars a year during the whole period of such use. But the question here is not as to the comparative advantages derived by the parties from the building and use of this road; or whether the government did not make a more liberal grant than was necessary; or whether it might not have made a better bargain in other respects; or whether the defendant has, or has not, obtained a more profitable contract than it ought to have had. Whatever considerations of this character may be urged elsewhere, when the parties come into a court of justice to seek an adjudication of their rights, they stand upon their contract as it is, and the simple dry question is, what is the contract, in fact and in law, and what are the rights of the parties under it? If this were a contract between two natural persons—private citizens—it does not seem possible that there could be any controversy as to the construction to be given to the words "after said road is completed," in relation to the question under consideration; and that the construction would be, completed as a whole up to the standard prescribed by the contract, so as to require an acceptance from the other party and a discharge of the party building from any further liability for the purposes of construction. If this would be the natural and proper construction, as between private parties, a different one certainly cannot be claimed, or, if claimed, admitted, because the government on the one side and a corporation on the other happen to be the parties to the transaction, and the contract chances to be found in a statute.

It has been further urged, with some earnestness and apparent sincerity, that the defendant is estopped from denying the completion of the road on July 15, 1869, in consequence of presenting its statements of completion, and its claim to have the road accepted as completed; and because it has accepted so much of the consideration from the government as it was able to obtain. But many elements of an estoppel are wanting. The government did not rely upon this statement, and accept the road. The statement was only filed in pursuance of the statute, as a basis to set in motion the commissions appointed under the act to examine and report to the president. It was the examination and report of the commission upon which the president was authorized to act, and upon which he did in fact act. In this case he not only acted, but refused to accept the road as completed in accordance with the statute until November 14, 1874, when he, for the first time, accepted the road as complete, and released the securities held to insure completion, which had till that time been withheld from the defendant, and which were fully ample to protect the government in case of defendant's default.

My conclusion is, that the defendant's liability to apply five per centum of the net earnings of the road to the payment of the subsidy bonds issued by the government and the interest thereon, did not accrue till October 1, 1874; and that the government is not entitled to recover any portion of the net earnings accrued prior to that date. The five per centum of the net earnings accrued since October 1, 1874, had not become due at the time this action was commenced. They are to "be annually applied" only. The demand in this case, made by the secretary of the treasury on defendant, was on November 14, 1874, and the suit itself was commenced on April 20, 1875, the former within two, and the latter within seven months after the completion of the road. As to the portion of the net earnings now due, therefore, this action is premature.

There is, also, a wide difference between the claims of the parties on the other point suggested, as to what constitutes "net earnings"

within the meaning of the statute. When it becomes necessary to determine this question, it is quite probable that neither party will be found to be wholly right in its construction of the words "net earnings." But under the view I take, it will be unnecessary to consider that point now.

Let there be a finding and judgment for the defendant.

[Taken by writ of error to the supreme court, where the judgment above was reversed, and the cause remanded for a new trial. 99 U. S. 449.]

Case No. 14,764.

UNITED STATES v. CERTAIN CASKS OF GLASS WARE.

[4 Law Rep. 36.]

District Court, S. D. New York. March, 1841.

EVIDENCE—PROOF OF FOREIGN LAWS.

Printed statute books of the parliament of Great Britain, purchased of the queen's printer, are admissible as prima facie evidence of the laws contained therein.

[Cited in The Pawashick, Case No. 10,851; Dundee Mortgage & Trust Inv. Co. v. Cooper, 26 Fed. 669.]

On the trial of this cause before BETTS, District Judge, and a jury, Mr. Hoffman, district attorney, offered to read in evidence printed acts of parliament, 5 & 6 Wm. IV., and 1 & 2 Vict., in relation to the exportation and drawback duty on glass, and called a witness who testified that he was in London in 1838, and went to the parliament printing house, to procure the said acts of parliament, but was referred to the queen's printer as the only one who could furnish them; that he accordingly went to the store of the queen's printer, and there purchased the acts in question.

Mr. Patterson, for claimants, objected to the admissibility of the statutes as evidence, contending that the district attorney must prove them by producing exemplifications under the great seal of England, authenticated by the secretary of state for foreign affairs or by a sworn copy compared with the rolls of parliament; and he cited several cases to that effect.

BETTS, District Judge. The ancient strictness of the rule respecting the proof of foreign laws has been much relaxed in England, and more so in the United States, of late years. The cases cited by the counsel show what the law has been on the subject, and also indicate some of the modifications of its former rigor, which have become incorporated in the modern practice; and it may be added, that in this state, until comparatively a recent period, not only was such strictness of proof exacted in respect to the laws of foreign nations, and of our sister states, as foreign laws, but even the statutes of our own legislature could not be read, of right, from the statute book. At this day, it is believed that in most of the states, and in the courts of the United States, the public laws are read from the printed statute books of the respective states, and such publications are accepted as at least prima facie evidence of the law. See Farmers' & Mechanics' Bank v. Ward [unreported]. I am not aware of any higher authority than a like usage and general acquiescence in it, for reading the acts of congress in this court from the statute book, nor why, if the rule adverted to is to be administered as it was formerly laid down, the district attorney should not be driven to produce exemplifications of every statute of congress offered in evidence here. In whatever terms the rule may be sometimes expressed, it seems to me, such cannot be its spirit; and if executed according to the letter, clearly the highest or best evidence would not be an exemplification under a foreign seal, but the oath of the king himself, perhaps, who sanctioned the law, or of the public functionaries who were present when it was enacted or passed through all the forms rendering it completely a law. The cases speak of foreign laws as facts to be proved by the best evidence; but certainly the spirit of the cases, particularly in the courts of the United States, regard the promulgation or publication of the foreign laws as the fact to be proved, and not the formula of their enactment or registration. It is no less the law if the law-giver declares it by proclamation or insertion in a newspaper, than if inserted in the roll of the tower, and accordingly it would seem that the only essential matter to be proved, is, whether it has been published and promulged as the law of the country. The fact of publication may be proved by evidence competent to establish any other fact in pais. The act being that of a sovereign, does not necessarily demand a different order of proof, than if it was the declaration or ratification of a private person. In this point of view, I think the evidence is admissible. But in my opinion, foreign statutes in relation to the navigation, exports and imports of the country may be read in evidence as history of its policy, and upon the same principle that its annals are read to prove changes of succession, changes of dynasty, or other political events, and facts of a public and notorious character. If the offer of the proof rested upon the statutes only, I should receive it as sufficient prima facie evidence, because, if the rule in this behalf is yet unsettled and dubious, it is time that the highest tribunal of this land should declare and determine it. And I may add, I should regret to see the United States behind England in recognising and administering this rule of evidence, upon liberal and philosophical principles, and that whilst the public laws of this country are read there, in the first instance, without question, we should exclude from our courts like proof of the laws of England.

Case No. 14,765.

UNITED STATES v. CERTAIN CIGARS, ETC.

[1 Woods, 306.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1873.

FORFEITURE — LOST MANIFEST — CARGO NOT UNSHIPPED.

On the trial of a libel for the forfeiture of certain goods imported into the United States, because the vessel had no manifest of her cargo on board, it was shown that no part of the cargo had been unshipped after it was taken on board, and that a manifest had been delivered to the master by the consignors on the day the vessel cleared, but had been inadvertently lost by him before the ship sailed; *held*, that the case fell within the proviso of the 24th section of the act of March 2, 1799 (1 Stat. 646), and that the goods ought not to be condemned.

[Appeal from the district court of the United States for the district of Louisiana.]

J. R. Beckwith, U. S. Atty.

T. J. Semmes and E. C. Billings, for claimants.

WOODS, Circuit Judge. The 24th section of the act of March 2, 1799, entitled "An act to regulate the collection of duties on imports and tonnage" (1 Stat. 646), provides "that if any goods, wares and merchandise shall be imported or brought into the United States in any ship or vessel whatever, belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board, * * * or which shall not be included or described therein, or shall not agree therewith, * * * all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such ship or vessel, shall be forfeited; provided, always, if it shall be made to appear to the satisfaction of the collector, naval officer and surveyor, or to the major part of them, * * * or to the satisfaction of the court in which a trial shall be had concerning any such forfeiture, that no part of the cargo of such ship or vessel had been unshipped after it was taken on board, except such as shall have been particularly specified and accounted for in the report of the master, or other person having the charge or command of such ship or vessel, and that the manifests had been lost or mislaid without fraud or collusion, or that the same was or were defaced by accident, or incorrect by mistake, in every such case the forfeiture aforesaid shall not be incurred."

The libel in this case is filed for the forfeiture of certain cigars and brandy alleged to have been fraudulently imported into the United States from the island of Cuba, about the 25th of November, 1871, on a vessel called the Frank Atwood, said goods being consigned to the master, mate, officers and crew, and not being disclosed or included or described in any manifest of the cargo on board the said vessel, and because the said vessel had no manifest of her cargo aboard. The answer of claimants denies that the goods were consigned as in the libel alleged; denies they were fraudulently imported, but admits that at the time of the arrival of the vessel at the port of New Orleans, the Frank Atwood had no manifest on board, but avers that when she left Havana, from which port she sailed direct to New Orleans, she had a complete manifest of the cargo, with every feature that the law required; that no part of the cargo was unshipped after it had been taken on board, and that the manifest had been by the master lost or mislaid. This answer presents a perfect defense to the libel. Does the evidence sustain it? It is established that the Frank Atwood sailed from Havana direct to New Orleans, and that no part of the cargo was unshipped during the voyage. It further appears in evidence that a manifest of the entire cargo was made up in the office of Bances & Co., in Havana, and with all the ship's papers put in an envelope and handed to the captain, on the day the ship cleared, which was the 12th of November, and on the 13th she sailed. This testimony is uncontradicted, and I have been unable to find anything in the record to throw suspicion upon it.

It is claimed by the district attorney, however, that there is no evidence to show that the manifest was ever on board the schooner; that if it was lost by the captain before he sailed as there is some evidence tending to show, the defense is not made out. I do not so understand the law. It is an attempt at fraudulent importation that the law punishes. If the captain of the vessel, between the office of the consignors and his ship loses the manifest, and sails supposing it to be among the ship's papers, and the fact of such loss is made to appear, the cargo is protected by the statute. The loss of the manifest is made probable by the fact that under the circumstances of this case, there was nothing to be gained by sailing without one, or by destroying it after sailing. I think the claimants have brought themselves within the protection of the proviso of section 24, and that this libel must therefore be dismissed.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

UNITED STATES v. CERTAIN DISTILLED SPIRITS. See Cases Nos. 11,493–11,495.

Case No. 14,766.

UNITED STATES v. CERTAIN HOGSHEADS OF MOLASSES.

[1 Curt. 276.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1852.

APPEAL—TERM—CUSTOMS DUTIES—EVIDENCE OF DUTIES NOT PAID.

1. An appeal from the district court is properly entered at the term of the circuit court, begun next after the entry of the decree in the district court, although the term of the district court, during which the degree was entered, had not been ended when the term of the circuit court was begun.

[Cited in U. S. v. The Glamorgan, Case No. 15,214; The Major Barbour, Id. 8,984; The Oriental, Id. 10,578.]

2. If an entry does not contain a part of the goods consigned by the same invoice and bill of lading, it is prima facie evidence that the duties have not been paid.

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a motion to dismiss an appeal from a decree of the district court on an information in the admiralty for the reason that the term of the district court at which the decree was entered had not ended when the term of the circuit court, at which the appeal was entered, was begun.

Mr. Lunt, U. S. Dist. Atty.

Mr. Bell, for claimant.

CURTIS, Circuit Justice. The question depends upon the construction of the twenty-first section of the judiciary act [1 Stat. 83], for although the act of March 3, 1803 [2 Stat. 244], also gave an appeal from the district to the circuit court, yet it has been held by the supreme court (U. S. v. Nourse, 6 Pet. [31 U. S.] 496), that the act made no change in respect to such appeals, except to reduce the necessary sum from three hundred dollars to forty dollars.

In The Montgomery v. The Betsey [Case No. 9,734], Mr. Justice Story says the appeal should be to the circuit court held next after pronouncing the decree. The precise point was not before him for adjudication, but on examining the language of this section of the judiciary act, and especially the proviso, it is quite clear his interpretation was correct. Motion overruled.

The appeal having been heard on its merits, the following opinion was pronounced by

CURTIS, Circuit Justice. The district attorney having filed an ex officio information in the admiralty against this property, founded on the sixty-eighth section of the collection act of March 2, 1799 (1 Stat. 677), the district court decreed a forfeiture, and the claimant appealed. That section provides, that any merchandise, subject to duty, and on which the duty shall not be paid, or secured to be paid, which shall be concealed in any vessel or other place, shall be forfeited. The first question is, whether this merchandise was concealed, within the meaning of the act. I am of opinion it was. It did not appear on the manifest, or invoice of the cargo. It was not entered at the custom-house, or in any manner made known to the collector, or any officer of the customs, by the consignee or master; nor did the consignee at any time manifest any intention to enter it, or to correct any mistake in his entry of the residue of the cargo. He gave to the stevedore, whom he employed to discharge the cargo, directions to discharge only one hundred and eighty-three casks, the amount entered for duties, and no more, and to go down to the skin, leaving the residue in the ends of the vessel, and when this amount had been discharged the hatches were put on as if the cargo had been all out. I am satisfied the consignee knew the invoice did not contain all the molasses, before the discharge of the cargo was commenced, and there is much reason to believe that part was omitted by his own express direction to the consignor; yet, instead of making, or taking any step to make a port entry, he gives directions to leave the residue of the cargo in the ends of the vessel, has the hatches replaced, and the vessel is about to be warped to the flats, for the purpose of scraping her bottom, as if her discharge had been completed, when she is stopped by an officer of the customs.

Several points have been taken in behalf of the claimant. First, it is said a seizure is necessary, and none is proved. It is not necessary to decide whether an actual seizure by an officer of the customs is one of the prerequisites of a forfeiture under this section, because, in this case, such a seizure is admitted by the answer which avers it was made without probable cause.

It is further argued that it does not appear that the goods were dutiable, or if so, that the duties had not been paid, or secured to be paid. That molasses imported from Porto Rico was dutiable, is known to the court as matter of law The claimant entered for duties 183 casks, as imported from that island in this vessel. These 183 casks must have been put on board after the residue, from their place of stowage. It is therefore a fair, not to say necessary presumption, that the whole was on board of the vessel when it sailed from Ponce, and was brought from thence; and if so, the presumption is, it was there shipped, and was the produce of that island, and the burden is on the claimant to prove the contrary. Of this there is neither proof nor the slightest probability. The information properly contains the negative allegation, that the duties had not been paid, or secured to be paid, on these goods, and it must be supported by the requisite prima facie evidence. The entry made by the claimant is produced, and it covers only the 183 hogsheads. This is sufficient prima facie evidence that he had not

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

paid or secured the duties on the residue, for he could do neither without entering them.

It is further urged that it does not appear that the goods seized were not part of the 183 casks entered, and on which duties were paid. But it does appear, that those seized were what were left in the vessel after 183 casks had been discharged; and the claimant having entered for duty that number of casks, and regularly discharged that number under the inspection of the officers of the customs, as being the merchandise entered by him, it is too late for him now to suggest that what he so landed was not entered, and what he concealed on board was entered. Let the decree of the district court be affirmed, with costs.

Case No. 14,767.

UNITED STATES v. CERTAIN PIECE OF LAND.

[1 Sawy. 84:[1] 11 Int. Rev. Rec. 126; 17 Pittsb. Leg. J. 128.]

District Court, D. California. March 31, 1870.

INTERNAL REVENUE—FORFEITURE—EXTENT OF—REAL ESTATE CONNECTED WITH DISTILLERY—USE.

The lot or tract of land, as intended in sections 6–8, 44, of the Act of 1868 [15 Stat. 126], of which a description is to be given, or which is required to be unencumbered, or for the value of which a bond is to be given, and which it is forbidden to encumber, and which under section 44 may be forfeited, is, as declared in section 7, the real estate and premises connected with the distillery, that is used in connection therewith to facilitate the carrying on of the business and conducive to that end, and does not include such pastures, orchards and vineyards as are in no other way connected with such distillery than that they are contiguous and under the same ownership.

[This was an action for forfeiture of a certain piece of land claimed by V. Spreckens.]

F. M. Pixley, for the United States.

J. J. Williams, for claimant.

HOFFMAN, District Judge. This action is brought to enforce a forfeiture under the forty-fourth section of the act of 1868. The section provides, in substance, that any person who shall carry on the business of a distiller, etc., without having paid the special tax, or without having given bonds as required by law, shall forfeit all the right, title and interest of such person in the spirits, wines, stills, apparatus, etc., owned by such person, and the personal property found in the distillery or rectifying establishment, or in the store or other place of business of the compounder, or any building, room, yard, or enclosure connected therewith and used with or constituting part of the premises, and all the right and interest therein of such person in the lot or tract of land on which such distillery is situated.

At the trial, the violation of the law was clearly proved, and the only question that arises is as to the extent of the forfeiture under the last cited clause of the act. It appears that the claimant is the owner of a tract of land or farm one hundred and thirty acres in extent. It is variously cultivated, and consists of fruit orchards, vineyards of several varieties of grapes, a pasture lot, barley field, and a mountainous and wooded tract not under cultivation.

It is claimed on the part of the United States that the whole of this farm is forfeited as constituting the "lot or tract on which the distillery is situated." It is apparent that if the statute is to be so construed in this case, it must receive the same construction in all cases, notwithstanding that the tract of land may be a rancho many square leagues in extent. The statute would thus be construed to impose a forfeiture of all the real estate owned by the offender, of which the site of the distillery formed a part.

The operation of such a law would not only be harsh but unequal—for it would make the amount of the forfeiture depend, not on the value of the distillery establishment and the presumed magnitude of its operations, but upon the accidental circumstance that the illicit distiller happened to own a large tract, on the corner of which a still, perhaps of insignificant proportions, was erected.

In section 7, the forfeiture for failing or refusing to give bond is, "of the distillery, etc., and all real estate and premises connected therewith." There would seem to be in this section an intention to limit the forfeiture to such real estate and premises as were used in connection with, or as auxiliary to, the illicit business.

The statute not only punishes the offender personally, but it regards the instruments and apparatus he has used in the commission of the offense, or which are conducive to the carrying on of the business, as tainted with the crime, and confiscated. But real estate, pasture, orchard, or wood lots, the homestead of the family, etc., which have no connection with the unlawful business, which were not used in it, or contributed in any degree to facilitate its prosecution, are not by the 7th section declared to be forfeited.

The 8th section provides that no bond of a distiller shall be approved unless he is the owner in fee of the lot or tract of land on which the distillery is situated, or unless he shall file the written consent of the owner, mortgagee, judgment creditor, etc., that the lien of the United States for taxes and penalties shall have priority, etc.

In case the distillery is on leased premises, a bond may be substituted, of which the penal sum is to be the appraised value of said "lot or tract of land," together with the buildings, distilling apparatus, etc.

If, under this section, the owner of a rancho several square leagues in extent, should offer his bond for approval, would the assessor be required to reject it, if it should

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

appear that a tract of a few hundred acres, perhaps five or ten miles distant from the distillery, was under mortgage? Or if a leaseholder were to make a similar application, should he be required to give a bond of which the penal sum must be the appraised value of the entire rancho?

The same question is presented under section 6. By that section the distiller is required to give "a particular description of the lot or tract of land on which the distillery is situated." Is he, under this section, to give the boundaries of his whole rancho, and to include all the real estate owned by him not separated by intervening property from the spot on which the distillery is erected? By the 7th section, the distiller is required to give bond that he will not suffer the "lot or tract of land on which the distillery stands, or any part thereof, to be encumbered by mortgage, judgment or other lien." Is this to be construed as prohibiting him from mortgaging, or perhaps even selling any part of the farm or rancho within the exterior boundaries in which the distillery is situated?

It seems to me that to these questions but one answer can be given. The lot, or tract of land of which a description is to be given, or which is required to be unencumbered, or for the value of which a bond is to be given, and which it is forbidden to encumber, and which under section 44 may be forfeited, is, as declared in section 7, the real estate and premises connected with the distillery; that is, used in connection therewith, to facilitate the carrying on of the business, and directly or indirectly conducive or contributory to that end. It will include all buildings, yards, enclosures, offices, stables, wine-cellars, etc., used in the illicit business. But it ought not to include dwelling-houses, pasture or sowing lots, etc., or village lots and houses, which, though owned by the offender, are not in any way employed in his business as a distiller, which may be occupied or rented by other persons, and which, so far as the illicit manufacture is concerned, might as well have belonged to any one else.

The language of the statute is "lot or tract" of land. The latter word may have been used as synonymous with the former and to indicate a village or town lot which, being of definite boundaries and usually of limited size, might not unreasonably be deemed to be used and occupied for the purposes of the illicit business. An adjoining lot, though owned by the offender, would not under this provision be forfeited. It would be strange if the circumstance that the distillery was situated on an extensive farm in the country, should involve in the forfeiture, pasture, grain and wood lots, orchards, vineyards, dwelling-houses, and even it might be village lots, remote from the scene of operations of the distillery and having no connection with it.

In the plat of the survey of the farm sought to be forfeited in this case, there is laid down a tract of land a few acres in extent, adjacent to the distillery, and including that building, the wine-shed, tank, etc. It is separated by a road from a vineyard of table grapes, which lies on the west; on the north, by a road running near or along a brook, from a barley field; on the east, by a fence, from a pasture lot; and on the south it is bounded by the exterior boundaries of the farm. It seems to me that to this tract the forfeiture should be limited. A judgment to this effect will be entered.

Case No. 14,768.

UNITED STATES v. CERVANTES.

[1 Hoff. Land Cas. 9.] [1]

District Court, N. D. California. June Term, 1853.[2]

MEXICAN LAND GRANT — CONCESSION — APPROVAL OF DEPUTATION—CONDITIONAL GRANT.

1. To constitute a definitively valid or complete title two things are necessary—First, a concession by the governor; and secondly, the approval by the territorial deputation, or, in the event of their refusal, by the supreme government.

2. Where the condition of a grant, which had not been approved by the deputation, required a house to be built and the land cultivated within one year from its date, and no house was built or cultivation made within six years, *held*, that the claimant had, under the rules of decision laid down by the supreme court, no equities which entitled him to a confirmation.

Claim [by Cruz Cervantes] for [the rancho of San Joaquin or Rosa Morada] a tract of land within boundaries supposed to contain two sitios of ganado mayor, granted to appellee on the first of April, 1836, by Nicolas Gutierrez, superior political chief, ad interim, of California. The claim was confirmed by the board of land commissioners. The United States appealed.

S. W. Inge, U. S. Dist. Atty.
Jones & Strode, for appellee.

HOFFMAN, District Judge. This case comes up on appeal from the decree of the board of commissioners to ascertain and settle private land claims in California. Could I have consulted my inclinations, I should have refrained from expressing opinions upon any of these cases, and would willingly have contented myself with affirming pro forma every decision of either the former or the present board, and remitted the case to that tribunal by whose decisions alone these questions will be finally determined. But I have not felt at liberty to shrink from this part of the duties imposed by law upon this court, nor to withhold the expression of its opinions, however immaterial, as regards the final results, its decisions may be. If these opinions shall, on some points, differ from

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 16 How. (57 U. S.) 619.]

the conclusions to which the board of commissioners has in this case arrived, it is with the full knowledge that their opportunities for examination and consideration have been far greater than my own, and that in dissenting from them I may fall into error. Were the consequences of my decision more serious, it would not be without great regret that I should find myself led to a conclusion differing in any respect from the opinions of so able and learned a tribunal.

By the fifth article of the rules and regulations of November 21st, 1828, prescribed by the general government, in pursuance of the sixteenth article of the general colonization law of 1824, it is provided "that grants to private persons or families shall not be held to be definitively valid without the previous consent of the territorial deputation, to which end the respective expedientes shall be forwarded to it." In this case, no approval of the territorial deputation is shown.

It is clear, from the very terms of the law, that to constitute a "definitively valid" or complete title, two things were necessary,—First, a concession by the governor; and secondly, the approval by the territorial deputation, or, in the event of their refusal, by the supreme government.

It is contended that the original grant or concession by the government passed a perfect title or estate in fee to the claimant, subject only to the condition that it might be annulled by the refusal of both the territorial deputation and the supreme government to confirm it. I have been unable, after much consideration, to assent to this construction of the regulations of 1828. The concession does not, on its face, purport to be an absolute grant; for the land is declared to be "the property of the petitioner, subject to the approval of the deputation." The right of granting being by law vested in the governor, with the approval of the deputation, or, in case of their refusal, that of the supreme government, I do not perceive how, without such approval, the complete title can be deemed to have passed. If the refusal of the deputation is considered merely a condition subsequent, which on its happening would divest a fee previously vested, the effect attributed to it is precisely that of the other conditions in the grant, admitted to be conditions subsequent. But these conditions operated on an estate supposed to have become "definitively valid." Can it be said that that which the law declares necessary to the "definitive validity" of a grant is identical in its effect with a condition which, on its happening, will divest an estate already "definitively valid?" That the grant by the governor had some validity is not denied. It was the performance of a part, perhaps the most important part, of the acts necessary to complete the title; but it was not the performance of all, nor did it purport to be. Until, then, either the territorial deputation or the supreme government had given their approval, the grant remained not "definitively valid," or in other words, inceptive and incomplete; and a confirmation and patent by the United States are necessary to pass the absolute title to the claimant.

Any other view of this question would, it seems to me, deprive the deputation of the important functions entrusted to them. Their right was not merely a qualified right to take from a petitioner land already absolutely granted to him, but it was the right to say whether or not the land should be granted to him at all; and until they or the supreme government had consented to the grant, the absolute or complete title cannot be deemed to have passed out of the Mexican nation. The title, then, of the claimant being found to be inchoate or imperfect, his right to a confirmation and perfection of it by the government of the United States must be tested by the principles laid down in similar cases by the supreme court. Had he gone on to perform the conditions, and confer the benefits on the Mexican nation, as stipulated for in his grant, no objection could be urged why this government, succeeding, as it does, to all the rights and duties of Mexico, should not perfect his title. That the settlement and cultivation of the vacant lands of the republic formed the sole consideration of these grants is not disputed; and in this particular case the ability of the petitioner to render this equivalent for his concession seems to have been the subject of particular investigation, for the governor is at pains to inform himself whether or not the petitioner had, as he alleged, any stock to put on the land, or the means of getting any.

The grant bears date on the first of August, 1836—and is made on condition, among other things, that the petitioner shall within one year, at farthest, build on the land a house, which shall be inhabited. It is subsequently provided that should he contravene these conditions, "he shall lose his right to the land, and it may be denounced by another." The juridical possession which the grant directs him to solicit of the respective judge, was never applied for until the year 1841; and no occupation or cultivation of the land by him is distinctly shown until 1846, ten years after the grant. The witness Godey testifies that in 1846 he saw the claimant residing on the rancho; and adds, that the house he lived in seemed to be several years old. Pacheco, the only other witness on this point, states that he does not exactly recollect the time when the claimant began to reside on his rancho, but thinks it was about two years after the revolution of Chico and Gutierrez. So far, then, as appears, there was a total neglect on the part of the claimant to comply with any of the conditions of the grant for a period of from five to eight years. If, then, we are right in regarding the title he has received only as inchoate or imperfect, the necessary authorities not having concurred in making the grant, the inquiry presents

itself, has he a right to demand of the United States that they should go on and perfect it? There is no doubt that under the treaty, as well as by the laws of nations, such title as the claimant had acquired when the sovereignty was changed, was secured to him as private property, and the question is, what was that right, according to the laws and usages of Mexico at the time of the cession? If the title is to be decreed, and a patent awarded, it must be on the same grounds as those on which the Mexican authorities would have been bound to decree it had a perfect title been solicited from them. De Villemont v. U. S., 12 How. [53 U. S.] 267; Glen v. U. S., 13 Pet. [38 U. S.] 257.

The rule as laid down in U. S. v. Kingsley, 12 Pet. [37 U. S.] 484, is, "that the United States succeeds to all those equitable obligations which we are to suppose would have influenced the former government to secure to its citizens their property, and which would have been applied by it in the construction of a conditional grant to make it absolute; and further, that the United States must maintain a right of property, under the treaty, by applying to it the laws and customs by which those rights were secured before the cession of the country, or by which an inchoate right of property would, by laws and customs, have become a perfect right." The inquiry is not so much what would the Mexican authorities, had there been no change in the circumstances of the country, or in their policy, have in point of fact done, as what they were, by their laws and customs, and in equity and good conscience, bound to do. Were they bound to confirm and perfect the title of this claimant? or were they at liberty to consider his rights as abandoned and lost, and refuse to accept, after so long a delay, his performance of the conditions of his concession, and treat the land as having reverted to the public domain, to be disposed of as present circumstances or policy might require? Grants or concessions of land upon condition have been repeatedly confirmed by the supreme court. It will, it declares, liberally construe a performance of conditions, precedent or subsequent, in such grants; nor will it "apply, in the construction of their conditions, the rules of the common law." U. S. v. Kingsley, ubi supra. Thus, where the full performance of the condition must have been a matter of indifference as well to the king of Spain as to the United States, after the cession of Florida, it appearing that a performance had been commenced within the time limited, the grant was confirmed. Arredondo's Case, 6 Pet. [31 U. S.] 691. So, when the grantee had in good faith begun to build his mill (which was the condition of his grant)—expended five thousand dollars towards it—had his horses and negroes stolen, while his mill was being built—had his mill dam carried away by a freshet—rebuilt his mill in 1827, which was destroyed by fire the same year—and the year after built another, of seventy horse power—the court determined that the claimant had shown a sufficient performance of the condition, cy prés—and the acts he had done amounted to a compliance with the condition, according to the equitable doctrines governing such cases. On the other hand, where, by the condition of the grant, one year was allowed for making the improvements required by the regulations, and three years for making an establishment on the premises, and the claimant never took possession of the land until long after the cession of the country, the court rejected the claim, disregarding the excuse offered by him, that hostility of the Indians, and official duties, prevented him; and observing that as to the first, he took his concession subject to that risk; and as to the second, that he held his office when the concession was made, and knew its duties. The court even went so far as to say, with reference to the condition, "that it was undoubtedly necessary that an establishment should be made within three years—such being the requirement of the concession, in concurrence with the regulations." In U. S. v. Boisdoré [11 How. (52 U. S.) 63] the consideration of the grant was, that a stock farm should be established on the land solicited, and that such an establishment was to be "for all the family" of the petitioner; and on it he was to employ all his force of negroes. The evidence showed an occupation of the land for forty years; that it had been cultivated, to some extent, from the date of the grant, and that stock had been kept there, but that such occupation had been by only a single mulatto; and that the petitioner had abandoned the idea of taking his whole family to the place, and employing all his negroes there. The court considered it altogether inadmissible that such trifling occupation, in utter neglect of Boisdoré's promises to the Spanish authorities and the duties imposed by his grant, fastened an equity on the conscience of the king of Spain to complete the grant. It may be proper to remark, however, that it is stated in the dissenting opinion of Mr. Justice McLean, that the grant was rejected by the majority of the court for want of certainty in its calls.

It is urged with much earnestness and ability by the counsel for the claimant, that the only penalty attached to a nonperformance of the conditions of the grant was that the land was liable to be denounced by another—and that upon such denouncement it might have been regranted, if then vacant; but that no denouncement having been made, nor the Mexican authorities availed themselves in any way of their right to treat the land as having reverted to the public domain, and the petitioner having gone on to perform the conditions, with the acquiescence of the government, he ought not now to be disturbed. I am deeply impressed with the force of these considerations. But if the view taken of the effect of the absence of the approval of the deputation be correct, the land cannot be

deemed to have been at any time finally alienated by the Mexican authorities; and the question is not whether a forfeiture should be insisted on, but whether the United States are bound to complete a transfer of their property which has as yet been only partially made. It cannot, I think, be denied that after the expiration of the year from the date of the grant, and up to the time when the claimant performed the conditions, the land, by Mexican law and usage, might have been denounced and regranted. Such was the express condition of the grant. But that condition also provides that in the event referred to, the petitioner shall lose his right to the land. Whether or not in the case of a complete and final grant the Mexican government could only take advantage of the forfeiture by the process of "denouncement," it is not necessary to inquire—for this is not a complete grant. It would seem far more reasonable to suppose that it could. The condition provides that the petitioner shall "lose his right to the land" in case of its violation. If, upon denouncement of the land, it could have been regranted, it would seem that the government must have had the right to make any other disposition of it which any change in their policy or circumstances might require. Whether such regrant or other disposition would have been made without a previous inquisition into the fact of forfeiture is not very clear. By the eleventh article of the regulations of 1828, it is provided that the governor shall designate to the new "poblador" a suitable time within which he shall occupy and cultivate the land under the conditions, and with the number of families stipulated for, with the understanding that if he shall not do so the grant shall be null. In this case, at least, it would seem that the title vested in the government ipso facto on the happening of the breach. But the inquiry in the case at bar is immaterial, for the full title has never passed out of the Mexican government; and the question is not whether the United States acquired, by the treaty, a right to enforce a forfeiture, but whether the claimant has a right to require this government to complete his title. No facts appear upon the record which serve to explain or excuse the long delay of the claimant; nor is there any very distinct proof of the nature of the occupation he finally took, or at least of the extent of the cultivation or amount of expenditures made by him upon the land. Had the Mexican government, at the date of the cession of this country, found itself in the precise position of the United States, with its interests, its policy, and the circumstances of the country radically changed, it is more than doubtful whether it would or ought to have felt itself bound to complete this grant, as the United States are now urged to do. If there was no obligation upon them to do so, and they were at liberty to refuse or comply, we are in the same situation, and the confirmation of this title must be obtained from another department of this government. Were I at liberty to follow blindly the dictates of my own judgment, I might, perhaps, have confirmed this title. But governed as I am bound to be by the principles established by the supreme court, I have been unable to resist the conviction that a confirmation of this claim would be a departure from the spirit, if not the letter of the rules of decision laid down in the more recent cases. If those rules are hereafter to be modified or departed from, it must be by the tribunal by which they were established. And if, in this case, the equities of the claimant can receive at its hands a more liberal construction and a more favorable consideration than I have felt at liberty to give them, no one will acquiesce in the result more cheerfully than myself.

Since the above was written, I have been informed by Señor Covarrubias, an intelligent Mexican gentleman of this country, that the revolution of Chico and Gutierrez occurred in the year 1836. The "revolution" seems to have been one of those transient and slight disturbances so common in this country, and more to be likened to the outbreak of a mob or a riot in a city than one of those historical events of which judicial notice could be taken. But assuming that the court is judicially informed of the date of its occurrence, the claimant has still, under Pacheco's testimony, failed to comply with the conditions of his grant for more than one year after the expiration of the term limited for their performance; nor does he prove, allege, or pretend the slightest excuse for so doing. But the testimony of Pacheco is inconclusive. That witness says he does not exactly recollect the time when claimant commenced residing on his rancho, but believes it was about two years after the revolution of Chico and Gutierrez. The evidence, however, shows that judicial possession was not applied for till 1841, five years after the grant. Pacheco was one of the assisting witnesses on that occasion, and he does not say that at that time even the claimant had ever built a house or cultivated the land. If the witness who, in 1846, saw a house on the rancho which seemed to be "several years old," is to be believed, the fair inference is that the house could not have been built before 1842 or 1843, six or seven years after the grant. On the whole, I conclude that there having been no performance or attempt at performance until long after the expiration of the term limited, and no excuse being suggested or pretended, I am not at liberty, under the rulings of the supreme court, to confirm the imperfect title of the claimant. Upon the other questions made in this case it is unnecessary to express an opinion.

[NOTE. The cause was taken on appeal to the supreme court, where the decree above was reversed, and the cause remanded to this court, with instructions to permit certain amendments to be made in the pleadings. 16 How. (57 U.

S.) 619. The decree of this court confirming the claim of Cruz Cervantes (Case No. 2,560) was affirmed on appeal to the supreme court. 18 How. (59 U. S.) 533.]

UNITED STATES (CERVANTES v.). See Case No. 2,560.

UNITED STATES (CHABOLLA v.). See Case No. 2,566.

Case No. 14,769.

UNITED STATES v. CHABOYA.

[Cal. Law J. & Lit. Rev. 71.]

District Court, N. D. California. Oct. 31, 1862.

MEXICAN LAND GRANT—ABSENCE OF GRANT—NOTORIOUS AND EXCLUSIVE POSSESSION—PROOFS.

1. To entitle a claim to confirmation where there has been no grant, clear evidence must be presented of a long-continued, notorious, and exclusive possession under claim of ownership of a tract of land of definite boundaries, and of the recognition of the proprietory and possessory rights of the claimant by his neighbors and by the authorities of the former government.

2. The proofs in this case fail to show an exclusive occupation or possession by the claimant of the tract claimed, or any general recognition of his rights thereto, as proprietor, by his neighbors, or by the Mexican authorities.

The claim in this case was originally confirmed on uncontradicted testimony, which seemed to establish beyond doubt the occupation and possession of the land, by permission of the Mexican authorities, since the year 1837. [See Case No. 14,770.] The cause having been opened for further proofs as to the boundaries and extent of the land occupied by [Pedro] Chaboya, additional testimony was taken. On the second hearing, it was objected that the claim had not been presented to the board, but that the petition and proofs presented to that tribunal, and the decree from which the appeal had been taken, referred to another tract of land. On examination, this objection was found to be well taken, and the cause was dismissed for want of jurisdiction. Application for relief was thereupon made to congress, and a law was passed empowering this court to take jurisdiction of the cause, and to decide the same on its merits. It has therefore been submitted on the testimony originally taken, and also on that taken under the order of the court reopening the case for further proofs on the subject of boundaries.

It appears that, in the year 1837, Pedro Chaboya entered upon a piece of land adjoining the pueblo of San Jose. Whether this entry was first made by permission of the authorities of the pueblo is not clear. Pico swears that Chaboya occupied the land by permission of the ayuntamiento, and Fernandez states that "the judge loaned it to him." But these witnesses may, very possibly, refer to a subsequent permission to occupy, given by the alcalde, which will hereafter be noticed. The land upon which Chaboya settled was universally recognized as part of the "ejidos," or common lands, of the pueblo, and his occupation of it appears to have provoked immediate opposition on the part of a considerable number of the pobladores. On the 21st of December, 1837, Manuel Pinto, J. Anto. Sepulveda, Dolores Pacheco, and others presented to the ayuntamiento a remonstrance against putting certain persons in possession of sitios which, in the opinion of the remonstrants, were the common property of the pueblo. Chaboya, notwithstanding this remonstrance, appears to have continued in possession, and on the 29th of June, 1838, the same persons again address the ayuntamiento on the subject. In this last document the remonstrants state that, "having learned that Pedro Chaboya has presented a memorial soliciting the place named La Posa, for the purpose of building thereon a house and corral, and for the purpose of agriculture, although he agrees to inclose his fields, it is not our pleasure that the said señor, or any one else, should occupy said places, as they are so close to this community; the water and pastures, in the most rigorous season of the year being the most abundant, and very necessary for the use of our cattle and horses. It is, therefore, our desire that said land may be preserved for the community without there being placed upon the same the buildings or establishments of any individual. If the said Chaboya has a mind to unite himself to this community, it will be more agreeable to us that he should make his house in the pueblo, etc. The said place (paraje) of La Posa has for some time been occupied by Pablo Parra, and not without much prejudice to this community. One of the reasons is that his fields are without fences, for which reason our cattle cannot be left in the neighborhood of said place. And as a further reason why he should not occupy said place, information was taken by the present juez de campo which will give sufficient grounds for the removal of said place."

From this document, it would seem that Chaboya had petitioned the ayuntamiento for the place called La Posa for the purpose of building thereon a house and corral, and that he had offered to inclose his fields, so that his cultivations might not prevent the cattle of the inhabitants of the pueblo from resorting to the spring for water. This the remonstrants opposed. It appears, also, that the place had already been occupied for some time by one Parra, to the great prejudice of the community.

BY THE COURT. The testimony, in some particulars, confirms the statements of the remonstrance. It is stated, by several witnesses, that the land near the Posa was occupied by Parra, who built a small house, covered with tules and plastered with mud, into which Chaboya moved when it was left by Parra, in consequence of the opposition made by the pueblo to his making a house there. The records do not disclose what reply was made by the ayuntamiento to the remon-

strance of the pobladores. No permission to Chaboya to occupy the land, emanating from the ayuntamiento, is produced, nor is it claimed that any was given. The place called La Posa, or La Posa de San Bautista, is described by nearly all the witnesses as a marsh (cienega), or watering-place for cattle, to which all the stock of the inhabitants of the pueblo resorted. The terms of the remonstrance clearly indicate that the land to which reference was made was not a rancho of one or two leagues in extent, but a piece of ground near the common watering-place of the pueblo, for it states that the "said place" had been occupied for some time by Parra, and it is not pretended that he was ever in occupation of the whole tract up to the limits of the nearest rancheros. The offer of Chaboya to inclose his fields, which is referred to in the remonstrance, and was no doubt contained in his memorial to the ayuntamiento, would also seem to show that he was soliciting a small piece of ground of the ejidos of the pueblo, for the purpose of building on and inclosing it. It does not appear, however, that Chaboya was expelled from the place upon which he had thus settled; and on the 10th of May of the ensuing year (1839), Chaboya addressed a petition to the governor, soliciting the grant of a tract of the extent of two leagues, "between the boundaries of the Señores Bernals, the Señor Narvaez, of Joaquin Higuera, Antonio Chaboya, and five hundred varas on the side of the pueblo."

In this petition Chaboya asks the ownership of the land which he actually possesses with his house and cattle, with the permission of the prefecture of the district, and he states that the reclamations addressed against him to the government have been made by only four or five evil-disposed citizens, and are absolutely destitute of justice. The permission given by the prefecture, alluded to in this petition, is not produced; but it would seem, from the terms of Castro's report, to whom the petition was referred, that some proceedings before the prefect had already been had. On the 20th of May the governor directed the prefecture to report, and in the meantime that it should arrange that the interested party should be conserved in the possession in which he finds himself of the land solicited so long as the necessary procedure is going on. On the 25th of May, Castro, the prefect, reports that the petitioner ought to be excused from the usual procedure, as the prefecture had already taken and perhaps dispatched it, conformably to his solicitation, and that the reclamations of the residents of the pueblo, of which he had already informed the governor, really had no other design than to drive Chaboya from the place he had occupied for many years, and were absolutely destitute of justice. It appears that, at the time this report was made, the prefect had already fulfilled the governor's order directing Chaboya to be conserved in his possession. On the 22d of May, two days after the governor's order, Castro addressed to the alcalde of San Jose the following:

"You are directed not to move the citizens Jose Parra and Pedro Chaboya from the place where they are established until the ejidos of this poblacion are regulated.

"God and liberty.

"S. Juan de Castro, 22d May, 1839.

"Jose Castro.

"Senor Alcalde del Pueblo de Alvarado."

No further proceedings before the governor appear to have been taken, and it is admitted that no title was ever issued to Chaboya. In pursuance of the order of the prefect, an arrangement appears to have been made between the alcalde of the pueblo and Chaboya, which was embodied in the following document:

"Citizen Dolores Pacheco, Justice of the Peace of the Pueblo of San Juan de Alvarado: By superior order of the Hon. prefect of the First district, it is granted to the citizen Pedro Chaboya that he may dwell in the place called La Posa de San Bautista without building any house on foundations, or, still less, erecting substantial structures, for the term of two years, subjecting himself to pay annually six dollars; and he must aid the work of bridges, or any other that may be beneficial to him. Dolores Pacheco.

"Pedro Chaboya.

"S. Jose G. de Alvarado, February 29, 1840."

As the claim of Chaboya is founded on an alleged equity, arising from a long occupation, by permission of the former government, of a tract of land with definite boundaries, it is essential to ascertain, if it be possible, to what land this permission to occupy referred. We have seen that, in his petition to the governor, Chaboya asks the ownership of what he "actually possesses." In a subsequent part of the petition he gives the boundaries of the land he solicits. They include a tract of about two square leagues in extent. The governor directs the prefect to arrange that the interested party may be conserved in the possession in which he finds himself of the land solicited. Two days afterwards, the prefect orders the alcalde not to remove the citizens, Jose Parra and Pedro Chaboya, from the place where they are established until the ejidos of the poblacion are regulated. It is urged, on the part of the claimant, that this permission to occupy by the governor, enforced by the order of the prefect, referred to the whole tract included within the boundaries mentioned in Chaboya's petition. Such would undoubtedly be the natural construction of the governor's order, and Chaboya's statement that he was actually in possession of the whole tract, by permission of the prefecture, seems to be confirmed by the report of Castro, that the prefecture, in his charge, had already dispatched the proceedings conformably to Chaboya's situation, and that the opposition to him was unjust.

On the other hand, the order of Castro to the alcalde refers not to Chaboya alone, but

also to Parra, the latter of whom is stated, as we have seen in the remonstrance of the residents of the pueblo, to have been occupying the land for some time at the date of Chaboya's memorial to the ayuntamiento, against which they protested. Had the prefect intended that Chaboya should not be disturbed in the possession of the whole tract, or sobrante, between the pueblo and the lands of adjoining rancheros, it is not easy to see why Parra was included in the order to the alcalde. The language, too, of the prefect's order seems to imply merely a prohibition to remove Chaboya and Parra from the particular spot where they had established themselves, rather than a direction that they, or either of them, should be permitted to occupy exclusively a tract nearly two leagues in extent of the common lands of the pueblo. "You shall not remove the citizens, Jose Parra and Pedro Chaboya, from the spot (del punto) where they are established, etc.,"—seeming to indicate that they were merely to be allowed to reside on and cultivate the place which they then occupied. But the license of the alcalde to Chaboya, which the latter signed and apparently accepted, admits of no misconstruction. "By superior order of the Hon. prefect, it is granted to the citizen Pedro Chaboya, that he dwell (que habite) in the place (en el parage) called Posa de San Juan Bautista, without building any house on foundations, or erecting permanent structures, for two years, subjecting himself to pay six dollars annually, etc." The remonstrance of the pobladores had been directed against the occupation by Chaboya, or any one else, of the land near the Posa, as they desired that no buildings or establishments of any individual should be placed there. The alcalde, however, by order of the prefect, gave to Chaboya the right to reside or dwell on the place for two years; but he was to make no permanent establishment upon it, as it belonged to the ejidos of the pueblo, and it was expected to be included within them when their limits were assigned. That this was the meaning and effect of the license is proved by Jose Fernandez. This witness states that he was secretary of Pacheco, and that he wrote the license; that it was signed by Chaboya; that no boundaries were given to him, the object being merely to give him permission to reside at the edge of the Posa.

It is urged by the counsel for the claimant that the description of the tract on which Chaboya was authorized to dwell as the place ("el parage") called La Posa de San Juan Bautista, shows that a large tract was intended, the term "parage" being equivalent to "sitio," or "rancho." It is true that that expression is frequently used to indicate the large tracts of land solicited by and granted to the former possessors of this country. But it is an expression of very indefinite import, and may as well signify the small piece of ground where Chaboya had his house and inclosures as the large tract he now claims. The same term is applied in the remonstrance of 1838 to the land occupied by Parra, and it is not pretended that his occupation extended to the whole tract now claimed by Chaboya. Several of the claimant's witnesses say, in general terms, that the place called La Posa de San Bautista, was bounded by the rancho of the Bernals, that of Narvaez, that of Antonio Chaboya, and by the pueblo, but they are unable to describe its boundaries, except by reference to those of the surrounding ranchos. They evidently suppose that it included all the sobrante lying between those ranchos and the pueblo, wherever the boundaries of the former might be. On the other hand, Antonio Bernal, Anto. Ma. Pico, Francisco Bernal, and Jose Fernandez testify that the place known as Posa de San Juan Bautista was a spring or marsh designated by that name, where the cattle of the vecinos of the pueblo went for water; that the name was never applied to any tract of land; that Chaboya never had any recognized limits, and never was recognized as having any greater rights than any other individual vecino. Fernandez, who was almost constantly in office from 1839 to 1850, says that he never knew of any boundaries known and recognized as those of Chaboya. Had there been such they would certainly have been known to him; that the land now claimed by Chaboya was never recognized as his by the pueblo or its authorities, and that he never had possession of the lands within the boundaries now claimed by him. All the witnesses called by the United States concur in the statement that the lands between the three ranchos named in Chaboya's petition to the governor were always recognized as pueblo lands, and even the witnesses for the claimants admit that they were of the ejidos of the pueblo, and used and occupied by the community in common. Even Jose Noriega, though he states that "all that corner" was called La Posa, is unable to say how much land it contained; and he admits (answer to question 42) that "it had no limits."

It is unnecessary further to recapitulate the testimony on this point. After a careful perusal of it, I have been unable to discover that the term Posa de San Juan Bautista was ever applied to a tract of any definite and recognized boundaries. Chaboya himself, though he asks in his petition to the governor for all the land bounded by the ranchos of the Bernals, the Narvaez, Joaquin Higuera, Antonio Chaboya, and five hundred varas at the side of the pueblo, does not apply to the tract solicited the name of La Posa, or any name whatever. The fact seems to be that Chaboya settled near the spring or marsh of that name, much to the dissatisfaction of some of the residents of the pueblo; that he applied for a grant for all the sobrante between the pueblo and the adjoining ranchos, which he failed to obtain, but was, by order of the prefect and license of the alcalde, allowed to continue his residence on the spot where he

had established himself, under certain restrictions. But it is, perhaps, less important to inquire what were the limits of the tract known as La Posa, if any it had, than to ascertain whether Chaboya did in fact occupy and have the exclusive possession of any tract of determinate boundaries, of which he was the recognized owner, or, at least, occupant.

On this, the vital point to be established by him, the proofs are, unfortunately for his pretensions, too plain to admit of doubt. It cannot be contended that Chaboya ever had exclusive possession of the land he now claims, except of such portions as he cultivated and enclosed. The whole tract seems to have been considered and used as the common lands of the pueblo. The cattle of Chaboya were not brought to the Posa until 1842 or 1843, and then only to the number of some six or eight hundred. They undoubtedly ranged over the tract now claimed by him, and also at times wandered upon the adjoining ranchos. But so also did the cattle of the inhabitants of the pueblo, which were many times more numerous. That Chaboya cultivated various pieces of land in the vicinity of the Posa, and elsewhere, is admitted by all the witnesses. But it appears that several others of the vecinos of the pueblo had similar cultivations in various parts of the tract now claimed by him. Fernandez swears (answer 38): "The Posa was always occupied by the cattle of the pueblo during this time (i. e. from 1839). I saw cultivations in front of the Posa, about three hundred varas from it, in 1841, of one Buitron, of Miguel Mesa, of Gervacio Chaboya and Cruz Chaboya. I saw these four there cultivating a good-sized patch of corn and watermelons. The land was open to all as common land, but notice always had to be given to the alcalde." Antonio Bernal testifies that he has known the land since he was old enough to know any thing. That he was not acquainted with the boundaries of Pedro Chaboya. "He had no boundaries." The land was known and used as pueblo lands. "We had cattle there, the Pachecos, the Flores, the Pintos, Jose Feliz, the Sepulvedas and their brothers, the Mesas, and the people of the pueblo of San Jose. The Posa never was a rancho. It had no boundaries. Parra, Francisco Garcia, Sepulveda, Jose Bernal, had cultivations about a mile from Chaboya's house. They sowed there for two years by authority of the pueblo, but were turned out because they interfered with the cattle who came to drink at the Posa. I have attended Rodeos at the neighboring ranchos. Never knew the Posa considered as a rancho belonging to Pedro Chaboya. For all my lifetime I have considered it as belonging to the pueblo. He never had any boundaries respected and known as such by the pueblo or any one else. Jose Noriega, Jose Antonio Alvisu, Justo Larios, Pedro Zepeda, P. Mesa, witnesses for the claimant, all acknowledge that the lands claimed in this case were part of the ejidos or common lands of the pueblo; and most of them admit that they were free to all the vecinos for occupation for pasturage or cultivation by license of the municipal authorities. Jose Noriega (answer 52) says: "That Pedro Chaboya, having no title, could not have prevented the vecinos of the pueblo from grazing their cattle and cultivating the lands." Question 57: "Could not any of the vecinos who desired to do so have cultivated portions of said land, provided they did not interfere with or trespass upon the lands actually enclosed and cultivated by others?" Answer: "All the world could do it, though some asked the judge." Antonio Alvisu states that the land Chaboya was authorized to occupy, by permission of the pueblo, was all he could occupy with his cattle. He occupied all the plain. The witness admits, however, that the cattle of the people of the pueblo ranged over the same lands. Justo Larios, in reply to question 28, "Would not those lands have been free for the occupation of any of the vecinos of the pueblo, either for the purposes of grazing or cultivation by a license of the municipal authorities, except so far as they were actually occupied and cultivated by other vecinos under a similar license?" says, "I believe so." Pedro Zepeda (answer to question 40) makes the same statement, as does also Pedro Mesa (answers 31 and 32). I am not aware that any witness disputes the fact. That the large extent of land now claimed by Chaboya was not recognized as a rancho belonging to him by any title either legal or equitable, and that his right to the possession of it was not respected by his neighbors, nor admitted by the government or the pueblo, is not only positively stated by numerous witnesses, but in some degree proved by evidence from the archives. In none of the grants of adjoining lands, or of the documents relating thereto, is Chaboya mentioned as a colindante or adjoining occupant. The Narvaez grant was made in 1844, and the pueblo is named as bounding it on the side which adjoins the tract now claimed by Chaboya. If the rights, either possessory or proprietory of Chaboya, were generally known and recognized, it is strange that none of the diseños, the informes, or the grants of the ranchos up to the boundaries of which he now claims, make the slightest allusion to them. It also appears that, in 1844, Chaboya petitioned for two leagues of a tract called "Los Cerritos." This he failed to obtain. But if he was already in possession of a tract of nearly the same extent, his title to which was recognized and respected, his motive for applying for another tract whereon to place the 600 or 800 head of cattle he possessed, is not easily understood.

The statements of several of the witnesses principally relied on by the claimants to show the possession and occupation by Chaboya of the tract claimed are in some respects contradicted by their acts. It appears that, in 1847, the authorities and inhabitants of the pueblo determined to divide up and distribute

their common lands among the vecinos, in lots of 500 acres each. Among these lands was included the tract now claimed by Chaboya. In the proceedings to effect this object, Jose Noriega and Antonio Sunol assisted, so far as appears, without objection or protest against violating the rights of Chaboya, and they each, together with Pedro Zepeda, another of the claimant's witnesses, obtained lots which they have since sold. In 1849 Chaboya himself appears to have protested against an intrusion on his land by Salvador Castro; but he did not then or at any time pretend to have obtained a title, and bases his rights upon what he calls his tranquil occupation for more than ten years, and "the concession made by the political chief under the imposition of a rent," evidently referring to the license to occupy, given by the alcalde by order of the prefect. What the nature of that occupation was we have already seen.

It is urged, on the part of the claimant, that, though other persons cultivated portions of the land claimed by Chaboya, none of them had fences or made settlements upon the land. They all lived in the town. It is not stated, I believe, by any of the witnesses, that these cultivations were fenced; nor is it stated that they were not. As it is admitted that the cattle of the pueblo and of Chaboya ranged over the whole plain, it is extremely improbable that any one would have attempted to make cultivations unless they were protected by a fence. That they resided in the town may be admitted. Chaboya did not, because, contrary to the wishes of the remonstrants in 1838, he had obtained a license to dwell in the place called La Posa. But I am unable to see how this circumstance even tends to show that he was the recognized possessor of all the land lying between the pueblo and the adjoining ranchos. It is also strenuously urged that the fact that the cattle of the pueblo ranged over the land claimed by Chaboya, and that portions were cultivated by others, is of no importance to establish an adverse possession, for the cattle also roamed, and even some cultivations were made, on lands admitted to belong to adjoining ranchos. But the point is not whether the United States have shown an adverse possession by the pueblo, but whether the claimant has shown such an ancient, generally recognized, and undisputed exclusive possession of a tract of land, the boundaries of which were definite and respected by his neighbors, as will, in the admitted absence of a grant, entitle him to confirmation.

It is said that this claim must be confirmed on the authority of U. S. v. Alvisu, 23 How. [64 U. S.] 318. But the cases seem to me radically different. Alvisu applied in 1838 for a grant of land and for permission to occupy while the proceedings were pending. This permission was granted. In 1839, the order of the governor was exhibited to the prefect, who agreed to reserve the land, and that the claimant might occupy it. In 1840, the administrator of the mission of San Francisco reported that the land was unoccupied, and that it did not belong to the mission or any private person. The testimony showed unequivocally, that Alvisu had occupied the land since 1840, that he had cultivated and built a house upon it. The supreme court, in confirming the claim, observe: "No objection was made or is suggested why he should not have been a colonist of that portion of the public domain. And no suspicion exists unfavorable to the continuity of his possession and claim. He has been recognized as proprietor of this land since 1840." But in the case of Chaboya, strenuous and determined opposition to his obtaining a grant, or even residing on the spot he had selected, was made by the authorities of the pueblo from the beginning. Although Castro reported that this opposition was unjust, yet for some reason the governor refused to grant. And though by order of the governor, the prefecture "arranged" that he should be conserved in his possession, yet the license given by the alcalde and accepted by Chaboya was only a permission to dwell at the spot, without erecting a house or permanent fixtures on the land. It does not purport to be a permission to occupy a large tract with specified boundaries; and the testimony establishes, by a decisive preponderance of proof, that the place or "parage" called La Posa was not known as a rancho of definite limits. The exclusive occupation by Alvisu of the tract of which he obtained possession, and his recognition as its proprietor since 1840, were not disputed. The evidence in this case shows that Chaboya had no exclusive occupation whatever; that the cattle of the pueblo roamed over the land; that portions of it were cultivated by the vecinos; that it was universally regarded as part of the ejidos of the pueblo, and free, as his own witnesses admit, to be occupied by any of the inhabitants, by permission of the judge, for purposes of grazing or cultivation. That his failure to procure a title did not result from indifference or carelessness, may be inferred from the fact that his license to reside at the Posa was obtained nearly a year after the date of his petition to the governor, and that nearly five years afterwards he contested with Pacheco the right of the latter to "Los Cerritos," and, failing in his suit, applied to the governor for a grant of the sobrante of that rancho. It is not to be supposed that he would, when thus anxious to obtain land, have omitted to secure, had it been possible, a grant of the tract for which he petitioned in 1839, and to have quieted forever all disputes between himself and the pueblo, with which, as the witnesses say, "he was always in question."

In all the testimony I have been unable to discover any satisfactory evidence of the recognition of Chaboya's title, either by the government, the pueblo, or the adjoining rancheros. He was not, as Sunol says, molested by the pueblo, but he does not appear ever to

have asserted or attempted to enforce any exclusive rights to the tract now claimed, except to the portions which he, like any other vecino, cultivated and enclosed. With that exception, the land was used and considered as part of the "ejidos," nor does Chaboya ever appear to have given a rodeo, which would necessarily have involved the recognition of his boundaries as against the pueblo and the adjoining rancheros. Had the facts of the case been as supposed when the cause was first before the court, I should have had no hesitation in confirming this claim. But, after a very attentive consideration of the testimony, and with the strongest desire to regard in the most favorable manner the pretensions of the claimant, I have been unable to see how the fact that he was permitted to live at the Posa under the license which has been produced, and the circumstance that he, in common with the inhabitants of the pueblo, permitted his cattle to roam over the plain, and cultivated portions of it, constitute, in the absence of any grant whatever, such an equitable title as either the former or this government is bound to respect and to perfect. The title of Chaboya to the 500-acre lot assigned to him when the pueblo lands were distributed, I understand to be not disputed by the United States. It includes his house and the larger portion of the land enclosed and cultivated by him. For that portion of his claim a decree of confirmation may be entered.

I much regret that, when disposing of the question of jurisdiction, I expressed views of the equitable rights of the claimant which may have induced him to apply to congress for relief. Those views were founded on the original testimony in the cause. The further testimony subsequently taken was not examined or considered, the attention of the court being exclusively directed to the question of jurisdiction. Under the act of congress it has become my duty to consider all the evidence, and decide the case on its merits. This I have endeavored to do unaffected by any previous expressions of opinion, into which, under an imperfect view of the facts of the case, I may have been betrayed.

Case No. 14,770.

UNITED STATES v. CHABOYA.

[Hoff. Op. 59; Hoff. Dec. 107.]

District Court, N. D. California. 1859.

MEXICAN LAND GRANT — LONG AND CONTINUOUS OCCUPATION—VALIDITY.

HOFFMAN, District Judge. It appears from the proofs in this case that on the 11th of May, 1839, Pedro Chaboya presented a petition to Gov. Alvarado, asking for a concession of the land which he then occupied by the permission of the prefecture of the district, and stating that the reclamations against him, addressed to the prefecture by the residents of the pueblo, were absolutely destitute of justice, as he in no way prejudiced their rights, and the land was vacant. On the 20th May, 1839, Gov. Alvarado, by a marginal order, referred the matter to the prefecture, and directed that the interested party "should continue in the possession in which he finds himself, while the suitable procedure is going on." On the 25th May, 1839, the prefect reports that the petitioner ought to be excused from the usual procedure, as the prefecture had already taken, and perhaps dispatched, it conformably to his solicitation. The prefect then goes on to observe that the reclamations which the residents of the pueblo have made, and of which he had verbally informed the governor, had no other design than to remove Chaboya from the place he had occupied for many years, on account of antipathy or prejudice. With this report, the pro expediente terminates. In May, 1844, Chaboya appears to have made a second application for two leagues of land, which, however, seems to have been a different tract from that upon which in 1839 he had already been living several years. The expediente in this last case terminates with a report by Francisco Guerrere, dated February 14, 1846, and the grant seems never to have been issued. The claim before the court is for the lands first petitioned for, and which the governor gave him permission to continue to occupy.

It appears by the testimony of Antonio Suñol that he has known the claimant for forty years; that he (claimant) has lived at the rancho called "Posa de San Juan Bautista," where he now resides, ever since 1837; that in that year he had two or three houses upon it, and 400 or 500 acres fenced in, which he has continued to cultivate up to the present time; that he now resides in one of the houses then upon the land, and that he has lived there to this day with his wife and seven or eight children. The witness states with some exactness the boundaries of the land occupied by Chaboya; that they were well known and recognized by his neighbors, the Bernals and Narvaes; that at the "rodeos" of the adjoining ranchos the boundaries of the ranchos were mutually recognized and respected; and that during all the time the pueblo never molested him or denied his title. On his cross-examination, the witness states that he knows the boundaries of Chaboya's land by knowing those of the surrounding ranchos; and that when he (witness) had cattle on Bernal's rancho, they never, when giving a rodeo on the latter rancho, crossed the boundary line of Chaboya. James Alexander Forbes testifies that he recollects when Chaboya occupied his land two or three persons opposed his doing so, on the ground that it belonged to the pueblo of San José; that the dispute was referred to the prefect, who settled it in favor of Chaboya, on the report of the subprefect Suñol; that after this Chaboya was not mo-

lested, and has continued to occupy the land to this day. None of the facts testified to by these witnesses are denied or disputed; at least no testimony has been taken to contradict them. The case presented therefore is: Has the claimant by the permission to occupy, given by the governor, followed by his long occupation and cultivation of the land, such an equity as the United States ought to respect? It appears to me that he has. When the United States forces took possession of California in 1846, Chaboya was found, with his wife and family, living upon, cultivating and claiming to own a small piece of land (for Suñol swears it is about a league in extent), of which he had the undisputed possession for about nine years. Though he had never obtained a formal concession, yet he had occupied it first by permission of the prefect, and then by the permission of the governor, obtained seven years before. The governor himself testifies that he would have given Chaboya a definitive title if he had asked for it; thus negativing the idea that Chaboya failed to obtain it by reason of the governor to grant. From Chaboya's first occupation of the land to the present time, a period of twenty-two years has elapsed, during which he has been living on it with his wife and numerous family. It seems to me that such an ancient possession the United States are bound to respect.

If the equities of the case be alone considered, this claim has a far more substantial foundation than many of the claims which, under decisions of the supreme court, this court has felt itself obliged to confirm. It cannot be pretended that the bare reception of a title paper signed by the governor for lands which the petitioner never, until long after the conquest, occupied, or, perhaps, even saw, could create so strong an equity as the ancient occupation and cultivation, by permission of the authorities and with the acquiescence of all the neighbors, which are proved in this case. I therefore think that the claim should be confirmed for the tract of land occupied by the claimant, according to the boundaries thereof, as shown in the deposition of Antonio Suñol. A decree must be entered accordingly.

[For a subsequent proceeding in this litigation, see Case No. 14,769.]

Case No. 14,771.

UNITED STATES v. CHAFFEE.

[4 Ben. 330.] [1]

District Court, N. D. New York. Oct., 1870.

WITHHOLDING PENSION — CONSTRUCTION OF STATUTE—PLEADING—GUARDIAN.

1. The last clause of the 13th section of the pension act of July 4, 1864 (13 Stat. 389), is not limited to offences under that act, and an agent who withholds from a pensioner a pension, granted by an act passed subsequent to the act of July 4, 1864, is indictable under it.

2. Where a pension agent was found guilty, under that clause of the act of July 4, 1864, under an indictment, which alleged that two minor children were pensioners, and that the accused had been employed as agent of V., the guardian of the minors, to collect the pension, and that the pension had been paid to him, and that it was his duty to pay the same to the guardian, which he had refused to do; and the pension certificate, which was in evidence, showed that the pension was "payable to V., as guardian of the minors;" and a motion was made to arrest the judgment: *Held*, that the guardian might perhaps, on the certificate, be properly considered as the pensioner, in her representative capacity; but that this motion must be determined on the language of the indictment, and as the indictment alleged that the minors were the pensioners, and did not allege a withholding of the pension from them, but from V., it did not state any offence against the act, and the judgment must be arrested.

[This was an indictment against La Fayette Chaffee. Heard on motion in arrest of judgment.]

W. Dorsheimer, U. S. Atty.
Oscar Folsom, for defendant.

HALL, District Judge. The defendant was tried, at the present term, upon an indictment charging him with wrongfully withholding moneys received by him, as the attorney or agent of the guardian of two minors, in payment of the pension granted to such minors by the United States. He was found guilty, and thereupon moved in arrest of judgment, upon the ground that the case is not within the 13th section of the act of July 4, 1864, on which the indictment is founded, because the act under which such pension was granted was not passed until after the passage of the act of 1864; and also on the ground that the indictment is insufficient to bring the case within the provisions of that section.

The indictment contains but a single count, by which the grand jurors, upon their oaths, present that one Stephen Williams was heretofore a private soldier, in the service of the United States of America; that on the 8th day of May, one thousand eight hundred and sixty-six, said Stephen Williams died, by reason of wounds received and diseases contracted while in the service of the United States, as aforesaid, and in the line of duty, as aforesaid; that the said Stephen Williams, at the time of his death, as aforesaid, left two minor children, him surviving—to wit, John C. Williams, who will be sixteen years of age on the 8th day of December, A. D. 1871, and Emma J. Williams, who will be sixteen years of age on the 17th day of June, A. D. 1874; that one Julia Voelker, at the time of the finding of this indictment, was, and for more than two years prior thereto, has been the guardian of said minor children, duly appointed and qualified, and acting as such guardian of said John C. Williams and Emma J. Williams.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that, by reason aforesaid, the said minor children, John C. Williams and Emma J. Williams, and each of them, on the 8th day of May, one thousand eight hundred and sixty-six, became and were entitled to have and receive a pension from the United States of America, at the rate of eight dollars per month, and an additional sum of two dollars per month, for each of said minor children, until sixteen years of age, pursuant to, and by virtue of, an amendment to an act of congress, approved on the 14th day of July, one thousand eight hundred and sixty-two [12 Stat. 566], entitled 'An act to grant pensions.' That, on the 17th day of July, one thousand eight hundred and sixty-eight, said pension, payable semi-annually at the rate aforesaid, to which the said minor children were entitled as aforesaid, had been duly granted and allowed by the United States of America, to said minor children. That on the fourth day of March, one thousand eight hundred and sixty-eight, said Julia Voelker, as such guardian, became and was justly entitled to have and receive from the United States of America a payment of said pension, amounting to the sum of two hundred and twenty dollars, and the said Julia Voelker, as such guardian, had a just and lawful claim against the United States therefor, pursuant to the act of congress aforesaid.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that heretofore, to wit, before the 4th day of March, A. D. 1868, said Julia Voelker, as such guardian, as aforesaid, did employ and authorize one La Fayette Chaffee, of Lockport, as her agent and attorney, and the said Julia Voelker did then and there duly execute and deliver to the said La Fayette Chaffee a sufficient power of attorney, to enable him to obtain and receive, from the said United States, said two hundred and twenty dollars, due to said minor children, and to said Julia Voelker, as aforesaid; and the said La Fayette Chaffee did then and there undertake and agree to and with the said Julia Voelker, as such guardian, to obtain and receive the moneys aforesaid, due and payable as aforesaid, to said minor children, and to said Julia Voelker, by reason thereof, and to pay over and deliver to the said Julia Voelker the amount of the said pension due and payable to said minor children, and to her as aforesaid, and it was the duty of the said La Fayette Chaffee to pay over and deliver to said Julia Voelker, such guardian, as aforesaid, the amount of said pension, due and payable as aforesaid, when the same should be paid to him, said La Fayette Chaffee, pursuant to the act of congress, as aforesaid, and the power of attorney aforesaid.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that afterwards, to wit, before the eighth day of August, one thousand eight hundred and sixty-eight, the said La Fayette Chaffee, such agent and attorney, as aforesaid, did make out, and cause to be executed, the papers necessary to enable said Julia Voelker, as such guardian, as aforesaid, through her agent and attorney as aforesaid, to obtain and receive said two hundred and twenty dollars, such pension, due as aforesaid, and such proceedings were duly had in the premises, by the said La Fayette Chaffee, such agent and attorney, as aforesaid; that heretofore, and on the 8th day of August, one thousand eight hundred and sixty-eight, said two hundred and twenty dollars, due and payable, as aforesaid, to said minor children, and to said Julia Voelker, was duly paid by the United States to the said La Fayette Chaffee, such agent and attorney, as aforesaid, as and for and being the aforesaid pension, which the said minor children, and the said Julia Voelker, as such guardian, as aforesaid, was, as aforesaid, duly and justly entitled to have and receive, as aforesaid, from the United States of America; and it then and there became, and was, the duty of said La Fayette Chaffee, such agent and attorney, as aforesaid, to immediately pay over and deliver to the said Julia Voelker, such guardian, as aforesaid, said sum of two hundred and twenty dollars, such pension, as aforesaid, as he, the said La Fayette Chaffee, such agent, as aforesaid, then and there well knew.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that heretofore, and on divers days, and at divers times, between said eighth day of August, one thousand eight hundred and sixty-eight, and the finding of this indictment, the said Julia Voelker, as such guardian, as aforesaid, at said Lockport aforesaid, duly demanded of and from the said La Fayette Chaffee, such agent and attorney, as aforesaid, the payment of the said sum of two hundred and twenty dollars, the said pension, due and payable to the minor children, and to said Julia Voelker, as aforesaid, but that the said La Fayette Chaffee, such agent and attorney, as aforesaid, has hitherto, and during all said times, refused, and still refuses, to pay over or deliver or to account to the said Julia Voelker, as such guardian, as aforesaid, the said sum of money, or any part thereof, except the sum of twenty dollars.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said La Fayette Chaffee, of Lockport, of Niagara county, with force and arms, etc., heretofore, to wit, on the eighth day of August, one thousand eight hundred and sixty-eight, at said Lockport, of Niagara county, in said Northern district of New York, and within the jurisdiction of this court, and at divers and sundry times, between that day and the finding of this indictment, and while the said La Fayette Chaffee was such agent and attorney of the said Julia Voelker, guardian of said minor children, as aforesaid, did

feloniously and wrongfully withhold from the said John C. Williams and Emma J. Williams such pensions, as aforesaid, and from the said Julia Voelker, such guardian, as aforesaid, a part of the aforesaid pension, so as aforesaid allowed, and due and payable, as aforesaid, to wit, two hundred dollars of said two hundred and twenty dollars, which had been so, as aforesaid, paid by the United States of America to the said La Fayette Chaffee, as said agent and attorney, as aforesaid, as and for the said pension of the said minor children, such pensioners, as aforesaid, and which was so, as aforesaid, due and payable to the said Julia Voelker, as such guardian, as aforesaid, and which it was the duty of him, the said La Fayette Chaffee, as such agent and attorney, as aforesaid, to have paid over to the said Julia Voelker, as such guardian, as aforesaid, he, the said La Fayette Chaffee, agent and attorney, as aforesaid, at the time of his so withholding the aforesaid part of the said pension then and there, to wit, at Lockport aforesaid, in the district and within the jurisdiction aforesaid, well knowing such last-mentioned withholding of the aforesaid pension to be wrongful and unlawful, contrary to the statute of the United States of America in such case made and provided, against the peace of the United States and their dignity."

The act of July 14th, 1862, referred to in the indictment, provides for granting pensions in certain cases, and the act of July 4, 1864—which is entitled, "An act supplementary to the act of 1862"—also provides for granting pensions in some cases not provided for in the act of 1862; but neither provides for the grant of a pension to the children of a deceased soldier, after the marriage of his widow who had been entitled to receive a pension during her widowhood.

After several sections, modifying, in several respects, the then existing laws in regard to pensions, the 13th section of the act of 1864 provides, "that any agent or attorney who shall directly or indirectly demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance, under this act, on the condition that he shall receive a per centum upon any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner, or other claimant, the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall, for every such offence, be fined, not exceeding three hundred dollars, or imprisoned, at hard labor, not exceeding two years, or both, according to the circumstances and aggravation of the offence."

On the 3d of March, 1865 [13 Stat. 499], by an act entitled, "An act supplementary to the several acts relating to pensions," it was provided (section 4), "That if any officer or other person named in the first section of an act entitled, 'An act to grant pensions,' approved July fourteen, eighteen hundred and sixty-two, has died since the fourth day of March, eighteen hundred and sixty-one, or shall hereafter die, by reason of any wound received or disease contracted while in the service of the United States, and in the line of duty, his widow, or if there be no widow, or in case of her death or marriage, without payment to her of any part of the pension hereinafter mentioned, his child or children, under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to under said act, had he been totally disabled, to commence from the death of the husband or father, and to continue to the widow during her widowhood, or to the child or children until they severally attain the age of sixteen years, and no longer. Provided, that when such pension has been, or shall hereafter be, paid to the widow, such child or children shall only be entitled to receive the pension, to commence from the death or marriage of such widow, and to continue as aforesaid." It was under the provisions of this act that the pension referred to in the indictment was granted.

Under the several statutes above referred to, it was insisted, by the counsel for the defendant, that the judgment ought to be arrested, on the grounds before stated. These grounds will be considered in their order.

It is very clear that the 13th section of the act of 1864, before alluded to, is limited in its operation, so far as the first two classes of the offences punishable under that section are concerned; but this results from the fact that, in respect to each of these classes, the words "under this act" are appropriately and expressly used for that purpose. These words are omitted, ex industria, in that part of the section under which the indictment in this case was intended to be framed; and there are no other words of limitation or restriction to limit its operation to pensions granted under the same act. The term "pensioner" is general, and as there is no limitation or restriction in this part of the section (as there was in the other parts of it), the withholding of a pension granted under an act subsequently passed is clearly an offence under this section, as much as if it had been granted under the provisions of the act of 1864.

The other question is a more serious one, and may not be entirely free from doubt. So far as the offence of withholding a pension is concerned, the 13th section of the act of 1864 provides for the punishment of a party who wrongfully withholds, from a pensioner, the whole or any part of the pension allowed and due to such pensioner, and does not in any way provide for any other case of withholding a pension. Now the indict

ment, in this case, in the statements made by way of inducement, avers that the minor children of the deceased soldier became and were entitled to the pension therein mentioned; that it had been duly granted and allowed by the United States to such minor children; and, although there is some lan guage in this portion of the indictment which would indicate that the person who drew the indictment had some vague idea that the indictment might be supported upon the ground that Mrs. Voelker, the guardian of the minor children, was a claimant, and had a claim against the United States, which the defendant had withheld, the portion of the indictment which directly charges the offence, only charges the offence of withholding from the pensioners and their guardian a part of the pension before referred to, and not the wrongfully withholding of a claim from the guardian, as a claimant. Withholding the pension from the pensioners is therefore the offence, if any, charged in the indictment In directly charging the offence, it is alleged that while the said La Fayette Chaffee was such agent and attorney of the said Julia Voelker, guardian of said minor children, "he feloniously and wrongfully withheld from the said John C. Williams and said Emma J. Williams, such pensioners, as aforesaid, and from the said Julia Voelker, as such guardian," a part of such pension, which (the indictment alleges) was due and payable to the said Julia Voelker, as such guardian, as aforesaid; and which (as the indictment also alleges) it was the duty of him, the said La Fayette Chaffee, as such agent and attorney aforesaid, to have paid over to the said Julia Voelker, as such guardian, as aforesaid. The indictment had before alleged, by way of inducement, that the defendant was employed as the attorney and agent of such guardian (not of the minor children); that said Julia Voelker (without adding as such guardian) executed and delivered to said defendant a power of attorney to enable him to obtain and receive such pension; that the pension had been paid to him as such agent and attorney; that it was the duty of the defendant to pay the moneys received to such guardian. The demand of payment alleged is a demand to pay to her, as such guardian, and the refusal to pay alleged is a refusal to pay to her as guardian. If, then, as is expressly stated, both by way of inducement, and in directly charging the offence, it was the duty of the defendant to pay the moneys received to the guardian, it was not his duty to pay them to the pensioners. There could be no wrongful or unlawful withholding of the pension from the pensioners; for, upon the face and frame and language of the indictment, they were not entitled to receive it from the defendant, or even otherwise, except as it might be paid to them by a guardian appointed by and responsible to the state authorities.

It is suggested, in the written brief or argument furnished by the second assistant of the district attorney, since the oral argument of the motion, and since the above was written, that, "by the express terms of the pension certificate, introduced in evidence, the pension was payable to Julia Voelker, as guardian of the minor children;" that the guardian was the only person who could authorize an agent to procure the pension money from the United States, and the only person who could properly demand, from the agent, the money in question; and that she was the only person to whom the agent was authorized to pay the money; and that the words, "and Julia Voelker, such guardian, as aforesaid," in the charging clause, may be rejected as surplusage, as the indictment expressly charges that the pension money was withheld from the children.

The fact in regard to the terms of the pension certificate may be as stated; and perhaps the guardian may, in that case, be properly considered as the pensioner, in her representative capacity; but if so, it can make no difference upon this motion. The motion in arrest must necessarily be determined upon the allegations of the indictment alone. The indictment, as has been seen, alleges that the minor children were the persons entitled to the pension, and that it was granted to them, and not to their guardian; and they are expressly designated as the pensioners throughout the indictment. If the indict ment had been differently drawn, in accordance with the fact suggested, a different question would have been presented; but, as the case now stands, the judgment must be arrested.

Case No. 14,772.

UNITED STATES v. CHAFFEE et al.

[2 Bond, 110.] [1]

District Court, S. D. Ohio. Oct. Term, 1867.

CRIMINAL LAW—EVIDENCE—PRESUMPTION OF FRAUD.

It is not competent for the government to prove as a fact from which fraud may be presumed, that the pecuniary circumstances of a distiller were apparently improved while engaged in distilling during a period when such business was not profitable.

This was a suit by the United States, in which a large amount was claimed for unpaid duties on whisky manufactured by defendants [Highland D. Chaffee and others] at Tippecanoe, in Ohio, which it was alleged was sold by them in fraud of the internal revenue laws. A great mass of testimony was introduced, and the case occupied the court and jury for upward of five weeks. The charge of the court was necessarily of great length, and would occupy too much

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

space for a full report. One question arose in the progress of the case believed to be novel in its character, which the reporter thinks it proper to publish. That question was, in substance, whether in a suit charging fraud in a distiller in failing to pay the legal tax on manufactured whisky, it is competent for the government to prove as a fact from which the alleged fraud may be presumed, that the defendants, in a comparatively brief period, while distilling was unprofitable, amassed sufficient wealth to produce a marked change in their pecuniary circumstances. The court overruled the inquiry, and stated the following as the grounds of its decision.

Durbin Ward, Dist. Atty.

Job E. Stevenson and John Dunlevy, for defendants.

LEAVITT, District Judge. This is a new question, so far at least as this court is concerned, and no authorities have been produced which throw any light upon it. The question is asked of the witness upon the stand, whether within a given time stated to him, the business of distilling, honestly conducted, was profitable or otherwise. And the district attorney has stated that this question, if admitted, is to open the door to further investigation in regard to the pecuniary circumstances of these defendants at one period of their lives as compared with their circumstances at another time. And the question is, whether this line of investigation shall be gone into. It is to be observed in the first place, that though this is a case in the name of the government of the United States, the rules of evidence which must control the action of the court and jury are precisely the same as in a controversy between individuals. The government is entitled to no immunity from the operation of principles of law applicable to judicial trial. It is incumbent on the government to substantiate the allegations set forth in the declaration upon which it seeks to hold the parties implicated liable. There are, in the declaration under which this case is proceeding, certain allegations of fraud committed by these defendants, with a view to evade the just payments of duties owing from them as manufacturers of whisky. We have heard much of whisky frauds committed in various parts of the country, and there is no doubt that they have been very extensive, and have operated greatly to the injury of the finances of the government, as well as prejudicially to others who are honestly pursuing that business. These considerations, however, have no relevancy to the strict legal question now propounded to the court. However desirable it may be (and I concur fully with all that is said in regard to the desirableness of exposing these frauds and holding those responsible who have committed them), the rules of evidence, as recognized by courts and applicable to judicial proceedings, can not be departed from for the purpose of reaching such cases. It is better that parties charged with these frauds should escape than that the well-settled rules of law in regard to judicial trials should be violated. The objection—and as it seems to me a conclusive one—against the investigation proposed is this: that it involves a clear infraction of a rule of evidence applicable to judicial trials, which is that mere collateral issues are to be avoided. And this rule is founded not only on principle, but upon expediency. It must necessarily lead to investigations that would be almost interminable in their duration, if evidence is admitted outside of the merits of the case, or which, if it bears at all upon the issue, is so remote in its operation that it would be entitled to no weight with the jury. Courts invariably exclude that kind of testimony. Now the objection to going into the inquiry whether these defendants have made money in their distilling operations is that it would lead to collateral investigations which would be without end. In this case there are four individuals charged as implicated in this fraud. The investigation proposed would necessarily lead to an inquiry into the pecuniary concerns and business transactions of each of these four individuals, and it would lead, furthermore, into a general inquiry as to the profits of distilling. This would also necessarily open the door to the examination of all the distillers in this region upon the point whether the business within certain periods of time was profitable or otherwise. Now, in the view I have suggested, it seems to me that this line of investigation can not be entered upon. It would moreover necessarily lead to the inquiry whether these defendants had other sources of profit arising from other business, or from speculation; whether in fact they had other means of accumulating property independent of their distilling operations. I freely concede to the counsel for the government that there might be indications so clear and so marked, that to a certain extent evidence of this kind might be adduced. These parties, however, are not charged criminally. They are not charged with embezzlement. That crime is where an individual fraudulently and feloniously appropriates property belonging to another to his own use; that is the definition of that offense; but clearly there can be no pretense that that charge is involved as against the defendants. The property in question was theirs, subject, of course, to the claim for the duties and taxes imposed by law; but it was their property, and within their control, under certain statutory limitations, and there can be no pretense of a charge of embezzlement against them. Now, the case referred to by the United States attorney, and of which I have an indistinct recollection, having seen it briefly reported in a paper, I believe, was an indictment against a quartermaster for embezzling the property of the

United States, and appropriating it to his own use and benefit. The district attorney is right in saying that in that case the court before which it was tried admitted evidence to show that this quartermaster had been previously in limited pecuniary circumstances, and that very suddenly his position with regard to pecuniary matters seemed to be changed, and instead of living in an humble, and economical way, the proof was, if I remember right, that he had taken a very expensive house in the city of New York; that it was superbly furnished; that he kept a carriage, and had outriders, and was living in a style altogether beyond the reach of one who received but a limited salary. Under these circumstances it is not strange that the court should have received the testimony upon a charge of embezzlement of public property, but it is quite clear that the principles of that case are not applicable to the present. This is, in form at least, a civil action; and as I observed before, the government is bound to prove the allegations upon which it predicts the charge of fraud. It must furnish data to the jury, by which they can estimate the amount due the government from the defendants charged with having fraudulently reported the amount of whisky they have distilled; and the mere circumstance, if it be true, that these parties have accumulated a fortune within the last few years, seems to me so remote in its bearing upon the issue presented to the jury as to be inadmissible. There is an objection, and a very decided one, to the admission of testimony as to public rumor, in regard to the pecuniary circumstances of these defendants. Public opinion and mere rumors are wholly unreliable as to the pecuniary circumstances of men. There is a very strong tendency in the public mind, for some reason that I can not wholly explain, to overrate the wealth and the pecuniary condition of men in the community; and such testimony, I think, should never go to a jury to establish that fact. Upon the whole, without going further into the consideration of this question, on the ground I have indicated, that it must involve, necessarily, collateral facts and issues not pertaining to the issue upon which the jury are to pass, I consider that the evidence is not admissible.

The general principle on this subject is very clearly stated by Mr. Greenleaf in treating of the admissibility of evidence. He lays it down as a rule that all evidence must be pertinent to the issue; and evidence of collateral facts, which affords no reasonable presumption or inference as to the principal fact or matter in dispute, must be excluded. The principal fact, or matter in dispute here, is the alleged fraud charged against these defendants—that they have been fortunate in their business operations, or otherwise, it seems to me, is so remote from this issue as not to be admitted as evidence.

[See Case No. 13,773.]

Case No. 14,773.

UNITED STATES v. CHAFFEE et al.

[2 Bond, 147.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1868.

NEW TRIAL—VERDICT AGAINST EVIDENCE—JOINT ACTION—WEIGHT OF EVIDENCE—CUMULATIVE EVIDENCE—CORRUPT JUROR.

1. A motion for a new trial is an appeal to the discretion of the court, and if there are any grounds for the apprehension that injustice has been done to the defendants, by a verdict for a large amount found against them by the jury, and that a different result would follow from a second trial, it is the duty of the court to grant it.

2. If, in a joint action of tort, a verdict is rendered against all the defendants, when as to one there was no evidence, it is a verdict against evidence, and may be set aside on that ground.

3. Where, in an action in tort, against several defendants, they sever in their pleas, and assert different defenses to the suit, if a verdict is returned against all, and there is no testimony against one, the case may be non prossed as to him, and judgment entered against the others.

4. There are authorities that where the plea is joint this may be done, but as to that point there is some conflict. If this was the only ground of exception to this verdict the court would overrule it, and refuse a new trial upon the agreement of the district attorney to enter a nolle prosequi as to William M. Chaffee.

5. Where a jury give credence to the testimony of two witnesses for the United States as against the testimony of nine unimpeached witnesses for the defendants, they decide against the weight of the evidence, and it is a ground for a new trial.

6. The doctrine is, that testimony merely cumulative does not, in general, afford a sufficient ground for a new trial, but in a case of great importance, involving large interests, courts have given a liberal construction to the rule, and received such testimony on an application for a new trial.

7. The law does not tolerate the slightest taint of corruption, or the least impropriety of conduct on the part of a juror, and proof that one juror has disregarded the obligations resting upon him and has acted corruptly so infects a verdict with fraud as to make it a nullity.

[This was an action of debt by the United States against Highland D. Chaffee and others for the penalty for the illegal manufacture of whisky. See Case No. 14,772. There was a verdict in favor of the United States for $253,200. Case unreported. The case is now heard upon motion for new trial.]

Durbin Ward, Dist. Atty.

Job E. Stevenson, for defendants.

LEAVITT, District Judge. This is a motion, by the defendants, to set aside the verdict returned in this case, and for a new trial. There are numerous grounds stated as the predicate of this motion. In stating the conclusions of the court, it will not be necessary to notice, in detail, all the grounds set forth in the motion on file. I shall refer only to those that seem to be conclusive as to the proper action of the court.

It may be remarked, preliminarily, that the suit was instituted jointly against the defend-

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ants, for an alleged fraud committed by them, in failing, as distillers, to make due returns of, and pay the duties upon, whisky manufactured by them at their distillery at Tippecanoe, in this state, whereby they incurred a penalty of four dollars a gallon on the spirits which they did not return, and on which they did not pay the legal duty. On the trial, the district attorney abandoned the first and second counts of the declaration, and the case was submitted to the jury on the third count only, which alleged, in substance, that, between February 1, 1865, and September 1, 1866, the defendants manufactured and had on hand twenty-four thousand nine hundred gallons of distilled spirits, subject to a duty of two dollars on each gallon, which they fraudulently sold or disposed of, without making a return of the same, and without paying the legal tax thereon; whereby they incurred a penalty of four dollars on each gallon, amounting in the whole to $99,600. The defendants joined in a plea of not guilty, and the case was submitted to the jury on that issue. After a prolonged and laborious investigation of the facts, and extended arguments of counsel, the jury returned a verdict against the defendants for $253,200. It may be aptly remarked here that on a motion to set aside a verdict for so large a sum, involving, as it does, the entire pecuniary means of all the defendants, and so largely in excess of the amount claimed by the United States, on the count of the declaration upon which the case was put to the jury, the court is under stringent obligations to exercise some measure of liberality in passing on the motion for a new trial. The motion is an appeal to the discretion of the court, and if there are any grounds for the apprehension that injustice has been done to the defendants in the large amount found against them by the jury, and that a different result would follow from a second trial, it is the duty of the court to grant it.

One reason prominently urged by the defendants' counsel as a ground for the present motion, is that the verdict is excessive, and against the weight of the evidence. In support of this reason, it is urged, first, that against William M. Chaffee, one of the defendants, there was no evidence implicating him in the alleged fraud; second, that as against the other defendants, the verdict is greatly in excess of the amount for which the defendants, from the weight of the testimony, can be held liable. In reference to the verdict as against the defendant, William M. Chaffee, it is not controverted by the counsel for the United States, that there was no evidence which connected him with the alleged frauds. It is clear from the testimony that the evidence did not justify a verdict against him, and that as to him the verdict should have been not guilty. In its charge to the jury, the court distinctly stated that if they found the evidence of the fraud charged did not prove the fact as to one or more of the defendants, and that the other defendants were guilty, they were authorized to return their verdict to meet that case. The jury, acting on the principle, as the court is advised, that as all the defendants had joined in a plea of not guilty, all were jointly responsible if fraud was made out against any of them, returned their verdict, without any discrimination in favor of William M. Chaffee. Now, the law is, that if, in a joint action, a verdict is rendered against all the defendants, when as to one there was no evidence, it is a verdict against evidence, and may be set aside on that ground. But it is proposed by the district attorney in case the verdict shall not be set aside, to enter a nolle prosequi as to William M. Chaffee, and take a judgment against the other defendants. The question whether a nolle prosequi can be entered, and judgment taken on the verdict against the other defendants, has been investigated by counsel, and many authorities have been cited in their briefs. I do not propose to notice the numerous references made to the books touching this question. I have, however, carefully looked at the authorities, and find they are not harmonious on the point. Where, in an action in tort against several defendants, they sever in their pleas, and assert different defenses to the suit, if a verdict is returned against all, and there is no testimony against one or more, the case may be non prossed as to such, and judgment entered against the others. There are authorities that where the plea is joint this may be done. But as to that point there is some conflict.

If this was the only ground of exception to this verdict, the court would overrule it and refuse a new trial, upon the agreement of the district attorney to enter a nolle prosequi as to William M. Chaffee. I shall now consider the question whether the verdict is against the weight of evidence as to all the defendants. And, on this point, it may be proper to observe that the question is not whether the United States, on the evidence, was entitled to a verdict, but whether, in estimating the evidence and finding so large an amount against the defendants by the jury, their verdict is not against the preponderance of the testimony.

As before stated, the claim of the United States is that the defendants, between the dates mentioned, manufactured whisky largely in excess of the quantity returned for taxation, and on which the duties were paid. And evidence was offered to the jury of large quantities shipped by them to various points by railroads and by canals. The quantity thus shipped greatly exceeded the quantity returned for taxation. This excess, as claimed by the district attorney, was about 1,245 barrels, and he contended that the defendants were liable to the penalty of $4 per gallon on the quantity. It must be conceded that the evidence on which this estimate was based was not of the most conclusive character. The government resorted to the only mode by which the shipments could be proved, namely, the freight books of the canal collectors and

the books and papers of different railroad offices, and of the commercial houses to which the whisky had been consigned. From the character of this evidence, the liability to a duplication of the shipments, and other errors liable to occur from the extent of the transactions, it was obvious to the court that it was not of the most reliable character. The jury supposed they were justifiable in the conclusion that the quantity of whisky shipped by defendants was greatly beyond that returned as made, and on which the duties were paid, and for this excess they returned their verdict, estimating such excess at $1 per gallon, producing a total of upward of $250,000. On the trial, the government, in offering testimony in chief, examined two witnesses upon the question whether the defendants had any whisky on hand in the fall of 1865. In their defense, the counsel for the defendants assumed that the defendants at that date had a large quantity on hand, which had been duly inspected, but was retained by them for sale in expectation of a more favorable state of the whisky market. And they claimed that the quantity thus proved to be on hand, deducted from the excess of shipments above the quantity returned for taxation, and on which the taxes were paid, would leave but a small deficiency on which the tax had not been paid. And they claim on this motion that the jury erred in not estimating by their verdict the whisky on hand, and in returning a verdict for the whole difference between the whisky shipped and that on which the tax had been paid, and that thus the amount of the verdict was excessive and unjust. Without reviewing the authorities on this point, it is only necessary to say, it is not only within the just discretion of the court to grant a new trial, but its imperative duty to do so, if the jury have misconceived the testimony in the matter referred to, or returned a verdict against the weight of that testimony. Now, as to the whisky on hand in the fall of 1865, as before noticed, two witnesses were examined by the United States. One testified positively there was none, and one negatively that he saw none. There were some unimportant facts urged to the jury, as corroborative of this evidence. On the other hand, there were eight or nine witnesses for the defendants who testified that they saw a large quantity on hand upon the premises of the defendants. The estimates of the witnesses as to this quantity varied from 1,000 to 1,500 barrels. With one exception, there was no attempt to impeach the credibility of these witnesses.

It would seem the jury, in making their verdict, made a deduction of 190 barrels, as on hand in November, 1865, and rejected the testimony of the defendants proving a much larger quantity. Now, from the above statement, it is obvious in doing this they decided against the weight of evidence on the point adverted to. They seem to have given credence to the two witnesses for the government, while they repudiated the testimony of the nine for the defendants. Where this was probably the case, it is a ground for a new trial. 27 Me. 357; 16 Ill. 495; 3 Grah. & W. New Trial, 1208; 5 Ohio, 245; 13 Mass. 507. In connection with the objection to the verdict, that it is against the weight of the evidence as to the quantity of whisky on hand at the time referred to, it may be proper to add that on this motion for a new trial, the defendants have offered the affidavits of some ten or fifteen persons, residents of Tippecanoe, where the distillery is located, or its vicinity, to the effect that having the opportunity of knowing the fact, there was on the premises of the defendants a large quantity of whisky prior to, and in the autumn of 1865. These persons were not witnesses at the trial, and their statements may be said to be cumulative in their character, and, therefore, not to be considered on this motion. The doctrine is assented to, that testimony merely cumulative does not in general afford a sufficient ground for a new trial. But in a case of great importance and involving large interests, courts have sometimes given a liberal construction to the rule, and received such testimony on an application for a new trial. If its effect, in the present case, is to show beyond any reasonable doubt, that the defendants had a large stock of whisky on hand in October, 1865, it may be considered on this motion. 3 Grah. & W. New Trial, 1055, and the authorities there cited. Every principle of justice seems to sustain this doctrine as applicable to the motion before the court, and leaves no doubt in the mind of the court that a new trial ought to be granted in this case.

There are other facts disclosed by the affidavits filed by the defendants in support of this motion, which are entitled to consideration, and are not without weight in its decision. To these I propose briefly to advert: It appears from the affidavit of Christopher Huffman that he was summoned and examined on the trial, as a witness for the defendants, and stated that he did not then recollect of any liquor being in the back grain-room; that after he left the witness-stand he remembered the fact that there was grain in that room, and requested to be recalled, and the defendants wished him to remain in the city till next morning for that purpose; that having been severely injured by the railroad accident near Lockland, and fearing his family would be anxious about him, he returned to his home at Tippecanoe, intending to come back to Cincinnati in time to be re-examined; but after getting home his wound became so much worse that he was unable to return. The affiant accounts for his failure to remember the fact adverted to, when examined as a witness, from his excitement and his severe bodily pain at the time. It is impossible for the court to know what influence the testimony of the witness might have had on the minds of the jury. But the fact which he failed to remember when examined, was pertinent to

the issue and important for the defendants. Without any negligence or default on their part they were deprived of the benefit of the witness' testimony by the occurrence of a providential event, beyond their control. Under such circumstances, even a possibility that his evidence would have produced an effect with the jury favorable to the defendants, affords a strong reason for giving them the benefit of his testimony on a retrial of the case. The affidavit of John Gunn also discloses facts tending clearly to the conclusion that justice demands that the case should be submitted to another jury for consideration. The affiant states that he was summoned as a witness by the United States, and examined as such on the trial; that after his examination he was summoned by the defendants as a witness in their behalf; that in coming from his home at Tippecanoe, he was so severely injured by the railroad disaster near Lockland, that he was unable to appear in court during the progress of the trial; that he would have sworn as a witness that in the fall of 1865, and for some time previously, the defendants had a stock of whisky on hand, though he can not state precisely how much. This is another instance of the defendants being deprived of what may have been very important testimony in their behalf, as the result of the railroad accident, and without any negligence on their part.

There is also an important fact appearing from the affidavits of Truman L. Trask and H. R. Landmier, composing the firm of Landmier & Trask, who, in 1866, were commission merchants in Cincinnati. On the trial, Landmier was examined as a witness for the government, and proved a shipment of 150 barrels of whisky to the house in July, 1866, by the defendants. He was not then able to state the date when the whisky was received, the canal-boat on which it was shipped, or any other particulars relating to the transaction. He now states that since his examination as a witness, he is enabled to remember the date of the receipt of the whisky, the canal-boat on which it was shipped, and the quantity received. He also distinctly remembers that the 150 barrels of whisky shipped to his house by the defendants was bonded whisky. Trask says in his affidavit that he bought the whisky of the defendants on July 17, 1866, as in bond; that it was shipped on the canal-boat Marie Louise, consigned to Grotenkemper & Co., of Cincinnati, who had a bonded warehouse, and received a few days after the date named; that the 150 barrels, after being inspected, were sold. This affidavit also states that during the latter part of the trial of this case, he was ill and away from home for two weeks, and was unable to attend to business until the trial was closed. There is every reason to suppose that on the testimony submitted to the jury, they included in their estimate of whisky shipped by defendants, on which the tax was unpaid, the 150 barrels purchased by Landmier & Trask, being bonded whisky, and which was consigned to the bonded warehouse of Grotenkemper & Co., and which, after being inspected, was sold. It could not be sold without the tax being first paid; and if paid, it was clearly erroneous to charge the defendants with the penalty of $4 per gallon on this whisky. This would be an item of about $36,000, to which, upon the supposition that the tax has been paid, the defendants were not liable. If there are reasonable grounds for the inference that this error has occurred in the verdict of the jury, if there were no other grounds for a new trial, it would, of itself, be sufficient reason for a retrial of the case. The facts disclosed by the affidavits may be classed under the head of newly discovered evidence, which, when material, is always a ground for a new trial. 1 Grah. & W. New Trial, 492; 3 Grah. & W. New Trial, 1049, 1057.

It is unnecessary to pursue this view any further. Motions for new trials are addressed to the sound discretion of the court; and this discretion, by all the more modern decisions, is more liberally exercised than formerly. At this day the courts grant new trials freely where it appears reasonably certain that the verdict is against the weight of evidence, or a party has been surprised at the trial, or has been deprived of his evidence by accident or other similar cause. And this is especially the case in suits where the amount involved is large, or the character of parties implicated. Kohne v. Insurance Co. of North America [Case No. 7,921]. In the case just cited—Kohne v. Ins. Co. of North America—the remarks of Mr. Justice Washington on the subject of new trials are very clearly stated and are cheerfully adopted as the views of this court. The learned judge says: "I certainly shall always respect the opinion of the jury, so far as not to set aside their verdict in a doubtful case, because I might have drawn a conclusion different from what they have done. But, if the verdict be plainly against evidence, or if, in a case of great consequence, as this certainly is, where some doubt might exist as to the correctness of the conclusions drawn by the jury, it would seem right that the case should be more deliberately argued and considered by another; it is certainly most consistent with the objects of justice to afford such an opportunity. I can not conceive how the granting of a new trial can impair the benefits of a jury trial. If by setting aside the verdict the consequence would be a judgment contrary to it, the position would be correct, but this is not the case. The cause is merely reheard before a new jury, when it may be more deliberately considered." As, in my judgment, a new trial should be granted on the grounds referred to, it is wholly unnecessary to refer to or consider all the other reasons stated in the motion of the defendants' counsel.

There is one other ground urged by the defendants for a new trial, to which it will be proper to advert. This is, the alleged corrupt attempt of one of the jurors to procure from the defendants a pecuniary reward as a consideration for his influence and efforts to obtain a verdict favorable to them. I do not propose to notice the facts before the court in reference to this charge. I am gratified in stating that there is no direct imputation of corruption as against any other member of the jury than the one referred to. And I am clear in stating that if the facts alleged against him are satisfactorily proved, it would be a sufficient ground for setting aside the verdict. The law does not tolerate the slightest taint of corruption or the least impropriety of conduct on the part of a juror, charged under oath to render a just verdict according to the law and the evidence. And proof that even one juror has disregarded the solemn obligation resting upon him, and has acted corruptly, so infects a verdict with fraud as to make it a nullity. But in looking at the facts before the court, touching the conduct of the juror referred to, the charge is not so clearly established as to justify the conclusion of his guilt. While there are certainly grounds of suspicion against him, the circumstances proved leave his guilt so doubtful as not to afford a proper predicate for the action urged by the defendants' counsel in relation to the pending motion. And as other reasons stated are sufficient in the judgment of the court to set aside the verdict and award a second trial, there is no necessity for a more extended notice of the ground now referred to.

I will just add, in conclusion, that the features of this case seem to require the exercise of liberality in passing on the motion for a new trial. The verdict of the jury is for a very large amount, and implicates the defendants as guilty of an enormous fraud upon the government. If there is any reasonable ground for the inference that upon a second trial the defendants can show that their liability has been exaggerated, and relieve their characters from the dark shadow now resting upon them, it is but just and equitable, for the reason indicated, that they should have the opportunity of doing so. The government will suffer nothing by the delay resulting from a second trial. It should ask for nothing from any of its citizens to which it is not justly and legally entitled; and if a wrong has been committed these defendants, the representatives of the government should rejoice in having it rectified. There can be no ground of complaint in awarding a new trial, in which the case may be submitted to another impartial jury. A new trial is awarded on payment, by the defendants, of all the costs which have accrued in the case. These costs to be paid within thirty days.

[NOTE. Upon the new trial the jury found a verdict against the defendants for the sum of $235,680. Case No. 14,774. From the judgmet entered upon this verdict a writ of error was sued out in the supreme court, which reversed the judgment and remanded the case for a new trial. 18 Wall. (88 U. S.) 516.]

Case No. 14,774.

UNITED STATES v. CHAFFEE et al.

[17 Pittsb. Leg. J. 116; 11 Int. Rev. Rec. 110.]

Circuit Court, S. D. Ohio. 1870.[1]

EVIDENCE—PRESUMPTIONS—INTERNAL REVENUE—ACTION FOR PENALTY.

1. Evidence which is in itself inconclusive derives a conclusive quality from mere defect of proof on the part of the adversary, or of the accused. Thus, where the government prosecutes for the penalty for the nonpayment of a tax on a quantity of whisky manufactured, and the testimony of the government did not amount to an absolutely conclusive character; was such, in fact, that the defence, if made in good faith, would have been assisted by the production of the books of the concern, and they were not produced, the law presumes against such party, and the jury is authorized to resolve all doubts adversely to his defence.

[Cited in Currar v. Munger, Case No. 3,487.]

2. The same rule is applicable where a party once had proof in his power which has been voluntarily destroyed, or placed beyond his reach.

3. When testimony of a damaging nature is given and defendant is by and makes no denial, all doubts are resolved against him.

The defendants were distillers at Tippecanoe, Miami county, Ohio, and the firm was composed of H. D. Chaffee, since deceased, Rue P. Hutchins, and Sidney L. Chaffee. This suit was an action in debt, brought by the United States, to recover of the defendants the sum of one million of dollars penalty, under the 48th section of the act of June 30, 1864, and acts amendatory thereof, for having in their possession, and unlawfully selling, large quantities of distilled spirits, with intent to evade the payment of the duties imposed by law thereon. The declaration contained three counts, two of which were abandoned by the plaintiffs upon the trial, and the third count was the only one upon which the counsel for the government relied for a verdict.

[At the former trial of this case the jury rendered a verdict in favor of the United States for the sum of $253,200. (Case unreported.) Upon motion the court set aside this verdict, and granted a new trial. Case No. 14,773.]

Henry Hooper, Asst. U. S. Atty., and Judge Headington, for the United States.

Follet & Wright, for defendants.

EMMONS, Circuit Judge (charging jury). I have no doubt that it will cause common congratulation that this very long and tedious trial is drawing so near its close. We have detained you only some eleven and a half working days, enabling the court and the jury in the intervals, I trust, to be re-

[1] [Reversed in 18 Wall. (85 U. S.) 516.]

lieved, not only from the irksomeness of the trial, but the disadvantages of continuous absence from other duties. High praise is due to counsel for this. Much has been gained in time by concessions which we had no right in law to call upon them to make, and it is gratifying to the court, in looking over the trial, to feel entire confidence that no one fact has been omitted which more time would have developed. We know just as much about the case as if we had, as on the former trial, consumed five weeks in its investigation. Certainly, the zeal and the untiring industry of the defendants' counsel exclude every complaint on the part of their clients; and I need not say that I think the government has nothing to complain of, in view of what its learned counsel has done.

The issues before you are very much simplified by the mutual admission that the time within which this wrong has been committed was between October, 1865, and September, 1866, a period of about ten months. It is also conceded that the amount of whisky on hand in October shall be credited to the defendants. That is, the government must show not only that they have sold more during the ten months than they paid tax on, but also than this amount when added to that which they had on hand. It is not quite so simple as this, because you will take into consideration whether, at the expiration of this period, they still had on hand some portion of that which they possessed in October, 1865. In round numbers, I think, the proof clearly shows, and perhaps it may be stated as a concession, that the tax has been paid on about 6,000 barrels. The government claims to show a sale of about 9,000, showing a surplus of some 3,000 barrels, or, in round numbers, some 188,000 gallons, on which the claim of the government for tax and penalty is about $750,000. That is the government's claim. The defendants reply that it is admitted they have paid taxes on some 6,000; that they proved they had on hand some 2,000 or 2,500 barrels; and although this would leave a balance of illicit whisky to be accounted for, still they insist the government has failed to show the manufacture of the whole amount of 9,000 barrels, and that, after a fair balancing of testimony, the jury ought to find that the defendants sold no whisky whatever in violation of law.

In a general way the government have shown by the consignees' testimony some 6,000 barrels, and by the way-bills and canal books some 3,000, making up the 9,000. They claim to show by the mash book the capacity of the distillery to be somewhere in the vicinity of double that necessary to produce the quantity which they actually paid a tax on. By consultation of this book it seems the average run of the distillery during the ten months, as reported, was about four hundred bushels; and turning to the earlier stages of its operations we find many months when it was seven and eight hundred, and more, bushels. It is for you to say, from the testimony, whether the capacity of the distillery was or was not what the government claims it to be. If you so find it, you will then come to the conclusion that there was power on the part of the defendants to commit the offence with which they are charged. It is claimed that the evidence of these consignees, and especially the testimony of the way-bills, is very delusive; that it tends to duplication, and that you will be very likely to charge these defendants twice over with the same amount. So far as the nature of this testimony is concerned, there has been, in modern times, a very great change of opinion, and I do not know that if I should search all the books I ever read, or call to mind all my experience at the bar, I could select a more fitting instance to illustrate my own opinion of the respective values of these two classes of testimony than the contrast between the persuasive effect of memoranda, made in the ordinary course of business, by those who have no motive to falsify, whose duty it was to record them at the time the transactions took place, on the one hand; and, on the other, the grossly conflicting verbal testimony given in this case as to the amount of whisky on hand in October, 1865. Compare the two, and see upon which, in its own nature, as men of common sense, you can repose your credence with most confidence. The one is plain, simple and direct, without a motive of falsification. The other presents a spectacle like this: a phalanx of twenty men swearing on their oaths to some two thousand barrels of whisky at a given time in a given place; and two-thirds as many, equally intelligent and equally respectable, with equal opportunities of knowledge, swearing there are not fifty barrels there. It is a hopeless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon.

It is, however, before you, and you will look carefully over its details, give due weight to the ingenious and able criticisms which have been made by the distinguished counsel for the defendants, give the same consideration to that which has been given by the learned counsel for the government, and resting there, stopping with the proof put in on the part of the government, say whether, if the defendants had given no proof whatever, you believe a plausible, reasonably proved case was made out. Would you have felt at liberty, on your oaths, to have acquitted the defendants if they had given no proof whatever? If you will pursue this order of investigation it will enable you, I think, more easily to follow that course which, in my estimation, is demanded by well settled principles in the law of evidence. The first question which arises is, do you believe the consignees? They are wholly unimpeached. We have no suggestions made by the defendants, either by argument or by evidence, that they swore untruly. The only liability to error is the danger of duplication.

The way-bills, the railroad shipments, the canal books, are attacked, not so much on account of what they say as the danger that they may speak twice upon the same subject. But it would seem to me that such a mistake is wholly unnecessary. The date, the quantities shipped, the shipments themselves, the consignees' names, all unite in preventing confusion. After much reflection, I am unable to call to mind any direction whatever which it is my duty to give you in estimating this testimony. I am asked for none whatever on the part of the defendants. It seems plain and direct. The utmost which counsel have said of it is, that it lacks that demonstrative certainty, that it is not that full proof which the law demands in an action so highly penal as this. Gentlemen, this may be most fully conceded, and still the government be entitled to your verdict. The proof in the outset may be defective; it may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find. For, although I instruct you fully, that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset, whether a case is established by the government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendants if, from the facts, you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation? Then the defendants assume the burden of proof. If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the government, or any material part of it, you will then take up their testimony in view of the principle which has been so much discussed, and which the court announced at an earlier part of the trial. Although the counsel for the defence, when this principle was announced, with spirit and energy sufficient, certainly, to demonstrate his sincerity, begged leave to differ with the court, in reference to the effect of not producing the books and not swearing the defendants, still the presumption of law is, that client and counsel have deliberately, and with full knowledge of the law and all its presumptions, elected to withhold this proof, and you will not, in the smallest degree, abate the full application of the principle on any notion that it may have been misapprehended. The rule is one which I am confident will commend itself to your common reason. It is this: Without exception, where a party has proof in his power, which, if produced, would render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defence. The same rule is applicable in a case where a party once had proof in his power which has been voluntarily destroyed, or placed beyond his reach.

This brief announcement of a rule is all which is usual from the bench to a jury, the law assuming that it will be received with unquestioning confidence. But I have a motive, which it is unnecessary to explain, for reading it as described and applied by a few authors and judges. They have been selected with reference to their applicability to this cause. Not that you, gentlemen, are concerned with them, but for the convenience of counsel only, I will announce the books and pages from which I read. Starkie, Ev. 819: "In all criminal cases the guilt must be most fully proved. No weight of preponderance is sufficient unless it generate full belief of the fact beyond all reasonable doubt." This strong rule, gentlemen, is applicable in the case before you. But the author adds, on the following page, 820: "In criminal cases, the proof should be of a conclusive character. But here it is to be observed that it frequently happens in criminal, as in civil proceedings, that evidence which is in itself inconclusive derives a conclusive quality from mere defect of proof on the part of the adversary, or of the accused." And in the next paragraph he says: "A party being apprised of evidence and having the means of explanation in his power, and who does not make it, the strongest presumption arises that the charge or claim is well founded. It would be contrary to all experience of human nature and conduct to come to any other conclusion." In Clifton v. U. S., 4 How. [45 U. S.] 242, in a revenue case, and in reference to circumstances much like these this jury has to consider, it is said: "Under these circumstances the claimant was called upon by the strongest considerations, personal and legal argument, to bring to his defense the best evidence under his control." They add (page 248): "Practical illustrations of this rule are witnessed daily in criminal cases, and are too familiar to require more particular reference."

In a recent case in the Southern district of New York (Quantity of Distilled Spirits [Case No. 11,494]), when, in a similar case, the defendant had refused his books and neglected to testify, Judge Blatchford said to the jury: "If a party has the power of clearing up a doubtful point and does not do it, but instead resorts to all sorts of evidence except the direct evidence he himself could give, any doubt must be resolved most strongly against him." He then proceeds to apply the rule to the refusal of defendants to testify in reference to imputed conversations, because, he says, they could testify in their own case.

Illustrations from criminal trials were given of how proofs creating only strong suspicion of guilt deserved that degree of conclusive-

ness demanded by the law for conviction if a prisoner failed to make explanation when such explanation was in his power.

His honor then proceeded as follows:

As Judge Blatchford applies this principle to a defendant who, in a case strikingly like this one, refused to contradict, under oath, a witness who swore to his confessions, I will, in connection with what he says, although somewhat out of the order I am following, ask your attention to what one of the government witnesses testified in reference to the defendant's admissions. He said the defendant told him, at the distillery, that he had little or no whisky there, some time in 1865. He testifies that in open court. The defendant sat by and heard it, but made no denial. It is not a matter for the jury to say that they will indulge in vague surmises in reference to the possibility of the witness being mistaken. The law, acting upon well settled principles of common reason, says that when such testimony is given, and the defendant is by and makes no denial, all doubts are resolved against him.

Mr. Follett—I would wish to state to your honor right there that this testimony was given in rebuttal, if your honor will recollect.

COURT—That makes no difference whatever. That testimony could not have been put in in chief, because it was not then applicable to the exigencies of the case. It was put in in rebuttal, as the learned counsel well suggests, and to rebut what? They had introduced some twenty-three witnesses who testified vaguely and loosely to estimates of whisky on hand, referring to anterior periods, endeavoring to recollect the observations which they then made; and to rebut that, the government called a witness, who said, "I conversed with the defendant at the distillery, and he told me he had little or no whisky there." Whether it is put in in rebuttal or in chief, has no significancy whatever in reference to the application of this principle of presumption.

It is for you to say whether the defendant did, or did not, keep books of account. The testimony, however, upon this point, seems to be uncontradicted, and that they consisted of day books, journals and ledgers. You will act upon your own business knowledge of what in all probability those books contained. The presumption of law, I charge you, is that the defendant did keep the accounts usual and necessary for the correct understanding of so large a business, and the accurate accounting, from time to time, between the several partners interested in it. I say to you that the books of the firm of which H. D. Chaffee was a member, he being dead, belonged of right to, and are assumed to be in the possession of, the surviving partners. The law presumes, also, the books to be in existence and accessible to the defendant, S. L. Chaffee, and his co-defendants, unless the contrary is shown by the evidence. The declaration of counsel that they are in Buffalo is not evidence of that fact, and, if it were, would in law constitute no excuse for their non-production, without further proof that, upon diligent inquiry and effort, they could not be produced. If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October 1865, and the amount which they had sold during the next ten months; or that the defendants, or that either of them could, by their own oath, resolve all doubts on this point—if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule.

And now, in the light of this rule, let us proceed briefly to consider the defendants' case. And first, I repeat, for the purpose of explanation only, that it is claimed, on the part of the defendants, the evidence of the government is uncertain, and may lead to duplication. Although you are to resolve all doubts against the defendants, this does not mean that because the plaintiff makes a prima facie case for $750,000, you are to write that down inexorably, and stop there. It means only that, if you believe such case is made, you are to start with that, and then carefully consider all the testimony; and, so far as you can, from any source, without any doubt or hesitation, mark out any, or all of it, that you will so do. Where there is certainty, this rule has no application. It is only where it is vague and doubtful that it comes in to relieve you from the doubt and perplexity which the silence of the defendants occasions. I have recurred to this again solely for the purpose of making this explanation.

Let us proceed, then, with the defendants' case. They say, grant what the government asserts, that we sold eight or nine thousand barrels of whisky during this time, we show you that we paid tax on six thousand barrels, and that we had two thousand or three thousand on hand. How is this proved? Two intelligent parties, whom you are warranted in presuming must know with certainty this great leading fact, refuse to testify. The law accords to them liberty to speak, and yet they remain silent. The books are also withheld. As a substitute for these sources of certainty there are produced as witnesses some neighbors of the defendants, grocers, physicians, day laborers, and farmers, who visited this distillery socially, or on business. All these witnesses speak, and to this I ask your particular attention, of subsequent estimates made from recollection, by endeavoring to call to mind quantities which they saw at past periods. They differed greatly in their general aggregate, and still more so in the amounts which they testified to as being at different places on the premises. Had these twenty-three men professed to have visited this distillery for the purpose of making an examination, and while there, with the property before them,

counted the tiers of barrels, and then and there estimated the quantity on the premises at two thousand five hundred barrels; and twelve others, equally intelligent and capable of observation, had sworn that they, too, went there for a like purpose; and, after diligent search, could find only some twenty-five in all, some of them working in the rooms, others storing property in them, and still others removing floors from the very apartments where these conflicting oaths located the greatest amounts of whisky, then there would be no room for reconciliation, or charity. The conflict would be too gross to call it misapprehension. Perjury beyond all doubt would have been committed. But you have no such case before you. Neither party professes to have made an estimate then and there, with the property before them, but each witness relies upon recalling what he had neither duty nor interest to observe at the time, and make measurements, and form opinions as to the quantities, only from what he remembers of the past. There is much liability for mistake on both sides in all such instances. Had this case been less important, and the expense and trouble of its retrial less, I am not at all certain but that I should have excluded this testimony altogether, trusting that a higher court would have upheld my decision in reference to what I concede would be a new step in practice. And now, gentlemen, in view of this state of facts, what should be your application of the rule of law that doubts should be resolved against the defendants? You certainly, it would seem to me, will be unable to fix, with entire confidence, upon any specific amount of whisky on hand in October, 1865. It certainly presents a case where you cannot say but there is doubt. It is a doubt in the power of the defendant to remove. If he does not do so, the law pronounces what your duty is. (Here the court called for the mash-book kept by the defendants.) There is a matter, which at one time I had though I was at liberty to omit, but subsequent reflection has convinced me that it is my duty to call your attention to it. If you believe that there have been any additions made, by or with the concurrence of the defendants, to this book, for the purpose of creating proof contrary to the truth, it also, perhaps, in an equal degree with any other facts in the case, raises a strong presumption against them. Here is an entry at the foot of the page: "Stopped this day; 2,056 barrels on hand in cribs and building." That is wholly exceptional. There is no other entry in the book like it. Its whole theory seems to be at war with the entry. You will observe the first one, which says 227 barrels on hand, is but a few months before, in December, 1863. Why "in cellar" should be added to several of these entries, when at this very period it is claimed there were several thousand barrels in the other departments, is not shown. By looking back in the book you will find blanks left all the way through, where these entries in red ink might have been made for any distance back. It is just in this period that the exceptional entry is made, and nowhere else; and to that I deem it my duty particularly to call your attention.

Gentlemen, a long experience of thirty odd years at the bar, in the contests of which I have always entered with very considerable zeal, must necessarily have fixed upon me the habit of earnestness, and, in some degree, unfitted me for concealing those proclivities which it is impossible for any intelligent judge not to have when he tries a case. In going over the facts in this compendious way, simply for the purpose of applying the abstract principles of law, which it is my sworn duty to state to you, I may, unconsciously, and I doubt not I have, more or less, indicated which way, were I a juror, I would find. But that is your province. If, in my zeal, I have, unconsciously, bowed a little too far over the fence which separates the field of your labors from mine, it is no disrespect for you to bow back again in the full consciousness that its cultivation is alone for you. That it is so I concede most fully, and do not ask the slightest consideration on your part for anything I may have said, which intimates what your duty in that regard should be. But as to the principles of law, and the presumptions which it makes from ascertained facts and conceded conditions, these you will take from the court, and inexorably apply, as they have been given you in charge.

The jury rendered a verdict for the government, and assessed the damages at $235,680.

[NOTE. From the judgment entered in this case a writ of error was sued out in the supreme court. Mr. Justice Field, in delivering the opinion of the court, said: "The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." The judgment was reversed, and the case remanded. 18 Wall (85 U. S.) 516.]

Case No. 14,775.

UNITED STATES v. CHAFLIN.

[See Case No. 14,798.]

Case No. 14,776.

UNITED STATES v. CHAIN CABLE.

[2 Sumn. 362.] [1]

Circuit Court, D. Massachusetts. May Term, 1836.

FORFEITURE—LANDING WITHOUT PERMIT—SHIP'S CABLE.

Appurtenances or equipments of a ship, as a chain cable, or other articles, purchased bonâ fide for the use of the ship, are not "goods, wares, or merchandise," within the meaning of the revenue act of 1799, c. 128, § 50 [1 Story, Laws, 617; 1 Stat. 665, c. 22], which require a permit before they are landed.

[Cited in The Gertrude, Case No. 5,370; Weld v. Maxwell, Id. 17,374. Followed in U. S. v. Fry, 48 Fed. 714; The Conqueror, 49 Fed. 105.]

[In error to the district court of the United States for the district of Massachusetts.]

Information of forfeiture and seizure on land of one chain cable, for having been unladen and delivered from the ship Marathon, at the port of Boston, without a permit, against the collection act of 1799, c. 128, § 50. The cause was tried in the district court, at September term, 1835, upon the general issue, by a jury, and a verdict was found for the defendant. [Case unreported.] At the trial a bill of exceptions was filed by the district attorney, the substance of which was as follows: It was proved, that the cable in question was purchased at Liverpool by the master of the ship Marathon, during the last season, to supply the place of a steam hempen cable, which had become unseaworthy before the arrival of the ship at Liverpool, that the purchase was made bona fide, with the intention of using said cable for that ship, and not to sell as merchandise. That the cable was stowed in the usual place, without any concealment, and on the arrival in Boston, the ship was secured by the said cable to the wharf. A few days after the arrival of the Marathon, the same claimant, William Eager, had another ship about to be launched at Medford, and a list of articles was furnished by the ship's carpenter to be used in the launching and bringing said vessel to Boston, among which were a chain cable, sails, blocks, &c. &c. The mate of the Marathon, who then had charge of her, agreed, with the knowledge and concurrence of said Eager, to loan from the Marathon, said chain cable, sails, blocks, &c. to be used for the purpose aforesaid, but afterward to be returned to the ship as soon as the launching was over; and he, the mate, accordingly caused the said chain cable to be landed, to be taken to Medford by the wagoner, as also the other articles referred to from the ship. The next day, or the day after, the teamster took the said sails and blocks to Medford on one team, he being unable to carry the chain cable on the same load, and, on Saturday following, about noon, loaded the chain cable into his wagon, carried it out to Medford; and while he was landing it at Medford, and before it was entirely out of his wagon, the said chain cable was seized by the custom house officers, and brought back to Boston. The said chain cable was soon after bonded, and put on board the Marathon. And the attorney for the United States requested the honorable judge to instruct the jury, that the cable could not lawfully be loaned or used for the purpose aforesaid, and that the collector of said port had authority to make the seizure. But the judge refused so to instruct the jury. On the contrary thereof, the jury were instructed, if they believed the purchase of said cable was bona fide, and necessary, and proper, the mere casual loan of it, to be used for the purpose before stated, would not subject it to be seized, unless they believed the proposed use was colorable merely. He further instructed the jury, that although the cable was to be considered a part of the ship, yet if it was separated from it with an intention of selling or using it for another purpose, and not restoring it to the ship, that might be an unlawful use, which might subject it to seizure. But he left it for the consideration of the jury, whether, at the time and place when the cable was landed, or when the seizure was made, they could infer that there was any such intention of diverting, permanently, the use of the cable, and separating it from the ship Marathon. The said attorney further requested his honor, the judge, to instruct the jury, that if it were lawful for the claimant to loan or use said cable, for the purpose aforesaid, it could not be legally landed for that purpose, without a permit from the proper officers of the port aforesaid. But the said judge refused so to instruct the jury: On the contrary, the jury were instructed, that the claimant had the right to make a temporary loan of the cable, for the purpose aforesaid, without any permit, and that the mere casual temporary loan of the cable for any such purpose as the one supposed, no more required a permit, than to carry a sail to a sailmaker to be mended, or a chain cable to the smith for the same purpose, or any other part of the ship's tackle or apparel, which required repairs. But it was for the jury to consider, whether the loan of the cable for the purpose aforesaid, was, or was not, colorable upon the evidence in the case.

Judgment being rendered according to the verdict, the present writ of error was brought to the circuit court.

Mr. Mills, Dist. Atty.

J. P. Cooke, for claimant.

STORY, Circuit Justice. In my judgment the whole point in this cause resolves itself into this; whether the chain cable in controversy was, at the time of its arrival and importation into the United States, bona fide, a part of the equipments and appurtenances of the ship Marathon. If it was, then it is clear

[1] [Reported by Charles Sumner, Esq.]

to me, that no forfeiture is incurred. If it was not, then the case must be treated as an attempted evasion of the revenue collection act of 1799, c. 128, and the forfeiture consequently attaches. It appears from the evidence, that the chain cable was purchased at Liverpool, in England, to supply the place of a steam hempen cable of the ship, which had become unseaworthy; and the purchase was made, bona fide, for the use of the ship, and not to sell as merchandise; and it was used for the ship on her arrival at the home port. Now, the question of bona fides was directly put by the learned judge of the district court to the jury, and they have affirmed it by their verdict. The only ground, then, open to controversy, is, whether the directions given by the court, and the refusal of the instructions prayed by the district attorney at the trial, were correct and justifiable in point of law. I think they were correct and justifiable. If the chain cable was bona fide purchased, and bona fide an appurtenance of the ship, at the time of the arrival and importation thereof, it is clear, that the owner might lend it and loan it, as he should please, without any permit. The provisions of the revenue laws do not require any permit to be given before the landing of any of the ship's appurtenances or equipments. If a new sail had been necessarily purchased abroad for the ship's use, to supply an old sail, worn out, or lost on the voyage, it will scarcely be pretended, that it required a permit in order to be landed, or that though composed of dutiable articles, before it was made up, the sail would, upon the ship's coming to the home port, be liable to duties.

It is possible, that evasions of the revenue laws may sometimes occur, under color of procuring new sails, or rigging, or equipments of our ships in foreign ports; and thus, the party may escape from the payment of the proper duties on the articles thus imported, and introduced into the country. But, the defect, if any, is to be cured by legislation, and not by the courts of law. Until congress shall declare, that the new rigging or equipments of a ship, procured abroad, are dutiable, or not to be landed without a permit, it seems to be difficult to conceive, how courts of justice can treat them as "goods, wares, or merchandise," within the meaning of the general revenue laws. The "goods, wares, and merchandises," within the provision of the 50th section of the revenue collection act of 1799, c. 128, are such only as are designed for sale or to be applied to some use or object, distinct from their bona fide appropriation to the use of the ship; in which they are imported. Upon any other construction, not only every sail, rope, yard, or other appendage of the ship, purchased for the immediate use of the ship, and from an obvious necessity, in a foreign port, would be liable to the ordinary duty acts; but even the common tables, chairs, wares, and provisions, for the daily accommodation of the ship and her crew, would fall under the like predicament, and could not be landed without a permit. It is impossible, in my judgment, to contend, successfully, for such a construction of our existing revenue laws. And yet I know not, how, upon principle, to distinguish between the case put, and the case now at the bar. Upon the whole, my opinion is, that the judgment of the district court ought to be, and hereby is affirmed.

Case No. 14,777.

UNITED STATES v. CHALONER.

[1 Ware, 214.] [1]

District Court, D. Maine. June Term, 1831.

POST-OFFICE—PROHIBITION OF PRIVATE CARRIAGE OF MAIL—PACKETS.

The 21st section of the post-office act of March 3, 1825 [4 Stat. 107], which prohibits persons concerned in carrying the mail, from carrying letters or packets, does not prohibit their carrying a package containing executions, and nothing else. By the term packet, in this section, is meant a packet containing letters, and not a package containing other articles.

This was a suit brought by the United States to recover a penalty of fifty dollars against the defendant, for an alleged violation of the act of congress of March 3, 1825, entitled "An act regulating the post-office establishment." It was submitted to the decision of the court on the following agreed statement of facts: "That the defendant was a mail carrier from Machias, through Eastport, to Calais, and that on the day specified, his driver took from Eastport certain packages, containing executions, and nothing else, and carried and delivered them to the persons at Calais named in the writ—judgment to be entered in favor of the United States, if in the opinion of the court, the action, on these facts, is maintainable—and if not, then for the defendant."

The District Attorney, for the United States.

George W. Pierce, for defendant.

WARE, District Judge. This action is brought to recover a penalty under the 21st section of the post-office act of March 3, 1825, c. 275 [3 Story's Laws, 1991; 4 Stat. 107, c. 64]. The terms of the penal clause are that, "if any person concerned in carrying the mail of the United States, shall collect, receive, or carry any letter or packet, or shall cause or procure the same to be done, contrary to this act, every such offender shall forfeit and pay, for every such offence, a sum not exceeding fifty dollars." This section contains no description of the offence. It is the naked enactment of a penalty, and the nature of those acts by which it is incurred must be sought in other provisions of the law. The 20th section of the act directs the mail carriers, on receiving any way letters,

[1] [Reported by Hon. Ashur Ware, District Judge.]

and they are bound to receive them if presented at a greater distance than one mile from a post-office, to deliver them at the first post-office at which they shall afterwards arrive. It was not contended that these packages which contained executions and nothing else, without any letter accompanying them, fall within the letter of this section. The 14th section provides, "that no stage or other vehicle which regularly performs trips on a post-road, or a road parallel to it, shall carry letters, nor shall any packet-boat or other vessel which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo. For a violation of this provision, the owner of the carriage or other vehicle or vessel shall incur the penalty of fifty dollars." The prohibitive words of the section apply to all carriages of whatever kind which perform regular trips on a post-road, and must be understood to include carriages employed under contracts with the postmaster-general, for carrying the mails, as well as others not so employed. But the prohibition is restricted to the carrying of letters. There is nothing in this section which, taken at the letter, renders it unlawful for a mail or other coach to carry packets. It is, however, contended that this section is to be interpreted in connection with the 21st, and other parts of the act, and that by the true construction of the law, taken in all its parts, packets as well as letters are included within the prohibition. By the 21st section, a penalty is incurred by carrying packets, and unless the prohibition of the 19th is extended to packets, this word in the 21st will become inoperative. Packets also are, it is said, as much within the reason of the act, as much within the mischief intended to be prevented, as letters. If by simply including two or more letters in one envelope, the law may be eluded, the whole policy of this section of the act may be defeated and the prohibitory clause rendered a dead letter. The intention of the law is, to prohibit the conveyance, especially in the mail coach, of all letters and packets which may by law be carried in the mail, which includes all packets, of whatever description, weighing not more than three pounds. Section 13. The 6th section is referred to in support of this view of the law. That directs every master or manager of a steamboat which shall pass from one port or place to another port or place in the United States where a post-office is established, to deliver all letters and packets addressed to a resident of such place, to the postmaster there, under a penalty of thirty dollars. Why should a steamboat be required to pass packets through the post-office, if a stage is not? The reason is apparently quite as strong in the latter case as in the former.

The answer given to this argument by the counsel for the defendant is, that in the penal clause of the 21st section, on which this action is founded, the meaning of the word packet is restricted to packets of a single kind, that is, those which contain letters. It is very clear that the word is not uniformly, or indeed most usually, taken in this restricted sense, in the act. In the 13th section, which establishes the rates of postages, packets are mentioned containing four or more pieces of paper, or one or more other articles, and are charged with quadruple the postage of a single letter; and in the 21st section, the word occurs four times where it is manifest that the meaning cannot be restricted to packets of letters. Packets containing articles of any description may be conveyed in the mail, provided their weight does not exceed three pounds. The argument for the plaintiff is, that wherever the word is used without qualification, it is to be taken in its most general sense, and that when the meaning is intended to be restricted to packets of letters, the qualifying word, letters, is used, as in the 6th and 13th sections. Admitting this to be the true construction of the statute—and if it be not conceded, I think it would be difficult to maintain it—it will still remain true that the court, to inflict the penalty in this case, must extend, by implication, the operation of the 19th section. Packets are not within the words of the prohibition, at least packets containing other articles than letters. A packet containing, in an envelope, several letters, is clearly within the intention of the act, and I think fairly within the letter. But this question is not before the court, as it is admitted that the packets, in this case, did not contain letters. But it appears to me that instead of interpolating the word "packet," in the 19th section, to make this conform to the 6th, the ordinary rules for the interpretation of penal statutes would lead us to restrict the meaning of the term in the 6th section, to packets of letters. That this is the true meaning of the term in this section, and not a mere juridical refinement to curtail the operation of a penalty, appears to be morally certain from the last clause of the section. In the first clause, the master of a steamboat is required to deliver all letters and packets to the postmaster, on his arrival at a place where there is a post-office, and in the last clause it is provided that every person employed on board any steamboat shall deliver every letter and packet of letters intrusted to such person, to the master, for the purpose of being delivered to the postmaster. Here the persons employed on board of a steamboat, other than the master, are required to deliver to him only such packets as contain letters. All other packets, therefore, they are permitted to take charge of and deliver, without passing them through the post-office. If the owner may do this, why should the master be prohibited from it? The language of the last clause ought to be taken as the interpretation of the word in the first, where it is used without qualification. This construction of the 6th section renders the prohibition of

that, coextensive with that of the 19th, and by interpreting the word packet in the 21st, to mean packet of letters, it places all the parts of the statute in harmony with each other. It appears to me that this interpretation coincides with the policy, and fulfils all the intentions of the law. It can hardly be supposed to be the intention of the legislature to impose a charge of postage on all small packets which it may be convenient for the citizens to transmit from place to place in stages and steamboats; at the same time, when the owners choose the conveyance by mail as most certain, or most safe, they are protected while in the mail by the same penalties, and charged with the same postage as letters.

This view of the law is confirmed by comparing the 19th section with the corresponding section in the previous postoffice laws. It is taken, but with material alterations, from the 16th section of the act of 1810, c. 54 [2 Story's Laws, 1160; 2 Stat. 596, c. 37]. This provides that if any other person than the postmaster-general, or the person by him employed, shall be concerned in setting up any horse or foot post, stage, &c., on any established post-road, or one parallel or adjacent to it, or from one post town to another, or any packet-boat or other vessel, to ply regularly from one place to another, between which a regular communication by water shall be established by the United States, and shall receive and carry any letter or packet, other than newspapers, magazines, or pamphlets, the owner shall forfeit for every offence the sum of fifty dollars. This section of the act of 1810 is borrowed without alteration from the 12th section of the act of 1799, c. 149 [1 Story's Laws, 691; 1 Stat. 735, c. 43]; and that again from the 14th section of the act of 1794, c. 23 [1 Stat. 360]; and this, with unimportant alterations from the first general act regulating the post-office establishment, in 1792, ch. 7 [Id. 232]. From the commencement of the post-office establishment, or rather from the date of the act of 1792, it has been unlawful for stages performing regular trips on a post-road, to carry from place to place any other packets than those containing newspapers, magazines, or pamphlets. In the revision of these laws by the act of 1825, the word packet is dropped. There appears to be no reason to doubt that it was omitted ex industria, and not unlikely for the purpose of making law conform to what is understood to have been the universal usage from the first existence of the post-office establishment. At all times the stages have been accustomed to carry, for the citizens living on mail routes, small packages of merchandise. This practice is of very considerable convenience to the citizens; it can impair but in a small degree the revenue of the post-office, for if these packages were charged with postage they would ordinarily not be sent by the stages, and it does not, therefore, appear to be opposed to the policy of the law. On the facts agreed on in the case, my opinion is that judgment must be rendered for the defendant.

Case No. 14,778.

UNITED STATES v. CHAMBERLAIN.

[12 Blatchf. 390.] [1]

Circuit Court, S. D. New York. Dec. 22, 1874.

CRIMINAL LAW—EVIDENCE—HANDWRITING—OTHER WRITINGS—COMPARISONS—EXPERT TESTIMONY.

1. On the trial of an indictment for depositing scurrilous postal cards in the mail, the cards put in evidence displayed characteristic instances of misspelling, and it was *held* to be competent to prove other writings of the defendant's, containing identical errors in spelling, for the purpose of connecting the defendant with the cards which formed the subject of the charge.

2. It was, also, *held* to be incompetent to test the knowledge of an expert in handwriting, by placing before him irrelevant papers, for the mere purpose of contradicting his testimony as to the handwriting thereof.

[Cited in Springer v. Hall, 83 Mo. 698.]

3. It was, also, *held*, to be competent for the jury to compare the handwriting of documents properly in evidence, and proved to have been written by the defendant, with the handwriting of the cards in dispute, for the purpose of ascertaining the origin of the cards.

4. It was, also, *held*, that, standard specimens of the defendant's handwriting being in evidence, an expert might point out to the jury features in the writing of such specimens, identical with those displayed by the cards in question.

This was an indictment [against Moses Chamberlain] tried before BENEDICT, District Judge, for depositing scurrilous postal cards in the mail.

The cards put in evidence displayed characteristic instances of misspelling, and it was held to be competent to prove other writings of the defendant's, containing identical errors in spelling, for the purpose of connecting the defendant with the cards which formed the subject of the charge.

It was, also, held to be incompetent to test the knowledge of an expert in handwriting, by placing before him irrelevant papers, for the mere purpose of contradicting his testimony as to the handwriting thereof.

It was, also, held to be competent for the jury to compare the handwriting of documents properly in evidence, and proved to have been written by the defendant, with the handwriting of the cards in dispute, for the purpose of ascertaining the origin of the cards.

It was, also, held, that, standard specimens of the defendant's handwriting being in evidence, an expert might point out to the jury features in the writing of such specimens, identical with those displayed by the cards in question.

There were cited, as authorities, Brookes v. Tichborne, 2 Eng. Law & Eq. Rep. 374;

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Doe v. Newton, 5 Adol. & E. 514; Rogers v. Ritter, 12 Wall. [79 U. S.] 317; Van Wyck v. McIntosh, 14 N. Y. 439; Griffits v. Ivery, 11 Adol. & E. 322.

Ambrose H. Purdy, U. S. Asst. Dist. Atty.

William Fullerton and William H. Waring, for defendant.

Case No. 14,779.

UNITED STATES v. CHAMPION.

[Cited in U. S. v. One Hundred and Twenty-Nine Packages, Case No. 15,941. Nowhere reported; opinion not now accessible.]

Case No. 14,780.

UNITED STATES v. CHANA.

[Hoff. Land Cas. 155.] [1]

District Court, N. D. California. June Term, 1856.[2]

MEXICAN LAND GRANT — SUTTER GENERAL TITLE.

The validity of claims under the Sutter general title affirmed in U. S. v. Hensley [unreported].

Claim [by Claude Chana] for four leagues of land in Yuba county [the Rancho Nemshas], confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.

Thornton & Williams, for appellee.

HOFFMAN, District Judge. The claim in this case rests upon what is known as the "general title" of Governor Micheltorena. The validity of that title has already been affirmed by this court in the case of U. S. v. Hensley; and the only inquiries that arise are whether the person from whom the claimant derives title was one of those for whose benefit the title issued—whether he has performed the conditions, and whether the land intended to be granted is sufficiently indicated. On the first point the evidence leaves no room for doubt. The documents contained in the expediente and the evidence on file clearly show that Pedro Teodoro Sicard was one of those who petitioned the governor, on whose applications Gen. Sutter had reported favorably, and for whose benefit the general title issued and was delivered to the latter. The copy of the general title which Gen. Sutter delivered to each petitioner in whose favor it had issued is produced, with the certificate of Sutter showing it to be a copy of the original. The board does not seem to have entertained any doubt as to the fact that Sicard was intended to be one of the grantees under the general title. The evidence also shows that the conditions of occupation and cultivation were fully complied with, and the situation and boundaries of the land are indicated with great precision in the petition and diseño which accompanies it. The claim was confirmed by the board, and the case has been submitted without argument or objection on the part of the United States to its validity.

We are of opinion that a decree affirming the decision of the board should be entered.

[Reversed by the supreme court. See 24 How. (65 U. S.) 131.]

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 24 How. (65 U. S.) 131.]

Case No. 14,781.

UNITED STATES v. CHAPEL.

SAME v. CROSBY.

[26 Law Rep. 22.]

District Court, W. D. Michigan. Nov. 11, 1863.

INTERNAL REVENUE — FAILURE TO TAKE OUT LICENSE—TO AFFIX STAMPS—INDICTABLE OFFENCES.

A failure to take out a license or a neglect to affix stamps as required by the internal revenue law, are indictable offences.

BY THE COURT. The motion to quash the indictment against Jared Chapel, for being engaged in the business of a lawyer without a license, and the demurrer to the indictment against Lysander Crosby, for making three promissory notes, each for more than twenty dollars, without being duly stamped to denote the duty imposed thereon, I will dispose of together. Both motion and demurrer have been argued, upon the distinct ground that the remedy by indictment does not exist, and that the only method of proceeding for a violation of the statute is by action or information of debt, to recover the penalty. There is this difference, however, between the two cases: to the pecuniary penalty imposed for being engaged in any business named in the section 64 of the internal revenue law, without a license, a subsequent statute has added punishment by imprisonment upon conviction; whereas, the provision requiring stamps to be placed on instruments imposes, for a violation, only a pecuniary penalty.

In order that we may intelligibly investigate and consider the question presented, we need, first, to look at the nature and purpose of penal statutes. "An offence," says Mr. Wharton, "which may be the subject of criminal procedure, is an act committed or omitted in violation of public law, either forbidding or commanding it." 1 Whart. Cr. Law, § 1. Misdemeanors at common law comprise all offences less than felony, which may be the subject of indictment, and these are divided into two classes—those penal at common law, and those penal by statute. Id. § 3. There are two sorts of penal statutes which create offences; one where the statute enjoins or forbids an act, without declaring the omission or commission of the act indictable; the other, where the omission or commission is made specifically indictable. Whart. Cr. Law, § 10. It is a well-settled rule of criminal law, that a statute which enjoins or forbids an act, that is

not at common law a misdemeanor, and imposes a pecuniary penalty for its violation, creates, technically, an offence. U. S. v. Mann [Case No. 15,718]. But, is it an offence which is indictable? I regard this question as put beyond controversy by the authorities. Mr. Wharton says (section 10, same volume): "If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment." See section 1, before referred to; also, 1 Russ. Crimes, p. 49.

Now, there is this distinction to be observed—some penal statutes simply prohibit or command an act, without imposing any penalty or punishment for a violation thereof, and without prescribing a mode of punishment; other statutes prohibit or command an act, and impose a pecuniary penalty upon any person committing an infraction of its provisions—sometimes prescribing a mode of recovery, and sometimes not naming any remedy. There is no disagreement in the authorities, that where a public statute enjoins or forbids an act without imposing any penalty or punishment, a violation of its provisions is a misdemeanor, for which the person can be indicted and convicted, and, consequently, punished by imprisonment. 1 Russ. Crimes, p. 49; 1 Whart. Cr. Law, § 10; Rex v. Wright, 1 Burrows, 543; Lord Mansfield's opinion, p. 4; Rex v. Harris, 4 Term R. 202, all the judges concurring; Lord Kenyon, C. J.; Ashhurst, Buller, and Grose, JJ.

The next consideration is the United States statute, under which the indictments are drawn. It cannot be claimed that the statute has made the acts complained of in either indictment, viz.: making promissory notes without stamps, and being engaged in the business of a lawyer without license, specifically an indictable offence; that is, the statute does not expressly declare that either shall be the subject of indictment. The statute which requires lawyers to pay a license of ten dollars is as follows: "Sec. 57. And be it enacted that from and after the first day of August, 1862, no person, association of persons, or corporation, shall be engaged in, prosecute or carry on either of the trades or occupations mentioned in section 64 of this act, until he or they shall have obtained a license therefor, in the manner hereinafter provided." Section 64 mentions the occupation of a lawyer; then section 58 enjoins the duty, upon every person desiring to obtain a license, of registering with the assistant assessor his name, occupation for which he desires a license, and the place where he proposes to carry on the same; and section 59 enacts that every person, who shall carry on such occupation without taking out a license as in that behalf is required, shall, for every such offence, respectively, forfeit a penalty equal to three times the amount of duty or sum imposed for such license—one moiety to the use of the United States, the other to the person who shall first discover or give information of the fact whereby said forfeiture was incurred. 12 Stat. 453.

I need spend no more time to show that the rule in reference to penal statutes unquestionably is, that it is an indictable offence to violate a public statute which enjoins or forbids an act; and if so, it is such indictable offence to engage in any business, trade or occupation, forbidden by section 59 of the act of congress in reference to internal revenue. That section simply forbids the act, and does not declare any penalty, or prosecute any remedy; and so with section 58. If Chapel desired to obtain a license, and willfully failed to register his name, etc. with the assistant assessor, and was afterwards found practising law without a license—which would be evidence that he did desire a license—he has violated another plain command of a public statute, and thereby committed an offence which all the authorities agree is indictable. The law, as contained in Russell on Crimes (volume 1, p. 49), and in the other authorities to which I have referred, cannot be questioned, viz.: "Where the statute commands or forbids the doing of a thing, the doing or omission of that thing wilfully, although without corrupt motives, is indictable." But the 59th section expressly provides that the person who carries on such occupation, etc. as is named in section 64, shall forfeit a pecuniary penalty; and a subsequent act adds to that penalty, on conviction, imprisonment, in the discretion of the court, not exceeding two years. Whatever might be said as to the remedy by indictment, under the provisions of section 59, in the absence of the later statute imposing imprisonment on conviction, it is clear that this latter provision establishes the intention of the law makers to be, that carrying on a business without license, when one is required, is not only an offence, but one punishable by indictment. For there can be no judgment or sentence of imprisonment in a civil proceeding; and hence, by necessary implication, if not expressly, the remedy by indictment is given by congress for a violation of section 59. It will result from the views already expressed, that the motion to quash the indictment against Jared Chapel, for engaging in the business of a lawyer without a license, must be denied.

Let me briefly recapitulate. The indictment and the law in Chapel's case are regarded in this wise: First. One count of the indictment charges a violation of section 59, which section forbids the act complained of; the section nor act prescribes no punishment or remedy for an infraction of this section, and so: Second. Another count charges a violation of section 58, and this section enjoins the act, for not doing which the charge is brought. The remedy for an infraction of either of these sections is clearly by indictment, as the authorities agree. It will be no-

ticeable the statute gives no penalty, punishment or remedy for a violation of either section; and being a public statute, one provision forbidding, the other commanding the doing of certain things, the sole remedy is an indictment for an offence, and the punishment imprisonment. And, third, one other count charges a violation of section 59. This section imposes a pecuniary penalty if certain business is exercised or carried on without a license. The remedy here is two-fold, by an action or information of debt, because section 31 expressly gives the right to recover, by action or other appropriate form of proceeding, and by indictment, because the subsequent statute of March 3, 1863 (12 Stat. 727, § 24), clearly gives, by necessary implication, this remedy.

I will now turn more particularly to a consideration of the demurrer to the indictment against Crosby:

The arguments made and authorities adduced in the two cases, by the respective counsel for the respondents, were not fully answered or refuted; and in the absence of existing authorities, I confess, I took the papers in this case not wholly free of doubt, because of the seemingly direct authority read to sustain the demurrer on the principal point, viz.: That where a statute imposes a pecuniary penalty for the doing of a particular act, the remedy by indictment will not lie, but only a civil action to recover the penalty, unless the statute expressly give indictment.

I will recur to the principal authorities cited by counsel for Crosby, and some of the leading authorities, declaring what I regard the correct rule of law governing the question.

There can be little doubt, I think, but the usual and almost universal practice, in the courts of the United States, has been to enforce the payment of pecuniary penalties, given by statute, by civil and not criminal proceedings. And so Judge Story, in the case of Matthews v. Offley [Case No. 9,290], says: "Upon general principles, when a pecuniary penalty or forfeiture is inflicted for a public offence or money, it seems clear that the action to recover the penalty or forfeiture must be brought in the name of the government, and not in the name of a private party, unless some other mode for the recovery is prescribed by some statute; and the usual remedy, in cases of a pecuniary penalty, is an action or information of debt by the government itself." Such was claimed to be the practice on the argument, and I am satisfied that such has been the usual practice.

The case of Adams v. Wood, 2 Cranch [6 U. S.] 336, does not go the extent claimed for it, viz.: authority that an indictment does not lie. The court says: Almost every fine or forfeiture under a penal statute may be recovered by action of debt as well as by information. I do not see that this is even negative authority. Neither can I regard the case of U. S. v. Mann [Case No. 15,718], and the case of Ex parte Marquand [Id. 9,100], as changing the former settled rule; though Judge Story refers in the case of U. S. v. Mann, to Rex v. Malland, 2 Strange, 828, where he says it is laid down as law "that where a pecuniary penalty is annexed to an offence, and no mode of prosecution is prescribed, an indictment does not lie therein, but only an information of debt on the exchequer."

It is true that the statute we are considering would seem to be within the rule of Rex v. Malland, as adopted by Judge Story. But, on further examination, we shall find Rex v. Malland to stand quite alone, and opposed to many other cases in the English courts; and, inasmuch as the question of the indictability of an offence, under a penal statute, was not argued or averred in the case decided by Judge Story, it cannot fairly be claimed that the rule quoted from a single case, which is opposed to many other authorities, should be controlling. And what is said by the same eminent judge in Ex parte Marquand, that an indictment does not lie in such cases, is sustained by reference only to Rex v. Malland and Adams v. Wood—the latter of which does not at all involve the question. The judge in the subsequent case to which I have referred, Matthews v. Offley [supra], which was an action of debt to recover a pecuniary penalty, for violating a public statute, says: "It has been held that a suit will not lie by a common informer, for such penalty, unless power is given to him for that purpose by statute; neither will an indictment lie for such a penalty unless also specially allowed by statute, for it is properly recoverable as a debt in a court of revenue by government, and is in no sense a criminal proceeding." The language of Judge Story, in the two last cases to which I have referred, is broad enough to overturn what was before a well-settled doctrine, provided what he says is to be regarded and held as law. Inasmuch, however, as Mr. Justice Story does not refer to the authorities, long existing, on which a contrary rule rests, thus showing that he did not himself consider that he was differing with authorities on the question, I cannot think it was intended to go so far as the language imports, in opposition to a well-settled rule of law governing penal statutes.

Indeed, well-settled rules of law, resting firmly on time-honored authority, are not overturned by the opinion a court may express on points either not within the case under consideration, or, if so, not without taking some notice of the former authorities on which the contrary doctrine rests. I will recur to a few authorities, to show the law to be otherwise than the language of Judge Story would indicate it to be. And first, I read from Sedgwick on Statutory and Constitutional Law (page 96): "Where a statute prohibits an act to be done under a certain

penalty, though no mention is made of indictment, the party offending may be indicted and fined to the amount of the penalty; but where it is merely provided, that if any person do a certain act, he shall forfeit a certain sum to be recovered by action of debt, no indictment can be supported." If a statute enjoins an act to be done without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature. And I refer to, as fully sustaining these views, 1 Chit. Cr. Law, 162; Cro. Eliz. 635; 2 Just. 131; 1 Whart. Cr. Law, § 10; 1 Russ. Crimes, pp. 49, 50; Rex v. Wright, 1 Burrows, 544, 545; Rex v. Harris, 4 Term R. 204, 205.

I wish to notice one further distinction in reference to penal statutes, before adverting to the sections of the statute in reference to stamps on notes, &c. viz.: "Where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statute, or the same statute in a subsequent substantive clause, describes the mode of providing for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause as for a misdemeanor at common law, or he may proceed in the manner pointed out by the statute, at his option; but if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other." And the reason is said to be, that the express mention in the same clause of any other mode of proceeding impliedly excludes that by indictment. 1 Whart. Cr. Law, § 10, par. 3; 1 Russ. Crimes, pp. 49, 50, and the authorities last before referred to. But I regard the case of U. S. v. Bougher [Case No. 14,627], as fully an offset to Judge Story's opinion, and as giving a just and correct rule, viz.: "In all cases where an act is declared to be unlawful, and a punishment or penalty is annexed to the doing of the act, it pertains to the sovereignty of the state, through the agency of the judicial department, to punish it by indictment. And it does not require any express statutory authority to warrant such a proceeding."

If we now carefully read sections 94 and 95 of the statutes, it will not be difficult to determine whether an indictment can be sustained on those sections. As I have said, it was argued that there was no prohibition against making instruments in writing, without paying the duty or fixing thereon stamps, but only a penalty imposed for doing so, which could be collected in a civil action alone. If we remove from section 94 words that do not affect its sense or meaning for our present purpose, and retain only those words that are necessary to our present examination, it declares as follows, viz.: "That * * * there shall * * * be paid, for and in respect of the several instruments * * * mentioned in schedule B, * * * by any person * * * who shall make * * * the same * * * the duty or sum of money set down in figures, against the same, or otherwise specified or set forth in said schedule." That does not mean merely, a person may do so, but it declares he shall, that is, it positively requires and commands every person who makes a note for over $20 to pay the duty imposed thereon. And the law is, that a wilful violation of that command is an offence, and may be punished by the statute, as will be noticed, not fixing any punishment or mode of proceeding. Section 95 declares, substantially, that if a person makes a note, etc. without the same being stamped for denoting the duty imposed thereon, or without having thereon an adhesive stamp to denote such duty, such person shall incur a penalty of fifty dollars; but does this section not prohibit the act by imposing the penalty upon those who shall make the instrument, as clearly as though by direct word of prohibition? I think so, and that the remedy, under this section, comes under the rule in Sedgwick on Statutory and Constitutional Law, and the other authorities cited. At the same time, an action or information of debt may be brought to collect the penalty, at the option of the prosecutor; and, indeed, section 31 clearly gives a civil action to recover any pecuniary penalty named in the act.

It will be further noticed, that section 95 provides the penalty, but does not give the mode of recovery; and hence, the remedy by indictment, under the distinction clearly made (1 Whart. Cr. Law, § 10, par. 3) and supported by ample authority, that where the remedy is not provided in the same clause that gives the penalty, but in another substantive clause, the prosecutor may elect to proceed as for a misdemeanor, at common law or by civil suit.

I am entirely satisfied that the rule of law governing statutory penalties is well defined and established, not only by elementary writers, but by adjudicated cases of high authority, and to be in accordance with the views I have expressed. Whatever may be said of the policy of adopting the remedy by indictment, rather than to collect the penalty by civil action, there is no doubt as to the right. And I may add that I see no objection to the government taking the remedy by indictment; for, if the action of debt, in all cases, was resorted to, it is fair to presume that in half the cases the government would be beaten on the execution. There being no imprisonment for debt, those without pecuniary responsibility might violate the statute with impunity, and the government would practically, in such cases, be remediless; there would be no use suing in debts where there could be no collection of the penalty and costs of suit, for want of property in the defendants.

I see no objection, therefore, to the remedy by indictment. If a man will violate a public

statute, which exacts no more of him than duty and patriotism demand, he has no right to complain, if the government, whose laws he has broken, adopt a mode of prosecution that is sure to prove effective.

The demurrer is overruled, with leave for defendant to plead to the indictment, and, as before intimated, the motion to quash in the other case is denied

Case No. 14,782.

UNITED STATES v. CHAPELS et al.

[Brunner, Col. Cas. 444;[1] 2 Wheeler, Cr. Cas. 205.]

Circuit Court, D. Virginia. July, 1819.

PIRACY—WHAT CONSTITUTES.

The crime of piracy is defined with reasonable certainty by the law of nations, and by the acts of congress, and consists of robbery or forcible depredation upon the sea.

[2] [The following preliminary remarks are explanatory of the case.

[The constitution of the United States confers on congress the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." Article 1, § 8. "The Federalist" (No. 42) says this power "belongs with equal propriety to the general government; and is a still greater improvement on the articles of confederation. These articles contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations. The provision of the federal articles on the subject of piracies and felonies, extends no farther than to the establishment of courts for the trials of these offences. The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes."

[On the 30th April, 1790 [1 Stat. 112], congress passed "An act for the punishment of certain crimes against the United States." (among others, the crime of piracy,) the 8th section of which is in these words: "And be it enacted, that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

[At the February term of the supreme court of the United States, 1818, however, there came on the case of U. S. v. Palmer [3 Wheat. (16 U. S.) 610] certified from the circuit court for the Massachusetts district. Palmer and others, citizens of the United States, had gone upon the high seas, entered and robbed the Industri Raffaelli, a Spanish ship, of various articles. In this case, the question arose, (to use the language of the chief justice,) "whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the Union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?" The court finally came to the decision, that "the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act 'for the punishment of certain crimes against the United States,' and is not punishable in the courts of the United State."

[To supply this omission, a new provision was deemed to be necessary; and it is understood, that with this intention the last congress adopted the 5th section of the "act to protect the commerce of the United States, and punish the crime of piracy," passed on the 3d of March, 1819 [3 Stat. 513]. The 5th section is in these words: "And be it further enacted, that if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy as defined by the law of nations, and such offender or offenders shall, afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [From 2 Wheeler, Cr. Cas. 205.]

[On Monday, the hall of the house of delegates was filled by a large concourse of spectators. The court was opened; the chief justice on the bench. Mr. Stanard, the United States' attorney, appeared on the part of the United States; Messrs. A. Stevenson, and W. Wickham, on the part of the prisoners; Messrs. Gilmer and Bouldin, the two other counsel whom the court had added to the defence, being prevented from attending—the first by indisposition, the last by absence. The prisoners William Chapels and others, (twenty-one in number) had been variously charged in three different indictments; one (under the act of 1819) was for robbing a Spanish vessel; another, under the same act, for robbing a Dutch vessel; the third, under the act of 1790, for robbing an American vessel. Samuel Poole was first put to the bar, under the first indictment charged with having piratically and feloniously set upon, boarded, broke, and entered "a certain Spanish vessel or brig, belonging to certain persons whose names are, as well as is that of the said brig, unknown," and robbed her of Spanish milled dollars. The prisoner being arraigned, and the jury impannelled, seven witnesses were sworn in.

[Evidence:

[Samuel Stanly, a youth of 18, gave a clear and particular statement of the transaction. He stated, that he had belonged to the armed vessel the Irresistible; that while she was lying in the port of Margaritta, about a mile from shore, about 1 o'clock in the morning, she was cut out by the crew of the privateer Creola. Such of the crew of the Irresistible, as wished to go ashore, were permitted to do so. The crew of the Creola said they were going to continue the cruise. They did go on a cruise. They went off St. Domingo, where they did but little; but off Cape Antonio, in the island of Cuba, they met with several vessels. Q. What colours did you assume? A. No particular ones; sometimes one flag, sometimes another; flags of different nations. Q. Who appointed the officers, and how? A. They were appointed by the crew of the Creola; (but witness could not tell particularly the manner of their appointment.) They brought to a Spanish vessel off Cape Antonio, from whom they took $2300. During all the time of the cruise, he was on board of the Irresistable; towards the last of it, he was made master's mate, before which time he had been before the mast. Q. Did you board a number of vessels? A. We did. Q. Were they also plundered? A. Some of them were. Q. What became of the money found in the Spanish vessel? A. It was shared among all hands. Q. Did you come into the waters of the United States, into the Chesapeake Bay? A. We did. Q. What became of the vessel? A. Com. Daniels sent down and took possession of her. Witness said the crew had abandoned and dispersed. (One of the jurymen.) Was it from apprehension? A. I cannot tell that. Being asked to specify the different flags under which they had sailed, he mentioned the Spanish, Buenos Ayrean, and English. The Buenos Ayrean flag was flying when she took the Spanish vessel. On cross examination, Stanly said that he had sailed in the Irresistable about six or seven months before she was taken by the crew of the Creola; that she had sailed from Baltimore, to make prizes under a commission from Gen. Artigas. Q. Did you not take vessels under the flag of Buenos Ayres? A. No. Q. Did you not conceive you had a right to take them? A. No; we could have taken them many a time. Q. Would you not have taken the Creola if found out of port? A. No. Q. Were you not apprised of there being a war between Buenos Ayres and Gen. Artigas? A. I was. We had it in our power to take Buenos Ayrean privateers from Baltimore, but we did not attempt it. Q. While in the Irresistable, what prizes did you make? A. A ship and schooner belonging to the Portuguese. Being interrogated farther, he stated, that when the Irresistable was taken at Margaritta, he was in her asleep, and so were her crew; that fifty or sixty of the crew of the Creola had boarded her. Q. Do you know Poole? A. Yes. Q. Did you see him that night? A. No; not till the morning. They drove us below, and we had no chance of seeing till morning. He stated that the Irresistable was the strongest vessel; she mounted sixteen guns; the crew of the Creola had boarded her with two boats. Q. Had you no sentinel? A. Yes; but all were gone asleep. Q. How did you know then you were boarded with boats? A. I heard the captain say so, as well as several of the people. Q. How many were there in the crew of the Irresistable? A. About 25 or 30. Q. Was the prisoner very active? A. He was. Q. Who seemed the leader among them at that time? A. Ferguson, who was afterwards appointed captain. Q. Did you observe Black? A. He was first lieutenant at first, but they broke him. Being further questioned, in a desultory way, he stated that some of the old crew of the Irresistable were not willing to join; that when told they might go ashore, it was too late, being as much as fifty miles from land; that in the course of the cruise, they spoke about thirty or forty vessels, English, French, American, Dutch, Danes; that they boarded an American vessel bound to St. Jago; searched her trunks, and took jewelry from them. Q. When you boarded vessels, did you hear an order to take Spanish or Portuguese property, but no others? A. No. Q. But in boarding the American vessel, were orders given to respect American property? A. Yes. Upon being interrogated particularly how he came to call the vessel they took a Spanish vessel, he said she had a Spanish flag and Spanish crew. Q. Did you go on board of her? A. No; but they brought the crew on board of us to search their vessel. She was bound from Campeachy to Havana—she had four or five in her crew, besides officers and

passengers; was a very small vessel. Her captain told our captain in French he was a Spaniard. The witness, being interrogated, said he did not himself understand French or Spanish. Soon after he got to Baltimore, the witness said he was put in jail, and promises were held out to him that he should not be punished if he gave evidence in the case; that he was taken in the vessel in the Patuxent by the revenue cutter. His share of the money from the prize was $29; as to the jewelry, it was set up and sold in the vessel, and the proceeds shared out, of which he received $7 more. They had also plundered a Dutch vessel, from whom they had taken some hampers of gin; as also one of Petion's schooners, from whom they took clothes, money, watches, &c., which plunder was divided among the crew. Being asked by a juryman, if they were to take Spanish and Portuguese property only, why they robbed the American, he replied that they robbed the passengers only of jewelry, but did not rob the vessel. Q. Was the jewellery Spanish or American property? A. I do not know. Q. Why did you take gin from the Dutch vessel? Was that a Spanish vessel? A. No; but because we wanted it.

[Samuel Beaver: Was one of the crew of the Irresistable, when she was seized at Margaritta, in the month of March last; when taken, the boarding crew loosed her sails, and stood out to sea; hove to at daylight, and sent those ashore who chose to go; they said at first she was coming home to Baltimore, but they went a cruising; she carried the Margaritta flag generally; but when boarding vessels, they used different flags; they boarded eight or ten, Dutch, French, American, two Spaniards; one a Spanish brig off Cape Antonio; took from her $2,300. From the American vessel (the Superior) they took a cask of water and jewellery. The money they took was shared among the crew; they sold the jewellery and divided out the money. When they arrived in the Chesapeake Bay, the crew was called together, and divided; those who were for going out again went to one part of the vessel, the rest to another; the strongest party was for coming in, and the vessel was brought into the Patuxent. Q. Had you orders to respect particular vessels? A. No: we boarded one and all. We were prepared to take specie wherever we could find it. Q. What was the station of the prisoner in the Irresistable? A. He was captain of fore-top, and master's mate. Cross examined, he stated, that eighteen of the crew of the Irresistable were set ashore at Margaritta; that he did not try to get ashore, because he did not wish to be drowned, the boat being leaky and full of men and clothes; that he was below and drunk when the vessel was taken; that Captain Ferguson had told them at first he had a commission; but two days after he told them he had not; that after they found there was no commission, then they determined to board everything. Q. When you went on board of a vessel, were you not told to take nothing but Spanish or Portuguese property? A. Yes; but if we saw any specie, it was ours. Q. Had you orders to take money wherever found? A. Yes. He stated, that he was arrested in Baltimore, and was told he should get a dollar and a quarter a day while attending as a witness.

[John Donald: Was one of the crew of the Creola; shipped at Baltimore under the Buenos Ayrean flag, for a 90 days cruise; at Margaritta the vessel was sold, and they had none to return home in, and were told the governor of Margaritta meant to press them. Captain Daniels had told some of the crew, whom he wished to enlist with him in the service of Venezuela, to which he had become attached, that if they did not join him, he would have them put into the fort, and fed on bread and water. Donald said, when he was asleep below, one of the crew of the Creola, who rose upon the vessel, came down to his berth, and threatened to blow out his brains if he did not join them in going against the Irresistable. They went in two boats, and seized the latter vessel; secured the men, and hoisted sail. The officers of the Creola were confined during the mutiny. Ferguson and Black were the leaders. Ferguson was proposed on the quarter deck of the Irresistable as captain—no one objected, and he was appointed officer. They had boarded a Spanish vessel, with logwood on board, and took from her (as he understood) $3,700 in specie. They boarded several vessels under the Buenos Ayrean flag; came across one of Petion's vessels, sent a boat aboard of her, took out jewellery, [there were several articles of it on the table of the court;] understood that this vessel was a pirate, and had no papers. They paid for the water taken from the American vessel, but does not know whether they paid for onions taken from the Dutchman. Q. You never thought of putting a prize-master on board of any of the vessels you saw? A. No;. we would not have disturbed the vessel. Being cross examined, said there were orders to respect American property, and only to take Spanish and Portuguese.

[John M'Fadden: Was first lieutenant on board the Creola when she was seized; gave the particulars of that transaction; on the 24th of March the mutiny took place; they seized all the small arms; threatened to blow out the brains of the officer on deck. M'Fadden was below; when he went on deck, he found fifty men armed; tried to pacify them and quell them; they said they were not going to take our brig, but Captain Daniels', ours not sailing fast enough; he thought at one moment he should have quelled the mutiny, but Black told them they would be strung on the beach, and hung like dogs, they then sung out, "as we have begun, let us go through with it"; they took all the small arms from the Creola; they said all might stay who chose; they wished none but volunteers; only four or five remained behind; Captain Daniels' other vessel tried

to pursue the Irresistable next morning, then in sight (about 20 miles off) from the mast head. Being further interrogated, said the Creola had a commission from Buenos Ayres; she was regularly commissioned; the crew shipped at Baltimore; cruise was finished at Margaritta. They did not think themselves authorized to take a vessel under the Artigas flag; on the contrary, he had known the two flags cruise together.—Mr. Stanard: Q. Does not the commission expressly restrict you from taking South American Spanish property? A. Yes; it is against the property of the subjects of the king of Spain.

[Henry Child: Had been the first officer of the Irresistable; was below when the Creola's crew came on board; he attempted to go up with a cutlass, but was taken and confined; they told him, as soon as things were arranged, they would give him the boat, and let him go ashore. Word was passed fore and aft for every one who wished to leave the vessel to go in the boat; he and nineteen men left it; the boat was in a leaky condition—much baggage in it, but had any more been willing to go with him, the baggage would have been thrown overboard. They overhauled his and Captain Daniels' trunks for the vessel's commission, but finding none. Ferguson said he could easily make papers for himself. When the Irresistable first arrived at Margaritta, the captain had taken all the papers on shore, to deposit them at the government house.

[Captain Paul: Was the commander of the Creola; was asleep in the cabin when the alarm was given; was suffered to go to the upper step of the gangway; was told they did not intend to injure his vessel, but to taken possession of the Irresistable; after leaving his vessel, he had fired at them, then went on board Captain Daniels' other vessel, which chased them eight hours in vain. Captain Paul being asked the date of his commission, said the original had been sent to Buenos Ayres, but a copy he had of it bore date in September, 1814. It did not justify him in taking any but Spanish property.

[Captain Daniels: Was the commander of the Irresistable; after the alarm was given, he was ordered by the governor to pursue her, but to no purpose; her boat returned to shore with twenty officers and men. The Irresistable had been engaged by the governor to sail to Venezuela in two days.

[The evidence being gone through, the court directed the jury to be kept together, and adjourned till next morning. On Tuesday morning the argument commenced. Mr. Stanard addressed the jury about an hour. On the part of the prisoner, Mr. Wickham spoke about half an hour, and Mr. Stevenson about an hour. Mr. Stanard closed on the part of the United States.

[The counsel on the part of the United States laid down the law, and analyzed the evidence. He called upon the jury, among other things, to lend their aid in cutting down that system of brigandage which was tarnishing the reputation of our country, and demoralizing our seamen. He cited the following passage from Bynkershoeck, to show what was piracy as defined by the laws of nations: "We call pirates and plunderers those who, without the authorization of any sovereign, commit depredations by sea or land," &c. &c.

[The counsel on the other side contended, that the words of the act of congress were too vague and loose to authorize the jury to dip their hands in the blood of a fellow citizen; that piracy was a general term, not clearly nor sufficiently defined in the laws of nations; that the great father of the church to whom you would look for a definition, gave no satisfaction upon it. What says Grotius? Not one syllable. Puffendorf? Profoundly silent. What Barbeyrac? Domat? Rutherford? Montesquieu? Wolfius? Vattel? Not a solitary word by way of definition: and the reason was, that it had been left to the municipal laws of different countries to define it, and, therefore, the law of nations had not. We have only the definition of one Dutchman, Byndershoeck; and even with that his commentator, Du Ponceau, had expressed his dissatisfaction. And yet the jury were to say upon their oaths that piracy had been defined by the law of nations. Why did not congress do their duty, in the exercise of their constitutional powers, and make a rule which might be understood by the judiciary of the country? If they had failed in doing their duty, it was their own look out; but surely no jury would take upon themselves to say by their verdict the law had been defined, when it was not; or upon such vague, general expressions, take the life of a fellow citizen. The counsel, by way of analogy, attempted to show that if congress had referred to other cases as defined by the law of nations, as territorial jurisdiction, the right of search, &c. how discordant the writers, and how unsettled the doctrines are upon the subject. Men, too, highly distinguished in this country, had differed upon the definition of piracy. The gentleman who presided in that court, had in another place, (in congress,) in the Case of Robins [Case No. 16,175], declared that not only an actual robbery, but cruising on the high seas without a commission, and with an intent to rob, was piracy. Whereas now, the United States' attorney says actual robbery is necessary to constitute the offence. Reference was also had to the constitution, by which congress is to define piracies and felonies committed on the high seas, and offences against the law of nations, to show that the former are distinguished from the latter, as if not ranked among the "offences against the law of nations." The evidence was then analyzed, and commented on. It was the testimony of accomplices, (always suspicious,) and here brought from duress of a jail, taking its colour from the hopes and

fears of the witnesses. It was attempted to be proven that they had contradicted themselves, and each other—that there was no satisfactory evidence of this being a Spanish vessel as charged in the indictment—that this act of congress was passed but ten days before they left Margaritta: they could not have known of it; and therefore it is as to them in the light of an ex post facto law, &c. &c. A particular and pathetic appeal was made in favour ot Poole, who had served gallantly in the navy of his country during the late war.

[Mr. Stanard replied to both gentlemen at considerable length. He denied the vagueness which was ascribed to the law of nations on the subject of piracy, and the other points touched upon. He supported the authority of Bynkershoeck. Vattel (Law Nat. bk. 1, c. 19) had denounced "all villains who by the quality and habitual frequency of their crimes, violate all public security, and declare themselves enemies of the human race. Thus pirates are brought to the gibbet by the first into whose hands they fall!" Blackstone, the vade mecu n of all the lawyers, says, "A pirate is an enemy of the human race." Even if writers on the law of nations had adopted different definitions of piracy, where was the definition of it that would not embrace the case of these men—whose lawless depredations came up to any definition of it which had ever been given? After developing this idea with great force, and ridiculing the pretensions that had been suggested, that these men had the right, under the commission belonging to the Irresistable, to capture Spanish property, he returned to the analysis of the testimony; he showed why the testimony of accomplices should be received; otherwise the most atrocious offences might escape with impunity. He concluded by a strong appeal to the jury in favour of the law—that the honour of our country required that the law should be put in force against brigands who not only sailed from its waters to collect plunder but returned to them as the scene for its partition, and as a sanctuary where they expected to escape the punishment of their crimes.] [2]

Mr. Stanard, U. S. Atty.

A. Stevenson and W. Wickham, for prisoners.

THE COURT then charged the jury in substance that the prisoner at the bar was indicted for cruising on the high seas without any commission, and boarding and plundering a Spanish vessel, or vessels belonging to some power to the jurors unknown; and piratically taking out of such vessel a sum of money, which the crew divided among themselves. The essential objects of inquiry were, whether the prisoner at the bar was engaged in such cruise without a commission: whether the robbery charged in the indictment was committed by him and others so cruising as aforesaid, and whether the fact amounted to piracy under the act of congress.

The fact of cruising and plundering the Spanish vessel was proved by the testimony of accomplices, and it was contended by the counsel for the prisoner that they were totally unworthy of credit. It is undoubtedly true that the testimony of accomplices is to be heard with suspicion; and if their testimony should be improbable, or contradicted by circumstances, or by other testimony, the jury might justifiably discredit it; but if all the circumstances of the case, circumstances which could not be mistaken or misrepresented, corroborated the testimony of the accomplice, and in fact were merely connected by that testimony, it would be going too far to say that the facts supplied by the witness were to be disregarded because he was an accomplice. But in this case, one of the witnesses, Donald, had been acquitted by the grand jury because he was forced on board the vessel, and his testimony concurred with that of the other witnesses in all that was material.

If the robbery was committed, their next inquiry would be, whether the vessel committing it sailed under a lawful commission. There was not only no testimony whatever of a commission, but all the facts given in evidence were totally incompatible with the idea of sailing under any authority whatever. The crew of one vessel had mutinied, seized another vessel, and proceeded on a cruise under officers elected by themselves.

The question whether the case came within the act of congress was one of more difficulty. It was impossible that the act could apply to any case if not to this. The case was undoubtedly piracy according to the understanding and practice of all nations. It was a case in which all nations surrendered their subjects to the punishment which any government might inflict upon them, and one in which all admitted the right of each to take and exercise jurisdiction. Yet the standard referred to by the act of congress, as expressed in that act, must be admitted to be so vague as to allow of some doubt. The writers on the laws of nations give us no definition of the crime of piracy. Under the doubts arising from this circumstance, the court recommended it to the jury to find a special verdict, which might submit the law to the more deliberate consideration of the court.

The jury retired but for a few moments, and brought in a special verdict.

A jury was then impaneled, and the case of ten others of the crew (charged in the same indictment) was, with their consent, submitted at once to trial; the evidence gone through, and the jury returned the following special verdict:—

We of the jury find that the prisoners,

[2] [From 2 Wheeler, Cr. Cas. 205.]

Bailey Durfey, William Chapels, alias William Chapel, Daniel Phillips, James Thomas, alias James West, Daniel Livingston, Luke Jackson, Stephen Sydney, Peter Nelson, Isaac Sales, and Peter Johnson, were, in the month of March, 1819, part of the crew of a private armed vessel called the Creola (commissioned by the government of Buenos Ayres, a colony then at war with Spain), lying in the port of Margaritta; that in the month of March, 1819, the said prisoners and others of the crew mutinied, confined their officers, left the vessel, and in the said port of Margaritta seized by violence a vessel called the Irresistable, a private armed vessel lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoners and others having so possessed themselves of the said vessel, the Irresistable, appointed their officers, proceeded to sea on a cruise without any document or commission whatever, and while on the cruise, in the month of April, 1819, on the high seas, committed the offense charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of congress of the United States, entitled "an act to protect the commerce of the United States, and punish the crime of piracy," then we find the said prisoners severally and respectively guilty. If the plunder and robbery above stated be not piracy under the said act of congress, then we find them not guilty. John G. Gamble, Foreman.

THE COURT then adjourned.

[NOTE. This cause was certified to the supreme court, where it was argued at the February term, 1820, Justice Story delivering the opinion. It was decided that the offense charged in the indictment amounted to the crime of piracy, and was punishable under the act of congress entitled "An act to protect the commerce of the United States, and punish the crime of piracy." Act April 30, 1790 (1 Stat. 112). 5 Wheat. (18 U. S.) 153.]

Case No. 14,783.

UNITED STATES v. CHAPMAN.

[4 Am. Law J. (U. S.) 440.]

District Court, W. D. Pennsylvania. Jan. Term, 1851.

CRIMINAL LAW—CONFESSION—PROMISE OF FAVOR.

A confession made by a prisoner against himself on a hearing before a committing magistrate, although previously cautioned by a magistrate not to criminate himself, held to be inadmissible because it appeared that forty-two hours before he had made a confession to one of the magistrate's officers under the influence of false promises.

The defendant, J. L. Chapman, was indicted for robbing the United States mail. It was proved that after defendant's arrest, promises of favor were held out by High Constable Hague, and under these the prisoner confessed. He was detained forty-four hours in the watch house, and being brought before the mayor, his examination was taken in writing, under the statute of Philip and Mary, and duly signed. The mayor knew nothing of the previous confession to Hague, and gave to the prisoner no more than the usual caution, which was not to answer any questions unless he pleased, telling him also that he was not bound to criminate himself.

The examination was offered by the district attorney, J. B. Sweitzer, and objected to by S. W. Black, counsel for prisoner.

Mr. Black stated the general rule in regard to admitting confessions in evidence. Every species of confession to be admissible must be voluntary and free. Any promise of favor, any threat or undue terror, operating on the mind, is sufficient to exclude the testimony. Archb. Cr. Pl. 117; 2 Hale, P. C. 235; 2 East, P. C. 659; 1 Phil. Ev. 104; 2 Starkie, Ev. 27; 2 Russ. Crimes, 645; Reg. v. Bosnell, 1 Car. & M. 584. The rule, said the counsel, is inflexible, and the confession must come from a free and willing mind, else the court is bound to reject it. And if it appears that any improper impression has been made upon the prisoner's mind by either magistrate or constable, it must be entirely effaced before a subsequent confession can be received. If inducements have been held out, and confessions obtained within a reasonable time before the official examination, the attention of the prisoner must be called to his prior confession and then explicit warning must be given not to rely on any expected favor. The loose and general caution "not to criminate himself" is far from sufficient. Inducements being once held out and confessions procured, the burden of proof is on the prosecution to show that they have been entirely removed, and that perfect freedom prevails in the mind. The presumption of law is that the influence still remains until by clear and satisfactory proof it is shown that every vestige is removed and the mind again set free. The proof, whether positive or circumstantial, must be ample and satisfactory. 2 East, P. C. 658, 659; Archb. Cr. Law, 118, 119; 2 Starkie, Ev. 27; State v. Roberts, 1 Dev. 259; Peter v. State, 4 Smedes & M. 31; Com. v. Knapp, 19 Pick. 507; Reg. v. Hewett, 1 Car & M. 536; 1 Phil. & A. Ev. 430.

It was contended by J. B. Sweitzer, U. S. Dist. Atty., that although the confession made in the first instance to the officer who made the arrest, had been induced by promises of favor, and was therefore inadmissible in evidence against him, still the subsequent statement made before the mayor, after the defendant had been duly cautioned not to criminate himself, was not liable to the same objection, and should therefore be admitted —that the influence of the motives proved to have been offered, could not be supposed to continue after the subsequent warning of the mayor, and "that where an inducement has been held out by an officer or a prose-

cutor, but the prisoner is subsequently warned by the magistrate that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or he is simply cautioned not to say any thing against himself, his confession afterwards made will be received as a voluntary confession." The following authorities were referred to in support of the position assumed: 1 Greenl. Ev. p. 267; Rex v. Howes, 6 Car. & P. 404; Rex v. Richards, 5 Car. & P. 318; Nute's Case, 2 Russ. Crimes, 648; Joy, Conf. 27, 28, 69, 75; Rex v. Bryan, Jebbs' Crown Cas. 157; Rex v. Cooper, 5 Car. & P. 535; Com. v. Harman, 4 Barr [4 Pa. St.] 269; Com. v. Dillon, 4 Dall. [4 U. S.] 114: Peter v. State, 4 Smedes & M. 31.

Mr. Black, in reply, said there was no reliable authority which justified the opinion that a simple caution by the magistrate "not to say any thing against himself" was sufficient when a previous confession had been unduly extracted. If we were without decisions, reason and principle would reject a rule so loose and insecure. If a prisoner has confessed, as in this case, under a promise and hope of advantage, the caution "not to say any thing against himself" would induce him to repeat the confession, because he had already believed that this course would help and not hurt him. It is venturing very far to say that a rule laid down by Greenleaf is not sound, not supported by authority. Nevertheless, I am persuaded it is the case here, and the reference which the learned gentleman, who represents the government has made, is not law. To support this position, Mr. Greenleaf refers to Rex v. Howes, 6 Car. & P. 404, and Rex v. Richards, 5 Car. & P. 318. These cases not only do not support but they overturn this doctrine. In Rex v. Howes, the magistrate stated that he told the prisoner "he need not say anything before him unless he pleased." But it seems Chief Justice Denman was not satisfied with this, for he questioned him farther, and when the magistrate said he had told him "his confession would do him no good, but he would be committed to prison to take his trial," then and not till then did he admit the testimony. Surely this does not look as if a simple caution not to say any thing against himself was considered enough. Does it not rather look as if the prisoner's attention must be called to his previous confession and explicit warning be given not to rely on any expected or promised favor? The case of Rex v. Richards in no wise supports the rule contended for, but by strong implication conflicts with it. Mr. Justice Bosanquet refused to admit the statement until it clearly appeared the inducement to confess had come to an end and the previous threat could not possibly have influenced her mind before the magistrate. The case of Rex v. Bryan, Jebbs' Crown Cas. 157, quoted by Mr. Greenleaf, it is sufficient to say is not authority in this court. But even it only seems to sustain the view taken. For no confession was made to any one having authority, until the prisoner's statement was made to Mr. Barry, the magistrate. Mr. O'Flaherty, the priest, presented the only temptations which were offered, and he is not such a person as the law contemplates, who could hold out inducements sufficient to exclude a subsequent confession. But, in other cases, English judges of acknowledged eminence and authority have declared the law to be precisely as I have stated. Mr. Baron Gurney, in Rex v. Green, 5 Car. & P. 312, uses this strong language: "A prisoner ought to be told that his confession will not operate at all in his favor; and that he must not expect any favor because he makes a confession; and that if any one has told him that it will be better for him to confess or worse for him if he does not, he must pay no attention to it. And that any thing he says to criminate himself will be used as evidence against him in his trial." And in Rex v. Arnold, 8 Car. & P. 621, Chief Justice Denman states what he conceives to be the proper course of proceeding. "A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates before they do so ought entirely to get rid of any impression that may have before been made on the prisoner's mind, that the statement may be used for his own benefit, and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial." The case of Com. v. Dillon, in 4 Dall. [4 U. S.] 116, proves nothing against us, because it seems that all importunities and threats were resisted by the prisoner, and he made no confession until he was brought before the mayor, and then according to the language of the court, it was "freely made and openly received."

The counsel has referred to Com. v. Harman, 4 Barr [4 Pa. St.] 270. This case, I think, helped him less, if possible, than 5 & 6 Car. & P. Chief Justice Gibson does not say that warning is sufficient to remove first impressions, but he does not say there, as we say here, that the presence of the constable as well as the "continuance of the same scenery which surrounded the prisoner at the first confessedly inadmissible confession, was calculated to produce on the mind of the prisoner the same influence at the latter period that existed at the first." Within forty-four hours of the first confession, so unduly obtained, in the same building and under the same roof, and the same scenery surrounding him, with Hague, who had tempted and beguiled him still at his elbow, who can say the second statement of the prisoner was free?

IRWIN, District Judge. As the confession in the first instance made by the prisoner to the constable who arrested him, was obtained by inducements which are excluded by law, and could not be received in evidence, the

question remains, whether the same confessions subsequently made, and taken in writing by the mayor of the city, signed by the prisoner, having previously been cautioned not to criminate himself, should be permitted to go to the jury.

It appears that the prisoner was arrested on the 10th of December last, between 9 and 10 o'clock in the morning, and taken to the mayor's office in this city. About two hours afterwards, from inducements held out to him by the constable who arrested him, he made a full confession of his guilt to that officer. He was afterwards removed to another part of the building, and there confined for forty-two hours, and from thence again taken to the mayor's office, either by Officer Hague, who arrested him, or some other constable. Here, the mayor, not having been informed of his previous confession, examined the prisoner and received his confession as above mentioned. During this examination, Constable Hague passed several times into and out of the office. Had the mayor been apprised of the previous confession, it would have been his duty to have told the prisoner, previous to his examination, in addition to the usual caution, that the promises made by the constable were delusive, and unauthorized, and to make him clearly understand that any thing he was about to confess, must not be with the hope or expectation of having the slightest favor shown to him in case of conviction. Without such information to the prisoner, may it not be a rational conclusion, that the confession which followed was made under the influence of the promises which had preceded and induced the previous confession? It is immaterial what length of time may have elapsed between the two confessions, if there had been no change in the circumstances or situation of the prisoner. Had he been at liberty, among friends, with opportunity for advice and reflection, a voluntary confession afterwards made would probably not be liable to legal objection; but after some hours of close confinement, he was taken to the room in which he made his first confession, and under the eye of the police officer to whom it was made, he repeats to the mayor all he had confessed to the police officer, without any knowledge by the mayor of that confession, and without any reference to it. Before such confession can be received in evidence, the court must be convinced that the mind of the prisoner was entirely free from the undue influence under which he made his first confession. But the circumstances of this case afford no room for such conclusion; on the contrary, they leave strong reason to infer that the last examination was but intended to put in due form of law the first confession, and that the promise of favor continued as first made. This conclusion may be repelled by evidence on the part of the prosecution; but in the absence of such evidence, the legal presumption is that the influence which induced the confession to Hague, continued when it was made to the mayor. The paper offered in evidence purporting to be the confession of the prisoner before the mayor, must therefore be rejected.

No other evidence appearing against him, the jury acquitted the prisoner.

Case No. 14,784.

UNITED STATES v. CHAPMAN.

[3 McLean, 390.] [1]

Circuit Court, D. Illinois. June Term, 1844.

PERJURY — BANKRUPT SCHEDULE — INDICTMENT — ITEMS OF SCHEDULE.

1. In an indictment for perjury under the bankrupt law, in not giving a true and full account of the property of the petitioner, the items on the schedule need not be stated in the indictment.

2. The allegation that the property was omitted, with intent to defraud A. B. and the other creditors, is sufficient.

[Cited in U. S. v. French, 57 Fed. 389.]

Motion to quash an indictment.

Mr. Butterfield, U. S. Dist. Atty.

Logan & Field, for defendant.

OPINION OF THE COURT. This is an indictment for perjury under the bankrupt law. The defendant being an applicant under the bankrupt law, presented a petition, which is set out in the indictment; and a schedule was annexed, which was sworn to by the petitioner. The indictment charges that the schedule did not exhibit a true account of all his property; that he owned a certain real and personal property, which is stated, and which he omitted to set down in his schedule, corruptly, fraudulently, &c. The second count states the same charge, and that the petitioner had conveyed the property to his mother, in trust. A motion is made to quash this indictment. 1. That the schedule was not stated at large in the indictment. This is unnecessary. No more of the items of property need be stated, than those charged to have been fraudulently and corruptly omitted. 2. That the allegation that the said property was withheld to defraud one of the creditors, naming him, and others, is insufficient, as all the creditors should be named. The allegation is sufficient. All the creditors need not be named in the indictment. In this respect we think the indictment is good. The motion to quash is overruled.

[1] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 14,785.

UNITED STATES v. CHAPMAN.

[5 Sawy. 528; 25 Int. Rev. Rec. 281; 9 Reporter, 134; 11 Chi. Leg. News, 391.] [1]

Circuit Court, D. California. May 26, 1879.

PUBLIC LANDS—SIOUX SCRIP LOCATION—OCCUPIED LAND—CONTEST—PATENT PENDING—PREEMPTION — STATE LOCATION.

1. In the location of Sioux half-breed scrip, the rules and regulations of the United States land-office require that in all cases where not located by the party to whom the scrip issued in person, the application to locate must be accompanied with a power of attorney from said party authorizing the same.

[Cited in Chapman v. Polack, 58 Cal. 555, 5 Pac. 232; Lee v. Justice Mining Co., 29 Pac. 1024, 2 Colo. App. 112.]

2. While a contest between a purchaser from the state, on a state selection, and a claimant under Sioux half-breed scrip location, arising under the provisions of the act of congress of July 23, 1866, is pending and undetermined before the register and receiver of the United States land-office, no patent can properly issue.

3. The act of congress under which the Sioux half-breed scrip was issued does not permit it to be located on land occupied by another; and the land in this case being occupied by the holder of a state title, with valuable improvements thereon, was not subject to location by said scrip.

[Cited in Chapman v. Polack, 70 Cal. 492, 11 Pac. 767; Polack v. Gurnee, 66 Cal. 267, 5 Pac. 229, 610.]

4. At the time the state agent applied to select the land in question, January 15, 1868, there being no pre-emption or other valid claim thereto, the state selection was good as one made on surveyed lands.

Proceeding to set aside patent.

Walter Van Dyke, for complainant.

George A. Nourse, for plaintiff.

SAWYER, Circuit Judge. This is a proceeding on the part of the government, at the instance of Mrs. Mary Polack, to set aside a patent for the quarter section of land described in the bill, on which the Geyser Springs and hotel are located, in Sonoma county. The patent was issued to Daniel Freinere, and is based upon a location, or attempted location, of Sioux half-breed scrip. Mrs. Polack claims the same land under a state selection, as a portion of the five hundred thousand acre grant. In April, 1854, one Archibald C. Godwin employed the county surveyor of Sonoma county to make a survey for him, the land being then unsurveyed public land, and he located, or assumed to locate, two school land warrants for three hundred and twenty acres each on the tract of land so surveyed, including the premises in controversy, for said Godwin, who was then the owner of said warrants. Said warrants were issued by the state of California under the act of May 3, 1852, to provide for the issuing and sale of school land warrants for the five hundred thousand acres of land granted to the state by act of congress of September 4, 1841. By proper mesne conveyances and assignments the right and title of said Godwin to said premises and the warrants located thereon became vested in Mrs. Mary Polack (then Mrs. Hart) in May, 1862. Her immediate grantor and assignor before that time had instituted an action in the district court for Sonoma county to oust some parties who had intruded into said premises, to wit: Godwin, Levy and Ewing, in which action a judgment had been rendered in favor of the plaintiff against said defendants. A writ of possession was issued on this judgment, and in May, 1863, the sheriff of Sonoma county put Mrs. Polack, as successor in interest of the plaintiff in that action, into possession and turned out the intruders. From that time till December 31, 1869, it is admitted that Mrs. Polack, by herself and tenants, had the exclusive possession and control of said premises and was in the actual occupation thereof; that during this period she had expended in adding improvements to the place between three and four thousand dollars, and that the value of the improvements purchased and added was over twelve thousand dollars.

In September, 1862, Mrs. Polack took steps to have a resurvey of the premises she had purchased and relocation of said warrants thereon, so as to adjust the lines according to the system of surveys adopted by the United States, in accordance with the act of the state, passed April 18, 1859. This act requires that the applicant for a survey and location should make an affidavit containing, among other things, a statement that there was no adverse claim to the land sought to be located.

In the affidavit filed by Mrs. Polack it was stated that there was no valid adverse claim, and it is contended that this was not a compliance with the statute. The affidavit, however, refers to the matter of the action by her grantor against the parties who had intruded into the premises, stating that it had been finally decided in favor of her title, and says that it is the only claim adverse to hers. This, it would seem, is a substantial compliance with the law, for this claim had already been finally adjudged invalid, and it was so stated; and this being the only adverse claim, and having already been declared void, it necessarily results that there was none within the meaning of the act, and it so appears in the affidavit. In my judgment the affidavit is sufficient. In the view taken of the case, however, it is not necessary to pass finally upon this question.

The map of the United States survey of township 11 N., embracing the land in question, was filed in the United States land-office January 14, 1868. On the next day, January 15, 1868, the state locating agent filed an application on behalf of the state of California for Mrs. Polack, and on her application to him for that purpose—for the loca-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 9 Reporter, 134, contains only a partial report.]

tion of said school land warrants—he located them on surveyed lands nearest conforming to the lands on which they had been located, to wit: the north half of section 13 and north half of section 14 of said township. This application was received and approved by the register of the United States land-office, and thereafter, on April 14, 1868, the said register of the United States land-office issued a certificate certifying that at the date of said filing and selection on the part of the state there was no evidence shown by the records or files in his office that any pre-emption, homestead or other right had attached to said land.

The record of the Sioux scrip in the United States land-office for 1868 shows entries up to July, and no entry for the application of Daniel Freinere for the north-east quarter of section 13—land in controversy—and also shows an erasure of the entries down to July 18, 1868, and then the insertion of the application of Daniel Freinere as of January 14, 1868, and the erased names and applications carried below. In explanation of this it is said the scrip in the name of Freinere for 444 E., the one in question, was mislaid in the office, and not entered on the books till the time it was found in July. It appears that W. S. Chapman, the defendant, had attempted to locate the same scrip on this land in 1866, before the United States survey of the land. Inasmuch as the Indian, or half-breed, never lived on the land or resided in the state, the land being unsurveyed, no such location could then legally be made.

There is indorsed on the application to locate this Sioux scrip the words: "Power to locate with R. R. No. 7, S. F. land-office," meaning that the power of attorney of the party to whom the scrip was issued, Freinere, authorizing Chapman to make the location, was with another piece of scrip issued to the same party, to wit: "The piece of scrip No. 444, letter B," which had been previously located in the same land-office on another tract of land, and had been indorsed in said office "R. & R. No. 7." This latter piece of scrip with the application to locate the same, it appears, was returned to Chapman through Britton & Grey, his attorneys at Washington, in 1868, on account of some defect in the location, and subsequently located in the United States land-office at Stockton on another tract of land. The power of attorney found with this scrip, as so located at Stockton, was only a special power to locate that particular scrip. There was no power shown to locate the scrip 444 E., the one attempted to be located on the land in question. The rules and regulations of the land-office, require that in all cases where not located by the party to whom the scrip issued in person, the application to locate must be accompanied with the power of attorney authorizing the same. The officers of the local land-office having recognized said scrip as having been presented for location January 14, 1868, although not then entered on their books, a contest arose as between it and the state selection.

The act of congress of July 23, 1866, [14 Stat. 209,] to quiet land titles in California, provides, that in cases where the state had theretofore made selections of any portions of the public domain in part satisfaction of any grant made to said state by act of congress, and had disposed of the same in good faith under her laws, the lands so selected were confirmed to the state; and where such selections were on unsurveyed lands when marked off and designated, they were to have the force and effect of a pre-emption right, and if the lines of the location and United States survey did not agree, the selection should be so changed as to include those legal subdivisions which nearest conform to the identical land included in state survey and selection. The holder of the state title is allowed the same time after the township plat is filed in the local land-office as a pre-emptor to present and prove up his purchase and claim, and the location was in time.

The state locating agent, in his application of January 15, 1868, on behalf of Mrs. Polack, based the claim of the state on this act of congress, as well as under the act of 1841, providing for the selection on surveyed land. On the motion of Chapman, the register of the United States land-office cited the state to appear at a hearing before that officer, to determine the respective rights between the state selection and the scrip location.

The attorney of Mrs. Polack holding the state title, and Chapman's attorney for the scrip location, appeared and entered on the trial July 9, 1868. The case having been adjourned to the next day, the United States surveyor-general notified the register that the township plat embracing this land was suspended, and thereupon the hearing was also suspended, and continued so suspended until August, 1874, after the suspension of the township plat had been removed. In the meantime, while the contest was pending and undetermined, and while the survey and trial were thus suspended, by some inadvertence, a patent was issued to Daniel Freinere, June 1, 1869, for the scrip location, and came into the possession of Chapman through his attorneys at Washington. As soon as the attention of the department was called to the fact, that the contest between the state selection and scrip location was still pending, the commissioner of the general land-office, on May 17, 1870, demanded a return of the patent, which was refused.

The purchaser of the state title under the act of 1866, has a right to have his claim to the land, selected under the state laws, fully passed upon by the United States land-office: "The register is to examine his claim, the character, the right asserted and the cer-

tificates under which he claims." Huff v. Doyle, 93 U. S. 563. No patent could properly issue to an opposing claimant for the same land while this hearing was regularly pending and remained undetermined.

In addition to this, as already stated, at the time it was attempted to locate the Sioux scrip, the land was occupied by Mrs. Polack and her tenants, and there were valuable improvements thereon belonging to her. The act of congress under which the scrip is issued does not permit it to be located on occupied lands, except in the district in the then territory of Minnesota mentioned in the act, and on behalf of the party in occupation. Hence, this land at the time was not subject to location by such scrip; and there being no pre-emption or other valid claim, the state selection of January 15, 1868, was good as a selection on surveyed lands.

I am of the opinion, therefore, that the patent was improperly issued, and that it should be set aside, and it is so ordered. Decree accordingly.

Case No. 14,786.

UNITED STATES v. CHARLES.

[2 Cranch, C. C. 76.] [1]

Circuit Court, District of Columbia. June Term, 1813.

CRIMINAL LAW—CONFESSIONS—INFLUENCE OF HOPE OR FEAR—WITNESS—GRAND JUROR.

1. A confession, made under the influence of hope or fear, cannot be given in evidence.

2. Grand jurors may testify as to the confessions made by the prisoner before them, upon oath, when under examination as a witness against another person.

[Cited in brief in Bressler v. People, 117 Ill. 427, 8 N. E. 62.]

3. Subsequent confessions, after having confessed under the influence of hope or fear, cannot be given in evidence.

Indictment for arson. Mr. Lufborough, the magistrate before whom the prisoner was brought, told him there was evidence enough to commit him at all events, and therefore he had better confess the whole truth, and that probably he would fare the better for it.

THE COURT (nem. con.) refused to suffer the confession to be given in evidence against the prisoner. Peake, Ev. 13; McNal. Ev. 42.

Mr. Jones, for United States, then called some of the grand jurors to testify as to what he swore when examined by the grand jury as a witness against negro Jacob Bruce.

Mr. Key and Mr. Morsell objected, that what he swore cannot be given in evidence against him. McNal. Ev. 47.

But THE COURT overruled the objection.

Mr. Rapine, one of the grand jurors, testified that the prisoner was not told that he need not answer any questions tending to criminate himself.

Mr. Key objected to the evidence for want of such caution to the prisoner.

But THE COURT said that the prisoner was presumed to know the law in his favor, without such caution.

Doctor Ott testified, that on the day after the examination of the prisoner by Mr. Lufborough, he was examined by Doctor Ott and Mr. Lufborough as a witness against Jacob Bruce; and after being told that if what he had before stated was not true, he might retract, made the same declaration.

Mr. Key objected, that the prisoner might have been influenced by the hope and fear excited by Mr. Lufborough on the former day. McNal. Ev. 43.

But THE COURT overruled the objection.

The jury found the prisoner guilty, but recommended him to mercy on account of his youth and apparent candor.

On the next day the counsel for the prisoner moved for a new trial, because the confessions of the prisoner, made upon oath, in his examination before the grand jury as a witness against negro Jacob Bruce, were permitted to be given in evidence against him by the testimony of grand jurors.

Mr. Key, for prisoner. There is no case in the books in which a grand juror has been permitted to give such testimony. 12 Vin. Abr. tit. "Evidence," H, pls. 20, 38. Judge Foster refused to suffer a grand juror to disclose the evidence, because sworn to keep secret, &c. So the clerk of the grand jury shall not be allowed to reveal that which was given in evidence before the inquest. McNal. Ev. 253.

Mr. Jones, contra. The rule of law that a witness is not bound to answer any question tending to criminate himself, would be useless if his declarations upon oath could not be given in evidence against him. The same rule applies to an examination before a grand jury. McNal. Ev. 246, 250, 253, 254. General Wilkinson, in Burr's trial, was protected by the rule from testifying anything which might criminate himself; and grand jurors were sworn to testify what General Wilkinson testified before them, to discredit his oath in court. U. S. v. Burr [Case No. 14,692a]. The grand juror's oath only prevents a disclosure of confidential communications by the public functionaries, or by a grand juror to his fellow jurors; it does not prevent him from disclosing when called upon in a judicial manner. The grand jury may hear evidence at the bar (2 Hale, P. C. 159, 160); and it is the practice of the general court in Virginia, in cases of difficulty before the grand jury, to call them to the bar, and have witnesses examined, and to instruct them upon the evidence, as in trials at bar. The grand jury are only to keep secret the king's counsel.

Mr. Key, in reply. The reason of the rule is the confidential nature of the communication. It is on the same reason that the magistrate, or counsel, shall not disclose

[1] [Reported by Hon. William Cranch, Chief Judge.]

what is committed to them. The oath of the grand juror forbids him to disclose any thing. It is all "the counsel of the United States." It is a high misdemeanor in a grand juror to inform the accused of the evidence which has been given against him before the grand jury. 4 Bl. Comm. 126, Tucker's note. The oath in Virginia is different, and that is the reason given by the chief justice, in Burr's case, for permitting Mr. Tazewell, one of the grand jurors, to be examined. The case of a popish priest, is a case of private confidence only; it is not imposed by the law of the land.

If the prisoner has been once induced to confess, by a promise or threat, it is the common practice to reject a subsequent confession of the same, or like facts. In one case it was admitted by Buller, J., but he observed that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favor on that account; and it ought most clearly to appear that the prisoner thoroughly understood such warning before his subsequent confession can be given in evidence. 2 East, Crown Law, p. 658, c. 16, § 94.

THE COURT (THRUSTON, Circuit Judge, absent) granted a new trial because the first confession of the prisoner had been made under the impression of fear and hope excited by the observations of the magistrate, (Mr. Lufborough.) And no subsequent confession of the same facts ought to be given against him, according to the law as stated in 2 East, Crown Law, c. 16, § 94.

Upon the new trial he was convicted, and pardoned by the president. See the case of U. S. v. Bruce [Case No. 14,676.]

Case No. 14,787.

UNITED STATES v. CHASE et al.

[25 Int. Rev. Rec. 161.]

District Court, D. Massachusetts. May 26, 1879.[1]

CUSTOMS DUTIES—PROTEST—ACTION TO RECOVER BALANCE.

1. Act June 30, 1864, § 14, Rev. St. § 2931 [13 Stat. 209], making the decision of the collector of customs of the port where merchandise is entered final and conclusive as to the rate and amount of duties on such merchandise unless the importer pays the amount claimed, and duly protests, appeals, and brings suit for its recovery, applies not only in cases where such collector errs in judgment as to the proper rate and amount of such duties, but also where there are informalities and irregularities on the part of the customs officers respecting the appraisal of such merchandise, such as would enable the importer to recover his money back if he had duly protested, appealed, and brought suit therefor.

2. In this case it appeared that the collector did not designate on the invoice the requisite number of sample bales for examination, nor did the appraisers make proper examination of the merchandise in question, and the said merchandise was in fact erroneously classified to the prejudice of the importer; but the appraiser made a certificate of appraisal in due form, and the collector made final liquidation of the duties on the basis of the appraiser's report, and the importer, having already paid the estimated duties, refused to pay the balance demanded. *Held*, that in a suit by the government against the importer to recover such balance, the importer could take advantage of none of the above facts in his defence.

This was an action of debt to recover a balance of duties alleged to be due on certain manufactures of jute, most of which are commonly known as "double warp bagging" or "Dundee bagging," imported into the port of Boston from Liverpool at various dates in 1870. The invoices showed that the merchandise in question was a manufacture of jute valued at over ten cents per square yard.

It appeared in evidence that from the time of the passage of the act, similar merchandise had paid a duty of 35 per cent. ad valorem under the provisions of Act June 30, 1864, § 7, cl. 1 (13 Stat. 209); and at the time of the entry of the goods, duties were estimated on that basis, and paid by the defendants [Henry S. Chase and others], and the merchandise delivered to the importers. On each invoice the collector designated certain packages for examination, but on none of them did he so designate one package in ten, nor in any case was one package in ten sent to the appraiser's store for examination. In but one of the importations was any package sent to the appraiser's store which contained double warp bagging, and the sample packages in every instance were in a few days thereafter sent to the importers, and all the goods were speedily sold. There was no evidence of actual examination of any of these goods by the appraisers in person, but the testimony tended to show that the assistant appraiser made some examination; and upon the invoices he reported as had previously been done in respect to double warp bagging, that the merchandise was a manufacture of jute under 30 cents per square yard, and dutiable at 35 per cent. ad valorem. He then handed the invoices with his report thereon to the appraiser for final action.

The appraiser appeared to have delayed final action for several months, and testified that he, before such action, ascertained that double warp bagging was then extensively in use for cotton bagging; and being satisfied it had theretofore been wrongly classified, he made appraisement and report as to double warp bagging as follows directly under the report of the assistant appraiser: "Manufacture of jute suitable for the uses to which cotton bagging is applied exceeding 10 cents per square yard, change from 35 per cent. to 4 cents per pound;" thus reporting the merchandise as being dutiable under clause third of the section above named. The appraiser at the same time made certain additions to the invoiced and entered value of other merchandise import-

[1] [Affirmed in 9 Fed. 882.]

ed with the double warp bagging. These certificates of the appraiser appeared to have been made without any examination of the goods by him, and without reference to examination by his assistant, and long after the sample packages had left the custom house, and all the goods had been sold and gone into consumption. The invoices with the above certificates were thereupon sent to the collector's department, and notice of the above advances in values was sent the importers on May 17, 1871. No appeal was taken to merchant appraisers. A few days later, the final liquidation of the several entries above named based on the appraiser's report was made by the collector, and notice thereof was duly posted and special notice thereof sent the importers on the same day. They denied the right of the collector to impose these additional duties, but made no formal protest or appeal; and the said suit was brought to recover a balance of $1,403.67, alleged to be due on the double warp bagging whereof the classification was changed as above stated, and a balance of $180.35 on the merchandise whereon the value had been advanced by the appraiser.

It was not denied on the part of the government that the appraiser was in error in classifying the double warp bagging as being suitable for the uses to which cotton bagging was applied, and that the collector was in fault in neglecting to designate on the invoice for examination one package in ten of each importation, and that neither the appraiser nor his assistant in fact had made such examination of the merchandise as the law requires in order to render an appraisement value; but it was claimed that the collector's decision as to the rate and amount of duties was final under section 14 of the said act, and that the defendants had neglected to take advantage of their only legal remedy for these errors and irregularities since they had not paid the amount claimed, and duly protested, appealed, and brought suit against the collector for its recovery.

The defendants contended that there had been no legal decision of the collector in this case; that the collector had no jurisdiction of the question until there had been an appraisement, and that there not only had been none in this case, but that the collector could but know it, since he had failed to specify on the invoice the sample packages requisite to make a valid appraisement possible; and that his decision therefore was wholly void.

It was replied in behalf of the government that the statute on its face gave the collector jurisdiction to determine the rate and amount of duty, provided there was an entry of merchandise through the custom house of which he was in charge, and that on the entry of merchandise he could determine the rate and amount of duty without any appraisal, and the remedy of the importer would be by protest and appeal and bringing of suit, or possibly by an action for damages against the collector; but that if an appraisal was necessary in order to give the collector jurisdiction, the appraiser's certificate in due form (like an officer's return on a writ) was such evidence to the collector of an appraisal as to give him jurisdiction; that the cases of U. S. v. Frazer [Case No. 15,161], in the United States district court for the Southern district of New York, and U. S. v. Rodocanachi [unreported], in the circuit court of the United States for the district of Massachusetts, cited by the defendants, were not applicable to the state of facts in this case, since in both these cases the collector had undertaken to revise a final decision and liquidation already duly made; that if the decision of the collector was absolutely void where there had been no valid appraisal, it would not be necessary to set out the irregularities complained of in a protest even in suits against the collector, whereas the cases of Burgess v. Converse [Id. 2,154], s. c., 18 How. [59 U. S.] 413, and Schmaire v. Maxwell [Case No. 12,460], expressly held that such informalities as were here complained of could only be taken advantage of where properly set out in such protest.

After the evidence was all in, it appeared that there was no dispute as to the facts, but that the only question was the question of law, whether the collector in this case had decided the rate and amount of duty within the meaning of section 14 above referred to.

P. Cummings, Asst. U. S. Atty.
C. L. Woodbury, for defendants.

NELSON, District Judge, thereupon said in substance that he had given the matter careful consideration in order to see if any valid defence existed against the government claim, since it appeared that the collector had in the final liquidation assessed a heavier duty on the merchandise imported than was imposed by the law properly construed. That the cases of Westray v. U. S., 18 Wall. [85 U. S.] 322, and U. S. v. Cousinery [Case No. 14,878], which both parties to this controversy conceded to be law, were to the effect that the decision of the collector was final where the appraiser and collector had made errors of judgment in determining the rate and amount of duties on imports, and where all the proceedings were regular in form; but that in this case there were irregularities in the mode of procedure of those officers as well as an error of judgment, yet that the provision of law making the decision of the collector final unless there be due protest, appeal, and bringing of suit, was intended to apply also to informalities and irregularities such as were here complained of; that it was

the misfortune of the defendants that they had failed to avail themselves of the statute remedy thus provided, but that in this action they were without defence; and he instructed the jury to find for the United States in the whole amount claimed with interest.

The jury returned a verdict for the plaintiff for $2,318.02.

[Upon a writ of error the circuit court affirmed the judgment. 9 Fed. 882.]

Case No. 14,788.

UNITED STATES v. CHASE et al.

[8 Chi. Leg. News, 123; 1 Law & Eq. Rep. 35; 22 Int. Rev. Rec. 10.]

Circuit Court, N. D. Ohio. Dec., 1875.

INTERNAL REVENUE — ACTION ON COLLECTOR'S BOND—PAYMENTS TO COLLECTOR.

[This was an action on a collector's bond by the United States against Harry Chase and others.]

Mr. Willey, U. S. Dist. Atty., and Mr. Sherman, Asst. U. S. Atty.

E. Bissfil, Geo. R. Haynes, and R. Waite, for defendants.

WELKER, District Judge. This was an action on an official bond, and the learned judge in substance said:

The defendant Chase, was collector of internal revenue for the Tenth district of Ohio, and as such officer received from the Toledo, Wabash and Western Railroad Company the sum of $24,823.87, being 5 per cent, reserved by said company on the payment of their coupons in the months of August, October and November, 1867, under section 122, of the act of June 30, 1864, and amended by section 9 of the act of July 13, 1866, and which sum he failed to pay over to the government. The company did not make return to the assistant assessor of the district of the said amount of said five per cent tax, but did make out such return and handed it to the collector to be by him delivered to the assistant assessor, which was not certified by the oath of either its treasurer or president. The company on the 1st day of June, 1868, and at the time said return was handed the collector, paid to the collector the amount of said tax, and the collector gave the company a receipt therefor signed by him as such collector. The return so made by the company and handed the collector was never delivered to the assistant assessor. On the trial it was claimed by the defendants, who were sureties of Chase on his collection bond, that they were not liable, because the return of said company was not made to the assistant assessor as required by law, and that therefore there was no proper or legal assessment of said tax so as to make the payment thereof to the collector a receipt of public money by him for which the sureties are liable. That it was a mere voluntary payment of said company to the collector, and not authorized by law.

Held: 1st. That the requirement of said section 122, that railroad companies shall deduct and withhold five per cent. of the amount of coupons, and pay the same to the government as a tax on such interest so received is a charge of a certain sum on the railroad company, and without assessment makes the company a debtor to the government for the sum prescribed. 2nd. That the collector was authorized to receive such tax without a return thereof having been made by said company to the assistant assessor as directed by said section. 3rd. That when the company made out and handed the collector to be given to the assessor a statement of amount of such reservation of five per cent. of interest received, it was such a fixing and acknowledgment of amount due the government, as made that amount received by the collector public money, and covered by the official bond of the collector, and for which sureties thereon are liable. 4th. That the supreme court of the United States in Re Savings Bank v. U. S., 19 Wall. [86 U. S.] 227, having decided that five per cent. undistributed earnings of said bank is a charge upon the bank, and without assessment, makes the bank a debtor for which a suit may be brought by the United States for its recovery, the principle of the decision applied to this case determines that the five per cent. due from the railroad company is such a debt due and payable to the United States, and that the collector being the only officer authorized to receive it, he having so received the same, it was public money in his hands.

Judgment for plaintiff for $35,725.65 and costs.

Case No. 14,789.

UNITED STATES v. CHASSELL.

[6 Blatchf 421;[1] 9 Int. Rev. Rec. 177; 1 Chi. Leg. News, 314.]

Circuit Court, E. D. New York. May 26, 1869.

INFORMERS—SHARE OF FUND—REVENUE OFFICER.

An assistant assessor of internal revenue, who, of his own motion, and by his own diligence, while in the discharge of his official duty as such assistant assessor, acquires information of facts on which to base a proceeding by indictment for a violation of the internal revenue law, and imparts such information to the district attorney, with the intent that such proceeding shall be instituted upon such information, is, if such information is the first information so imparted, and if it leads to the indictment and conviction of the offender, entitled to share, as informer, in a fund in court arising from a fine imposed by the court, and paid on such conviction.

This case came before the court upon a motion for the distribution of a fund in the registry, arising from a fine imposed upon the defendant [Frederic Chassell]. The pro-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ceeding against the defendant was an indictment found against him for carrying on the business of a retail liquor dealer, without having paid the special tax required by law. Upon that indictment he was tried and convicted, and a fine was imposed by the court, which was paid, and constituted the fund in question. One-half of this fund was now claimed by Brewster Wood, as informer. In support of his claim, Wood produced a certificate of the district attorney, to the effect that he was the person who first informed of the cause, matter, and thing, whereby the arrest and conviction of the defendant were procured. To this he added his own oath, showing that he first informed the district attorney of the facts upon which the prosecution was based, and also that he had no knowledge or information that any claim was made by any other person to have first informed of such matter and thing. On the part of the government, there was produced the written admission of Wood, that he obtained the information which he imparted to the district attorney, while in the discharge of his official duty as assistant assessor of the Third collection district of the state of New York.

BENEDICT, District Judge. On the facts in this case, a single question is raised, namely, whether the circumstance that Wood obtained the information, on the communication of which he bases his claim as informer, while in the discharge of his official duty as assistant assessor, debars him from claiming a share of the fine, as informer. My opinion is, that it does not, and for the following reasons: It was long since held, that an inspector of the customs might become entitled to receive an informer's share, by reason of information given by him to the collector of customs, and was not debarred from that right by the fact that he was employed by the government in the enforcement of the revenue laws, under a salary. Hooper v. Fifty-One Casks of Brandy [Case No. 6,674]. This decision was acquiesced in, and has since controlled the distribution of forfeitures under the customs laws.

If the early provisions of the internal revenue laws be examined, they show clearly an intention on the part of congress to continue this feature of the customs laws in the laws relating to the internal revenue. Thus, the act of July 1, 1862, in the 31st section (12 Stat. 444), makes it the duty of a collector of internal revenue to prosecute for the recovery of any sums forfeited by the act, and declares that all fines, penalties, and forfeitures shall be sued for in the name of the United States or of the collector, and that one moiety of the recovery shall be to the use of the person who, if a collector or deputy collector, shall first inform of the cause, matter, or thing, whereby such fine, penalty or forfeiture was incurred. This provision was re-enacted in the 37th section of the act of March 3, 1863 (Id. 730), and substantially the same provision appears in the 179th section of the act of June 30, 1864 (13 Stat. 305). By the act of March 3, 1865 (Id. 483), section 179 of the act of 1864 is amended by striking out the words, "if a collector or deputy collector;" and the note to an edition of this act, which was then published and distributed by the government, declares that thereafter a moiety of all fines, penalties, and forfeitures is to be paid to the informer, "whether officer of the revenue or a private citizen." These enactments indicate an unmistakable intention to permit officers of the revenue to participate, as informers, in the distribution of fines, penalties, and forfeitures. The various subsequent acts disclose no change of intention, but have always left this right open to be claimed by any person; and they have been passed with full knowledge that revenue officers were constantly being paid large rewards as informers, and in the face of treasury regulations which clearly recognize their right to claim such rewards. There is no reasonable doubt, therefore, that congress intended, by the present act—what seems to be said by the act—that any person whosoever may share in a fine, penalty, or forfeiture, provided it be made to appear that such person first informed of the cause, matter, or thing, whereby such fine, penalty, or forfeiture shall have been incurred.

The intention to include officers of the revenue in the general words used by the act, and to enable them to participate in the distribution of fines, penalties, and forfeitures, is reasonable; for, this mode of stimulating the zeal of officials, by the hope of additional compensation, is a common practice in revenue laws, and the small fixed compensation which is attached to many offices tends to confirm the supposition that it was expected that such compensation would be increased by the rewards of diligence.

As there exist, in the act, no words of limitation in regard to the persons who may become informers, so, also, there is no limitation in regard to the method by which the information shall have been acquired. Any person may become entitled to share as an informer, by reason of any information which contributes in a substantial way to recover the fine, penalty or forfeiture which is finally imposed, provided such information has not only been acquired, but also properly imparted. To whom imparted, the act does not say; but its fair import is, that the information must be imparted to some one authorized to, and who does thereupon, take official action to recover the fine or penalty, or to enforce the forfeiture, which the information discloses to have been incurred: and the information must be imparted with the intention of having it so acted upon. It must, also, be the first information so imparted. These restrictions can be fairly gathered from the words of the act, and I am unable to see that any other limitations

can be reasonably inferred from any thing contained in the act.

According to this construction of the law, it clearly appears, that the present petitioner is entitled to a distributive share in the fine in question; for, it appears, that, of his own motion, and by his own diligence, he acquired information, which, being acted on by the proper officer, led to the conviction of the offender. This information he imparted to the district attorney, who, and who alone, was authorized to institute the proceedings which resulted in the imposition of the fine, and he so imparted his information with the intent that such proceedings should be instituted upon his information, and his was the first information so imparted. These facts, unattended with any countervailing circumstances, entitle him, according to my view of the law, to be adjudged to be the legal informer, entitled to a distributive share of the fund in court.

In thus disposing of the case, I have not omitted to notice two recent cases arising under this same provision of law. U. S. v. One Hundred Barrels of Distilled Spirits [Case No. 15,946], and In re Four Cutting Machines [Id. 4,987]. But I find nothing in the actual adjudications of those cases, upon the facts of those cases, as I understand them, which leads me to a different conclusion from that at which I have arrived in this case.

Case No. 14,789a.

UNITED STATES v. CHA-TO-KAH-NA-PE-SHA et al.

[Hempst. 27.] [1]

Superior Court, Territory of Arkansas. Oct., 1824.

INDIANS—CRIMINAL JURISDICTION OVER—HOW FAR INDIAN TRIBES INDEPENDENT.

1. Congress has the constitutional power to pass laws punishing Indians for crimes and offences committed against the United States.

2. Indian tribes are not so far independent nations as to be exempt from this kind of legislation.

[Indictment against Cha-to-kah-na-pe-sha and Wa-na-she-shinger, Osage Indians, for murder.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. This is a motion for a new trial, and the grounds relied on are (1) that the verdict is contrary to law; and (2) that it is contrary to and without evidence. In support of the first ground, it has been contended that the Osage Indians are a sovereign and independent nation, possessing the right to declare war and commence hostilities against the United States, or any other nation; that the facts stated in the indictment constitute an act of war against the United States; and that the prisoners cannot be made amenable to the civil tribunals of this country. Even if this position was sound, which is not the fact, still the proof in the case shows that the Osage Nation were in amity with the United States, and had no intention of going to war by the murder of which the prisoners are found guilty. It was an attack upon our citizens by a party of Osages, for the purpose of robbery and plunder, unauthorized by the Osage Nation. The nation, in fact, has disavowed the act and surrendered the accused, together with others, to be tried. Does this court, then, possess the power? Congress has passed a law expressly giving this court jurisdiction of offences committed by Indians, such as the one charged against the prisoners. That the act alluded to is constitutional we have no doubt, and we are bound to carry its provisions into effect. With regard to the other ground, that the verdict is contrary to evidence, it is sufficient to remark, that the proof satisfied the jury of the guilt of the prisoners, and it was so strong no reasonable doubt exists in the minds of the court, of the justice and propriety of the verdict which the jury have rendered, and the motion for a new trial must be overruled. Motion denied.

The counsel for the prisoners then moved the court in arrest of judgment, on the following grounds: (1) It does not appear in the indictment that the offence was committed on lands belonging to the nation or tribe of Indians, as by law it ought to do; (2) the offence with which the prisoners are charged, is not set forth with sufficient certainty; (3) it does not appear from the indictment with sufficient certainty, that Curtis Wilborn was killed and murdered by the Indian chiefs and warriors.

But after the argument THE COURT overruled the motion, and sentenced the prisoners to be executed by the marshal, by hanging, on the 21st of December, 1824, between the hours of 12 o'clock m. and 4 o'clock p. m. of that day, and they were executed accordingly.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 14,790.

UNITED STATES v. CHEESEMAN et al.

[3 Sawy. 424; [1] 21 Int. Rev. Rec. 340.]

Circuit Court, D. California. Sept. 13, 1875.

STATUTES — REPEAL BY IMPLICATION — ASSISTANT TREASURER'S BOND—LIABILITIES OF SURETIES.

1. Where a statute revising another act embraces the entire subject-matter of the prior act, with additional provisions, it must be regarded as a substitute for, and as repealing such prior act.

2. The act of congress of June 30, 1864, to provide internal revenue, etc. (13 Stat. 294–297), embraces the entire subject-matter of section

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

2 of the act of December 25, 1862 (12 Stat. 632), and repeals the latter section.

3. The liabilities of sureties are strictissimi juris, and cannot be extended beyond the reasonably necessary import of the language of the bond.

[Cited in U. S. v. Adams, 24 Fed. 353.]

[Cited in brief in City of Harrisonville v. Porter, 76 Mo. 359. Cited in Milwaukee Co. v. Ehlers 45 Wis. 293.]

4. Subsequent to the passage of the act of congress of June 30, 1864, to provide internal revenue, etc. (13 Stat. 223), the assistant-treasurer of the United States and treasurer of the branch mint at San Francisco, gave an official bond in pursuance of sections 6 and 7 of the act of August 6, 1846, to provide for the reorganization of the treasury, etc. (9 Stat. 60), and conditioned in the language of said sections; also referring to the act of May 23, 1850, providing for a bullion fund (9 Stat. 436), but not containing the conditions prescribed for stamp agents' bonds by section 170 of said act of June 30, 1864, and not making any reference to said act or duties; which bond was accepted by the secretary of the treasury: *Held*, that the sureties on said bond, given as assistant-treasurer and treasurer of the branch mint, are not liable for any default of their principal occurring in the performance of the duties of stamp agent, in pursuance of the provisions of said section 170 of said act of June 30, 1864.

At law.

A. P. Van Duser, U. S. Atty.

Latimer & Morrow, for defendants.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

SAWYER, Circuit Judge. This is an action on the official bond of D. W. Cheeseman, as assistant-treasurer of the United States, and treasurer of the branch mint at San Francisco.

The eighth article of the complaint alleges, as one breach, that the principal in the bond failed to account for a certain amount of internal revenue stamps supplied him for sale by the commissioner of internal revenue of the United States under authority of acts of congress. The defendants claim that there is no liability under the conditions of the bond and the statute, for any delinquency of the assistant-treasurer, as internal revenue stamp agent; that for this reason the deficiency alleged in article 8 does not constitute a breach in the condition of the bond, and that the matter alleged is therefore immaterial; and, on that ground, they move to strike it out in accordance with the practice under the State Code of Procedure. The bond sued on bears date July 2, 1864.

The act of August 6, 1846, provided for the appointment of assistant-treasurers of the United States at certain cities. 9 Stat. 60, § 5. Section 6 provides: "That the treasurer of the United States, the treasurer of the mint of the United States, the treasurers, and those acting as such, of the various branch mints, all collectors of the customs, all surveyors of the customs acting also as collectors, all assistant-treasurers, all receivers of public moneys at the several land offices, all post-masters, and all public officers of whatsoever character, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by this or any other act of congress, or by any regulation of the treasury department made in conformity to law; and also to do and perform all acts and duties required by law, or by direction of any of the executive departments of the government, as agents for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by law to make, and which are of a character to be made by the depositaries hereby constituted, consistently with the other official duties imposed upon them."

Section 7 provides that all the treasurers and assistant-treasurers named in the act "shall respectively give bonds to the United States faithfully to discharge the duties of their respective offices according to law."

On July 3, 1852, "An act to establish a branch mint of the United States in California" was passed, section 7 of which provides as follows: "That the said branch mint shall be the place of deposit for the public moneys collected in the custom houses in the state of California, and for such other public moneys as the secretary of the treasury may direct; and the treasurer of said branch mint shall have the custody of the same; and shall perform the duties of an assistant-treasurer, and for that purpose shall be subject to all the provisions contained in an act entitled 'An act to provide for the better organization of the treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue,' approved August the sixth, one thousand eight hundred and forty-six, which relates to the treasurer of the branch mint at New Orleans."

The defendant, Cheeseman, was appointed treasurer of said branch mint, and as such gave the bond in suit. The condition of the bond follows the language of the said act of August 6, 1846, before cited, and will be set out in the course of this opinion.

It also adds "to be substituted for present bond of four hundred thousand dollars by virtue of act of May 23, 1850" (9 Stat. 436). This act relates to a bullion fund set apart to pay for bullion received at the mint before it is coined; and provides for the increasing of bonds of treasurers to cover the increased responsibility under the operation of the act. No reference is made in the condition of the bond in suit to stamps, stamp agents, or to

any other act of congress, than those just cited.

By the act of July 1, 1862, as one source of revenue, congress provided that certain merchandise and certain instruments should be stamped, with stamps to be furnished by the government; and by section 102 the commissioner was authorized to furnish any person such stamps upon payment of the amount of duty represented by such stamps less a commission of five per cent. when the amounts taken were fifty dollars or more. It also provided for the return of such stamps so furnished, as should become unfit for use, or for which the purchaser should have no use. 12 Stat. 477, § 102. This act was amended December 25, 1862, by which the commissioner of internal revenue was authorized to supply the assistant treasurer at San Francisco with stamps "without requiring prepayment therefor," provided, "that no greater commission be allowed than is now provided by law"—that is to say, no greater than was allowed private parties, who received stamps upon payment, as provided in the statute before cited. 12 Stat. 632, § 2.

On June 30, 1864, congress passed another act, which covers the whole subject of internal revenue taxation, and especially that portion relating to stamp duties. Section 173 of this act repeals by direct reference nearly all the acts upon the subject, and then adds a general clause, "together with all acts and parts of acts inconsistent herewith." Section 161 of this act, like section 102 of the act of July 1, 1862, authorizes the commissioner of internal revenue to supply any person with stamps upon payment of the amount represented less commissions allowed for selling, or otherwise, and for the return of those not used; and to supply certain designated manufacturers with stamps "without prepayment therefor, on a credit not exceeding sixty days," upon "such security as he (the commissioner) may judge necessary to secure payment," etc. Section 170 provides as follows: "That in any collection district, where in the judgment of the commissioner of internal revenue, the facilities for the procurement and distribution of stamped vellum, parchment, or paper, and adhesive stamps, are or shall be insufficient, the commissioner, as aforesaid, is authorized to furnish, supply, and deliver to the collector and to the assessor of any such district, and to any assistant treasurer of the United States, or designated depositary thereof, or any postmaster, a suitable quantity or amount of stamped vellum, parchment or paper, and adhesive stamps, without prepayment therefor, and shall allow the highest rates of commissions allowed by law to any other parties purchasing the same, and may in advance require of any such collector, assessor, assistant treasurer of the United States or postmaster, a bond with sufficient sureties, to an amount equal to the value of any stamped vellum, parchment or paper, and adhesive stamps, which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required of all quantities or amounts undisposed of, and for the payment monthly, of all quantities or amounts, sold or not remaining on hand. And it shall be the duty of such collector to supply his deputies with, or sell to other parties within his district who make application therefor, stamped vellum, parchment, or paper, and adhesive stamps, upon the same terms allowed by law, or under the regulations of the commissioner of internal revenue, who is hereby authorized to make such other regulations, not inconsistent herewith, for the security of the United States and the better accommodation of the public, in relation to the matters hereinbefore mentioned, as he may judge necessary and expedient. And the secretary of the treasury may from time to time make such regulations as he may find necessary to insure the safe-keeping or prevent the illegal use of all such stamped vellum, parchment, paper and adhesive stamps." 13 Stat. 297, § 170.

These are the only statutes brought to the attention of the court bearing upon the question presented by the motion to strike out. The bond in question was given after the passage of the last named act of June 30, 1864. This act clearly operated as a repeal of the act of December 25, 1862, although the latter act is not specifically referred to in the repealing clause. But the latter embraces the entire subject-matter of the prior act on this subject, making changes on the point in question and adding other provisions, and was manifestly intended as a substitute for it. In such cases it is well settled that the operation of the later act is to repeal the one for which it is substituted. Murdock v. City of Memphis, 20 Wall. [87 U. S.] 617; U. S. v. Tynen, 11 Wall. [78 U. S.] 88; Henderson's Tobacco, Id. 652; Bartlet v. King, 12 Mass. 537; Com. v. Cooley, 10 Pick. 37; Pierpont v. Crouch, 10 Cal. 315; Sedg. St. & Const. Law, 126; Butler v. Russell [Case No. 2,243]; Norris v. Crocker, 13 How. [54 U. S.] 438. The act of 1862, therefore, need not be considered.

The liabilities of sureties cannot be extended by implication or construction. The surety cannot be bound beyond the scope of his engagement. He is entitled to stand upon the strict terms of his contract. His liability is strictissimi juris, and cannot be extended beyond the reasonably necessary import of the language of his bond. Miller v. Stuart, 9 Wheat. [22 U. S.] 703; U. S. v. Boyd, 15 Pet. [40 U. S.] 207-209; Legget v. Humphreys, 21 How. [62 U. S.] 76; Morton v. Thomas, 24 How. [65 U. S.] 317; Smith v. U. S., 2 Wall. [69 U. S.] 235.

Is the default alleged in article 8 of the complaint fairly within the terms of the condition of the bond? The condition of the bond is in the language of the act of 1846,

which was passed long before there was any act relating to stamps in force. One of the conditions is in the language of section 7 of said act that the principal "shall truly and faithfully continue to execute and discharge all the duties of the said office according to the laws of the land." These duties were specifically defined by section 6 of the same act, and another condition of the same bond follows substantially the language of that section, and is, that "he shall truly and faithfully continue to execute and discharge all the duties of the said office, according to the laws of the United States, and moreover has well, truly and faithfully kept and shall well, truly and faithfully keep safely without loaning, using, depositing in bank or exchanging for other funds than as allowed by the act of congress hereinafter specially referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered by the proper department or officer of the government to be transferred or paid out; and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made, and shall faithfully and promptly make the same as directed, and has done and shall do and perform all other duties as fiscal agent of the government, which have been or may be imposed by any act of congress, or by any regulation of the treasury department made in conformity to law; and also has done and performed, and shall do and perform all acts and duties required by law, or by direction of any of the executive departments of the government, as agent for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by the law to make, and which are of a character to be made by a depositary constituted by an act of congress, entitled 'An act to provide for the better organization of the treasury, and for the collection, safe keeping, transfer, and disbursement of the public revenue,' approved August 6, 1846, consistently with the other official duties imposed upon him; then this obligation to be void and of none effect," etc.

The language of the statute and of the condition is very broad, but the words must be taken as having reference to such duties only as have some natural relation to the ordinary duties imposed upon the particular officer, who gives the bond. The language prescribing the duties is the same for "all collectors of customs, all surveyors of customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters and all public officers of whatsoever character." All these officers are provided for in the same section. It can hardly be supposed that congress intended that the words "all other duties as fiscal agents of the government which may be imposed by this or any other act;" in the section prescribing the duties of the officers mentioned and which is inserted in the treasurer's bond, in suit, should include the duties of collectors of customs, receivers of land offices and postmasters in case congress should, after giving the bond, see fit to impose the duties of such officers on the assistant treasurer.

If so, then the duties of all officers, who have anything to do with the moneys of the government, might be imposed on an assistant treasurer, and the liabilities of his sureties extended far beyond anything contemplated at the time of the execution of the bond. We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties acquainted with the duties of the various public officers as usually devolved upon them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of government should require it; and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers. Thus the duties of treasurers are usually to keep safely, and pay out upon lawful authority the public moneys, not to act as collectors of customs, postmasters, receivers of land offices, or other officers engaged in collecting the different branches of the public revenues. Treasurers are ordinarily understood to be keepers of the public funds collected by other classes of public officers to whom those specific duties are specially assigned. We do not think the words of the treasurer's bond under consideration would cover the duties of collectors of customs, etc., imposed by the act of congress or a regulation of the treasury department after the giving of the bond. The sale of stamps required by act of congress to be used upon certain specified merchandise and written instruments, is one mode of raising and collecting revenue; and the furnishing of stamps to the assistant treasurer for sale to other parties in pursuance of section 170 of the act of 1864, is but making him an agent for the sale of stamps, and collection to the extent of sales of that branch of the public revenue. The stamps themselves are not money. There is no natural or necessary connection of this service with the ordinary duties of that officer, as treasurer. The service is more appropriate to other officers, whose duties are to collect revenue, and it was at first imposed on that class of officers. Section 102 of the act of July 1, 1862, as has been seen, authorized the commissioner to "supply collectors, deputy collectors, postmasters, stationers and other persons (without naming assistant treasurers), at his discretion with adhesive stamps," etc., "upon payment at the time of delivery" of the amount of duties "said stamps represent;" and to allow five

per cent. as commission, providing also for a return of such as were not used. Section 161 of the act of June 30, 1864, made a similar provision as to similar parties, the supply to be made upon payment, and, also authorized the delivery of stamps to certain manufacturers, without payment upon giving satisfactory security for payment within sixty days. Section 170 of the same act authorized the commissioner of internal revenue in those districts where in his judgment the facilities for distribution of stamps were insufficient, to furnish to the collector and assessor of the district, and to any assistant treasurer, or any postmaster, a suitable quantity of stamps "without payment therefor," and to allow the highest rates of commission allowed other parties purchasing the same; and provided that the "commissioner may in advance require of any such collector, assessor, assistant treasurer of the United States, or postmaster, a bond with sufficient sureties to an amount equal to the value of any stamped vellum, parchment or paper and adhesive stamps which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts sold or not, remaining on hand."

Thus it will be seen that under section 161, the stamps were to be supplied to certain officers and persons only on prepayment of the amount represented by the stamps, less commissions, to certain manufacturers on credit upon giving security, and under section 170 they might be supplied for sale on similar commissions to certain officers named without prepayment, in the discretion of the commissioner, but he was authorized to require security and the condition of the bond is prescribed. Some of the officers mentioned in both sections are the same, as postmasters and collectors. It seems to be a fair inference from these sections that congress intended that there should be in all cases either prepayment of the value less commissions, or special security given for the faithful performance of this particular duty.

Why require prepayment of collectors and postmasters in section 161, if their official bonds as collectors and postmasters already given covered the duty? or why authorize the supply of stamps to these same officers in section 170 of the same act, and require other special security, if it was contemplated that their bonds as collectors and postmasters already given protected the government? These officers, like assistant treasurers, give bonds for the faithful discharge of their duties which are prescribed by section 6 of the act of 1846. If the assistant treasurer's bond under that act covers the liabilities by reason of the provisions of section 6, the same must be true of the collectors' and postmasters' bonds. It seems very evident to us that congress intended that the specific bond authorized by section 170 of the act of 1864 should be given to cover the specific duty devolved upon the stamp agents provided for in that section, that is to say, when stamps are delivered without prepayment. The language is not that an "additional" bond shall be required, but that "a bond with sufficient sureties" may be required. If congress had contemplated that a bond as assistant treasurer should cover this duty, there would have been no need of this bond, or if it had supposed the bond already given insufficient, it would naturally have authorized an additional bond as in case of the bullion fund with a condition covering all duties instead of limiting the responsibility to that particular duty. The bond in question was given after the passage of the act of 1864, yet it does not contain the condition prescribed by section 170 to cover the duties of the assistant treasurer as stamp agent, and makes no reference to it. It does, however, refer in terms to the act of 1846 and to the act of 1850 relating to a bullion fund, and purports to have been executed in pursuance of those acts. It seems to refer specifically to all duties intended to be covered. "Expressio unius est exclusio alterius." The parties executed the bond, and the secretary of the treasury accepted it in this form. If it was intended to cover the duties of the assistant treasurer, as stamp agent under the act of 1864, it is reasonable to presume that the secretary of the treasury would have required the conditions prescribed by section 170 to be inserted, or at least to have required some reference in the bond to those duties, or to that act. The secretary prescribes the form of the bond.

We think the reasonable conclusion is, that congress intended to require a distinct and separate bond containing the conditions prescribed in section 170 of the act of 1864, to cover the duties of stamp agents provided for in that act; that as the bond in suit was given since the passage of the act of 1864, and does not contain the conditions prescribed by that act, and makes no reference to the act, but only refers to the acts of 1846 and 1850, the sureties might have reasonably supposed, and were entitled to suppose, that another bond would be given to cover the service of stamp agent, should the commissioner exercise his discretion, and require that service of the person acting as assistant treasurer, and that their liabilities upon the bond were limited to the duties of assistant treasurer and treasurer of the mint, and such duties as usually pertain to that office, and as they existed under prior acts of congress; and that they are not liable on the bond in suit for the delinquencies set out in article 8 of the complaint.

The result is that the averments of said article are immaterial, and should be stricken from the complaint, and it is so ordered.

Case No. 14,791.

UNITED STATES v. CHENAULT.

[2 Cranch, C. C. 70.] [1]

Circuit Court, District of Columbia. April Term, 1813.

EXTORTION—ATTEMPT TO COLLECT FEES ALREADY PAID—EVIDENCE—CONTENTS OF WARRANT.

Laboring to exact fees from one party after having received them from another is not extortion, and whether it is an indictable offence, quære. The contents of a warrant cannot be proved without producing it, or accounting satisfactorily for its non-production.

This was an indictment [against Elijah Chenault] for laboring to exact fees from the plaintiff, after having received them from the defendant, on a warrant before a justice of the peace in the case of Carlin v. Weston.

THE COURT refused to instruct the jury that the offence charged was not indictable; but told them it was not extortion.

THE COURT also refused to suffer parol evidence to be given of the contents of the warrant without producing it, or accounting satisfactorily for its non-production.

Case No. 14,792.

UNITED STATES v. CHENOWETH et al.

[6 McLean, 139; [2] 4 West. Law Month. 165.]

Circuit Court, D. Ohio. Oct. Term, 1854.

SHIPPING PROHIBITED ARTICLES ON STEAMBOATS—GUNPOWDER—WHO LIABLE.

1. Act August 30, 1852 [10 Stat. 61], which prohibits the shipment of gunpowder and other ignitible articles on board of steamboats, punishes by fine or imprisonment, for putting up such articles for shipment, except they be put up and marked as required, or for shipping the same.

2. An individual who has not put up the articles, is not liable for shipping the same, if the articles have not been actually shipped on board of the vessel

Mr. Morton, U. S. Dist. Atty.
Mr. Taft, for defendants.

OPINION OF THE COURT. This is an indictment against the defendants for shipping gunpowder, in violation of the act of congress of the 30th August, 1852. By the 8th section of that act, gunpowder and other materials which ignite by friction, are required to be packed in a particular manner, and distinctly marked on the outside with a description of the articles; and any one who shall pack or put up for shipment any of the above articles, or shall ship the same, except as above provided, shall be deemed guilty of a misdemeanor and punished by fine or imprisonment, &c.

The defendants having pleaded not guilty, a jury was sworn, &c. A. H. Bayless, a witness, stated that three casks containing kegs, which he supposed to be gunpowder, were deposited on the wharf of Cincinnati, for shipment on the —— day of ——, 1853. The dray tickets represented the casks to contain merchandise. The head of one of the hogsheads was out, and witness saw kegs which he supposed contained gunpowder. Capt. Halderman states, that in November last he went to the wharf, and found at the landing three bacon hogsheads, marked R. R., Florence, Alabama. He had the head taken out of the third hogshead, and found they contained powder. A man by the name of Ross said he had shipped them, and on being told it was contrary to law, said he was not aware of it, and that he had been in the habit of shipping powder. The kegs which contained the powder were of the usual size, and contained each about twenty-five pounds. Each cask contained from seven to ten kegs. The defendants were engaged in the commission and forwarding business. Ross said the hogsheads had been carried to the Steamboat "Royal Arch." Robert Kennedy, says he was clerk to the St. Louis mail boat, that the hogsheads were marked as containing oil cake, he received the hogsheads the evening before from defendants. In rolling the hogsheads to put them on board the steamer, the head fell out of one of them. Capt. Pearce spoke to one of defendants, who had the head put in. Thomas Gwynne; the witness drives a powder wagon; he hauled the casks from the powder house. Saw when the head came out, the hogsheads contained kegs of gunpowder. Capt. Pearce, saw the cask with the head out, and saw that it contained kegs of gunpowder. A motion was made to overrule the evidence, but the court refused to take the evidence from the jury. It appeared that the hogsheads had been forwarded to the defendants for shipment in the ordinary course of their business; and there was no evidence to show that they had any knowledge of the contents. The hogsheads appeared to have been used for pork or bacon hams, from the marks which they bore.

THE COURT instructed the jury that there being no evidence to show that the defendants had packed the gunpowder for shipment, in violation of the act of congress, they could only be convicted, under the act, for shipping the article. It does not appear that defendants had any knowledge that the casks were brought from the powder house, from which a presumption might arise that they had knowledge of their contents, but if such a presumption could be raised, it would not go to convict the defendants of packing the powder. This being the case, the jury will enquire whether the articles were shipped. The words of the law are "if any one shall put up for shipment, on board of any such vessel, except as before directed, or shall

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John McLean, Circuit Justice.]

ship the same," he shall be deemed guilty, &c. The articles were not shipped by the defendants, although they were brought to the wharf for that purpose. Before the hogsheads were actually shipped on board the vessel, the head of one of them was taken out, and the gunpowder was discovered, which prevented the shipment of them within the meaning of the law.

It is admitted that the shipment of gunpowder or other articles specified, as prohibited by the act, should be punished; as such act endangers the lives of passengers and the property on board, as well as the boat itself. But however aggravated the act, no one should be convicted, unless it be shown he is guilty of the offense within the statute.

The jury found the defendants not guilty.

UNITED STATES v. CHOATE. See Case No. 14,627.

Case No. 14,793.

UNITED STATES v. CHOTEAU et al.

[32 Hunt, Mer. Mag. 715.]

District Court, S. D. New York. 1855.

CUSTOMS DUTIES—EXCESS IN WEIGHT—ABSORPTION OF MOISTURE.

This was a suit to recover duty upon the alleged weight of a quantity of wool imported by the defendants [Pierre Choteau and others]. The custom house weighers made returns showing an excess over the weights specified in the invoice, which would amount to about $300.

Mr. Joachimsen, Asst. U. S. Atty., produced witnesses to prove that the weight of the wool on its arrival here exceeded that specified in the invoice.

Messrs. Porter & Sanford, for defendants, produced evidence to show that wool, by absorbing moisture while at sea, becomes heavier from one to five per cent.; that the wool in question was weighed in England, and the weighers gave the weight mentioned in the invoice; that the wool was kept here in a dry place after its arrival, and so decreased in weight that it was sold at a less weight than that mentioned in the invoice.

THE COURT (BETTS, District Judge) charged the jury that although the increased weight may have accrued from moisture, or any other action of the elements,—except being exposed to or injured by sea water,—the wool was liable to pay duty at this port on the weight here.

The jury brought in a sealed verdict for plaintiff.

Mr. Joachimsen moved for a reference to ascertain the amount of duty to which the wool was liable, and named Mr. Bridgham as the reference.

Case No. 14,793a.

UNITED STATES v. CIGARS, etc.

[37 Leg. Int. 237;[1] 14 Phila. 554.]

District Court, E. D. Pennsylvania. May 25, 1880.

INTERNAL REVENUE—FEES OF OFFICERS—HOW ACCOUNTED FOR.

Officers' fees in revenue cases need not be immediately paid over to the internal revenue department, but may be accounted for in the semi-annual returns of the officers. And in certain other causes of information, for forfeiture, as also in certain actions of debt, etc.

[These were actions for forfeiture of certain cigars late in the possession of Edward Bolin.] Heard upon motion for order to pay the whole fund in the registry of the court in each of the causes (including the fees, costs, charges and expenses of the officers of the court) to the local collector of internal revenue.

John K. Valentine, U. S. Dist. Atty., for the motion.

A. Sydney Biddle, contra.

Before McKENNAN, Circuit Judge, and BUTLER, District Judge.

BUTLER, District Judge. This motion contemplates a change of practice, respecting officers' fees, in revenue cases. Heretofore, the fees in these, as in all other cases, have been retained by the officers when collected and received, and accounted for in their semi-annual returns. Now, it is claimed, that the amount should be paid over to the internal revenue department, through the collector, and the officers look to the treasury for its return. That the practice heretofore pursued conformed to the law, as it existed prior to the act of June 30, 1864 [13 Stat. 223], re-enacted July 13, 1866,—Rev. St. § 3216 [14 Stat. 98],—is not, I believe, open to doubt. The act of February 26, 1853,—Rev. St. §§ 823, 828, 839, 842 [10 Stat. 161],—prescribes what fees shall be allowed to the clerk, district attorney and other officers; and sections 839, 842 and 844 show, with great distinctness, that these fees are to be retained by the officers, when received, until the limit fixed, as the maximum of their compensation, is exceeded. Each one of these sections 839, 842, and 844, recognizes this right to retain, in plain terms, the last declaring "that every district attorney, clerk and marshal shall at the time of making his half-yearly return to the attorney-general pay into the treasury * * * any surplus of the fees and emoluments of his office, which said return shows to exist, over and above the compensation and allowances authorized by law to be retained by him." Section 856 provides that "the fees of district attorneys, clerks and marshals, * * * in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury." And on this language, and that

[1] [Reprinted from 37 Leg. Int. 237, by permission.]

of the act of July 13, 1866 (Rev. St. § 3216), the argument in support of the motion is based. The "cases where the United States are liable to pay" (referred to in section 856) are not, however, suits in which the fees are collected from its antagonists; but others, in which it is an unsuccessful party; and also where services are required (such as the act specifies), for which no fees are taxed to the defendant. Where the United States is successful, and the fees are recovered from the defendant, it is not liable to pay, and the case does not fall within this section. This construction is reasonable, and conforms to the language employed; while any other would bring the section in conflict, not only with the several sections before referred to (which provide, as has been seen, for the officers' retention of their fees), but also with the section immediately following it (857), which directs that "the fees and compensation of officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as fees of the officers of the states respectively for like services are recovered." The distinction in the mind of the draugntsman, which, without this section, would have been plain, is thus put beyond doubt. The fees, other than those which are to be paid out of the treasury, are those which are taxed and collected in suits; and these are to be recovered as like fees are recovered by similar officers of the state. In Pennsylvania such fees are recovered by taxation and execution, if not voluntarily paid; and when recovered belong exclusively to the officer. The plaintiff in whose suit they are collected has no claim upon nor responsibility respecting them. Beale v. Com., 7 Watts, 186. In this case Chief Justice Gibson says: "He who orders the service is also liable on an implied contract. Down to the receipt of them (the fees), by the sheriff, he certainly is; but it cannot be doubted that payment to the agent of the creditor, by the debtor ultimately liable, discharges the collateral liability of the intermediate one. If the money be lost in the sheriff's hands, it is lost to him whose property it was at the time; for a loss which would not have happened without some degree of negligence must be borne by him whose inattention occasioned it, and it is the business of the officer to see that the sheriff pay over his fees."

The act of July 13, 1866,—which provides "that all judgments, and moneys recovered or received for taxes, costs, forfeitures and penalties, shall be paid to collectors as internal taxes are required to be paid,"—effects no change in the existing law, except to require the costs, which belong to the government, to be paid into a different department, in internal revenue cases. These costs consist in expenditures made by it, during the progress of suits, and taxed to, and recovered from, defendants, on its account. And this manifestly, was the only purpose of the act. It does not require the officers' fees to be thus paid over; and no proper object is discoverable for such a requirement. The fees belong to the officers as the emoluments of their offices. Conceding that congress might require the payment, and send the officers to another department to recover back, such a purpose will not be attributed to the statute in the absence of plain terms to that effect.

This interpretation gives full force to the language of the statute, and, I have no doubt, to its purpose. The distinction between costs to which a successful party is entitled, and fees belonging to an officer, is well understood by the profession; and is judiciously stated by the court in Musser v. Good, 11 Serg. & R. 248, and again in Beale v. Com., before cited. In the former case the court says: "Costs are an allowance to a party for expenses incurred in conducting his suit; fees are a compensation to an officer for services rendered in the progress of the cause." The act of 1866, manifestly, recognizes this distinction, and was not intended to affect the officers referred to, by taking possession of their fees, but simply to turn the money coming to the government, in the form of costs, from revenue cases, into another department, more appropriate for its reception. The entire amount collected in the cases referred to has been paid into court; and we regard this as a proper practice, as it affords all persons interested an opportunity of contesting the officers' claims. The motion is therefore denied.

McKENNAN, Circuit Judge. The statutes referred to in the opinion of the district judge apply, as well to the disposition of money collected, or paid under proceedings in the circuit court, as to money in the custody of the district court. Hence it was desired that the circuit judge should sit with the district judge at the argument of the motion. The questions involved in it were argued with great fulness and ability, and the foregoing opinion is the result of our concurrent judgment. It is to be understood, therefore, as practically an adjudication by both courts, and as establishing the rule by which similar applications will be determined by the circuit court.

Case No. 14,794.

UNITED STATES v. CINQUE.

[Nowhere reported: opinion not now accessible.]

UNITED STATES v. The CIRCASSIAN. See Case No 2,720.

Case No. 14,795.

UNITED STATES v. CISNA.

[1 McLean. 254.] [1]

Circuit Court, D. Ohio. July Term, 1835.

INDIANS — POWER OF CONGRESS TO REGULATE INTERCOURSE AMONG — RESERVATION INCLUDED WITHIN STATE LIMITS — FEDERAL CRIMINAL JURISDICTION.

1. Under the power to regulate commerce with the Indian tribes, congress have power to prohibit all intercourse with them, except under a license.

[Cited in Oliver v. Liverpool & L. Ins. Co., 100 Mass. 537; Territory v. Guyot (Mont.) 22 Pac. 134.]

2. This power is the same as the power to regulate commerce among foreign nations, under which embargo laws have been enacted, and also laws of non-intercourse.

3. Under the treaty-making power, certain political relations have been established between the United States and the Indian tribes.

4. The laws regulating intercourse with the Indians, were intended to operate on communities, somewhat remote from a white population.

5. The exception in the act of 1802 [2 Stat. 139] refers to Indian tribes at that time surrounded by white settlements, as the remnant of tribes in Connecticut, Massachusetts, and other states.

6. The power of congress to regulate commerce with the Indians does not necessarily cease on their being included within the limits of a state.

[Cited in U. S. v. Seveloff, Case No. 16,252; U. S. v. Bridleman, 7 Fed. 897.]

[Cited in State v. McKenney (Nev.) 2 Pac. 172.]

7. The federal relations should be withdrawn from the Indians within a state, by the concurrent acts of the federal and state governments.

[Cited in U. S. v. Ward, Case No. 16,639.]

8. But if no such acts take place, and the Indians occupy a territory of very limited extent, surrounded by a white population, which necessarily have daily intercourse with the Indians, and it becomes impracticable to enforce the law, the federal jurisdiction must cease.

[Cited in U. S. v. Sa-Coo-Da-Cot, Case No. 16,212; Ex parte Sloan, Id. 12,944; U. S. v. McBratney, 104 U. S. 624; Bush v. Commonwealth of Kentucky, 107 U. S. 115, 1 Sup. Ct. 630.]

[Cited in State v. Doxtater, 47 Wis. 292.]

[Indictment against Jonathan Cisna.]

Mr. Swayne, U. S. Dist. Atty.

Mr. Parish, for defendant.

OPINION OF THE COURT. The defendant, having been indicted at the present term, for stealing a horse within the reservation of the Wyandott tribe of Indians, of the state of Ohio, of the goods and chattels of Henry Jocko, a friendly Indian, filed a demurrer to the indictment, which brings before the court the question, whether they can exercise jurisdiction in the case?

The indictment is founded on the fourth section of the act of congress, "to regulate trade and intercourse with the Indian tribes," passed 30th March, 1802 [2 Stat. 139], which provides: "If any citizen or other person shall go into any town, settlement, or territory belonging or reserved by treaty of the United States to any nation or tribe of Indians, and shall there commit robbery, trespass, or other crime, against the person or property of any friendly Indian or Indians, which would be punishable if committed within the jurisdiction of any state against a citizen of the United States, or, unauthorized by law or with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken or destroyed belongs, a sum equal to twice the just value of the property taken or destroyed, &c."

The Wyandott reserve is twelve miles square, and is situated in Crawford county, which for some years has been regularly organized as a county. And at the last session of the legislature of Ohio, a law was passed which declared, "that all white inhabitants, now or hereafter resident in said Wyandott reservation, shall be, and they are hereby made subject to the laws of the state of Ohio for the purpose of taxation, and for all civil, criminal, and military purposes, as other white citizens are now, or hereafter may be, in the different townships in the said county of Crawford, any law or custom to the contrary notwithstanding." Before the passage of this law the legislature had not, by express enactment, extended the jurisdiction of the state over this reserve; but in the general laws respecting crimes and punishments, it is not excepted from their operation. This reserve is surrounded by a dense white population, and public roads lead through it in various directions. It is admitted to be as much frequented by the white population as any other part of the county; and it would be extremely inconvenient, if not impracticable, for the citizens of the county to avoid entering the reserve in pursuing their ordinary and daily avocations.

On the 9th of January, 1789 [7 Stat. 28], the United States entered into a treaty with the Wyandott and other nations of Indians, in which it was agreed that if any citizen of the United States, or other person not being an Indian, shall settle on their land, such person shall forfeit the protection of the United States, and the Indians were at liberty to punish him or not, as they please. And all citizens or inhabitants of the United States were prohibited from hunting or destroying the game, or even entering on the Indian lands without a passport. Certain stipulations were made for the punishment of offences, such as horse-stealing, robbery, &c., and the Indians agreed to surrender the offenders among their tribes, who were to be punished equally with the citizens of the United States. At the time this treaty was

[1] [Reported by Hon. John McLean, Circuit Justice.]

formed, the Wyandott tribe owned a very extensive territory of rich and fertile country; but treaties of cession have been made from time to time, until their territory is restricted to twelve miles square.

By the act of 1802, above referred to, which regulates trade with the Indians, all citizens or residents of the United States are prohibited from entering into the Indian lands without a license, and penalties are provided for hunting on them, or committing depredations upon the property of Indians. Murder, by a white person, of an Indian, is punished with death; traders without license forfeit their merchandize; and a penalty is incurred by purchasing from an Indian a gun, any instrument of husbandry, a horse, or other specified articles of property. Jurisdiction is given to the superior courts in each of the territorial districts, and the circuit courts of the United States, of similar jurisdiction in criminal cases in each district of the United States in which any offender under the intercourse law shall be apprehended, or may be brought for trial. The peculiar relation which a tribe of Indians, that resides within the limits of a state, bears to the federal and state governments, renders every exercise of jurisdiction over their persons and property, by the federal government, a matter of great delicacy and importance. The federal government is one of limited and specific powers. It cannot exercise jurisdiction by implication, but is confined to the special grants of power in the constitution; and in carrying into effect these grants, the most appropriate means should be adopted, and no means beyond what are necessary to give effect to the power, can be legitimately used. All powers not delegated to the federal government, are reserved to the states and the people. The power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, is given to congress in the constitution. And under this and the treaty making power, numerous treaties have been formed and laws enacted, to regulate commercial intercourse with the numerous Indian tribes which live within the federal limits. The validity of these treaties and laws, it is believed, has not been questioned, so far as they act upon the Indian tribes and our own citizens, beyond the boundaries of any state. But serious questions have arisen, and are likely again to arise, between the federal and state authorities, respecting the jurisdiction of the former, under these laws, over the territory of Indians situated within a state sovereignty.

Within this state no collisions on this important subject have occurred; but the principle on which jurisdiction is exercised by the federal government, must be the same, under the same circumstances, in every state. The supreme court of Ohio have not decided whether offences under the state laws, if committed within the Wyandott reserve, by a white person, may be punished; but a circuit court of common pleas have decided that no punishment can be inflicted in such a case. No one can read the laws for the regulation of our intercourse with the Indian tribes, without perceiving that they were designed to operate on and protect communities of Indians, remotely situated from our own population. In the act of 1802 is a provision that it shall not be so construed "as to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of the individual states." This provision applied to the condition of Indians at the time the law was passed; and at that time the Wyandott tribe was not only far more numerous than it now is, but its territory was extensive and remote from a white population. They did not reside within the ordinary jurisdiction of any state. The exception was applicable to remnants of tribes which resided in Massachusetts, Connecticut, and other Eastern states. No express provision has been made in treaties or by act of congress, at what period or under what circumstances the power of the federal government to regulate commerce with the Wyandott or any other tribe of Indians, living within a state, shall be terminated.

This is a question whether it shall be decided by the federal or state authorities as important as it is delicate; and it is much to be regretted that some rule on the subject has not been adopted which would prevent collisions of jurisdiction. A concurrent action by the federal and state governments, in regard to this matter, would seem to be the most appropriate method of withdrawing the regulation of the general and substituting that of the local authority. But the federal government has not acted on the subject, and the duty is now imposed upon this court to determine, whether the power to act belongs to the judicial branch of the government.

The question of jurisdiction which is raised by the demurrer is, whether the law under which this indictment has been found, can be carried into effect within the Wyandott reserve. Whether this is properly a judicial question may admit of some controversy. If the period at which the law shall be suspended could be fixed, at the time the state government was organized, there would be no difficulty on the subject. But the Wyandott tribe of Indians required as much the fostering care and superintending power of the federal government, for the protection of its trade in 1803, when Ohio was admitted into the Union, as for some years prior to that period—and the white population was almost as remote from the Indian settlements as it had been for years; and the state jurisdiction was not extended over the Indians, nor was there any difficulty in giving effect to the intercourse law of 1802. In addition to these considerations, the supreme court

have decided, that this law is not necessarily suspended within the limits of a state. If the provisions of the act of 1802 shall not apply to the case before the court, it must be upon the ground that they were unconstitutional when adopted, or have become inoperative by the progress of time and change of circumstances.

The former branch of this enquiry is strictly the exercise of a judicial power; but the latter, in most cases, at least, would seem to belong to the legislative department of the government. So far as it regards the policy of the federal government towards the Indians, within its constitutional powers, it is exclusively a question for the legislature; but as it respects any question of power between the federal and state governments, in whatever form it may arise, the judicial power is competent to decide it. During the whole course of our connection with the Indian tribes, we have recognized in them a power to make treaties, and certain political relations exist growing out of treaties between the federal government and almost every distinct tribe of Indians within our national limits. These relations may be extended by treaties as far as a sound policy, in the discretion of the treaty making power shall admit, where the Indians reside beyond the limits of a state; but within those limits neither the treaty making power nor the legislative power can be exercised so as to abridge the rights of a state.

Congress can exercise no power on this subject, beyond that of regulating commerce with the Indian tribes. The same power is given to congress to regulate commerce with foreign nations and among the several states. Under this investiture of power to regulate commerce with foreign nations, a wide scope of legislation has been exercised. But the regulation of commerce among the several states has been limited principally to certain prohibitions and the equalization of duties. Congress cannot effectually regulate commerce with the Indian tribes, without adopting such provisions by law, as shall preserve those tribes from an indiscriminate commercial intercourse with our own citizens; such is their inferiority in the business of commerce while in an uncivilized state, that their interests would be sacrificed, if left to an unrestricted intercourse. It was on this ground that the act of 1802 prohibited white persons from entering upon the Indian territory without a license, and further to give protection to the Indians, government agents were appointed to reside among them, and penal laws were enacted, as has been stated, against citizens of the United States for committing depredations upon the territory, the persons or the property of the Indians. The exercise of the power to prohibit any intercourse with the Indians, except under a license, must be considered within the power to regulate commerce with them, if such regulation could not be effectual short of an intercourse thus restricted. Under the power to regulate commerce with foreign nations, congress have passed non-intercourse, embargo and other laws, which restricted or altogether prohibited any commercial intercourse with those nations; and as the power to regulate commerce with the Indian tribes is given to congress in the same clause of the constitution, and in the same words, it would seem to follow that the power may be exercised to the same extent in the one case as in the other. There is nothing in the condition of the Indians, when under the exclusive jurisdiction of the federal government, nor in the constitution, which can operate against this construction. The power to regulate commerce among the several states is limited by other provisions of the constitution, by the nature of the power and the sovereignty of the states.

The law of 1802 is constitutional, and so the supreme court have decided. That this act had a constitutional operation upon the Wyandott Nation admits of no doubt; and it remains to be considered whether the situation of this tribe has become so changed as to render this law inoperative as to them. The territory of the Wyandotts, as before stated, is limited to twelve miles square, and it is surrounded by a dense white population, which have daily intercourse with the Indians. Stores and taverns are kept within the reservation by the Indians or those connected with them, which are as much resorted to for trade and other purposes, by the surrounding white population, as similar establishments in any other part of the country. The treaties made with this tribe have not been abrogated, and they hold their possessory right to the soil on the same tenure as other tribes with whom treaties have been made. And a sub-agent of the government still resides among them, through whom the government holds its official intercourse with the tribe. The Wyandotts have made rapid advances in the arts of civilization. Many of them are very intelligent; their farms are well improved, and they generally live in good houses. They own property of almost every kind, and enjoy the comforts of life in as high a degree as many of their white neighbors.

On a community of Indians situated in so limited a territory, and mixed up with and surrounded by a white population, which carries on with them almost every kind of commerce incident to their condition, can the acts which regulate intercourse with the Indians operate? For years past, as if by universal consent, they have not been enforced over this territory. They are wholly unsuited to the condition of the Wyandott tribe, and it would be impossible to give them a practical operation. And it may be said that the federal government by restricting the territory of this tribe, and encouraging their advances in civilization, has mainly contributed to produce this state of things.

But it is insisted that the larceny charged in the indictment may be punished under the act of congress cited, as it was committed within the reserve, and on the property of one of the Wyandott Indians. And how does congress derive power to punish this offence, when committed within a state? The answer must be, from the power to regulate commerce with the Indians. But if this tribe of Indians is so situated as to render the exercise of this power wholly impracticable, must it not of necessity cease? And does not the incident fall with the principal power? If congress had power to punish offences committed on the persons or property of Indians, generally, there could be no objection to the exercise of it without reference to circumstances. But when the power to punish is derived exclusively from the power to regulate commerce, it is perfectly clear, when the power to regulate commerce ceases, the power to punish must also cease. To exercise the power to punish for a violation of a regulation necessary to maintain a commercial intercourse with the Indian tribes, as the Wyandotts are now situated, and within their territory, would be a usurpation of power by the general government, and a direct infringement upon the rights of the states.

This conclusion cannot be resisted. And it is immaterial whether the intercourse law of 1802, has been expressly repealed as to the Wyandotts, or rendered inoperative by the force of circumstances. That the law cannot be enforced in this reserve is clear; and this state of things having been produced by the conjoint acts of the federal and state governments, it may be presumed that the former intended, as to this tribe, to abrogate the law. No other presumption can be raised from a state of facts, wholly incompatible with the provisions of the act. An act may be repealed as well by adopting subsequent and incompatible provisions, as by express enactments. And in this view the act of 1802, so far as it regulates trade with the Wyandott Indians, must be considered as substantially repealed. Has not the state jurisdiction to punish offences committed by its own citizens within the Wyandott reserve? Of this, I can entertain no doubt. Ever since the state government has been organized, it has had power to punish its own citizens for offences committed within its limits; whether within an Indian territory or not; and if there be no constitutional prohibition, the state has power to punish its own citizens for offences committed beyond its own limits. The laws of a state cannot operate extra-territorially; but having jurisdiction over its own citizens, the legislature if not prohibited by the constitution, could make certain acts committed by them beyond its own limits, and without the limits of any organized government, an offence. No process could be issued to arrest an offender beyond the state boundaries, but if he comes voluntarily within the state, he would subject himself to its jurisdiction.

By the first section of an act of the British parliament of the 31st Geo. III., passed in 1803, it is provided, "that from and after the passing of this act, all offences committed within any of the Indian territories, or parts of America not within the limits of either of the said provinces of Lower or Upper Canada, or of any civil government of the United States of America shall be, and shall be deemed to be offences of the same nature, and shall be tried in the same manner and subject to the same punishment as if the same had been committed within the provinces of Lower or Upper Canada." Many years ago, the state of Georgia punished its own citizens for depredations committed upon the Indian territory within the state, and no one has ever questioned the legality of such a procedure. The state of New York has not only punished its own citizens, for offences committed within the Indian reserve in that state, but has extended its jurisdiction in criminal cases, over the Indians. The jurisdiction of the federal government over the Indian territory within a state, under the most favorable circumstances for the exercise of the power is limited to the mere purposes of trade, and cannot prevent a state from punishing its own citizens for offences committed within such territory. The exercise of this power by a state, would not be incompatible with the exercise of the power vested in the federal government. There are many offences, such as counterfeiting the gold and silver coin of the country, the notes of the Bank of the United States, &c. which are punishable as well under the laws of the state as those of the Union.

But as it regards the case under consideration, all objections are obviated by the fact, that the regulations of congress respecting commerce with the Indian tribes, have not been enforced within the Wyandott reserve for years, and cannot for the reasons stated be now enforced. It may be admitted that property stolen in an adjoining state and brought into Ohio, would not subject the offender to a prosecution in this state. The offence having been committed in a distinct sovereignty, could not be punished in Ohio; but such a case would, in no respect, be similar to the one under consideration. The Indian territory within a state cannot be considered as a foreign jurisdiction. Under certain circumstances, it has been decided that a state cannot extend its laws over the Indian territory, within it, and especially when those laws are incompatible with constitutional regulations by the federal government. But the jurisdiction is not foreign. If the state have the fee of the Indian lands, it may dispose of that fee subject to the Indian right of occupancy. And in every other respect may the

state exercise a jurisdiction over the territory which shall not be incompatible with the constitutional regulations of the general government.

In the course of the argument by the district attorney, several adjudications of the supreme court, and a decision of the circuit court for the Eastern district of Tennessee, were referred to, as sustaining the jurisdiction in the present case. But the facts in this case are wholly dissimilar from those in the cases referred to, and they are not more so than the principles which apply to those facts. It is gratifying to reflect that the state laws will afford a more ample protection to the Wyandotts, as it regards their property, than the laws of the federal government. For the laws of the state punish with greater severity the offence charged in the indictment, than the laws of congress. And as it respects the Indians, no doubt can exist that their complaints will receive as prompt attention and as adequate redress, as those which are made by citizens of the state.

These considerations cannot enter into the question of jurisdiction; but they show that a decision against the jurisdiction of this court, will not leave the Indians unprotected, or lead to a failure of justice. The demurrer must be sustained.

It being suggested to the court by the district attorney, that prosecutions in the state court would be instituted against the defendant and the others against whom indictments had been found, for similar offences, the court directed the marshal to deliver over the defendants to the state authorities to answer, &c.

Case No. 14,796.

UNITED STATES v. CITY BANK.

[6 McLean, 130.] [1]

Circuit Court, D Ohio. Oct. Term, 1854.

BANKS — ILLEGAL DEPOSIT — ACTION TO RECOVER — DRAFTS — GOVERNMENT AGENTS — EVIDENCE.

1. No bank, under the sub-treasury law, can become a depository of the public money.

2. The law prohibits such a deposit, and inflicts a severe penalty on the public officer who makes it.

3. But a state bank may engage with the secretary of the treasury to transmit a draft to New Orleans or elsewhere.

4. This does not render a deposit necessary.

5. The same draft received by the bank may be transmitted, or having the specie at the place, the bank may draw on it and pay the treasury at New Orleans.

6. This accommodates both parties, without expense.

7. Where the money of the government is improperly placed in a bank, the illegality of the transaction is no bar to a recovery.

8. The agents of the government do not bind the government, when their powers are transcended.

[Cited in State v Sooy, 39 N. J. Law, 149.]

9. The money, in such a case, would be received wrongfully, and without any authority from the assent of the government.

10. It could be recovered by the government, if not on the contract, on the general counts.

11. And in such a case the writing would be evidence to charge the bank.

At law.

Ewing, Corwine & Morton, U. S. Dist. Atty.

Stanbery, Swan & Andrews, for defendant.

OPINION OF THE COURT. This action is brought by the United States to recover one hundred thousand dollars from the City Bank, which were received by it under a contract to convey the same from New York to New Orleans. The first count in the declaration charges that on the first of November, 1850, the City Bank of Columbus contracted with the United States to transfer the sum of one hundred thousand dollars, monies of the plaintiffs, from New York to New Orleans, to be deposited in the treasury of the United States at that place, by the first of January, 1851; and the said defendant, then and there, received the said sum, and promised to transmit and deliver the same to the treasury of the plaintiff in New Orleans, etc. And that the said defendant did not transfer the said sum of money by the 1st of January, 1851, nor at any other time, but converted the said sum of money to its own use. To this count a general demurrer has been filed.

On the argument of the demurrer, it was insisted by the counsel for defendant, that the contract was void, as against the policy and the provisions of the act of congress, of August 6, 1846, to provide "for the collection, safe keeping, transfer and disbursement of the public revenue" (9 Stat. 59).

Argument of Counsel:

"This act requires all receipts and expenditures of the government to be made in coin or treasury notes. Section 18. It declares certain rooms in the treasury building at Washington, in the mint at Philadelphia and New Orleans, and in the custom houses of Boston, New York, Charleston, and St. Louis, to be the treasury of the United States; and provides for the appointment of four assistant treasurers, at the four last-named places. Sections 2–5. Section 6 requires all public officers to keep safely, without depositing in banks, etc., all public money, till the same is ordered to be transferred or paid out; and when orders for transfer are made, to make such transfers. Section 10 authorizes secretary of treasury 'to transfer' the monies in the hands of any depository to the treasury, or to any other depository, as the safety of the monies, or the convenience of the public service, may require. Section 13 allows to public officers all necessary expenses for

[1] [Reported by Hon. John McLean, Circuit Justice.]

safe keeping, transferring, and disbursing public monies. Section 16. That all officers, and other persons, charged by this or any other act, with the safe keeping, transfer, or disbursement of the public monies, are required to keep an entry of each sum received, and of each payment or transfer. And if any one of the said officers 'shall use, loan, exchange,' or 'deposit in any bank,' any public money entrusted to him for safe keeping, disbursement, transfer, or any other purpose, every such act shall be deemed an embezzlement, punishable by indictment, imprisonment from 6 months to 10 years, and to fine equal to the sum embezzled. And the provisions of this act shall be construed to extend 'to all persons charged with the safe keeping, transfer, or disbursement of the public monies,' whether such persons be indicted as receivers or depositaries of the same; and the refusal of such person, whether in or out of office, to pay any draft, etc., for any public money, no matter in what capacity received, or to transfer or disburse any such money, shall be prima facie an embezzlement.

"It is manifest that the intention of this act is to divorce the government from the banks, and to prohibit all bank agency in its fiscal arrangements. It prohibits all public officers from so much as using a bank as a place of deposit, and it declares that the deposit in a bank of monies entrusted to a public officer, or other person, for safe keeping or transfer, shall be construed an embezzlement. In the face of those provisions, it is absurd to say that a bank may be an agent to make a transfer, or that the contract of a bank for such a purpose is valid. The act of transferring the money involves a receipt and custody of the money, and its transportation to the place of delivery. For the time being the entire control of the money is in the person charged with the transfer. Such a custody or control over public money by a bank is contrary to the policy of this act, which proceeds on the idea of its insecurity. The simple act of depositing money, whilst in a course of transfer in a bank, is declared to be an embezzlement, and amounts to a high offense. If a bank cannot be used by a person charged with a transfer, so much as a place of temporary deposit or safe keeping —if that is forbidden by such a severe penalty—how can it be argued that the entire custody and control of the money, its receipt, transportation, and delivery, may be lawfully entrusted to such an agency?

"It may be very well maintained that this law considers the business of transfer as an official business, just as much as the receipt and safe keeping of the money. The sixth section requires the public officers to make the transfer. The thirteenth section allows to officers all necessary expenses for transferring. It is only in the sixteenth section that any provision appears which indicates that other persons than public officers can be charged with the business of transfer; but this provision applies as well to the safe keeping and disbursement (by other persons) of the public monies, as to their transfer, and these acts—i. e., the safe keeping and disbursement, are clearly official acts. It is difficult to imagine how a private individual can be charged with the safe keeping and disbursement of public money. It is also provided that all persons charged with any of these duties, are to make an entry of every payment or transfer. This carries the idea of official duty, the keeping of office books and accounts. So also does the last clause of the section, which provides that it shall apply as well to persons in as out of office. Persons out of office are clearly those who have been in office, but whose term of office has ceased in some way before their official duties were closed, and, therefore, for the finishing of their official duties, they are treated as officers, though denominated 'other persons.' But if the act is capable of being so construed as to allow this business of transfer to be matter of individual employment and private enterprise, and there was nothing in the act which, as matter of public policy, would prevent the employment of a bank as a transfer agent; yet, on another ground, a bank could not be so employed. The only guards provided in the act for the safe keeping, transfer and disbursement of the public monies, are these two—the official bond of the public officer, which secures the performance of the duty civiliter, and the prosecution for embezzlement, which secures it criminaliter. In one, if not in both these modes, the public treasure must always be secured. If the business of transfer can only be entrusted to an officer, then the security is in both modes; but if a person, other than an officer, can be so employed, then the security, the only sort provided, is the liability to a prosecution.

"A corporation, such as a bank, cannot be prosecuted in the mode provided by this act. It does not come within the purview of the law as a person capable of undertaking the duty of transfer, for the reason that it cannot be made liable to the provisions of the act intended to enforce and secure the performance of the duty. Nor can it be claimed that the public is secured under such a contract with the corporation, by the liability of the individual members or servants of the corporation, to a criminal prosecution. It is the corporation which makes the contract, and which is entrusted with the money, not the individual members or servants of the corporate body. 'Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members.' Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 587.

"The City Bank not capable of making this contract: The terms of the contract, as they are expressed, bind the bank to transfer

$100,000 of the public money from New York to New Orleans, to be deposited in the treasury of New Orleans, by the 1st of January, 1851, free of charge. It is clear from the whole scope of the sub-treasury act, that a transfer of public money from one depository to another, involves simply the transportation of the money in specie, i. e., of the very money. It is in the nature of a bailment, a contract to carry and safely deliver the identical money entrusted to the agent. Every one knows that such was understood to be the meaning of this law, and that one great objection to the law, was the unnecessary cost of transporting coin between distant points, when transfers by means of drafts or bills of exchange would be so cheaply and readily made. Notwithstanding these objections, the law was so framed as to exclude all such paper or bank facilities, and there has been an annual appropriation to meet these extraordinary expenses. Vide Appropriation Act 1849 (9 Stat. 363), $15,000. The use, loan, investment, or exchange of public money for other funds, is expressly forbidden, as to all officers or persons entrusted with it for safe keeping or transfer. Section 16. This being the nature of the contract, we maintain that this bank had no capacity to make it.

"The City Bank is a corporation chartered by the state of Ohio, which, in addition to the ordinary incidents of a corporation, is expressly limited by its charter as follows: 'To loan money, buy, sell, and discount bills of exchange, notes, and all other written evidences of debt, receive deposits, buy and sell gold and silver coin, and bullion, collect and pay over money, and transact all other business properly appertaining to banking.' 43 Laws Ohio, p. 44, § 51. It is too clear for argument, that such a transaction as this does not come within any of the enumerated powers. It is not a loan of money, a buying, selling, or discounting, a deposit, a purchase, or a sale of coin, or a collection and paying over of money. Nor does it come under the general provision of business properly appertaining to banking; for it is certainly no proper banking business to transport bullion or any other commodity, either for hire, or as in this contract, without charge. It is simply a bailment, a contract to carry and safely deliver, without any use of the thing. That the subject matter of the contract is coin, or money, does not make it any more a banking business than if it were corn or any other specific article. The only plausible ground on which such a contract could be put as properly appertaining to banking, would be to suppose that the bank might receive and use the coin in New York, and by means of drafts or bills of exchange, effect the payment of a like sum in other coin at New Orleans, and so have the incidental benefit in the rate of exchange, or otherwise, between funds at New York or New Orleans. That would, in effect, be a dealing in coin or in exchange. But such a dealing is expressly forbidden to persons entrusted with the transfer of the public money. It can neither be bought, sold, or exchanged. It must be kept without use, and transferred without use, and cannot, in any way, or by any device, be made the subject of dealing or traffic, by individuals, or, most emphatically, by banks.

"The foregoing points arise on demurrer to the first count of the declaration, which sets up a contract with the bank."

The entire written argument by the counsel for the bank is given, in order that the strength of the grounds assumed may be shown.

Many of the arguments, in behalf of the defendant, are admitted. It was, no doubt, intended by the sub-treasury act, as it is usually called, to separate the moneyed action of the government from the banks. Although the bank of the United States had for nearly twenty years acted as the fiscal agent of the government, transmitting and paying public money at all points in the Union, when required, without loss or expense, the bank was rendered unpopular, and the deposits were withdrawn from it, and temporarily, state banks and other places were used for deposits, until the sub-treasury law was passed. This change has caused a heavy charge on the treasury, besides the losses that have been incurred; but it has been sustained until this time, by the popular voice. No deposit of public money can be made by a public functionary in a state bank, without a violation of the sub-treasury act. And it may be admitted that the act speaks of the sub-treasury officers, as making transfers of public monies, when ordered by the secretary of the treasury. These transfers to disbursing agents are not necessarily to be made in specie. The twentieth section of the sub-treasury act provides, "That no exchange of funds shall be made by any disbursing officers or agents of the government, of any grade or denomination whatsoever, or connected with any branch of the public service, other than an exchange for gold and silver; and every such disbursing officer, when the means for his disbursements are furnished to him in gold and silver, shall make his payments in the money so furnished; or when those means are furnished to him in drafts, shall cause those drafts to be presented at their place of payment, and properly paid according to the law; and he shall make his payments in the money so received for the drafts furnished, unless, in either case, he can exchange the means in his hands for gold and silver at par."

From the above provision, drafts were authorized to be transmitted in making disbursements, and these drafts may be exchanged for gold and silver. There is no prohibition in the act against the employment, as an agent to transmit funds, either an in-

dividual banker or a bank. And it is believed that under the present system bankers have frequently been employed to transmit the funds of the government, from one part of the country to another. During the war with Mexico, and for some time after its termination, the heavy disbursements were necessarily made at the West. New York, from its large importations, was the principal depository of the government; it was therefore necessary to transmit money from New York, where it was received, to New Orleans and other places in the West, where it was to be disbursed. Drafts on New York will readily command specie at New Orleans. Now, the secretary of the treasury, it appears from the declaration, being desirous to transmit one hundred thousand dollars from New York to New Orleans, draws a draft for that amount on the sub-treasurer of New York, which is received by the defendant, under an agreement to pay it into the sub-treasury at New Orleans. The very draft received by the defendant, may be transmitted to New Orleans, and there exchanged for specie, or the defendant, having specie at New Orleans, may draw on it in behalf of the sub-treasurer in New Orleans, in payment for the New York draft. Such a transaction would be the safest, the most expeditious, and the least expensive mode, of remitting the money. No one can be so competent as the secretary of the treasury to direct these exchanges, as he necessarily has a knowledge of the fiscal action of the government, including all places of deposit, and the amount of disbursements necessary at different points. That this may be done by the secretary, under the law, is clear.

But it is argued that the City Bank, by its charter, has no power to transmit coin from one point to another. That it might as well undertake the transportation of corn or anything else, which not being within the charter, would not bind the bank. But this does not meet the question. The question is not as to the transmission of coin, or any other commodity; but the City Bank is authorized to deal in bills of exchange. Of this there can be no doubt. The bank has power, as declared in its charter, "to loan money, buy, sell and discount bills of exchange, notes, and all other written evidences of debt." This is ample for the purposes of this case. Having funds in New Orleans, or the means of making a deposit there, the bill in question may be supposed to have been received by the bank, to meet obligations incurred in New York, or to constitute a fund there on which drafts may be drawn. This, in effect, is a mere exchange of a fund in New Orleans, for a deposit of the same amount in New York. By this transaction the government is accommodated without expense, and also the bank.

There are numerous cases, where two persons enter into a contract in fraud of the law, and against its policy, the rights of no third party being involved, in which neither a court of chancery nor of law will give relief as between the contracting parties. He who has gained an advantage will not be required to account, as the wages of iniquity are not adjustable at law or in chancery. But this rule does not hold, where the government is a party. The agents through whom the government acts, possess a limited authority, which, if transcended by them, does not bind the government. The contract or writing in such a case would be evidence of the receipt of the money, and having come into the possession of it without right, the illegality of the transaction would be no bar to a recovery. The possession of the bank would be wrongful, and without the assent of the government. And in such a case the contract would charge the bank, if not on a special on a general count in assumpsit. And the stockholders of the bank, having received the money through their agents, would be legally bound to refund it. But in the present case there was no illegality, as the contract with the bank was not a deposit of money, but a matter of exchange, which both parties might enter into. The demurrer is, therefore, overruled.

[There was a judgment in this case in favor of the defendant, which was affirmed in error by the supreme court. 21 How. (62 U. S.) 356.]

Case No. 14,797.

UNITED STATES v. The CITY OF MEXICO.

[11 Blatchf. 489;[1] 1 Cent. Law J. 191.]

Circuit Court, E. D. New York. Feb. 19, 1874.[2]

SHIPPING — PENAL ACTION — EMPLOYING SEAMEN WITHOUT SIGNED ARTICLES—MEXICAN VOYAGES—STATUTES.

The 14th section of the act of June 7th, 1872 (17 Stat. 265), provides, that, "if any master, mate, or other officer of a ship, knowingly receives, or accepts to be entered on board of any merchant ship, any seaman who has been engaged or supplied contrary to the provisions of this act, the ship on board of which such seaman shall be found shall, for every such seaman," be liable to a penalty not exceeding $200. The 13th section of the same act provides, that every agreement with a seaman shall be signed by him in the presence of a shipping commissioner, and be acknowledged and certified under the hand and official seal of such commissioner. The 12th section of the same act provides, that the master of every ship bound from a port in the United States to a foreign port, shall make an agreement with every seaman of his crew, in a form prescribed by that section. By the act of January 15th, 1873 (17 Stat. 410), it is provided, that the 12th section of the said act of 1872 shall not apply to masters of vessels when engaged in trade with Mexico. The 1st section of the act of July 20th, 1790 (1 Stat. 131), provides, that the master of any vessel bound from a port in the United States to a foreign port, shall make an agreement in writing or in print, with every seaman on board, declaring the voyage or term of time for which such

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirming Case No. 2,756.]

seaman shall be shipped. *Held*, that the said act of 1873 had no effect to modify the provisions of the said 13th section of the act of 1872, and that, notwithstanding the said act of 1872, the master of a vessel making a voyage from New York to a port in Mexico was required, under the said act of 1790, to make the agreement therein required, and was also required to see that such agreement was signed, acknowledged, and certified before a shipping commissioner, in the manner prescribed by the said 13th section of the said act of 1872, and that such vessel was liable to the penalty provided by the said 14th section of the said act of 1872, if her master received a seaman on board who had been engaged otherwise than under an agreement so signed, acknowledged and certified.

[Appeal from the district court of the United States for the Eastern district of New York.

[This was a libel for a penalty against the steamship City of Mexico for a violation of the shipping act of June 7, 1872. The district court condemned the steamship in the sum of $200 and costs. Case No. 2,756. Claimants appeal.]

George W. Hoxie, Asst. Dist. Atty.
John E. Parsons, for claimants.

WOODRUFF, Circuit Judge. The libel in this case is founded on the provisions of the 14th section of the act of congress of June 7th, 1872, entitled, "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." 17 Stat. 262, 265. That section imposes a penalty upon any ship, not exceeding two hundred dollars for each offence therein specified, and it separately specifies offences which shall subject the ship to penalty, by two distinct clauses: "First, if any person shall be carried to sea as one of the crew on board of any ship making a voyage as hereinbefore specified, without entering into an agreement with the master of said ship, in the form and manner, and at the place and times, hereby in such cases required, the ship shall be held liable, and for each such offence shall incur a penalty not exceeding two hundred dollars: provided, always, that the ship shall not be held liable for any person carried to sea," &c., &c. (describing certain cases of secretion on board without the knowledge of any officer of the ship, or false personation, &c.). "Secondly, if any master, mate, or other officer of a ship, knowingly receives, or accepts to be entered on board of any merchant ship, any seaman who has been engaged or supplied contrary to the provisions of this act, the ship on board of which such seaman shall be found shall, for every such seaman, be liable to and incur a penalty of a sum not exceeding two hundred dollars: provided, further, that, in case of desertion, or of casualty resulting in the loss of one or more seamen, the master may ship * * * and report the same to the United States consul at the first port at which he shall arrive, without incurring such penalty." Here are described two separate penalties, in distinct clauses of the section, and, as will presently be seen, the inquiry why both were inserted is very important and significant. For, the cases mentioned therein do not, on their face, seem to differ. Looking at the description of the cases, without consulting any other provisions of this or other statutes or requirements of law, it may well be suggested, that no person can be carried to sea, as one of the crew with the knowledge of the officers of the ship, without being received, accepted, or entered on board; and, hence, the two clauses would seem to be tautological or repetitious, prescribing two penalties for the same violations of law, one for each offence, not exceeding two hundred dollars, and the other for every such seaman, not exceeding two hundred dollars. But, this declaration in these separate clauses will, I think, be found a significant and important aid to the construction of the statute, when the facts of this case, the other provisions of this statute and the former law, and the claims here made by the counsel for the parties, are more fully brought into view.

From as early as the year 1729, the statutes of England, for the protection of seamen as well as the security of ship owners, have required, under penalty, that no master bound to parts beyond seas shall carry any seaman or mariner to sea, without first coming to an agreement with such seaman or mariner for his wages, time of service and other particulars specified, which agreement shall be in writing, &c. (Act 2 Geo. II. c. 36, § 1), and providing expressly that the seaman shall sign such agreement (Id. § 2). By subsequent statutes, having the interest and protection of seamen constantly in view, the provisions of the act referred to have been enlarged and carried into greater detail, and, down to the present time, the policy and even the necessity of such agreements have been recognized, and this requirement kept in full force.

The subject very early engaged the attention of the congress of the United States, and, by the act of July 20th, 1790 (1 Stat. 131), it was enacted, that, from and after the first day of December then next, "every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel, (except such as shall be apprentice or servant to himself or owners,) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And, if any master or commander of such ship or vessel shall carry out any seaman or mari-

ner, (except apprentices or servants, as aforesaid,) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping; provided such seaman or mariner shall perform such voyage; or, if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one-half to the use of the person prosecuting for the same, the other half to the use of the United States; and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained in this act." Other provisions follow, designed to secure both the seaman and the master or owners to the performance of their reciprocal duties. The act of April 14th, 1792 (1 Stat. 254), among other things, provides for the return of seamen, bound by agreement to serve, to their home, in certain cases, through the consuls of the United States. Other and subsequent acts exhibit the desire of congress to watch over and protect the interests of seamen.

In 1872, the act under which this proceeding was instituted was passed. It provides for the appointment of a shipping commissioner, and makes numerous and extensive provisions for carrying out the intention expressed in its title, above recited. Section 12 relates to ships bound from a port in the United States to a foreign port, or from a port on the Atlantic to a port on the Pacific, or vice versa; and provides that the master of every such ship "shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be in the form, as near as may be, as hereunto in table 'D,' in the schedule annexed, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars, that is to say:" Here follow numerous particulars, including all that were contained in the act of 1790, and very many which were not required by the law of 1790, or otherwise, in respect to other vessels than those in this section specified, and the form of agreement annexed, table D, contains many other specific details. Provisos to the section authorize the master to perform the duties of a shipping commissioner, as provided in a previous section, when in a port for which no shipping commissioner has been appointed; and, further, that this section should not apply to masters of vessels where the seamen are, by custom or agreement, entitled to participate in the profits or result of a cruise or voyage, nor to masters of coastwise nor to lake-going vessels that touch at foreign ports. It will thus be seen, that the duty of the master to enter into a written or printed agreement with the seaman is continued; and that, as to ships bound on certain specified voyages, the agreement must contain the details specifically mentioned in this section, while the masters of other vessels not included in this section satisfy their duty by making an agreement in writing, signed by the seaman, containing what was prescribed in the former law. The masters of all ships described in the act of 1790 must make the agreement with the seaman in writing or in print, some in the form prescribed by that act, others in the much more detailed form prescribed in this 12th section, but none are permitted to go to sea without a written or printed agreement with the seaman. Hereupon follows section 13, which declares that the following rules shall be observed with respect to agreements: "First. Every agreement, (except in such cases of agreements as are hereinafter specially provided for,) shall be signed by each seaman in the presence of a shipping commissioner. Secondly. When the crew is first engaged, the agreement shall be signed in duplicate, and one part shall be retained by the shipping commissioner, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship, and shall be delivered to the master. Thirdly. Every agreement entered into before the commissioner shall be acknowledged and certified under the hand and official seal of such commissioner, and shall be indorsed on, or annexed to, such agreement, * * *" and the form of acknowledgment and certificate is given. It is claimed, that the words, "every agreement," in the first clause of this 13th section, mean only those agreements which masters of certain specified vessels named in the 12th section are, by that section, required to make. But, that is not the literal reading of the section. If that had been its intent, nothing was easier than to have so expressed it. Throughout the act, wherever it was intended to limit a provision to the voyages described in the 12th section, the limitation is made in express terms. Sections 8, 22, 24, 35, 36, 40, 58, and others which are connected therewith in their provisions. Nor is there anything in the design and object of the law, which implies such a limitation. If there were no other provisions in the various sections of the statute, except such as relate to the particular vessels included in the 12th section, much plausibility would be given to the claim, but many of the sections, probably the greatest number of them, are general, referring alike to other seamen as well as to those named in the 12th section. Sections 9, 11, 23, 25, 26, 31, 32, 43-50, 51-

54, 61–63, and others. Section 15 is especially significant, and the special exception in section 13 of "agreements hereinafter specially provided for," greatly strengthens this interpretation. For, when, after the use of the terms "every agreement," congress declares certain agreements to be excepted, the presumption is against any other exceptions. Nor does the nature of the provisions in the 13th section indicate such an intent. The purpose of the act is fittingly declared, in its title, to be for the protection of seamen. They need protection against being compelled or seduced to sign agreements to serve, without properly understanding the provisions of the agreement, the term of service, the nature of the voyage or voyages, the compensation they are to receive, and the times of payment. They are frequently in danger of being approached and led into engagements when intoxicated. All this congress knew, and wisely provided that every agreement should be signed by them in the presence of the commissioner, and be duly acknowledged. Certainly, this court cannot say that this was not as important, in reference to the agreements which are required by the act of 1790, as to those specified in the 12th section.

The two clauses of the 14th section, above recited, apply to this construction of the 13th section with especial significance. The first clause refers to the crew of a ship "making a voyage as hereinbefore specified," i, e., making the voyages mentioned in the 12th section, and annexes the penalty to taking to sea without an agreement "in the form," &c., hereby, "in such cases," required. The form hereby required is prescribed in the 12th section, and is required only in the cases therein specified. The vessel here was not condemned under that clause. But, the second part of the section is more general. It refers, in terms, to the officers of "any merchant ship," and to "any seaman" who has been engaged or supplied contrary to the provisions of the act. There are several provisions relating to that subject, and, probably, none more important than the 13th section, which provides for their signing agreements to serve for a voyage, in the presence of the commissioner, and so guards them from imposition and deception therein, as the case may be, when they are in a condition wholly unfit to take care of themselves. Sailors are so often likened to children, in reference to the ease with which they can be deceived or influenced, and to their recklessness and inability to protect themselves, that the value of this provision needs no further illustration. Unless this second clause is to have such general scope and effect, extending beyond the 12th section, and to cases not within it, it is difficult to assign to it any useful meaning. The cases arising under the 12th section are provided for in the first clause. These considerations lead to the conclusion, that not only the agreements mentioned in the 12th section, but all other agreements with seamen, required by law to be in writing (though not included in the 12th section), must be signed by the seaman in the presence of the commissioner, or the penalty declared in the second clause of the 14th section is incurred by the ship.

To apply this conclusion to the case now under consideration: By an act of congress passed on the 15th of January, 1873 (17 Stat. 410), the act to authorize the appointment of shipping commissioners, now under consideration, was amended, by adding to the above mentioned 12th section a further proviso, namely: "Provided, further, that this section shall not apply to masters of vessels when engaged in trade between the United States and the British North American possessions, or the West India Islands, or the republic of Mexico." By this proviso the number or class of vessels whose master is required to make with seamen the written or printed agreement specified in that section is greatly reduced. The voyage of the steamship City of Mexico, for which seamen were shipped without their signing an agreement, as required in the 13th section of the said act, was, as proved on the trial of this cause, "from the port of New York, via Vera Cruz, and one or more ports in Mexico, and back to New York, with privilege of touching at any intermediate ports." This was a case within the proviso introduced by the amendment of 1873, so that section 12 of the act has no application thereto. So far as this voyage is concerned, the act and the amendment are to be read together, and the master of the City of Mexico was under no duty to make, with his seamen, an agreement, in the form and with the numerous details, of its contents and time of signing by the master, which the 12th section prescribes. But, applying to the case the conclusion herein above stated, the master was within the section which requires that every agreement shall be signed by the seaman in the presence of the shipping commissioner, unless it can be shown that he was under no legal obligation to make any written or printed agreement whatever with his seamen. That proposition cannot be maintained. Upon that point I concur fully in the reasoning of the judge of the district court. The effect of the amendment was to withdraw the voyage of the City of Mexico from the operation of the 12th section, and to leave it in the same condition, and subject to all the duties and obligations to which it would have been subject, if the 12th section of the act had been originally passed in its now amended form.

An actual intention, in the minds of the legislators, to withdraw a very large proportion of our seamen from the protection of written shipping articles, which it has been the intention and policy of England, for more than one hundred and fifty years, to pro-

vide, and which this country adopted in its earliest history, and has since consistently maintained, will not, I think, be, for a moment, contended. The argument is, that whatever we may suppose to have been in the mind of our legislators, we are bound by what is involved in the words and legal effect of their enactment. And thereupon it is claimed, that, when the terms of the 12th section of the act of 1872 were, as originally passed, made broad enough to embrace the voyage in question, that operated by implication as a repeal of the act of 1790, so far as relates to such voyages, and, hence, when, in 1873, congress withdrew such voyages from the operation of the 12th section, that act necessarily left such voyages wholly unprovided for by any existing law; and that, although it is possible to say that this legislation created a casus omissus, which the legislators did not probably, in their minds, contemplate, the court is, nevertheless, bound to construe statutes according to the meaning and legal effect disclosed by the statutes themselves, and not by any speculative inquiry into the actual intention of the legislators. This may be conceded, but, if it is claimed that the legislative intent may not be gathered from the nature of the subject, the consequences which would flow from a proposed construction, and the admitted policy of the government, the claim goes too far. Whenever the construction of statutes and their legal effect is doubtful, or susceptible of a double interpretation, these considerations are of great force, and often conclusive.

The act of 1790 (with some few exceptions) applied to the masters of all vessels. Section 12 of the act of 1872 selected some of those vessels, and applied to them its more stringent and particular provisions. From these latter provisions, the voyage now in question was, by the amendment of 1873, relieved. Now, I do not deem it very material to say whether the voyages to the West Indies were always under the operation of both statutes, and so, when relieved from the operation of the 12th section, were simply left under the influence of the statute of 1790; or, whether the 12th section operated as a technical or constructive repeal of the act of 1790, in respect to such voyages, but that the amendment operated to revive the act of 1790 thus constructively repealed. Either view works the same result. Repeals by construction are not favored. There was no repugnance or inconsistency between the requirements of the act of 1790 and the requirements of the 12th section of the act of 1873. To the requirements of the act of 1790 that 12th section added others, in special cases. When the voyage now in question was withdrawn from among those cases, it remained under the operation of the act of 1790, as fully as if the act of 1873 had not been passed.

It follows, that the City of Mexico incurred the penalty declared in the second clause of the 14th section of the act of 1872, for which the decree was pronounced in the district court [Case No. 2,756]; and it must be so here decreed, with costs.

Case No. 14,798.

UNITED STATES v. CLAFLIN et al.

[13 Blatchf. 178.] [1]

Circuit Court, S. D. New York. Nov. 5, 1875.

INDICTMENT — DESCRIPTION — CERTAINTY — SMUGGLING.

1. Section 4 of the act of July 18th, 1866 (14 Stat. 179), reproduced in section 3082 of the Revised Statutes, provides, that, "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined," &c. An indictment founded on this section described the merchandise as "certain goods, wares and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of $30,000, a more particular description of which is to the jurors unknown," and stated that the goods were dutiable goods introduced into the port of New York from France: *Held*, that the indictment was not open to the objection, that the goods were not sufficiently identified, and the description of them not sufficient to enable the defendant to prepare his defence.

2. It is not necessary to describe property in an indictment with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy.

3. A reasonable amount of detail in describing property is all that is necessary in an indictment, and, if more detail is required, a bill of particulars may be demanded.

4. An indictment under the said section need not set out the offence committed in the original importation, with the same particularity of time, place and circumstances that would be required in an indictment for the original offence.

5. Whether the said section applies to any other case than that of smuggled goods, quere.

6. The indictment having alleged that the illegality in the original importation of the goods was, that they had been "smuggled and clandestinely introduced into the United States," the charge must be confined to such illegality.

7. The averment that the goods were smuggled and clandestinely introduced into the port of New York from the republic of France is a sufficient averment to enable the court to say that the original importation was illegal, within the meaning of the statute.

8. The meaning of the word "smuggle," defined.

9. When technical words are used in an indictment, they must be taken to be intended to have their technical meaning.

10. In an indictment under the said 4th section of the act of 1866, it is not a sufficient designation of the illegality of the original importation, to say, merely, that the goods had been imported and brought into the United States contrary to law.

[This was an indictment against Horace B. Claflin and others, alleging the buying,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

receiving, and concealing of goods illegally imported. Heard on motion to quash the indictment.]

Benjamin B. Foster, Asst. U. S. Dist. Atty. William M. Evarts, for defendants.

BENEDICT, District Judge. This cause comes before the court upon a motion to quash the indictment. The provision of law under which the defendants are charged, is section 4 of the act of July 18th, 1866 (14 Stat. 179), reproduced in section 3082 of the United States Revised Statutes. It is as follows: "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined, &c.," the offence being a misdemeanor. The indictment contains four counts. In the first the charge is that of concealing, in the second, that of facilitating the transportation, in the third, that of facilitating the sale, of certain merchandise. These three counts are similar in form, and the objections now to be considered apply to each of them. The fourth count is different, and will be considered by itself.

The first objection which I examine is, that the goods, forming the subject of the transaction charged, are not sufficiently identified. The language used to identify the goods is as follows: "Certain goods, wares and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of $30,000, a more particular description of which is to the jurors unknown." There is also the additional statement that the goods were dutiable goods introduced into the port of New York from France. The rules by which the sufficiency of an indictment is to be determined have been too often stated to require repetition. These rules, as they have been understood and applied in the adjudged cases, are to be applied here. Their operation cannot be extended because of any embarrassment under which these defendants lie, because of the great extent of their business, and the large number of transactions, similar in character, which their dealings involve. Judged thus, the description under consideration will be found sufficient. Plainly, the language used shows the subject of the transaction to be within the scope of the statute creating the offence, for the statute in terms includes all kinds of merchandise. It is also clear, that the description in the indictment, together with such evidence as a trial must necessarily furnish, will fully protect in any future prosecution for the same offence. It is not necessary to describe property with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. Says the court, in Reg. v. Mansfield, 1 Car. & M. 140: "There must be some parol evidence in all cases, to show what it was that he was tried for before." The requisite notice of the offence charged is also to be found in the language used. The rule requiring notice of the offence charged is never so applied as to compel a description calculated to be fatal to the prosecution. A reasonable amount of detail in description is all that can be demanded for the purpose of informing the defendant. If, in any case, such reasonable detail prove insufficient to enable the defendant to prepare his defence, all possibility of injustice is removed by a bill of particulars, to which the defendant is entitled upon making oath that further particulars are necessary to enable him to defend. While speaking of a bill of particulars, it may be remarked, that the objections to a bill of particulars in a criminal case, because it cannot be certainly known that the bill of particulars describes the goods to which the attention of the grand jury was drawn, is an obvious one, and has been often urged, but has not been deemed of sufficient practical importance to overcome the advantages, both to the defendant and the prosecution, which follow from the practice. I have never heard a motive suggested as calculated to induce a public prosecutor to omit the presentation to the consideration of the grand jury of the goods that he must prove before the petit jury in support of the indictment which the grand jury find: and it cannot be presumed that the official representative of the United States, when called on to furnish a more detailed description of the goods presented by him to the consideration of the grand jury, would place on file a description of other goods. Experience has shown that the opposite presumption is sufficient to prevent injustice, and the practice seems established by the authorities. The description under consideration is not so deficient in detail as to be fatal to the indictment. It states that the articles bought were cases containing silk goods imported from France. It is true, that no numbers or marks are given; but marks and numbers may have been absent from the cases, and that for the purposes of concealment. The voyage of importation is not given, nor the name of the ship, nor that of the consignee; but such particulars are not necessarily disclosed by the cases of the goods, and are often wholly unknown; and, to require the various species of silk goods in the cases to be set forth, would open too wide the door for the defeat of the prosecution upon a question of variance. To demand the statement in the indictment of such particulars of description is to push the rule beyond reason. Furthermore, the grand jury have stated, in the indictment, that a more particular description is unknown to them.

That I do not go beyond the bounds of precedent in holding this description to be sufficient for the purpose of identifying the goods and enabling the defendants to prepare a defence, is made apparent by referring to some of the descriptions which adjudged cases show to have been approved. The words "one sheep" do not go far towards enabling an extensive grazier to prepare a defence. Such charges as "ten domestic fowls," "woolen cloth," "hay," "twenty-two pounds' weight of tin," "certain goods," "one post letter, the property of the postmaster general," "one leg of mutton," "one book of the value of $3," "divers goods," will all be found to have been considered sufficient to identify the subject of the charge in an indictment.

I pass, therefore, to consider the next objection—that the illegality in the importation of these cases is not properly stated. In support of this objection, the proposition is advanced, that an indictment for buying goods which have been brought into the United States contrary to law must set out the offence committed in the original importation, with the same particularity of time, place, and circumstances that would be required in an indictment for the original offence. Such a proposition cannot be maintained. The offence of knowingly buying smuggled goods is similar in character to that of receiving stolen goods, so much so that it has been conceded that the rule applied to indictments for receiving stolen goods may be properly applied to this indictment. The concession is fatal to the objection under consideration. The rule applying to indictments for receiving stolen goods is thus given by Roscoe: "It is not necessary to state in the indictment the name of the principal felon, and the usual practice is merely to state the goods to have been before then feloniously stolen." Rosc. Cr. Ev. 885. See, also, 2 Whart. Cr. Ev. §§ 1899, 1900. Archbold gives the form thus: "One silver tankard, goods and chattels of J. N., before then feloniously stolen." In Rex v. Jervis, 6 Car. & P. 156, it was expressly adjudged unnecessary to say by whom the principal offence had been committed. The same rule has been applied in cases of other offences than that of receiving stolen goods. Thus, in a prosecution under the English statute which makes it an offence to "receive any post letter, * * * the stealing, or taking, or embezzling, or secreting whereof shall amount to a felony under the post office act, knowing the same to have been stolen, taken, embezzled, or secreted," the indictment, as given by Archbold (Archb. Cr. Pl. 441) charges, that "one post letter, the property of the postmaster general, before then from and out of a certain post-letter bag feloniously stolen, J. S. feloniously did receive and have, knowing," &c. So, under 16 & 17 Victoria, where the offence is being in company with more than four others, "with any goods liable to forfeiture under this or any act relating to the customs," the indictment, as given by Archbold (Id. 869) charges that J. S., "being then in company with divers persons to the jurors unknown, to the number of five or more, was found feloniously with certain goods then liable to forfeiture under and by virtue of a certain act, to wit, an act," &c.

I next consider the position taken in support of this motion, that the indictment, to be good, should not only confine the charge to the dealing in smuggled goods, that is, goods secretly run into the United States without passing through the custom house, but also should state facts from which the court can determine such to have been the character of the importation referred to. It seems unnecessary to determine, in this case, whether section 4 of the act of 1866 can be applied in any case other than that of smuggled goods, for, whether the general words of the act are intended to cover other cases or not, this indictment is confined to such a case. Here, the pleader having, by the use of the words of the act, brought the charge within the scope of the statute, has proceeded to limit the charge to a dealing in smuggled goods. The illegality of the original importation is, in express terms, stated to consist in this, that said goods have been smuggled and clandestinely introduced into the United States. The case of U. S. v. Thomas [Case No. 16,473] is authority to show that the effect of adding such words to the words of the act is to confine the charge to the illegality thus described. Thus the indictment itself furnishes an answer to the first branch of the objection under consideration; and this language of the indictment has been here relied on by the prosecution as answering the argument made to show that section 4 of the act of 1866 is confined to cases of smuggled goods.

The second branch of the objection in hand is, that averring the goods to have been smuggled and clandestinely introduced into the port of New York from the republic of France, is not giving such a statement as enables the court to say that the original importation was illegal, within the meaning of the act of 1866. But, as already shown, the particularity of the statement respecting the act of importation required in charging the smuggler, is not required in charging the buyer of smuggled goods. In the case of the buyer, the act to be proved is the buying of certain goods, and the guilty knowledge which makes the act criminal is knowing the goods to have been smuggled. Here, the act of the defendant intended to be proved is stated with particularity of time, place, and subject-matter, and the guilty knowledge required by the act is shown by the averment that the defendants knew the goods to have been imported contrary to law, as aforesaid, that is to say, in this, that they had been smuggled into the United States.

The word "smuggle" is a technical word, having a known and accepted meaning—"a necessary meaning in a bad sense." It implies something illegal, and is inconsistent

with an innocent intent. The idea conveyed by it is that of a secret introduction of goods with intent to avoid payment of duty. As such it is used by itself alone, and in the statutes even. It is used in section 4596 of the Revised Statutes, in a provision relating to seamen, where an "act of smuggling" plainly is supposed to mean such an act as above described, and none other. The word is used in the same technical manner in the English statute (16 & 17 Vict. c. 107, § 244), where it is deemed sufficiently descriptive of a particular illegal employment in a ship, to designate it as "a smuggling ship." This technical meaning of the word has taken the form of a statutory definition in the moiety act of June 22d, 1874 (18 Stat. 186), where it is declared, that the act of "smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles, without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." What is smuggling for the informer when he claims his reward must also be smuggling for the goods as to which he informs.

But, it is asked here, and the question is one which can be asked with equal significance in many cases—How does it appear that the goods which the grand jury have designated as smuggled are smuggled goods, within the legal acceptation of the word? The answer is, that, when technical words are used in an indictment, they must be taken to be intended to have their technical meaning. In an indictment for uttering counterfeit money, it is sufficient to say that the defendant "uttered" the money, without stating the circumstances which are supposed to amount to an uttering. Under the statute making it an offence "to impair the queen's current coin," it is sufficient to use the words "did impair;" and, under another statute, to say, "did deface." Archb. Cr. Pl. 748, 749. Where the act reads, "shall import or receive into the United Kingdom counterfeit coin," it is sufficient to say, "did import from beyond the seas." Id. 751. The present indictment is within the principle of these precedents.

The real difficulty of the defendants does not lie in the form or the matter of the indictment, but in the fact that the charge made does not conform to the proofs which they suppose the government to have, and, upon the argument, this was put forth as matter of complaint, and the district attorney was challenged to admit that none of the goods referred to in the indictment were smuggled goods; but, it cannot in this way be made to appear that the indictment is bad. Nor is a motion like the present adapted to secure relief from such a difficulty.

I have now considered the objections urged against the first three counts of the indictment. It remains to consider the fourth and last count. This count is likewise based upon section 4 of the act of 1866. The difference between it and the other counts is, that, in assigning the illegality of the original importation, it uses simply the words of the statute, averring only that the goods had been imported and brought into the United States contrary to law. If the act of 1866 is confined in operation to a single form of illegality, it might be questioned whether a count like this, in an indictment for a secondary offence, would not be supported by the authorities already referred to; and, certainly, there is weight in the argument derived from the repealed provisions of section 16 of the act of 1842 [5 Stat. 563], the provision of the moiety act of 1874, and the general features of the revenue laws, to show that illegalities and frauds committed in regard to the value, description, invoice and ascertainment of the amount of duties to be paid upon goods which come into the custody and under the supervision and scrutiny of the officers of the customs, are excluded from the operation of the act of 1866. But, there are other forms of illegality, as, for instance, the introduction of prohibited goods, where the intent to avoid payment of duties does not exist, the introduction of goods packed in prohibited methods, and the like, which do not appear to be so excluded, and, if several forms of illegality are intended to be covered by the words of the act, it would seem that the illegality should be designated with more particularity than is afforded by the words "imported contrary to law." When the language of a statute comprehends, under general terms, divers forms of illegality, having different characteristics, it may well be considered proper to require something more than the words of the act. In cases of receivers, it is usual to state whether the goods received were goods stolen or goods obtained by false pretence. For this reason, and because such a count, based upon this same statute, has been condemned in a reported case in this circuit—the Case of Thomas, above referred to—I am of the opinion that the fourth count of this indictment should be rejected.

My determination upon this motion, therefore, is, that the fourth count of the indictment be quashed and that, as to the other counts, the motion be denied.

[For an action of debt against same defendants, see Case No. 14,799.]

Case No. 14,799.

UNITED STATES v. CLAFLIN et al.

[14 Blatchf. 55;[1] 22 Int. Rev. Rec. 395.]

Circuit Court, S. D. New York. Nov. 29, 1876.[2]

STATUTES — REPEAL — REVISED STATUTES — FINE — HOW RECOVERABLE — ILLEGAL IMPORTATIONS.

1. The decision of the supreme court in Stockwell v. U. S., 13 Wall [80 U. S.] 531, was, that the 4th section of the act of July 18, 1866 (14 Stat. 179), did not effect such a repeal of the 2d section of the act of March 3, 1823 (3 Stat. 781), as took away the right of the United States to proceed under said 2d section, upon a cause of action which arose before the act of 1866 took effect

[Cited in U. S. v. Jordan, Case No. 15,498.]

2. As to causes of action falling within the terms of the 2d section of the act of 1823, which arose after the passage of the act of 1866, and before the passage of the Revised Statutes of the United States, no suit can be maintained brought after the passage of the Revised Statutes.

[Cited in The T. W. Eaton, Case No. 8,612; Thommasen v. Whitwill, 12 Fed. 903.]

3. No recovery can be had under said 2d section in respect of any acts done after the enactment of the Revised Statutes.

4. The fine provided for in section 4 of the act of 1866, which is substantially identical with section 3082 of the Revised Statutes, cannot be recovered in a civil action, but must be imposed after a conviction on a trial for a crime.

[Error to the district court of the United States for the Southern district of New York.

[This was an action for a penalty by the United States against Horace B. Claflin and others.

[For an indictment against the same defendants, see Case No. 14,798.]

The opinion of the district court (BLATCHFORD, District Judge,) was as follows:

"It is quite clear that the 2d section of the act of March 3, 1823 (3 Stat. 781), must be regarded as having been repealed by section 5596 of the Revised Statutes, (even if it had not been previously repealed,) on the ground that some portion of that act is embraced in the Revised Statutes, the provisions of the 1st section of that act being embraced in section 3099 of the Revised Statutes, and the provisions of the 2d section of that act not being embraced in any section of the Revised Statutes. The effect of such repeal is to destroy the right of the plaintiffs to recover under said 2d section in respect of any acts done after the enactment of the Revised Statutes. Therefore, counts 7, 9, 11 and 13 of declaration No. 2 are bad.

"By section 5597 of the Revised Statutes, it is provided, that the repeal of the several acts embraced in the Revised Statutes shall not affect any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under the said acts shall continue, and may be enforced in the same manner as if said repeal had not been made; and, by section 5598, it is provided, that, all offences committed, and all penalties or forfeitures incurred under any statute, embraced in the Revised Statutes, prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made. Thereupon, the question arises, whether the 2d section of the act of 1823, on which the counts for double the value of the imported goods are founded in these cases, was in force at the time of the enactment of the Revised Statutes, or whether it had been superseded and virtually repealed by the enactment of the 4th and other sections of the act of July 18, 1866 (14 Stat. 179). It was decided by the supreme court in Stockwell v. U. S., 13 Wall. [80 U. S.] 531, that the penalty of double the value of the imported goods, imposed by the 2d section of the act of 1823, was not repealed by the 4th or any other section of the act of 1866. This decision was made at the December term, 1871. Yet, the 2d section of the act of 1823 is not found in the Revised Statutes, and, as has been shown, must be regarded as having been repealed by section 5596 of the Revised Statutes, even if it were not previously repealed. What is the effect of the omission to include it in the Revised Statutes? Section 5595 of the Revised Statutes declares, that the revision embraces the general and permanent statutes which were in force on December 1st, 1873, as revised and consolidated by the commissioners; and section 5596 declares, that all parts of acts passed prior to December 1st, 1873, which are not contained in the Revised Statutes, have been repealed or superseded by subsequent acts, or were not general and permanent in their nature, and that all acts passed prior to December 1st, 1873, no part of which is embraced in the Revised Statutes, shall not be affected or changed by the enactment of the Revised Statutes. As was pointed out by the circuit court for this district in Re Stupp [Case No. 13,563], the purport of the foregoing provision of section 5596 is, that, if any portion of a particular act is embraced in any section of the Revised Statutes, the parts of the same act which are not contained in the revision have been repealed or superseded by subsequent acts, or were not general and permanent in their nature, but that, if there be an entire permanent and general statute which was in force on the 1st of December, 1873, and no part of it is to be found in the Revised Statutes, it is to be regarded as still in force. As a portion of the act of 1823 is embraced in section 3099 of the Revised Statutes, and as the provisions of the 2d section of that act are not contained in the Revised Statutes, and as those provisions were general and permanent in their nature, it follows, that congress has declared by section 5596, that the provisions of the 2d section of the act of 1823 were repealed or superseded by a subsequent act. This declaration was made

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 97 U. S. 546.]

by congress after the decision in Stockwell v. U. S. [supra] was made, and in view of that decision; because, the only subsequent provisions of law by which the 2d section of the act of 1823 could have been, or were claimed to have been, repealed or superseded, were the provisions of the 4th section of the act of 1866, in connection with the provision of the 43d section of that act, repealing all parts of acts conflicting with or supplied by the act of 1866, and the provisions of the 4th section of the act of 1866 are found embodied in section 3082 of the Revised Statutes, and, in the marginal note to that section, the case of Stockwell v. U. S., 13 Wall. [80 U. S.] 531, is referred to.

"The force of the legislative declaration contained in section 3596 of the Revised Statutes, in respect to this subject, has been recognized by the supreme court in two cases. In Murdock v. City of Memphis, 20 Wall. [87 U. S.] 590, 617, the question arose as to whether any part of the 25th section of the judiciary act of September 24, 1789 (1 Stat. 85), remained in force after the enactment of the 2d section of the act of February 5, 1867 (14 Stat. 386), or whether the later section had taken the place of the prior one, there being no express repeal of the prior one. Other provisions of the act of 1789 are incorporated in the Revised Statutes, but the 25th section of that act is not incorporated in them, and the 2d section of the act of 1867 is incorporated in them. The court came to the conclusion that the 25th section of the act of 1789 was technically repealed, and that the 2d section of the act of 1867 had taken its place, although the act of 1867 had no repealing clause, nor any express words of repeal. The opinion of the court then proceeds: 'This view is strongly supported by the consideration, that the revision of the laws of congress, passed at the last session, based upon the idea that no change in the existing law should be made, has incorporated with the Revised Statutes nothing but the 2d section of the act of 1867. Whatever might have been our abstract views of the effect of the act of 1867, we are, as to all the future cases, bound by the law as found in the Revised Statutes, by the express language of congress on that subject; and it would be labor lost to consider any other view of the question.'

"In the case of Smythe v. Fiske, 23 Wall. [90 U. S.] 374, the supreme court, in construing certain sections of tariff acts passed in 1842 [5 Stat. 548], 1846 [9 Stat. 42], and 1864 [13 Stat. 202], refers to the manner in which those sections, as reproduced in the Revised Statutes, are worded, and says that such wording is 'a legislative declaration that such was the state of the law on the 1st of December, 1873,' that is, prior to the enactment of the Revised Statutes, and 'is necessarily a construction of the last clause of the 8th section of the act of 1864, in accordance with that which we have given to it,' and that 'it was the declared purpose of congress to collate all the statutes as they were at that date, and not to make any change in their provisions.'

"In accordance with these views it must be held, that the omission to enact in the Revised Statutes the 2d section of the act of 1823, while another portion of that act is enacted in the Revised Statutes, is a legislative declaration by congress, that, on the 1st of December, 1873, and prior to the enactment of the Revised Statutes, the 2d section of the act of 1823 was not in force, but had been repealed or superseded. It could have been repealed or superseded only by the act of 1866; and it must be held that congress has declared, by statute, that, notwithstanding the decision of the supreme court in Stockwell v. U. S. [supra], the 2d section of the act of 1823 was superseded by the act of 1866, and was not in force after the act of 1866 was enacted.

"The authority of congress to declare, by statute, the existing state of statutory law, has been recognized and upheld by the supreme court. In Bailey v. Clark, 21 Wall. [88 U. S.] 284, the question arose as to the meaning of the words 'capital employed' by banks or bankers, in the 110th section of the internal revenue act of June 30th, 1864 [13 Stat. 277], as amended by section 9 of the act of July 13, 1866 (14 Stat. 136), as applicable to questions of taxation which arose in 1869 and 1870. Congress, by section 37 of the act of June 6, 1872 (17 Stat. 256), enacted that the words 'capital employed,' in such 110th section, 'shall not include money borrowed or received from day to day, in the usual course of business, from any person not a partner of, or interested in, the said bank, association or firm.' In reference to this enactment, the court says: 'This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute, and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising, it would undoubtedly have so provided in terms.'

"The question thus presented, as to whether causes of action falling within the terms of the 2d section of the act of 1823, and which arose prior to the enactment of the Revised Statutes, on the 22d of June, 1874 [18 Stat. 186], can be prosecuted on or after the latter date, has been heretofore ruled by me in favor of such prosecution, on the ground that the supreme court had held that the act of 1866 did not repeal the 2d section of the act of 1823. But the views above presented as to the effect of section 5596 of the Revised Statutes, in the particulars referred to, were not as fully considered as they now have been. It follows, that all the odd numbered counts, in both of the declarations, must be held bad.

"As to the even numbered counts, all those in suit No. 1, and counts 2, 4, and 6 in suit No. 2, are founded on section 4 of the act of

1866, while counts 8, 10, 12 and 14 in suit No. 2 are founded on section 3082 of the Revised Statutes. These sections are substantially identical. It was decided by the supreme court, in Stockwell v. U. S., that the 4th section of the act of 1866 was designed to punish as a crime that which before had subjected an offender to only civil liability or quasi civil liability. Besides the forfeiture of the offending merchandise, the only penalty imposed is, that the offender shall be fined in a sum not exceeding $5,000, nor less than $50, or be imprisoned for any time not exceeding two years, or both. This fine is manifestly a fine not to be recovered by a civil action, but to be imposed after a conviction on a trial for a crime, as a punishment for which the court may, in its discretion, inflict imprisonment, either with or without the imposition of a fine. No such imprisonment can be inflicted as the result of a civil action.

"Moreover, this is an action of debt, and, in each of the even numbered counts, the plaintiffs claim the sum of $5,000 as a debt. But the statute does not impose a penalty or fine of $5,000, or of any other definite sum, or of any sum which can be reduced to a certainty otherwise than by the discretion of the court in fixing such sum after a verdict on a trial. There can be no verdict for any definite sum. Debt lies only when a sum certain is due to the plaintiff, or a sum which can be reduced to a certainty, so as to form the basis of a verdict in favor of the plaintiff for a sum certain.

"It follows, that all the even numbered counts are bad. The demurrers are sustained."

George Bliss, U. S. Dist. Atty.

William M. Evarts and Elihu Root, for defendants in error.

JOHNSON, Circuit Judge. After examining the case of Stockwell v. U. S., 13 Wall. [80 U. S.] 531, I am constrained to think that the supreme court did not intend to hold that the second section of the act of March 3d, 1823, there in question, was not, to any intent, repealed by the 4th section of the act of July 18th, 1866, but only that no repeal was thus effected which took away the right of the United States to proceed under the former section, upon a cause of action which arose before the act of 1866 took effect. That was the case which stood for judgment, as matter of fact, and that was the limitation stated at the end of the prevailing opinion of the court. The general tenor of the argument would seem to lead to the broader conclusion, that no repeal, in any sense, was effected by the act of 1866; but this rather strengthens the force of the limitation upon the conclusion, which was expressed, certainly not by any accidental phrase, in the opinion of the court. It is true, that we are left without any indication of the ground of the discrimination. That, however, is not necessary to be ascertained for the purpose of the present case; for, so far as the question of the repeal of the act of 1823 may be supposed to affect transactions occurring before the passage of the Revised Statutes and after that of the act of 1866, that question seems to be controlled by the provisions of the Revised Statutes. In the views expressed by Judge Blatchford, and upon the grounds stated by him on this point, I concur.

In this connection, it ought to be observed, that, quite evidently, the views expressed by Judge Blatchford were those entertained by the commissioners to revise the statutes, and by the congress which enacted them. The commissioners reported to congress, in their draft of the revision, both section 4 of the act of 1866 and section 2 of the act of 1823, consolidated into one section. Revision of the United States Statutes, as drafted by the commissioners appointed for that purpose (volume 2, p. 1480, tit. 36, c. 10, § 636). This appears to have been done by the commissioners, not because they so construed the law, but because of the supposed effect of the Stockwell Case, to which they refer in a foot-note to the proposed section. The section, as reported by the revisers, is as follows, (a note, which accompanies it, stating that the words in italics are new, and the words in brackets [parentheses] are found in the existing law, but are recommended to be omitted): "Sec. 636. If any person shall fraudulently or knowingly bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law, *double the value of* such merchandise shall be forfeited, (and) or the offender shall, (on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court) *be punishable by a fine of not more than five thousand dollars nor less than fifty dollars, or by imprisonment for not more than two years, or both.*" The revisers' foot-note to this section is as follows: "Section 2 of the act of March 3, 1823, c. 583 (3 Stat. 781), is substantially incorporated in the text, pursuant to the decision in [Stockwell v. U. S.] 13 Wall. [80 U. S.] 531. It provided 'that, if any person or persons shall receive, conceal, or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so received, concealed or purchased.'" Congress, with the whole subject thus fully spread before it, and the question of the scope and ef-

fect of the decision in the Stockwell Case thus fairly and formally presented, struck out from this proposed section all that was incorporated into it from the act of 1823, and left in section 3082 of the Revised Statutes only the provisions of the act of 1866, with slight verbal alterations.

Upon the other sets of counts, I do not think it necessary to add anything. The judgment must be affirmed.

[This case was subsequently carried by writ of error to the supreme court, which affirmed the judgment of this court. 97 U. S. 546.]

Case No. 14,800.

UNITED STATES v. CLANCEY.

[1 Cranch, C. C. 13.] [1]

Circuit Court, District of Columbia. June Term, 1801.

WITNESS—INTEREST—OWNER OF STOLEN GOODS—RELEASE OF INTEREST IN FINE.

Upon indictment for larceny under the act of congress [of 1790 (1 Stat. 112)], the owner of the goods stolen is a competent witness after having released to the United States his half of the fine.

[Cited in U. S. v. McCann, Case No. 15,655; U. S. v. Brown, Id. 14,657; U. S. v. Tolson, Id. 16,530.]

Indictment [against John Clancey], under the act of congress, for stealing the goods of Luke O'Dea.

The attorney for the United States offered the owner of the goods as a witness. The counsel for the prisoner objected, because, by the act of congress, half of the fine is to go to the owner.

The witness executed a release to the United States of his half of the fine, whereupon he was sworn.

Case No. 14,801.

UNITED STATES v. CLARK.

[Crabbe, 584.] [2]

District Court, E. D. Pennsylvania. May 26, 1846.

EMBEZZLEMENT FROM MAIL — EMPLOYE OF POST OFFICE—INDICTMENT—BANK NOTE.

1. In an indictment under the act of March 3, 1825 [4 Stat. 102], for embezzling a letter containing a bank note, it is not necessary to state the particular office held by the accused.

2. Neither is it necessary to allege the note to have been of an incorporated bank, or of any value.

This was an indictment [against Eben H. Clark] under the twenty-first section of the act of March 3, 1825 (3 Story's Laws, 1991), for embezzling a letter containing a bank note.

The case came on to be tried, before Judge RANDALL, and a jury, on May 25, 1846; and was submitted without argument by Mr. Petit, district attorney, for the United States, and by Mr. Wheeler, for Clark, except a suggestion, by the prisoner's counsel, that the indictment was defective as not stating the particular office held by Clark (who was postmaster at Cherry Ridge, Wayne county, Pa.), or alleging that the note was of an incorporated bank, or of any value. The words of the indictment were "that * * * one Eben H. Clark, late of the district aforesaid, Yeoman, then and there being a person employed in the department of the post office establishment, did secrete and embezzle a letter, to wit, etc., * * * the said letter then and there containing a bank note for the payment of ten dollars, contrary, etc."

RANDALL, District Judge. The indictment charges that the accused, being a person employed in the department in the post office establishment, did secrete and embezzle a letter, etc., containing a bank note for the payment of ten dollars.

It is objected, in the first place, that the indictment does not state what particular office the accused held; and precedents of indictments under St. 7 Geo. III. c. 50, show that the particular office is named. Appropriate precedents are certainly entitled to respect, and when they have been uniformly acted upon will be considered of authority; but the English statute names a variety of officers in the post office who shall be liable to the penalty, while the act of congress merely says "any person employed in any of the departments of the post office establishment," and the precedents in this court have been uniform with this one. The fact of such employment is a question for the jury, and I do not think the objection has any force.

It is next alleged that the bank note is not stated to have been of any incorporated bank, or of any value; and the case of Stewart v. Com., 4 Serg. & R. 194, is said to support that objection. It may be a sufficient answer to say that the case of Stewart v. Com. was decided on a local statute then in force, but since, as to that part of it, repealed, confining the larceny of bank notes to those of an incorporated bank; and that the act of congress, under which the present indictment is framed, makes no such distinction. In an indictment for larceny it is necessary to state the value of the article stolen, as well to ascertain the degree of the larceny, so as to enable the court to pass sentence of restitution. No such necessity exists in this case. The offence charged is secreting and "embezzling a letter." The punishment for this offence depends upon whether the letter contains any of the securities mentioned in the twenty-first section of the act of 1825, the first of which is "any bank note." The amount or value of the note does not alter or change the offence,

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by William H. Crabbe, Esq.]

and is therefore immaterial. The object of the law is to insure a faithful discharge of the duties of the office by every one in any way connected with it. It therefore prevents all temptation to crime by punishing the embezzlement of one dollar as severely as that of ten thousand.

Case No. 14,802.

UNITED STATES v. CLARK.

[2 Cranch, C. C. 620.] [1]

Circuit Court, District of Columbia. Nov. Term, 1825.

HOMICIDE—SLAVE—MANSLAUGHTER—PUNISHMENT.

In Alexandria county, a slave guilty of manslaughter was punished by burning in the hand and whipping with ten stripes.

[Cited in U. S. v. Frye, Case No. 15,173.]

The defendant [John Clark], who was a slave about thirteen years old, was indicted for the murder of another slave, named Burdet, about fifteen years old. The deceased was larger and stronger than the defendant, and struck him several times, till the latter drew a knife and told the deceased that if he did not leave striking him, he would stab him; the deceased continued to strike him, and he stabbed the deceased in the left breast, of which wound he died instantly.

The jury found him guilty of manslaughter, and THE COURT sentenced him to be burnt in the hand, and whipped with ten stripes.

Case No. 14,803.

UNITED STATES v. CLARK.

[4 Cranch, C. C. 506.] [1]

Circuit Court, District of Columbia. March Term, 1835.

JUSTICE OF PEACE—PROSECUTION FOR TAKING INSUFFICIENT BAIL—INDICTMENT.

In an indictment against a justice of the peace for taking insufficient bail in a criminal case, it is not necessary to state in what respects the bail was insufficient; nor to set out the security taken; nor to aver that the defendant ordered the offender to be discharged from the arrest. Motion to quash refused.

[Cited in Mattingly v. U. S., Case No. 9,295.]

This was an indictment [against Robert Clark] for corruptly taking "insufficient security" for the appearance of George Milburn, who was arrested on a capias ad respondendum, and in custody of the marshal upon an indictment for keeping "a certain gaming-table called a 'faro-bank,'" against the form of the act of congress of the 2d of March, 1831 (4 Stat. 448), which makes it a penitentiary offence, whereby the said George Milburn was released from the custody of the marshal, and escaped; and also by means whereof he did not appear at the said court, and therein made default, and hath not since appeared to be dealt with according to law, to the great hindrance of public justice, in contempt of the laws, and against the peace and government of the United States.

The counsel for defendant moved the court to quash the indictment: (1) Because it does not state in what respects the security taken was insufficient; whether it was insufficient because the sum was too small, or because the persons taken as bail were insufficient to answer the amount of the recognizance, or because the form in which the security was taken was insufficient; and because it does not set out the security taken, so that the court can judge whether it was regularly taken, and in an amount adequate to the offence, and in due form. (2) Because it does not aver that the defendant ordered Milburn to be discharged from arrest.

CRANCH, Chief Judge. Upon comparing this indictment with the form of an indictment for a similar offence in 2 Chit. Cr. Law, 244, the court is of opinion that it is in substance a good indictment, and is sufficiently certain to require the defendant to plead to it. The motion to quash it is, therefore, overruled. The other indictment against the same defendant for taking insufficient security in the case of Henry Miller, is even more full and formal than the other; and the motion to quash it is also overruled.

THRUSTON, Circuit Judge, not sitting, as he was not present at the argument.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,804.

UNITED STATES v. CLARK.

[1 Gall. 497.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

PERJURY—HEARING BEFORE DISTRICT JUDGE—STATUTE.

1. Whether perjury, committed on a hearing on a criminal complaint before the district judge, be within the act of April 30th, 1790, c. 9, § 18 [1 Stat. 116].

[Cited in U. S. v. Nunnemacher, Case No. 15,903: Ex parte Perkins, 29 Fed. 909. Explained in Todd v. U. S., 15 Sup. Ct. 891.]

[2. Cited in Boston & P. R. R. v. Midland R. R., 67 Mass. (1 Gray) 355, to the point that, when a statute uses words whose meaning is well ascertained by the existing jurisprudence, they shall be understood in that meaning, unless the context displaces such construction, and clearly sets up another meaning.]

G. Blake, for the United States.

Mr. Pitman, for defendant.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The grand jury have found an indictment against Stephen G. Clark for perjury. The indictment char-

[1] [Reported by John Gallison, Esq.]

ges the offence to have been committed on the hearing of a certain complaint against Henry Bancroft and others, for piracy, "depending before the Honorable John Davis, then and ever since being judge of the district court of the United States for the aforesaid district of Massachusetts, and a magistrate of the said United States," and concludes, "against the form of the statute in such case made and provided." A motion has been made to quash the indictment, because the offence is not within the purview of any statute of the United States; it not being charged to have been committed in any oath or affirmation, taken in any court of the United States; or in any deposition taken pursuant to the laws of the United States. It is very clear, that the indictment does not, in terms, charge the offence to have been committed in any court of the United States, nor in any deposition taken pursuant to its laws. The act, on which the indictment is founded (Act April 30th, 1790, c. 9, § 18) provides, that "if any person shall, wilfully and corruptly, commit perjury, or shall, by any means, procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States," he shall, on conviction, be punished. The hearing before the district judge was under the authority of the judiciary act of September 24th, 1789, c. 20 [1 Stat. 73], which provides "that for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States, where he may be found," be arrested, imprisoned, or bailed for trial, before the competent court of the United States.

It is contended by the district attorney, that every act done and proceeding had by the district judge, in his official capacity, is an act of the district court of the United States; and that the hearing before him was in his official capacity. If this argument were true, the substance of the objection would still remain; for it is nowhere alleged that he acted in his judicial or official capacity, much less is it averred, that he acted as a court of the United States. Now no rule is better settled, than that criminal statutes are to be construed strictly, and that no conviction can be had for a statute offence, unless it be charged in such a manner, as to bring the case within the terms of the statute. The statute does not punish every perjury, but only a perjury, done in a court of the United States. Plainly, therefore, it is of the very essence of the offence, that it should be charged as committed in such court. Now under the authority of the United States there are but three courts known in law, the district, circuit, and supreme court; and as congress alone can, by the constitution, ordain and establish courts, none can exist but such as they create and name. The offence is not charged to have been committed before either of these established courts; and we cannot, by intendment and inference, make out what ought to have been directly averred. But the argument itself is not correct. The district judge is not the district court, though he is the presiding officer thereof. A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. Co. Litt. 58; 3 Bl. Comm. 23. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law. The officers exist independent of the exercise of such appointed jurisdiction; though the court may not, in general, be holden independent of its officers. This last position, however, is not always strictly true; for a court is considered so much as an assemblage of mere abstract judicial powers, to be organized and exercised at stated times and places, that by our laws, it may be adjourned without the presence of a judge. Act Sept. 24th, 1789, c. 20, § 6. There are many powers, which the officers of a court, collectively or individually, may and do exercise, exclusive of their organization as a court. Indeed what they shall do in either the capacity of an officer, or of a court, depends exclusively upon the provisions of the law. It is not true, therefore, that every act done by the district judge is, in point of law, the act of the district court. In some instances, powers are confided to him, which he may exercise either in court, or, by virtue of office, out of court. In other instances, powers are given to him in one capacity, which are denied in the other. The power to issue writs of habeas corpus is an example of the former kind. Act Sept. 24th, 1789, c. 20, § 14. The power of the district judge to appoint and hold special district courts, of the latter kind. Id. § 3. In his capacity as a court, he may try certain offences and suits of common law and admiralty jurisdiction. In his capacity as a judge he has no such authority. In his capacity as district judge, he is a constituent member of this court. It would be absurd to contend, that when he holds the circuit court, he yet holds the district court. Nay, the very case before us is a very strong illustration of the distinction. As a district court, or rather, holding the district court, he has no cognizance of the offence of piracy; it is expressly excluded by statute (Id. § 9) and consequently the complaint would have been coram non judice. As a judge of the United States, he has complete cognizance for the purpose of commitment for trial. If, therefore, the offence had been laid, as committed before the district court, on a trial or complaint for piracy, it would have been a fatal objection. It cannot be necessary to pursue the argument on

this head further; it is utterly insupportable.

It is further argued by the district attorney, that the indictment may well be supported, as charging a perjury in a "deposition taken pursuant to the laws of the United States," because, in a large sense, a verbal oath or affirmation may be considered as a deposition. If this were true, I do not perceive how it would help the indictment. It would still be a fatal defect, that it was not so charged. The indictment would not bring the case within the terms of the statute, and no argumentative inferences will supply the want of direct averments of material facts. 2 Hawk. P. C. p. 249, § 10; Id. c. 25, § 110; 1 Saund. 135, note 3; Bac. Abr. "Indictment," H, 3. But is this the true exposition of the statute? I have already stated the general rule, as to penal statutes, that their construction is strict; a rule that, in cases of doubtful meaning, always inclines the court to that, which is most favorable to the defendant, unless it be repelled by the context. For myself, I confess that I think, that the language of this statute is not only not doubtful, but obviously pointed against the construction contended for. The words, stripped of unnecessary appendages, admit of but two readings, viz. "if any person shall wilfully and corruptly, commit perjury, in any deposition taken pursuant to the laws of the United States;" or "if any person shall, wilfully and corruptly, commit perjury, on his or her oath or affirmation, in any deposition," &c. Read the language either way, there is an obvious distinction between an oath and a deposition; and in the latter way, which in my judgment is the true reading, the distinction becomes irresistible. Besides, the ordinary and usual meaning of the word "deposition" is confined to written testimony, at least in legal proceedings; and in legislating upon this subject, congress must be presumed to use the language in its legal sense. I believe there will not be found an instance in our laws, where the word is used in a different sense. In the act of September 24th, 1789, c. 20, § 30, in which congress have provided for the taking of depositions of witnesses under certain circumstances, the language is, that "the deposition of such person may be taken;" and throughout the whole section the word is used to denote the written testimony of witnesses, in contradiction to oral testimony. This act was contemporaneous with that, on which the indictment is founded; and as the terms "deposition" and "taken" are used in both in the same connexion, it seems to me impossible to doubt, that they ought to receive the same interpretation, more especially, as the depositions taken under the judicial act must have been immediately within the purview of the prohibition.

The indictment, therefore, cannot be supported upon the footing of the statute. It is certainly a most unfortunate omission in our laws; but I am afraid it is not the only class of cases, in which legislation in detail has unintentionally clogged the administration of justice. But although the indictment cannot be supported on the statute, it may be, nevertheless, good at common law: and if so, the conclusion against the form of the statute will not vitiate it. 2 Hawk. P. C. 251, § 115; 4 Term R. 202; 5 Term R. 162; 1 Saund. 135, note 3; Com. Dig. "Indictment," G, 6. We are, however, precluded from considering this question as at common law, because the supreme court have held, that this court has no common law jurisdiction over offences. I am bound to acquiesce in that decision, though I have never been able to satisfy my judgment of its accuracy. Had the point been fully argued, instead of passing subsilentio, I should have felt a greater satisfaction in the decision. It is, however, to be considered as settled, unless that high tribunal should hereafter choose to review the question in a more deliberate argument. I should not regret it, however, if a division of the court is made on either point, because it will bring the questions solemnly before the court of the last resort.

DAVIS, District Judge, did not concur in this opinion, with a view to a solemn decision in the supreme court, and therefore the cause was certified to the supreme court, as upon a division of the court.

Case No. 14,805.

UNITED STATES v. CLARK.

[34 Leg. Int. 312; 23 Int. Rev. Rec. 306; 13 Phila. 476; 6 Am. Law Rec. 129; 9 Chi. Leg. News, 427; 16 Alb. Law J. 224; 2 Cin. Law Bul. 220; 25 Pittsb. Leg. J. 17.] [1]

District Court, E. D. Pennsylvania. Aug. 27, 1877.

OBSTRUCTING PASSAGE OF MAIL — STOPPING PASSENGER TRAIN CARRYING MAIL—RES GESTÆ.

1. The act of congress [Act 1872; 17 Stat. 312] which makes it criminal to obstruct or retard the passage of the mail applies where the mail is carried by rail in a passenger train which is unlawfully stopped by persons who are willing to permit the passage of the mail car detached from the passenger cars of the train.

[Cited in Re Grand Jury, 62 Fed. 843.]

2. Words used by such persons may be act of obstruction when they constitute part of the wrongful business in question.

The defendant [Edward Clark] was indicted under section 3995, Rev. St., for knowingly and wilfully obstructing and retarding the passage of the mail and of the carriage carrying the same. The evidence on behalf of the prosecution was that the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, in this district, on the

[1] [Reprinted from 34 Leg. Int. 312, by permission. 16 Alb. Law J. 224, contains only a partial report.]

morning of the 27th of July last; that on the arrival of the mail train from Mauch Chunk to Philadelphia, at the depot on that morning, the defendant, who had no connection with the train, said to persons having charge of it, that the mail car could go on, but not the rest of the train; and that he afterwards got on the train and with others placed it in a siding, where it remained for several days.

Mr. Valentine, U. S. Dist. Atty., and Mr. Gilpin, Asst. U. S. Dist. Atty.

Benjamin L. Temple, for defendant.

CADWALADER, District Judge (charging jury). The defendant is charged with retarding the transportation of the mail. The first question is, whether anybody committed the offence; and the second question, whether the defendant participated in its commission. It would be convenient to consider those two questions separately. The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton, for no lawful purpose, and that one or more of them declared that the mail might go on, but the passenger train should not. They uncoupled the mail, and afterwards coupled it for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not in point of law whether they were or were not willing that the mail car or baggage car, or the particular vehicle carrying the mail, should go on. I had occasion, a week ago, to define the law on that subject; and when I had reached my home in the evening I found that the afternoon mail had brought me the Chicago Legal News, containing Judge Drummond's opinion on the same subject; and although I cannot recollect the words which I used, the words are so nearly identical that I cannot now discriminate between what I said and what he said. The substance of it is that from the foundation of the government of the United States, under the present constitution, the mails have been carried in the same vehicles or trains which also transport passengers. The public authority, and no private person, regulates the method of transportation. As Judge Drummond said: "In relation to the transportation of the mails by means of railroads it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss, so that while nominally they permitted the mail car to go, they really, by preventing the transit of other passenger cars, interfered with the transportation of the mails."

There is a familiar proposition of law that where a person is concerned in performing an unlawful act, he is responsible for other unlawful acts which he commits in the course of the wrong that he intends to commit. If a man intends to strike A with a stick, and he strikes B and breaks his head, he cannot get off by saying to B, "I did not mean to strike you, I meant to strike the other man." That the purpose was here not to delay the mail is of no importance if the act done was an unlawful act, and its effect was to retard the transportation of the mail. This question came before the judges of the supreme court of the United States about nine years ago. [U. S. v. Kirby], 7 Wall. [74 U. S.] 486. They said that if a man stops the mail when he is doing a lawful act, such as arresting a criminal who is a passenger, that is not obstructing the mail. The supreme court, however, added these words: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object." These propositions are not disputed in the present case. I believe counsel candidly admitted the law to be so. But when we come to consider the facts presently, it will be found useful to have thus ascertained how the law is laid down. If you believe the evidence, there is, I think, no reasonable doubt that the offence in question was committed by somebody; that the transportation of the mail at this place, and from it, was unlawfully retarded.

Then the second and the main question is, whether the defendant was a guilty participant. If he participated in any wise intentionally in what brought about the result, he is guilty. It may become in this case material to define another rule of law, which is to determine when words spoken are acts. A witness who says a man did nothing, may nevertheless prove that he did something by words. It thus becomes important to know when spoken words constitute either acts of guilt or evidence of guilt. In some cases it is, in other cases it is not, a difficult question. In the present case I can state the rule in a simple and intelligible way, and it will be for you to apply it, or to reject its application. The rule is, that where words constitute part of the business, rightful or wrongful, which is in question, they are acts. If, therefore, one of the crowd there said, in defining their purpose, that the mail might go on but the passenger train should not, if such words were uttered when the transaction was in progress, and as a part of it, the man who uttered those words committed a wrongful act if the jury find that such was his intention. Let us apply the evidence in this case. But before

doing so I will make another discrimination, so as to simplify the question which we are ultimately to reach. It is contended by the defendant's counsel that, if, for any reason, whether for protection of the mail or any other cause, it was taken out of the car which was pushed into the cut, from that time there was no offence to be committed, that from that time the progress of the offence was ended. Consider that a moment. If, for the safety of the mail, or for the purpose of assorting it, or for any other purpose, it was temporarily taken out of the car, how is it the less retarded if the unlawful act prevented it from being taken back to the car and carried forward? Mr. Dawes, the postmaster, has testified that the mail was delayed three days. At what point of time was it delayed? Suppose somebody had gone and locked or unlocked the door in execution of the general design, would that not have been part of the act of delaying? The question, therefore, is, not where the mail was, but whether it was delayed.

And now we come to the particular evidence which is to determine the guilt or innocence of the present defendant. The weight of the evidence, I think, is in his favor on one point; and that is that the original uncoupling of the car had occurred before he reached the place. The witnesses on his part so testify; and although the apparent tendency of some testimony of witnesses for the prosecution was, as one would first listen to it, the other way, yet I see no necessary contradiction; and we may take it that according to the weight of the evidence he did not arrive there with his two companions until that part of the act committed was consummated. But that he was there before the car was wheeled to the siding, the evidence on this part tends also to prove; and if that is so, and, if Mr. Lewis is correct in stating, as he did twice in his evidence, that the defendant himself said that the mail car should go no further, then there is sufficient evidence in law for the conviction of this defendant, if you find it sufficient in fact. Mr. Lewis's testimony is distinct. He said: "I recollect the train; the 27th of July; when it came in a big crowd there mounted the train; said it should not go further; saw defendant there, heard him give orders, heard him say that the mail car should go but not the rest of the train." Whether that occurred before or after the actual taking out of the mail, if it was in part execution of the whole transaction, it retarded the mail for two or three days. If, I say, you find, without any reasonable doubt, that the words which Mr. Lewis has uttered here were really uttered by the defendant, and were uttered with the object and purpose of preventing, by intimidation or otherwise, the progress of the mail, then, as I said before, the evidence is sufficient in law, if it satisfies you in point of fact without any reasonable doubt. If you have any reasonable doubt you will give the defendant the benefit of it and acquit him; but if, as men of business, you have no reasonable doubt, you should find a verdict conformable to your real belief.

There is some evidence tending to show that, in ordinary times, persons mount these passenger trains, or other parts of the train, and perhaps also baggage and mail trains, in order to go from one side of the river in Pennsylvania to the other in New Jersey, and that is allowed without charge. If you believe that that was really the errand of this defendant, you should give him the benefit of it as a strong reason of presumption in his favor. But you should also recollect that, according to the evidence, there was a large crowd there, some of whom had already declared that the train should not proceed with the passenger part of it; and you will recollect that the period when, according to the evidence, this defendant mounted the train, if he did mount it, was after it had been declared that the train should go no further, and after it had been uncoupled, if you so find; but if you also find that he was a participant in moving it to the siding, whether the mail was in it or not, provided that part of the acts was in execution of the general purpose of retarding the mail, then that part of the evidence would be of much less importance. You will give it such weight as you think it is entitled to.

The district attorney states that I have made a mistake. He says that the mail, according to the evidence of Mr. Dawes, was sent on the same afternoon, that instead of being delayed two or three days it was delayed only say two or three hours. But that would make no difference in point of law if the evidence convinces you that it was willfully delayed. The main question, I think, for you, is, whether the defendant was one of those who declared, as Lewis testifies, that the passenger train should not go on though the mail train might.

The counsel for the defendant understood the evidence as though it were a regular thing to take the train to this cut or siding. If he is right, give the defendant the benefit of that view of the evidence. But the testimony is that the train was coupled after having been uncoupled, and that it was carried to the siding and left there.

I believe, gentlemen, I have said all that occurs to me as necessary.

The jury rendered a verdict of "Guilty."

Case No. 14,806.

UNITED STATES v. CLARK.

[1 Lowell, 402;[1] 4 N. B. R. 59 (Quarto, 14); 1 Am. Law T. Rep. Bankr. 237; 3 Am. Law T. 226; 2 Leg. Gaz. 294.]

Circuit Court, D. Massachusetts. 1869.

BANKRUPTCY—INDICTMENT FOR FRAUDULENT DISPOSITION OF PROPERTY—OMISSION OF PROPERTY IN SCHEDULES—INDICTMENT.

1. Whether congress has power to punish a fraud committed by a debtor on his creditor, both residing within the same state, unless the act is done in contemplation of bankruptcy or in connection with some other matter within the federal jurisdiction, quære?

2. Section 44 of the bankrupt act [of 1867 (14 Stat. 539)], punishing bankrupts who, within three months before their petition is filed, dispose of goods otherwise than in the due course of trade, with intent to defraud, does not refer to an intent to defraud only the original seller of the goods thus disposed of.

[Cited in U. S. v. Penn, Case No. 16,025; U. S. v. Myers, Id. 15,848.]

3. The crime of fraudulently omitting property or effects from a bankrupt's schedule is complete when the false schedule is filed.

[Cited in Huntington v. Saunders, 64 Fed. 480.]

4. An indictment for omitting property and effects from the schedule need not allege that the bankrupt took the oath of allegiance prescribed by section 11 of the bankrupt act.

Indictment [against Hugh Clark] for a misdemeanor under the bankrupt act. After a verdict of guilty, the defendant moved in arrest of judgment.

M. F. Dickinson, Jr., Asst. U. S. Dist. Atty.

E. Avery, for defendant.

LOWELL, District Judge. The third count of this indictment charges that the defendant, within three months next before the commencement of proceedings in bankruptcy, did dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, certain of his goods and chattels, described, which he had obtained on credit, and which remained unpaid for, with intent to defraud a certain creditor. It is objected that congress cannot legislate for frauds committed by a debtor on a single creditor within the same state, unless the act relates to bankruptcy or to some other matter within the federal jurisdiction; and that it has not in fact so legislated in this case. Without now passing upon the constitutional question, which, however, seems to me well taken, I may say that on the construction of the clause under consideration I am of opinion with the defendant, that the scope of the act is to punish frauds on the creditors generally, and not on the particular creditor who sold the goods, nor any other single creditor, and that this count, which charges a fraud on one creditor only, cannot be sustained. If the goods were obtained on credit with intent to dispose of them to raise money, the fraud on the seller would be the most obvious one; but the statute seems to be directed against frauds upon the creditors as a body, and it does not refer the intent to the time of the purchase, but to that of the disposal of the goods out of the usual course of trade, and at that time the fraud could not injure one creditor more than the rest.

But the verdict cannot be set aside, if either of the other counts is good, for it was a several finding on each of the three charges. The first and second counts both allege specified omissions of property and effects from the schedule of assets filed by the defendant with his voluntary petition in bankruptcy. It is urged that all the acts and omissions mentioned in the first part of section 44 [of the bankrupt act (14 Stat. 539)] must take place after the proceedings are begun; whereas, the filing of the schedules in voluntary petitions is contemporaneous with the beginning of the proceedings. Upon a careful reading of the section, it appears by no means necessary to hold that the clause beginning, "or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule," is qualified by the original limitation of time. It is a new division of the subject, and one which requires no such limitation, because the prohibited acts cannot be committed before bankruptcy. The offence is complete if a bankrupt fraudulently omits from his schedule any property or effects, with the designated intent. An English case was cited to show that a bankrupt ought not to be held guilty of omission and concealment until he had passed his last examination. But that case was decided under St. 6 Geo. IV. c. 16, § 112, which punishes a bankrupt who shall not, upon his examination, deliver up his estate, books, &c., and it was held that he had a locus penitentiæ until his last examination. Under our act, his duty is to file accurate schedules at the outset, and if they are fraudulently inaccurate he is punishable. We have no last examination of bankrupts, nor any examination at all, unless specially ordered. The whole system is so different in this respect, that the case cited has no relation to the subject of inquiry.

Another objection is, that the indictment does not sufficiently show that the bankrupt court had jurisdiction, and that the proceedings were regular and sufficient. Under this head, again, there was much reliance placed upon the English cases. It is hardly necessary to consider now how far an indictment must go in this direction. We have never adopted the English practice of requiring in every action tried by an assignee evidence of every fact necessary to show that he is rightfully such. The assignment is conclusive evidence of his right; and the bankrupt court is a superior court whose acts are presumed to be regular. In this case, however, enough is pleaded to show that the district court, sitting in bankruptcy, had jurisdiction

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

of the subject-matter and the person, and that proceedings were duly begun. The absence of an allegation that the defendant took the oath of allegiance is more especially relied on. To this there are two answers: First, that the omission of effects from the schedule with intent to defraud might be complete before the oath of allegiance was taken; because, although the prescribed form contemplates that the oath shall be annexed to the petition, yet it cannot be doubted that under section 11 it might lawfully be filed at any time afterwards and before further proceedings are had, with precisely the same effect as if annexed. It may be doubted, too, whether the bankrupt can take advantage of the omission of his duty in this respect. Another answer is, that neither the law nor the prescribed form requires that the petition should state whether the bankrupt is a citizen of the United States or not; and this indictment does not show this defendant to be a citizen; and as the statute is equally applicable to resident aliens, while the oath is to be taken only by citizens, there is nothing on the face of this indictment which calls for an allegation that the oath was taken. If the defendant was a citizen, and neglected to take the oath, he must show it in defence. The indictment, in setting out the petition, follows the form of petition prescribed by the supreme court, and actually adopted in this case.

Motion denied.

[The defendant was thereupon sentenced to imprisonment in the jail of the commonwealth at Dedham, in the county of Norfolk, for the space of fifteen months.] [2]

Case No. 14,807.

UNITED STATES v. CLARK.

[1 Paine, 629.] [1]

Circuit Court, D. New York. Oct. Term, 1826.

UNITED STATES—PRIORITY—ASSIGNMENTS—INSOLVENCY—NOTICE—PRINCIPAL AND SURETY—ASSUMPSIT.

1. An assignment under the act of congress of 1797 [1 Stat. 512], to entitle the United States to their priority, must be an assignment of all the debtor's property; that is, the assignment must be a general one as opposed to a partial assignment, or an assignment professedly of a part only of the debtor's property.

[Cited in U. S. v. Langton, Case No. 15,560; Allen v. U. S., 17 Wall. (84 U. S.) 209.]

[Cited in King v. McGilliard, 76 Ind. 31; Mussey v. Noyes, 26 Vt. 474.]

2. Where there is an omission of an article of property in an assignment which purports to be general, but which does not show that the intention was that the assignment should be a partial as opposed to a general one, it does not take the case out of the act.

[Cited in Winner v. Hoyt, 66 Wis. 247, 28 N. W. 390.]

3. If the assignment does not on its face appear to be general, the onus probandi is on the United States.

4. The priority of the United States does not attach by the mere concealment of their debtor while insolvent. The "legal bankruptcy" mentioned in the act applies only to cases of legal insolvency, where by operation of law the debtor's property is taken out of his hands to be distributed by others.

[Cited in U. S. v. Wilkinson, Case No. 16,695.]

5. An assignee is not liable under the act until notice of the debt due the United States. But the notice need not be given by the United States, nor is a judgment or suit against him necessary in order to charge him with notice. The notice must be such as is required in ordinary cases of trustees, and enough to put a prudent man on inquiry.

[Cited in U. S. v. Eggleston, Case No. 15,027.]

6. Where the debtor, at the time of making the assignment, informed the assignee that he was surety on a bond to the United States, and that he believed the bond was broken, it was *held* sufficient notice to the assignee.

7. The bond on which he was such surety was a paymaster's bond, conditioned that the latter should well and truly account for and pay over all monies received by him as such paymaster. *Held*, that the debt of the paymaster to the United States was created by the advances made to him, and not at the time of striking a balance of account against him on the treasury books; and that the surety became a debtor as soon as the paymaster failed to account according to law.

8. And it was *held*, that it was not necessary that the debt of the surety should be ascertained by a judgment against him in order to make the assignee chargeable with its payment; but that the latter might in the action against himself have the benefit of any reduction to which the surety was entitled.

9. Where the United States are entitled to a priority, they can bring an action of assumpsit against the assignee for monies received by him under the assignment.

10. The article omitted in the assignment was a debt from the assignee to the debtor of the United States, growing out of a previous partnership between them. After the making of the assignment the assignee gave the debtor his bond for the debt. *Held*, that if the bond was given for monies of the debtor in the assignee's hands at the making of the assignment, the amount might be recovered in assumpsit, but not if it grew out of unsettled partnership concerns.

11. Where assumpsit is brought against an assignee, and he has funds which cannot be reached by the action, it seems that he is not entitled to a deduction for his expenses incurred in the preservation of the property, and the execution of his trust.

12. Where a part of the assigned property had been sold at auction under the direction of the assignee, it was *held* enough prima facie to show that he had received the price for which it was sold.

This was an action of assumpsit for money had and received, to recover of the defendant [Daniel P. Clark] certain funds of Gilbert Stuart, a debtor of the United States, which had come to the hands of the defendant; the United States claiming the funds by virtue of the priority given by the fifth section of the act of March 3, 1797. The defendant pleaded the general issue.

Gilbert Stuart and another became sureties on a bond to the United States, with Joseph B. Stuart, the principal, a paymaster in the army, on the 10th of July, 1813. The bond was joint and several, in the penalty of

[2] [From 4 N. B. R. 59 (Quarto, 14).]

[1] [Reported by Elijah Paine, Jr., Esq.]

$7,000, conditioned, that the said Joseph B. Stuart, the paymaster, should faithfully perform the duties of paymaster of the —— regiment, and should account for and pay all monies which should come to his hands as such paymaster. By transcripts from the treasury department, it appeared that the paymaster's account was dated December 20, 1819, and a balance of $18,000 and upwards was then due by him to the United States. All the items both of charge and credit were prior to the 15th June, 1815. On the 28th of August, 1819, Gilbert Stuart kept concealed to avoid arrest by his creditors, being deeply insolvent. On the said 28th of August, 1819, Gilbert Stuart being thus insolvent, made an assignment of his property to the defendant and John Stuart, Jr., providing for all his creditors to be paid according to certain priorities. The schedules containing the specification of the property conveyed, were entitled: "Of the Real Property of Gilbert Stuart;" "Of the Personal Property of Gilbert;" "Bonds and Mortgages of Gilbert Stuart;" "Notes and Accounts of Gilbert Stuart;" "Contracts for Sales of Lands of Gilbert Stuart." The schedules contained a minute detail of all the property. A notice was advertised immediately after the assignment, stating, that Gilbert Stuart had assigned his real and personal estate to John Stuart, Jr., and Daniel P. Clark, for payment of his debts, according to the terms of the assignment. At the time the assignment was made, it was declared by Gilbert Stuart to John Stuart, Jr., that it was to contain all his property, and after the execution of it that it did so contain. Within a few days before the assignment, John Stuart, Jr., asked the defendant Clark, the other assignee, if he did not owe Gilbert Stuart, to which he answered, "No, not a dollar." Gilbert Stuart declared the same thing. On the 20th of September, 1819, a settlement took place of certain previous concerns between the defendant and Gilbert Stuart, growing out of a partnership between them, which had ceased long before, the funds of which had been used by defendant in his own business; and on that settlement the sum of $7,400 was found due by defendant to Gilbert Stuart, for which he gave his bond. This bond was afterwards reduced by payments to Gilbert Stuart by the defendant, and allowances by the former to the latter, to $3,000, in April, 1820. On this last settlement the bond for $7,400 was given up, and a new obligation given by defendant to Gilbert Stuart for $3,000, in which he had, however, inserted as a condition, that he was to be indemnified against his liability to the creditors under the assignment, for a certain sale to one Joanna Stuart, of furniture of Gilbert Stuart, comprised in the assignment. The whole amount of property proved to be sold was, furniture $2,556. A further sum of $90 was received by defendant. In May, 1821, suit was brought by the United States on the bond against Gilbert Stuart, and judgment rendered in the same month for the amount of the bond. It appeared, that at the time the assignment was made, on the 28th of August, 1819, Gilbert Stuart informed the defendant of the bond to the United States, but told him that he, Gilbert Stuart, was not liable, because he had not been duly notified of the default of Joseph B. Stuart. It further appeared, that on the 20th of September, 1819, the date of the first settlement, the defendant knew of the bond and of the default of Joseph B. Stuart, but thought Gilbert Stuart not liable.

R. Tillotson, Dist. Atty., S. A. Foote, and D. Lord, for plaintiffs, contended:

That by the indebtedness of Joseph B. Stuart, all accruing before the 15th of June, 1815, the condition of the bond was broken, and Gilbert Stuart was a debtor to the United States, within the meaning of the act, on and before the 28th of August, 1819. That by the concealment of Gilbert Stuart, he being insolvent, an act of legal bankruptcy had been committed within the act of congress of March 3, 1797, which entitled the United States to a priority of payment out of Gilbert Stuart's estate. That the assignment of the 28th of August, 1819, was an assignment by the debtor, Gilbert Stuart, of all his property within the meaning of the same act. That the debt of $7,400 having been left out of the assignment through mistake or fraud, or not then being ascertained, this circumstance did not prevent the assignment from being a general one, within the meaning of the law. That an action for money had and received would lie, for the proceeds of the assigned property, and also for the amount of the reserved debt, on which the priority was alleged to have attached on the 28th of August, 1819. That no payments after the 28th of August, 1819, or at farthest after the 20th September, 1819, should be allowed to defendant.

T. A. Emmet and R. Emmet, for defendant, contended:

That the condition of the bond not being for the payment of a specific sum of money, the indebtedness of Gilbert Stuart as surety, did not arise until the extent of his liability was ascertained and defined by a judgment on the bond, or, at least, until the commencement of a suit upon it; and at all events, that no such indebtedness could have arisen or existed in law prior to the settlement of the paymaster's accounts in December, 1819. That the defendant, as assignee of the surety, could not be charged with notice, nor had the plaintiffs a right to inquire into his acts as assignee previous to the legal existence of the surety's indebtedness to them. That the defendant's knowledge of the paymaster's default, at the time of the assignment, was not sufficiently proved, and even if it had been, that such knowledge and the knowledge of Gilbert Stuart's suretyship, could not

bind him, prior to a judgment against Gilbert Stuart as such surety, inasmuch as Gilbert Stuart might have had a good defence, which would have discharged him in an action brought against him as surety. That the assignment was not an assignment of all the debtor's property within the meaning of the law, and even if it were so, that the totality of the assignment and the keeping concealed to avoid arrest, were not circumstances of which the United States could avail themselves to create their priority, unless there was an ascertained and strictly legal indebtedness by Gilbert Stuart to them at the time, which could not be the fact, as the paymaster's accounts were not even finally made up, and his defalcation ascertained, until after Gilbert Stuart had made his assignment and kept himself concealed. That even if the priority of the United States did attach from those circumstances, they had no right to enforce it by an action against the defendant. That the act of 1797, under which the United States claimed priority in this case, creates no personal responsibility of an assignee, nor gives any right of action against him, while the act of 1799 [1 Stat. 627], giving a like priority in cases of debt for duties, expressly declares that an assignee who shall pay a debt due to another, before the debt for duties to the United States has been paid, shall be answerable in his own person and estate, and that the use of such express words of liability in the latter act, and the omission to use them in the former, shows, that such personal liability of an assignee, to be enforced by an action at law, was not contemplated nor intended in cases like the present. That a preference only being acquired by the act of 1797, the United States must resort to the same mode of proceeding that any common creditor would have to pursue, to get at the property of a debtor, viz. by obtaining a judgment against such debtor, and issuing execution; and in case such judgment and execution should prove ineffectual, owing to an assignment made by the debtor, then by filing a bill in equity against the proper parties, to compel a discovery and production of the property, and to establish their preference in the distribution of it. That in any case an action for money had and received would not lie against an assignee by a creditor not claiming under the assignment, and that for want of such privity between the United States and the defendant it could not be maintained in the present case. That even if the action would lie, it would only be to recover such money as the plaintiff could prove to have been actually in the hands of the defendant as assignee when the suit was brought, but not to make the defendant accountable for any monies which he might have received and paid to other creditors, even although such payments had been made by him with full knowledge of the preference claimed by the United States. That the defendant was at all events entitled to be allowed for all payments made by him before he had notice of the debt due by Gilbert Stuart to the United States, and of its ascertained amount, and that such notice must have been given expressly by the United States themselves.

THOMPSON, Circuit Justice (charging jury). Some observations have been made to you, in relation to the act of congress under which the United States claim a preference over other creditors of Gilbert Stuart, which are calculated to divert your attention from the matters proper to be submitted to you. It has been treated as a harsh and severe law, and one that is not entitled to the favourable consideration of the court and jury. With the policy or fitness of this law, we have no concern; it is a valid and constitutional law, and has been so adjudged by the highest tribunal of the country. It is, therefore, binding and obligatory upon us; and must govern the rights of the parties in this case, so far as the question of preference is concerned. Most of the questions which have been agitated in the course of the trial are questions of law, upon which I have already intimated an opinion; but to which exceptions have been taken, and to enable the parties to avail themselves of such exceptions, it may be proper for me again to notice the various questions that have arisen.

The first inquiry is, whether Gilbert Stuart was a debtor to the United States, within the meaning of the act of 1797 (2 Bior. & D. Laws, 595 [1 Stat. 515]), and at what time he became so indebted. The language of the act is very broad, and applies to all persons thereafter becoming indebted to the United States by bond or otherwise. It appears that on the 10th day of July, 1813, Gilbert Stuart and Moses Willard became bound with Joseph B. Stuart to the United States by a bond in the penalty of $7,000; conditioned, that Joseph B. Stuart should perform the duty of paymaster in the —— regiment of the ——, and well and truly account for, and pay over all such monies as should be received by him as such paymaster.

It is contended on the part of the defendant, that Gilbert Stuart did not become a debtor to the United States, until judgment was recovered against him on this bond; or at all events not until suit brought. This I think is not a correct view of the law. Gilbert Stuart became a debtor to the United States whenever the condition of the bond was broken. The condition of the bond is not to account when called on, but well and faithfully to account; that is, to account according to law, and to pay over the balance. Joseph B. Stuart was bound according to law to account every three months: and it appears by the abstracts from the treasury books, that all the charges and credits to Joseph B. Stuart are prior to 15th of June, 1815. At that time, a balance of more than the amount of the bond appeared due by Joseph

B. Stuart, as paymaster, to the United States.

It is urged, however, that no balance was struck against him until 29th December, 1819, and that the debt of Joseph B. Stuart did not accrue till then. But this cannot be so considered. The striking the balance on the treasury books, does not in any sense create the debt, it only ascertains the amount due. The debt is created by the advances made, and Joseph B. Stuart was as much a debtor before the balance was struck as afterwards. The last credit given him was on the 15th of June, 1815, and whatever amount the treasury books then showed due from him, was the debt due, and which he was bound to pay; and not having been paid or accounted for in any manner, the bond became forfeited, both as to the principal and his sureties; and Gilbert Stuart from that time became a debtor to the United States.

But it has been contended, that admitting the priority exists, still no right of action at law accrues to the United States; and on this subject a distinction has been attempted to be drawn between the act of 1797, and the duty act of 1799. The act of 1799 is confined to bonds given to secure duties and has no concern with the act of 1797, and is not to affect the construction of it. It is said that by the act of 1797, the United States acquire merely a preference, and that this preference is to be exercised through a judgment and execution, and not by any action at law. This construction would render the act nugatory. It has been settled that the priority does not give a lien to the United States; that it does not overreach bona fide purchasers; and therefore the property would seldom be reached by an execution. This therefore cannot be the manner of enforcing the priority. The act not having prescribed the mode, it is left to the ordinary rules of law to carry the priority into effect, according to the circumstances under which it is sought. If the United States needed the aid of a court of equity, they could file their bill, as in compelling the execution of a trust; but if circumstances are not such as to require the interposition of a court of equity, then the United States are not obliged to go there.

Suppose the defendant is proved to have received the whole amount of the bond in cash from Gilbert Stuart at the time of the assignment, would the United States be driven into a court of equity to recover it? Would not an action for money had and received lie in such a cause? The case is the same, if such a state of facts exists here as shows that the defendant has received money of Gilbert Stuart's estate, under the assignment. If a trustee has received money out of his trust estate which he is bound to pay over to a creditor, that creditor may maintain this form of action and may sue at law. If questions arise as to the rate of distribution among a number of creditors entitled to a portion of the insolvent's estate, then the aid of a court of chancery may be necessary. But here the United States have an exclusive right, and are entitled to full satisfaction. Of course, a resort to a court of equity to settle the distribution of the funds cannot be necessary; and if the jury are satisfied that the defendant has received the money in contemplation of law, then there is no need of resort to a court of equity, and this form of action at law is maintainable.

The next point to be considered is, whether such a state of facts existed in this case that the priority of the United States attaches. It has been contended on the part of the plaintiffs, that the concealment of Gilbert Stuart to avoid arrest by creditors, was an act of legal bankruptcy, and that this act alone gives the right of priority to the United States. There is in this part of the law some little obscurity. The general object of the act is to give a preference to the United States. This presupposes a distribution of the debtor's property. The idea of preference is inapplicable while the property remains in the hands of the debtor and subject to his control. How could such a preference be enforced? Only by the ordinary course of a suit against the debtor and execution thereon, all of which exists by the ordinary course of law, and supposes no preference. A preference necessarily implies that the property is put out of the control of the debtor and to be distributed by others or by operation of law. A mere insolvency so long as the debtor retains the management and control of his property, does not allow of the application of the law. The act looks to a legal insolvency, where the property is taken up by the law for distribution among the creditors of the debtor. There is no difficulty in the construction of the act until we arrive at the last phrase "legal bankruptcy." What is "legal bankruptcy"? In 1797, when the act of congress was passed, we had no bankrupt law; and therefore these words can have no reference to bankruptcy under a bankrupt law. The words seem in their connexion to have reference to the previous cases put in the section, and to point out some legal insolvency or some mode of proceeding by which the property of the debtor is taken out of his hands and to be distributed by others.

I know of no mode of enforcing a preference while the debtor is going on in the management of his own affairs: the only mode of proceeding in such a case is, to commence a suit against the debtor and go on to judgment and execution in the ordinary way. The concealment, therefore, of itself, would not be such a circumstance as to make the act apply and give rise to, the attaching of the priority of the United States, if Gilbert Stuart had remained in the possession and management of his property. But in this case there has been a voluntary assignment by the debtor of his property, on the 28th August, 1819, within the meaning of the law. The supreme court

of the United States have decided, that the assignment must be of all the debtor's property: by which I understand, that it must be an assignment of all, as contradistinguished from a partial assignment, or professedly an assignment of part only of the debtor's property. The case put of a fraudulent omission of a part is not the only exception, but is mentioned by way of illustration. Where an assignment purports to be general, and is understood and intended so to be, the omission of a trifling article through mistake or accident, would not surely take the case out of the act. This would be inadmissible on every sound principle of construction. The true distinction is that which has already been suggested: that where the omission does not show that the intention was that the assignment should be a partial one as opposed to a general one, the act applies, and the priority of the United States attaches. Here the assignment purports on the face of it to be a general one. The schedules are headed "Of the Real Property"—"Of the Personal Property." The vouchers for his debts and all the various descriptions of property of Gilbert Stuart are set out with every possible particularity. If the assignment does not on its face appear to be general, the onus probandi lies certainly on the United States. But here they have proved the generality of the assignment in the most satisfactory manner. When the assignment was executed, it was given out by the parties to be general. It was understood by John Stuart, Jr., the other assignee, and so declared by Gilbert Stuart, that all his property was to be included. John Stuart, Jr., tells him that all his property must be included. Gilbert Stuart says that he has done so. The defendant, immediately previous to the assignment, tells John Stuart, Jr., that he does not owe Gilbert Stuart a dollar.

The defendant is concluded by all this from now disputing the generality of the assignment, and setting up the omission of the $7,400, which he has since acknowledged he owed Gilbert Stuart at the time of the assignment, for the purpose of defeating the priority of the United States. If this debt was reserved by fraud, then the priority is not defeated; if, because it was not deemed a legal debt, but only an honorary one, or was omitted by mistake, then also the priority attached; and in either case the omission of this debt is no objection to the right of priority on this ground. The right of priority, therefore, is put on the ground that this is a general assignment. As to the insolvency of Gilbert Stuart at the date of the assignment, it is abundantly proved, and is not in fact disputed.

When then did this priority take effect, as regards the present defendant? It has been contended on his part, that it takes effect only on obtaining judgment against himself, or at most, from the time of suit brought against him. As to this point, the act is entirely silent. It is to be put, therefore, on the general principles of law relative to the liability of trustees. They are not liable until notice. And if there had been no notice until after the bringing of this suit, the defendant would not, in this action, have been liable at all. Had then the defendant that notice of the debt of Gilbert Stuart to the United States which would charge him, and when had he such notice? In all cases of this kind, to protect a trustee, he must act bona fide in disposing of the property; and when such circumstances come to his knowledge, as should reasonably put a prudent man on inquiry, this is all the notice which is required. It has been said here that no notice would be available unless it came from the United States, they being the creditors. This is not correct. It is enough if the trustee be in possession of such facts as that a faithful and fair discharge of his duty would put him on inquiry.

It appears in evidence, that at the time of the assignment, the defendant was informed by Gilbert Stuart that he was surety for Joseph B. Stuart in a bond to the United States, and that he believed the bond was broken. This was sufficient notice, and he is from that time chargeable with the duty which the law imposed on him, to give a preference to the United States in the distribution of Gilbert Stuart's property. It was his duty to make inquiry at the proper office, to see what the debt was, and to pay it. It has been said that this would be imposing on the defendant great risk and hardship; that if he had been called into a court of chancery by the creditors, provided for in the assignment, he would not have been excused by reason of this bond, from accounting for all the funds he had in his hands. But this I apprehend is a mistake. The defendant would by presenting the circumstances before the court of chancery, have been protected by it until the actual amount of the debt could have been ascertained and paid. He was in this respect in no jeopardy. As to the objection urged on behalf of the defendant, that until judgment against Gilbert Stuart the surety, the defendant could not know the amount for which Gilbert Stuart would be liable, as the amount might be reduced by Gilbert Stuart on the trial; the defendant in this action may now have the same benefit. He might, if he could, show the debt of the United States reduced to any extent, in the same manner as Gilbert Stuart could have done in the action against him.

The amount of the recovery is a question resting with you, under the rules of law heretofore stated, and such as may be hereafter laid down. The liability of the defendant to the priority of the United States arose, as I have already decided, at the time he had notice of Gilbert Stuart's debt; and such notice was given at the time the assignment

was made. He was therefore from that time bound to apply to the debt of the United States the whole of what he should receive under the assignment, until the debt was paid. He was bound to pay the proceeds of the assigned property as the law directs. He comes under this obligation by assuming the trust, and is legally bound to pay over the money he receives to those by law entitled to it. In the present case the United States were so entitled. Whenever the money was received by the defendant, he received it to the use of the United States. This being an action for money had and received, it is necessary for the plaintiffs to show that the defendant has in fact received money to which they are entitled, or such facts must be proved as to afford a fair and reasonable presumption that money has been received. From the evidence in this case it appears, that certain furniture which had been assigned by Gilbert Stuart to the defendant, was sold under his direction, at public auction, for $2,356; and it is not unreasonable to presume, that he has received the money. It is at least enough, prima facie, and throws on the defendant the burthen of rebutting this presumption, by proof on his part. And unless he has done so to your satisfaction, that amount, deducting the commissions and auction duties, is recoverable in this action.

With respect to a part of this money, the proof is very satisfactory, that it has in fact been received by the defendant; and he has also had credit upon his bond to Gilbert Stuart for another part. Whatever you think the evidence will warrant you in concluding that he has received, or had the benefit of in paying his own debt, he is responsible for. The defendant claims that he is entitled to a deduction of $621, for expenses incurred by him in the preservation of the property assigned to him, and in the discharge of his trust, and this seems to have been conceded on the part of the plaintiff. Had it not been, I should entertain some doubt whether he was entitled to such deduction. If the recovery in this case could reach all the proceeds of the assigned property, it would seem reasonable that the expenses necessarily incurred in and about the preservation of the property should be first paid, and perhaps the priority of the United States would not overreach such expenses. But as it appears that the defendant has funds that cannot be reached in this action, I should have inclined to the opinion, that the expenses incurred in the execution of the trust, should fall on such funds. If, however, this is yielded on the part of the plaintiff, you can make the deduction.

It is claimed, on the part of the United States, that they have a right to receive the full amount of their debt out of the bond given by the defendant to Gilbert Stuart in September, 1819, for $7,400. Whether the defendant in this action, for money had and received, can be made responsible for any part of this bond, is a question by no means free from difficulty. The circumstances in relation to this bond are involved in considerable obscurity. Whether it was given for a real debt due from the defendant to Gilbert Stuart, may be doubtful from the evidence. If given for such debt, it is a part of the trust fund, and for which the defendant might be made accountable in equity: Whether in this action, or not, will depend on the question, whether it was given for money which the defendant had in his hands at the time of the assignment, belonging to the estate of Gilbert Stuart, or whether it grew out of some unsettled partnership concerns: If the latter, I should think it could not be reached in the present action. Of this you will judge from the evidence, and render your verdict accordingly.

The jury found a verdict for plaintiffs for $1,760.81.

Case No. 14,808.

UNITED STATES v. CLARK.

[2 Spr. 55;[1] 25 Law Rep. 345.]

District Court, D. Massachusetts. Dec., 1862.

ARMY — INDICTMENT FOR ENTICING SOLDIER TO DESERT—SUFFICIENCY OF EVIDENCE.

1. Where the prisoner, in order to induce one H. to enlist, made representations to him as to the means and facilities of deserting, and, after he had enlisted, received the whole of his bounty money, and at the times when he made such representations, and received the money, he believed they would be likely to cause H. to desert, and they did cause him to desert, the prisoner may be deemed to have procured or enticed him to desert, within the meaning of the statute of 1812, c. 14, § 17 [2 Stat. 673].

2. It is not necessary, in order to warrant a conviction, that the prisoner should have wished or intended that H. should desert.

This was an indictment under the statute of 1812, c. 14, § 17 (2 Stat. 673), charging the prisoner with having enticed and procured a soldier by the name of Hayden to desert. It appeared that early in November last, Hayden enlisted as a soldier, received a bounty of twenty-five dollars from the United States, and one hundred dollars from the city of Boston, and was immediately mustered into service and sent to the camp in Cambridge; he there remained doing duty as a soldier about a fortnight, and then deserted. There was evidence tending to show that just previous to the enlistment the prisoner, in a conference with Hayden, told him that, if he would enlist, he could obtain the bounty and avoid serving as a soldier by deserting; that he could either obtain a furlough and then desert, or that the prisoner would come to the camp and take him away in a wagon; that immediately after this conversation, Hayden went with the prisoner to the rendezvous, enlisted, received the bounty, and immediately delivered the whole

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

amount to the prisoner. There was also evidence tending to show that the prisoner was to hold a part of the bounty for Hayden, and keep the residue for his own use.

T. K. Lothrop, Asst. Dist. Atty., for the United States.

B. F. Russell, for prisoner.

SPRAGUE, District Judge, in charging the jury, among other things instructed them as follows: That if the prisoner procured Hayden to enlist believing at the time that he would probably desert, still if the prisoner did not say or do any thing which would be likely to cause him to desert, or if what was said and done by the prisoner did not in fact cause Hayden to desert, then the prisoner is not guilty of the offence charged; but that it was not necessary, in order to establish the guilt of the prisoner, that the government should satisfy the jury that he wished or actually intended that Hayden should desert. It may be that his wishes and purposes went no further than to cause Hayden to enlist, and thereby to obtain for himself the reward for furnishing a recruit, and a part or the whole of the bounty money. It may be that he would have really preferred that Hayden should not be able to escape from the service. Still, if in order to induce Hayden to enlist to accomplish his own purpose of gain, the prisoner made representations and gave assurances to Hayden as to the means and facilities of deserting, and, after Hayden had enlisted, received from him his bounty money, and at the time when such representations were made, assurances given, and bounty money received, the prisoner believed that they would be likely to cause Hayden to desert, and they did cause him to desert, then the prisoner may be deemed to have procured or enticed him to desert within the meaning of the statute.

Verdict, "Guilty."

UNITED STATES (CLARK v.). See Cases Nos. 2,837 and 2,838

Case No. 14,809.

UNITED STATES v. CLARKE.

[4 Cin. Law Bul. 49.]

Circuit Court, S. D. Ohio. 1879.

CONSTITUTIONAL LAW — ELECTIONS — INDICTMENT AGAINST JUDGE OF ELECTION FOR NEGLECTING TO PERFORM DUTIES.

The United States election laws constitutional.

On motion to quash the indictment against Gus. Clarke.

BAXTER, Circuit Judge. The defendant was a judge of the election held recently in Cincinnati, at which members of congress were voted for, appointed by the state authorities, and stands indicted, under section 5515 of the Revised Statutes, for unlawfully neglecting to perform certain duties enjoined on him as such judge by the laws of Ohio. He appears, and moves to quash the indictment, not because it is not within the purview of the act of congress under which it is framed, but upon the ground that section 5515, declaring such neglect of duty an offense against the United States and punishable by indictment in the federal courts, is unconstitutional and void. And in support of this position, learned counsel have referred us to the case of Commonwealth of Kentucky v. Dennison, 24 How. [65 U. S.] 66. We have been familiar with this case for a long time, and at the request of defendant's counsel have re-examined it with considerable care. The facts are that the governor of Kentucky had, in pursuance of the act of congress in that behalf enacted, made a demand on Gov. Dennison, then governor of Ohio, for the apprehension and surrender of an alleged fugitive from the former state, but Gov. Dennison refused to comply with that requisition. Thereupon an application was made by the commonwealth of Kentucky to the supreme court of the United States for a mandamus to compel Gov. Dennison to perform the duty imposed upon him by the law. The court refused the mandamus, and said: "The act does not provide the means to compel the execution of this duty nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with such power. Indeed, such a power would place every state under the control and dominion of the general government, even the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the constitution, has no power to impose upon a state officer, as such, any duty whatever and compel him to perform it; for, if it possessed this power, it might overload the officer with duties that would fill up all his time, and disable him from performing his obligations, and might impose on him duties of a character incompatible with the dignity to which he was elevated by the state."

We recognize in this decision an authority binding on us. And if that case and this are alike, defendant's motion must prevail. The duty of providing by law for the arrest and return of fugitives is imposed by the constitution exclusively on congress. And in exercising the power thus conferred congress saw fit to impose the duty of causing fugitives to be arrested and surrendered to the demanding state, on the chief executive of a state in which the fugitive might be found. The duty thus enjoined on the governors of the states was generally exercised by them in all proper cases. But in the case of Commonwealth of Kentucky v. Dennison

[supra], the latter declined to act, and the supreme court, as we have already seen, when applied to for a mandamus to compel him, held that the federal government could not require him to perform such a duty. The language of the court was, of course, employed with reference to the facts of the case then before it.

But the duty of providing for the election of members of congress is a matter in which both the federal and state governments have an interest. "The times, places and manner of holding the elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time, by law make or alter such regulations, except as to the places of choosing senators." So it will be seen that the obligation to provide for the election of members of congress is one that attaches to both the general and state governments. And under the legislation upon the subject the states hold the elections through officers of their own selection. But this duty is not left entirely to state supervision. It is performed under and in pursuance of the laws of both powers. The federal government does not assume to overload a state officer with duties inconsistent with his dignity, or with "his obligations to the state." Nor does it undertake to compel such officer to perform such duties which, under the constitution, are imposed exclusively on the federal government, as was true in the case of Commonwealth of Kentucky v. Dennison, but commands a faithful compliance on the part of such officer, in any matter pertaining to the holding of such elections and certifying returns, etc., that he is required by the state laws to do and perform. And any willful refusal or neglect to do any one or more of the things thus required, is declared to be a crime against the United States, and made punishable by indictment in the federal courts.

We think the law is within the constitutional powers of congress, and a very proper and delicate exercise of the national authority. The law being, as we think, valid, this court has jurisdiction of the offense charged in the indictment, and plaintiff's motion to quash will be disallowed.

Case No. 14,810.

UNITED STATES v. CLARKE.

[2 Cranch, C. C. 152.] [1]

Circuit Court, District of Columbia. June Term, 1818.

NEW TRIAL—PAPERS TAKEN OUT BY JURY.

If the jury take out the coroner's inquest and depositions, and find the defendant guilty of murder, a new trial will be granted.

Indictment [against Michael Clarke] for murder of defendant's wife.

The jury, when they retired, took out with them the coroner's inquest and depositions, without leave or consent of the prisoner's counsel, and having returned with a verdict, guilty.

THE COURT granted a new trial.

[See Case No. 14,811.]

Case No. 14,811.

UNITED STATES v. CLARKE.

[2 Cranch, C. C. 158.] [1]

Circuit Court, District of Columbia. Dec. Term, 1818.

INSANITY — DEFENCE TO CRIMINAL PROSECUTION.

A prisoner should not be found guilty, if, at the time of committing the act, he was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act

The prisoner [Michael Clarke] was indicted for the murder of his wife by shooting her with a musket upon her return home in the evening from church.

Mr. Key, for prisoner, prayed the court to instruct the jury that if they should be satisfied, by the evidence, that the prisoner, from long and settled habits of intemperance, had become disordered, both in body and mind, and subject to fits which affected both his mind and body, and that, by reason thereof, he was generally, and at all times, when not under the influence of liquor, of unsound mind, then the prisoner cannot be found guilty of killing the deceased with malice.

Which instruction THE COURT (nem. con.) refused to give, but instructed the jury that if they should be satisfied, by the evidence, that the prisoner at the time of committing the act charged in the indictment, was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act, they should find him not guilty.

Verdict, "Guilty." Sentence of death.

[See Case No. 14,810.]

Case No. 14,812.

UNITED STATES v. CLARKE et al.

[Hempst. 315.] [2]

District Court, D. Arkansas. Dec., 1844.

ACTION OF COVENANT — DEFENCES — ACCORD AND SATISFACTION—UNPERFORMED AGREEMENT.

1. Different defences which may be made in an action of covenant.

2. An accord must be executed before it can amount to satisfaction. An unperformed agreement is not sufficient, and cannot be pleaded in bar.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Samuel H. Hempstead, Esq.]

[This was an action by the United States against Lorenzo N. Clarke, James Pitcher, and Charles P. Bertrand. Heard on a demurrer to pleas.]

S. H. Hempstead, U. S. Dist. Atty.

F. W. Trapnall and John W. Cocke, for defendants.

JOHNSON, District Judge. This action of debt is founded on a contract in writing, under a penalty of twenty thousand dollars, conditioned to perform certain articles of agreement entered into at the same time, namely, the 8th of December, 1837, between Lorenzo N. Clarke and the government, to furnish rations to the Chickasaw Indians. The penal bond, with the conditions thereunder written, and the articles of agreement, constitute but one agreement, upon which the United States have brought their action.

The defence disclosed by the defendants,—seventh, eighth, and ninth pleas, to which the district attorney has demurred,—is a subsequent agreement by the defendant Clarke with the plaintiffs, obligating himself to deliver to the United States rations of beef, corn, and salt, at a specified price, for all the Seminole Indians who should emigrate west during one year after the date of the contract, and stipulating that he should be entitled to a credit of five and a half cents for every ration of subsistence so delivered upon his indebtedness under the contract upon which the present suit is based.

The defendants fail to aver in their pleas that any rations were in fact delivered under the latter contract; but they do allege that this latter agreement was received by the plaintiffs in full satisfaction and discharge of the covenants and stipulations contained in the contract referred to in the declaration. By adverting to the terms and provisions of the latter, it appears manifest that it was not the intention of the parties that it should operate by way of discharge and satisfaction of the obligations incurred by the first agreement, for it provides expressly that for each and every ration delivered by Clarke, he should be entitled to a credit of five and a half cents on the first contract, so that he might liquidate and pay his debt due to the plaintiffs under the same.

The contract set out in the pleas affords intrinsic evidence not to be mistaken, that the parties to it never intended it as a discharge and satisfaction of the previous contract, but, on the contrary, they manifestly intended that the first contract should remain in full force, and only provided that it might be satisfied, paid, and discharged by the delivery of a sufficient number of rations of subsistence. When delivered, they should operate to liquidate and discharge it. That was the object, and nothing beyond it. The averment in the pleas, that the latter contract was received by the plaintiffs in full discharge and satisfaction of the former contract, cannot be regarded, because it is inconsistent with the terms and provisions of the contract itself, as well as the clear intention of the parties. It may be further remarked, that the amount of rations to be furnished by the defendant Clarke is left wholly uncertain and entirely dependent upon the number of Seminole Indians that might emigrate during the year. It rested on that contingency. It seems to me that it can admit of no serious doubt, that a contract thus uncertain and unperformed in any part, cannot be legally pleaded as an accord and satisfaction of a previous liability. 1 Com. Dig. "Accord," b, 3, 201. The pleas are not sufficient in law to bar the action, and the demurrer to them must be sustained. Demurrer sustained.

The seventh and eighth pleas having been amended by leave of the court, the district attorney again demurred, for this, among other causes, that "the pleas did not show that the accord had been executed, without which it could not be a bar to the action."

OPINION OF THE COURT. This action is in substance for the recovery of damages for a breach of covenant, and is governed by the rules applicable to that action. To an action of covenant, the defendant may set up various defences in bar of the action. He may deny that he ever made the covenant, by putting in the plea of non est factum; or he may plead a fraud practised upon him in its execution, and so avoid it. He may plead that he has performed the covenant stipulated on his part to be performed, or that he is discharged from performance by the failure of the plaintiff to perform a condition precedent. He may plead an accord, which Blackstone defines to be "a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account." 3 Bl. Comm. 15; 1 Bac. Abr. "Accord," 54.

The question arises in this case, to which of these classes of pleas do the seventh and eighth amended pleas belong? Are they pleas of accord and satisfaction, or of covenants performed? It seems to me that they are not pleas of the latter class, because they fail to aver performance. It is true that they aver part performance, and a readiness and an offer to perform fully, which was refused by the plaintiffs. The defence then is, part performance and a legal excuse assigned for failure to perform fully. A part performance, and a readiness and offer to perform the residue, is not in all cases equivalent to an actual, full and complete performance. For example; if A. covenants with B. to do any specific act, as to deliver certain property upon the demand of A. at a certain place, and B. is sued by A. for a failure to deliver the propery, B. may show that he could not deliver it, because A. never made the demand, and so bar the recovery of damages, on the ground that he was pre-

vented from performing the contract by the fault of A., and not by any fault of his own. But suppose the action should be brought by B., can he recover the same amount of A. that he would be entitled to, in case he had actually delivered the property and fully performed his contract? Clearly he could not. He could recover no more than the damages he had sustained by reason of the failure of A. to make the demand, so as to enable B. to comply with his contract. B. never having in fact delivered the property, would not be entitled to recover its value. The property is still his own, and he could only legally recover of A. the damages occasioned by the breach of the contract on the part of A. Thus it appears that part performance and readiness to perform in full does not give a party the same rights.

These, then, are not pleas of covenants performed. To what class do they belong? It appears to me that they can only be considered as pleas of accord, and are they, in the form pleaded, valid? I think not; for it is not averred that the accord was received and accepted in satisfaction of the contract sued on; but it is averred that performance of the new agreement was to operate as satisfaction. Full performance, as already remarked, is not alleged; and according to the best authorities, an executory agreement unperformed cannot be set up as a valid accord and satisfaction. 1 Bac. Abr. "Accord and Satisfaction," A, 55; 1 Ld. Raym. 122; 6 Wend. 390; 16 Johns. 86; 2 H. Bl. 317; 5 Term R. 141.

The demurrer to the seventh and eighth amended pleas is sustained. Demurrer sustained.

NOTE. Performance of part and tender of performance of the residue is not a good plea. Shepherd v. Lewis, T. Jones, 6; 1 Bac. Abr. "Accord," A, 59. If an accord be to do two things, and the defendant do one, and not the other, this is no bar to the action, because the plaintiff has no remedy for that which is not performed. 1 Bac. Abr. "Accord," A, 58; Rolle, Abr. 129. The accord must be executed. 9 Coke, 79, b; 1 Salk. 76; T. Raym. 450; 2 Keb. 332; T. Jones, 158, 168; 7 Blackf. 582. Part payment and an agreement to take the residue at a future day cannot be pleaded as satisfaction in bar. Cro. Eliz. 304–306. To constitute a bar to the action, the accord must be full, complete, and executed. 6 Wend. 390; 16 Johns. 86; 3 Johns. Cas. 243; 5 N. H. 136, 410; 1 Com. Dig. B; 4, 201, tit. "Accord." Bacon says: "Accord is an agreement between two persons, to give and accept something in satisfaction of a trespass, etc., done by one to the other. This agreement, when executed, may be pleaded in bar to an action for the trespass; for in all personal injuries, the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cause of complaint, and therefore present satisfaction is a good plea; but if the wrongdoer only promise a future satisfaction, the injury continues till satisfaction is actually made, and consequently there is a cause of complaint in being; and if the trespass were barred by this plea, the plaintiff could have no remedy for the future satisfaction, for that supposes the injury to have continuance." 1 Bac. Abr. tit. "Accord and Satisfaction," 54. If the defendant pleads a concord between himself and the plaintiff, that he should pay the plaintiff £3 in hand, and should undertake to pay the plaintiff's attorney's bill, and avers that he had paid £3, and was always ready to pay the attorney's bill, but he never showed him any; this is no good plea, because the accord is not shown to be fully executed. 1 Bac. Abr. 59; 3 Keb. 690; 1 Com. Dig. "Accord," B, 4. To make a plea good, both accord and satisfaction must be shown. Maze v. Miller [Case No. 9,362].

Case No. 14,813.

UNITED STATES v. CLARKE et al.

[5 Mason, 30.] [1]

Circuit Court, D. Massachusetts. May Term, 1828.

CUSTOMS DUTIES—BOMBAZINES—HOW CLASSIFIED.

Under the tariff act of 22d of May 1824, c. 136 [4 Stat. 25], bombazines, being goods of which wool is a component material, are liable to pay a duty of 30 per cent.

[Cited in Lawrence v. Allen, 7 How. (48 U. S.) 791; U. S. v. United States Tel. Co., Case No. 16,603.]

[Error to the district court of the United States for the district of Massachusetts.]

The original action was debt on a bond for duties on goods imported in the Mercury, Birt master, from London, in the common form. The bond was dated on the 5th of September, 1826. Plea of a tender of $151.18 on the day of payment of the duties, in full of the duties, specifying the goods, and the duties payable on each kind, and among them bombazines of the value, with the charges, of £67. 0s. 10d., on which the duties amounted to $65.49; that is to say, 20 per cent. ad valorem increased by the addition of ten per centum of said amount in value. Replication, that the bombazines were a manufacture of which wool was and is a component part, and are by law subject to a duty of 33½ per cent., with the addition of ten per cent., &c. Demurrer and joinder. Judgment for the defendants [Edward Clarke and others], on which the writ of error was brought.

G. Blake, U. S. Dist. Atty.

F. Dexter, for defendants.

STORY, Circuit Justice. This is a writ of error from a judgment of the district court of Massachusetts district, in a suit on the common bond given to secure the duties on certain foreign goods imported in the Mercury from London. It is unnecessary to consider the pleadings, because the parties have agreed, that the cause shall be decided upon its merits; and in this view alone has it been argued at the bar. The whole controversy turns upon the question, what duty is payable on bombazines of foreign manufacture imported into the United States under the act, commonly called the tariff act of 22d May, 1824, c. 136. That act imposes "on all manufactures of wool, or of which wool shall

[1] [Reported by William P. Mason, Esq.]

be a component part, except worsted stuff goods and blankets, which shall pay 25 per cent. ad valorem, a duty of 30 per cent., ad valorem." &c. In a subsequent clause of the same section, it imposes "on all manufactures of silk, or of which silk shall be a component material, coming from beyond the Cape of Good Hope, a duty of 25 per cent. ad valorem; on all other manufactures of silk, or of which silk shall be a component material, 20 per cent. ad valorem." Non-enumerated articles pay a duty of 15 per cent. ad valorem.

It has been suggested at the bar, that this fabric may fall under the class of non-enumerated articles. It does not strike me, that such can be the just, legal conclusion, upon the facts admitted at the argument, unless the act itself involves a repugnancy. Bombazine is a fabric, (as was admitted at the argument,) composed of worsted and silk, that is, a fabric of which wool is a component material, and silk is also a component material. It is therefore clearly comprehended in the above enumerated description of goods paying an ad valorem duty, and the only question, which can properly arise, is, to which class does it, with reference to duties, in the contemplation of the legislature, appropriately belong. The language of the first clause is, that "on all manufactures of wool, or of which wool is a component material, except worsted stuff goods," &c. a duty of 30 per cent. shall be paid. If there had been nothing more in the act, there would be little ground for doubt. Bombazines are not in the commercial sense worsted stuff goods, for that description is understood, and indeed not questioned at the bar, to apply only to the lighter sorts of goods composed wholly of worsted, such as bombazetts, plaids, bindings, &c. Such was the contemporaneous exposition given by the treasury department to the language of the act, and it has never to my knowledge been controverted. The exception indeed is carved out of the preceding description; but it does not thence follow, that it is to be construed as co-extensive with, or applicable to, all the kinds of goods, which that description was intended to include. The terms "of which wool is a component material," necessarily suppose, that there were other materials in this class of fabrics than wool; for otherwise the specification would have been wholly superfluous, as the preceding words, "all manufactures of wool" would comprehend all, of which wool was the exclusive material. The exception of "worsted stuff goods" is therefore an exception out of these latter words, and in no just sense a limitation upon the natural meaning of the other words.

As, then, bombazines are not worsted stuff goods, and as they are goods of which wool is a component material, they are liable to the 30 per cent. duty, unless it can be shown, that in some other part of the act there is an implied exception, or a necessary repugnancy, which defeats the duty. It is said, that the succeeding clause does create such an exception, because it lays a duty of 20 per cent. "on all manufactures of silk, or of which silk shall be a component material;" and silk is a component material of bombazines. If the fact is so, (and indeed it is undeniable,) it seems to me to create, not a case of exception out of the preceding clause, but of repugnancy to it. Different duties are laid in different parts of the act on the same fabric; and as it would be impossible to say, which ought to prevail, neither could prevail. The act quoad hoc would be a nullity. The fabric could not strictly be deemed a non-enumerated article, which the legislature designed should be liable to pay a duty of 15 per cent. ad valorem only, for it is doubly enumerated in the act; but the repugnancy of the clauses would lead to that as the necessary judicial conclusion. If this would be the legal result, upon the argument, it certainly deserves great consideration, before it is adopted; for the legislature ought not to be presumed to create such a repugnancy, unless the conclusion be inevitable.

My opinion is, though it is not given without hesitation, that a construction may be adopted, which will give effect to each clause without involving such a necessary repugnancy. It is this. The first clause respects manufactures, of which wool is a component material, and was designed to embrace all goods, which fall within the general description, without any exception. If any particular fabric had been intended to be excepted, it would have been incorporated into the exception or proviso of that clause. This being assumed as the legislative intention, every subsequent clause is to be construed in subordination to it. When, therefore, the next succeeding clause laid a different duty on goods, of which silk is a component material, there is an implied exception of all such goods as were already provided for in the preceding clause, that is to say, of all such goods as embraced wool and silk as component materials, leaving all other goods, of which silk was a component material, to the full operation of the duty of 20 per cent. In this way a natural and rational exposition is given to both clauses, and no repugnancy arises. And I think this construction greatly fortified by considerations derived from the other articles of cotton, flax, and hemp, in the second clause, in respect to which the same difficulty must arise, when they are in combination with wool. Nor should the observation be omitted, that this was the contemporaneous construction given by the treasury department, and it has hitherto silently prevailed without any legislative interference to cure the supposed defect in the act, or correct the supposed error of judgment in the department. The tariff act of 1828 [4 Stat. 270], just passed by congress, has been referred to by the counsel for the defendant, to show that bombazines are spe-

cially named therein. This is true, but they are enumerated as a fabric, of which wool is a component part, and as an exception from a class, which is to pay a duty of 40 per cent. ad valorem. But the same act places a duty on goods, of which silk is a component material, without excepting bombazines. So that this act plainly indicates a legislative opinion, that bombazines fall within the description of goods, of which wool is a component material, and are liable to pay duties as such, without the slightest suspicion, that it was necessary to except them from the clause respecting silks.

The judgment of the district court must therefore be reversed with costs.

Case No. 14,814.

UNITED STATES v. CLAYTON.

[2 Dill. 219;[1] 19 Am. Law Reg. (N. S.) 737; 4 Chi. Leg. News, 50; 5 West. Jur. 550.]

Circuit Court, E. D. Arkansas. Oct. Term, 1871.

ELECTIONS—GOVERNOR OF STATE—"ELECTION OFFICER"—RULES FOR CONSTRUING STATUTES.

1. The governor of a state is not "an officer of election" within the meaning of section 22 of the act of congress of May 31, 1870 (16 Stat. 145), which makes it criminal for any "election officer" fraudulently to make any false certificate of the result of any congressional election.

[Approved in U. S. v. Kelsey, 42 Fed. 886.]

2. Rules by which courts arrive at the intention of the legislature in construing criminal statutes, stated and applied.

3. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms.

[Cited in U. S. v. Whittier, Case No. 16,688; U. S. v. Reese, Id. 16,137. Approved in U. S. v. Comerford, 25 Fed. 904. Cited in U. S. v. Huggett, 40 Fed. 637; U. S. v. Garretson, 42 Fed. 25; U. S. v. Wilson, 58 Fed. 771.]

[Cited in State v. Green, 87 Mo. 585; State v. Reid (Mo. Sup.) 28 S. W. 173. Cited in brief in U. S. v. Guiteau, 1 Mackey, 505. Cited in U. S. v. Spaulding, 3 Dak. 85, 13 N. W. 539.]

4. In statutes creating and defining criminal offences, the courts will not, by construction, engraft words in one section upon those of another, unless the legislative intention be plain and clear.

5. The relations of a state to the general government, and of the governor to both, referred to as showing the improbability that congress would (if its power be conceded), provide for the trial and imprisonment of this officer for omitting or fraudulently performing election duties prescribed by state laws.

The indictment in this case was presented at the April term, 1871, and is founded upon section 22 of the act of congress of May 31, 1870 (16 Stat. 145). A demurrer thereto is filed. The indictment is, in substance, as follows: That on November 8, 1870, an election was holden under the laws of Arkansas in the several counties (naming them) constituting the Third congressional district of the state, to elect a representative in the congress of the United States; that Thomas Boles and John Edwards were respectively candidates for that office, and voted for at said election, that abstracts duly made and certified by the county clerks of the said counties composing the congressional district, of the returns of said election in the various election districts (duly made to said county clerks by the judges and clerks of said election), showing the number of votes cast respectively for Boles and Edwards, were filed in the office of the secretary of state; that on said 8th day of November, 1870, and for four months thereafter, the defendant [Powell] Clayton, was the governor of the state of Arkansas, charged with the duty of making and granting the certificate hereinafter mentioned; that during said period one Robert J. T. White was secretary of state; that December 1, 1870, said White, in the presence of the defendant, Clayton, as governor, did duly cast up and and arrange the said votes from the said several counties so returned as aforesaid; that on February 20, 1870, the defendant, as governor, did willfully, unlawfully, and fraudulently make and grant, under the seal of state, and deliver to said Edwards, a certificate, stating therein "that it appears from the returns made to the office of the secretary of state, that at an election held, etc., John Edwards was duly elected in the Third congressional district to represent the state of Arkansas in the Forty-Second congress of the United States." The indictment then alleges that the said certificate was false and fraudulent, and that, "in truth and fact, it did not appear, at the time it was made, by and upon said returns so made as aforesaid, that said Edwards was elected; but, on the contrary, it did, then and there, as aforesaid, appear by said returns that the said Boles was duly elected by a majority of one hundred votes, all of which said Clayton well knew, contrary," etc.

The election laws of the state of Arkansas, in substance, provide that the governor shall appoint registrars of election; that the board of registrars shall appoint the judges of election, and the judges, the clerks of election. The judges certify to the number of votes given to each person which is attested by the clerks. The judges are to transmit the poll books to the county clerks "within three days after the closing of the polls." "On the fifth day after the election the county clerks are to open and compare the returns and make abstracts of the votes given for the several candidates, and send certified copies of the abstracts to the secretary of state." The act provides that "it shall be the duty of the secretary of state, in the presence of the governor, within thirty days, or sooner if all the returns are received, to cast up and arrange the votes from the several counties for the persons voted for for members of congress; and the governor shall, immediately thereafter, issue his proclamation declar-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

ing the person having received the highest number of votes to be duly elected to congress, and shall grant a certificate thereof, under the seal of the state, to the person so elected." Laws Ark. 1868, pp. 314, 325.

In support of the demurrer, it was argued by the defendant's counsel that the indictment is insufficient in law: (1) Because it does not allege that the defendant was an election officer. (2) Because it does not allege what the result was of the casting up and arranging of the votes by the secretary of state, and that the certificate issued to Edwards was false according to the result ascertained by the secretary of state, the only allegation in this regard being that it was false as appears by the returns on file. (3) Because, within the meaning of section 22 of the act of congress of May 31, 1870, upon which the indictment is framed, the defendant, being the governor of the state, was not an officer of the congressional election mentioned in the indictment. (4) Because it is not within the constitutional powers of congress to provide for the punishment of the defendant, the chief executive officer of the state, in respect of acts and duties performed by him as such executive under the laws of the state.

Mr. Harrington, Dist. Atty., with whom were Messrs. Whipple, Thompson, and Barnes, for the United States.

Messrs. Wilshire, Gantt, Warwick, and Yonley, for defendant.

Before DILLON, Circuit Judge, and CALDWELL, District Judge.

DILLON, Circuit Judge. The indictment against the defendant, who was at the time of issuing the certificate of election to Edwards, the governor of the state of Arkansas, is founded upon section 22 of the act of congress of May 31, 1870 (16 Stat. 145). The amendatory act of February 28, 1871 (16 Stat. 433), does not apply to the case, since the indictment is for an act committed before its passage, and is not based upon section 20, which this last-named statute amends, but alone upon section 22, abovementioned. This section provides "that any officer of any election at which any representative or delegate in the congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election, or the result thereof; or fraudulently make any false certificate of the result of such election in regard to such representative or delegate, * * * shall be deemed guilty of a crime, and liable to prosecution and punishment therefor," by fine or imprisonment, or both.

The indictment necessarily proceeds upon the theory that the defendant, although the act charged against him was one required by the laws of the state to be done by him in the capacity of governor, was, within the meaning of the act of congress just quoted, an officer of election, and as such, issued and delivered to Edwards the certificate of election, which is alleged to be fraudulent. Accordingly, one of the counsel for the government well observed on the argument that the decisive question here was, whether the defendant, within the intention of congress, was, or was not, an election officer, and acting as such in making and delivering the election certificate set out in the indictment. If he is not an election officer, it was admitted that the indictment against him would not lie. To this fundamental inquiry, then, we first direct our attention; for, if this question be resolved against the government, that is an end of the case, and it is unnecessary to consider whether congress has the constitutional power to provide for the punishment of state officers in respect of acts performed by them as such, under state authority. And so, in this event, it would be equally unnecessary to determine whether, if the defendant were an election officer, the indictment sufficiently avers it, or charges the offence with the particularity required by the rules of criminal pleading.

The act of congress, in the section under consideration, provides for the punishment of "any officer of election" who shall "fraudulently make any false certificate of the result of any election in regard to a representative" in congress. The question is one as to the meaning of the phrase "officer of election" or "election officer." What was the scope of the legislative intention? Undoubtedly, this language was designed to include, and does appropriately include, local judges and clerks of election at which a representative in congress is voted for. But did congress mean, by this language, to include the chief executive officer of a state? Did it mean to include in any case an official act of the governor of a state, and to provide for his punishment if he shall neglect or refuse to perform any duty imposed by state laws in respect to elections for congress, or shall violate any such duty? Did it mean to include by this description an official act of the governor, which in any case cannot be done until thirty days or more have elapsed since the election was holden and the polls closed, and which, in the case made by the indictment, was not done by him until nearly four months after the election had ended? Is the act of the governor of the state, in granting the certificate of election, the act of an election officer?

This is, as above observed, a question of

legislative intention. Now, in what manner do the courts ascertain the legislative will? We answer, that it is ascertained primarily and chiefly by the language the legislature has used to express its meaning. We must suppose in the enactment of statutes, particularly statutes so important as the one under consideration, that congress weighed well the words it employed. In the office of interpretation, courts, particularly in statutes that create crimes, must closely regard and even cling to the language which the legislature has selected to express its purpose. And where the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular or general signification. Statutes enjoin obedience to their requirements, and, unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed in any unusual sense. For these reasons, whose cogency is obvious, the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is that the language is used in no extraordinary sense, but in its common, every-day meaning. When courts, in construing statutes, depart from the language employed by the legislator, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it has never had an expression. The legitimate function of courts is to interpret the legislative will, not to supplement it, or to supply it. The judiciary must limit themselves to expounding the law; they cannot make it. It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. "If this rule is violated," says Chief Justice Best, "the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws." Fletcher v. Lord Sondes, 3 Bing. 580.

The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offences, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism; nevertheless the doctrine is fundamental in English and American law, that there can be no constructive offences; that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States. U. S. v. Morris, 14 Pet. [39 U. S.] 464; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; U. S. v. Sheldon, 2 Wheat. [15 U. S.] 119. And see, also, Ferret v. Atwill [Case No. 4,747]; Sedg. St. & Const. Law, 324, 326, 334; 1 Bish. Cr. Law, §§ 134, 145.

In view of these acknowledged rules of law, the question occurs: Did congress mean, by the use of the words "officer of election" or "election officer," in the section of the statute on which the indictment is framed, to include the governor of a state? Is the governor an election officer? It seems to us not. These words are apt and usual words to describe the clerks and judges of the election, but not to describe the governor of a state. Such is not their ordinary or usual meaning. To make them apply to the executive of a state in respect to an act done a month or more after the election is closed would be a forced and unnatural meaning, and one which is not necessary in order to give the statute effect or operation. We hazard nothing in saying that in popular use no one would naturally infer that the words "officer of election" included the chief executive of a state.

Other considerations fortify the conclusion that congress did not intend to provide for the indictment of the governor of a state. The states are integral and indestructible parts of the general government, without which it cannot exist (Texas v. White, 7 Wall. [74 U. S.] 700), and in view of this relation, and of the high position and important relation of the executive of a state to the United States, as well as to the state itself, it would seem very improbable that congress would undertake to punish the governor for omitting or fraudulently discharging the duties enjoined by the laws of his state. The punishment by imprisonment would result in depriving the people of a state of the executive officer they had elected, and prosecutions of this kind, if authorized, could not fail frequently to lead to agitation, and disturb that harmony which should exist between the state and its people and the general government. Under the constitution (article 1, § 4), congress has the undoubted power to provide its own officers for the holding and conduct of congressional elections, and it would most probably exercise it, if it deemed it necessary, in preference to undertaking to

make or treat the governor of a state as an election officer, and to punish him through the national courts for malfeasance or nonfeasance in office. Kentucky v. Dennison, 23 How. [64 U. S.] 66. And especially would this seem to be so in view of the fact that the certificate of the governor is not binding upon congress, each house of which is, by the constitution, made the judge of the elections, returns, and qualifications of its own members. Const. art. 1, § 5.

Admitting, for the occasion, the power of congress to provide for the punishment of the executive of a state, as claimed by the prosecution, we repeat, that in view of the foregoing considerations, it seems to be improbable that it would undertake to exercise the power. At all events, it is impossible, on legal principles, that any such intention should be held to exist from the use of the general words "election officers."

We have carefully considered the very able arguments which have been addressed to us to show that the governor is embraced in the more general language of sections 19 and 20 of the same act, and that, if so, these words, supposed to include the governor, should, though omitted by the legislature, be inserted by judicial engraftment into section 22, on which the indictment is founded. In answer to the argument, we deem it necessary only further to observe that the governor is not in terms named in either of those sections; that it is far from certain that they intended to embrace any official act of this officer, and, if they did, we could not, after the judgment of the supreme court, delivered by Chief Justice Marshall, in U. S. v. Wiltberger, supra, enter upon the dangerous and unauthorized work of incorporating the provisions of one section of a law into another. We could never be sure that we did not put in what congress may have purposely left out. The bill charges no indictable offence, and the demurrer thereto must be sustained. Demurrer sustained.

As to enjoining the governor of a state by the federal courts. Murdock v. Woodson [Case No. 9,942]; Harrison v. Hadley [Id. 6,137].

Case No. 14,815.

UNITED STATES v. CLEMENT et al.

[Crabbe, 499.] [1]

District Court, E. D. Pennsylvania. March 27, 1843.

CUSTOMS DUTIES — "AD VALOREM" — VALUE OF PACKAGES—DUTIES VOLUNTARILY PAID WITHOUT PROTEST.

1. The term "ad valorem," used in the various revenue laws of the United States charging a duty on imports, does not always mean the actual value of the article at the place of exportation.

2. The 7th section of the act of 14th July, 1832 [4 Stat. 591], directed that goods should be appraised at their actual value at the time of purchase and place of exportation; the act of 29th May, 1830 [Id. 409], fixed the duty on molasses at five cents per gallon; the 1st section of the (compromise) act of 2d March, 1833 [Id. 629], directed that in all cases where duties imposed on foreign imports should exceed twenty per cent on the value thereof, one-tenth of such excess should be deducted biennially, &c. Molasses being imported under these acts, the cost of the packages in which it was contained formed a proper item of its value on which to calculate the twenty per cent.

3. But if, in addition to including the value of the packages in that of the molasses, a separate duty had been charged on them, it would have been wrongly imposed.

4. Duties wrongly imposed, if paid by the importer voluntarily and without protest or remonstrance, cannot be recovered from or set-off against the United States.

5. Payment to a public officer, if unaccompanied by remonstrance or protest, which need not be written, is a voluntary payment.

[Cited in Northrup v. Shook, Case No. 10,329.]

This was an action on a custom-house bond, No. 1294, dated 30th June, 1841, conditioned for the payment of $793, on the 30th December, 1841, that sum being part of the duties charged on an invoice of molasses, imported by the defendants [Clement and Newman] from Cuba into Philadelphia. The act of 29th May, 1830 (4 Story's Laws, 2211 [4 Stat. 409]), fixed the duty on molasses at five cents per gallon; the act of 14th July, 1832, section 7 (4 Story's Laws, 2323, 2324 [4 Stat. 591]), directed that goods should be appraised at their true and actual value at the time of purchase and place of exportation; and the (compromise) act of 3d March, 1833, § 1 (4 Story's Laws, 2328 [4 Stat. 629]), enacted, that in all cases where duties imposed on foreign imports should exceed twenty per cent. on the value thereof, one-tenth of such excess should be deducted biennially until the 31st December, 1841, after which day one-half the residue of such excess should be deducted, and that the remainder thereof should be deducted after the 30th June, 1842. On the arrival of the molasses, for part of the duty on which this bond was given, the custom-house officers at Philadelphia, in accordance with their instructions and usual custom, calculated the duty on the number of gallons at five cents per gallon, and also on the gross value, including that of the hogsheads, tierces, &c., in which the molasses was contained, at twenty per sent. ad valorem; they then deducted from the result of the first method of calculation four-tenths of its excess over that of the second method (it then being in the fourth biennial period), and so fixed the amount of duty to be charged, thus:—

Duty on 36,031 galls. at 5 cents per gall.		$1,801 55
Value, including packages, &c.	$6,309 00	
Twenty per cent. thereon	1,261 80	
Excess at 5 cents per gall.	539 75	
Deduct four-tenths of this excess		215 90
Net duty		$1,585 65

[1] [Reported by William H. Crabbe, Esq.]

For this amount of $1,585.65 the defendants gave two bonds,—the one on which this suit was brought, and the other, of similar date and condition, for $792.65; they were, however, of opinion, that the value of the molasses should have been appraised exclusive of the packages in which it was contained, and therefore, in order to test the question, allowed the bonds to remain unpaid and suit to be brought thereon. The defendants' method of calculation was as follows:—

Duty on 36,031 galls. at 5 cents per gall.		$1,801 55
Value, excluding packages, &c.	$4,663 82	
Twenty per cent. thereon	932 76	
Excess at 5 cents per gall.	868 79	
Deduct four-tenths of this excess		347 51
Net duty		$1.454 04

—Being $131.61 less than by the custom-house calculation.

The invoice contained the following statement of the cost and charges:—

Original cost of molasses		$4,031 1rs.
Charges.		
Export duties	$ 264 3rs.	
Cost of casks	1,616 5½	
" " bbls.	28 4	
Hire " casks	37 1	
Cartage, storage, and gauging	177 2	2,123 7½
Commissions on $6,155.0½ at 2½ per cent.		153 7
		$6,308 7½

The defendants claimed to set off against the demand of the United States both one-half of the sum of $131.61, alleged to be an overcharge on this importation,—the present bond being for one-half the gross duties,—and also the sum of $345.22, being an alleged overcharge, under similar circumstances, paid by them on a former importation. A claim for the repayment of these sums had been disallowed by the treasury department.

Mr. Watts, U. S. Dist. Atty.

Though the amount claimed here is but small, the principle involves the restoration of an immense sum,—not only nineteen or twenty thousand dollars heretofore paid by these defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. The execution of this bond is not denied, but it is contended on the other side that the defendants are entitled, in the first place, to a credit of $65.80½, one-half the difference between the two methods of calculating the duties on this importation, and, secondly, to one of $345.22, arising, in a similar manner, on a previous importation, and then paid by these defendants. To oppose these credits we rely on the compromise act of 1833, and especially on its fifth section, which shows that since the passage of that act the policy of government has been to abolish specific duties and adopt the ad valorem system, which we shall see embraces all charges in the estimate of value. We also rely on the acts of 29th May, 1830, imposing a specific duty of five cents per gallon on molasses, and of 14th July, 1832, section 15, prescribing the method of assessing duties on goods under the ad valorem system, and requiring that all charges but insurance shall be included in the estimate of value. The ninth section of this last act authorizes the secretary of the treasury to establish regulations to carry out the law, and thereunder the treasury circular of 20th April, 1833 (Book of Treasury Circulars, 71), directs that, as to articles subject to specific duties, the comparative ad valorem rate, under the act of 1833, is to be calculated according to the system of the law of 1832, and other laws imposing ad valorem duties. It is conceded by the defendants that where the duties are ad valorem, all charges are included in the appraisement, but they contend that in estimating the comparative ad valorem rate as to articles subject to specific duties, it is merely on the value of the article itself; this we deny, and insist that an ad valorem rate can mean but one thing, and be calculated in but one way. The defendants, in their sworn invoice, have themselves assented to the system adopted in this case, by giving us there the cost of the hogsheads as part of the charges in Cuba. Those charges being shown by the invoice, the only method of calculating the duties by the laws just cited, and by the treasury instructions under them, is to ascertain, first, the specific duties, next, what they would be at twenty per cent. ad valorem, including all charges except insurance, and then, if there is any excess in the former over the latter, to deduct four-tenths of that excess (being then in the fourth biennial period) from the whole amount of the specific duty, and charge the remainder thereof as the proper rate. This disposes of the first credit claimed.

To the second credit defendants ask for, we reply, first, that it is covered by the same objections as the other, and, second, that the duties on which it is founded were paid voluntarily and cannot be recovered by the defendants, they having given no proof of compulsion or protest. Act March 3, 1839, § 21 (9 Bior. & D. Laws, 1012 [5 Stat. 348]); Mowatt v. Wright, 1 Wend. 355; Clark v. Dutcher, 9 Cow. 674; Lowry v. Bourdieu, Doug. 470; Ripley v. Gelston, 9 Johns. 201; Greenway v. Hurd, 4 Term R. 553; Whitbread v. Brooksbank, Cowp. 69; Brisbane v. Dacres, 5 Taunt. 144; Bank of U. S. v. Bank of Washington, 6 Pet. [31 U. S.] 8.

Mr. Cadwalader, for defendants.

Our defence in this case is founded on a belief that there has been an overcharge of duties on this importation, amounting to $131.61, which has arisen from a mistake in the method of calculating the comparative

ad valorem rate, and therefore, while we admit the execution of the bond, we claim to set off against it both the sum of $65.80½, one-half that overcharge, and also one of $345.22, heretofore paid by these defendants under similar circumstances. The methods of imposing duties on imports are two: ad valorem and specific. Under neither system has it been the policy to charge a duty on the packages containing the article imported—indeed, in some instances, it has been the policy to encourage certain descriptions of packages—and under the specific system the duty is expressly charged on the goods themselves. Under the ad valorem system, however, it was enacted that all charges but that of insurance were to be included in the estimate of value; this soon gave rise to great dissatisfaction, which was finally settled by the adoption of the compromise act of 1833, by which duties were gradually reduced to a horizontal scale of twenty per cent. on their home value, and this reduction is to be accomplished by comparing the specific rate with one of twenty per cent. on the value, and regulating the former by the latter. The question here simply is whether, in calculating the rate on the value in order to ascertain the amount of specific duty to be charged, we are to include the cost of packages, although it is admitted that they are not chargeable with specific duties. The process at the custom-house is to calculate the specific duty on the article itself, and an ad valorem duty on the article and the packages containing it; thus, while the law of 1833 directs a reduction of four-tenths when the duties exceed twenty per cent. on the value of the article, the officers manage to add to the duty four-tenths of twenty per cent. on the value of the package. The law says that the specific duty shall bear a certain proportion to twenty per cent. on the value of the article, but the custom-house construes this to mean, not the real value of the article, but a fictitious value, assigned to it according to a peculiar system, adopted where the duties are not specific but ad valorem. In this case they gain for the United States thereby, four-tenths of twenty per cent. on nearly $1,700 more than the real value of the molasses.

It is admitted by the district attorney that the packages themselves are not dutiable. But he also says that, since the act of 1833, the policy of the government has been to bring the duties to an ad valorem standard. That is true and not true. The policy, since then, certainly was to come to a duty on the value, and in facilitating and regulating that process to have a constant reference to the value of the article, but not to the foreign value. The law of 1833 has reference to the real value of the article, "the value thereof" is its expression; but the term "ad valorem" has a peculiar meaning attached to it by the revenue laws. It means something more than the intrinsic value of the article: it is that value with an addition. The officers of the custom-house, however, construe value and ad valorem as the same thing, thereby indirectly defeating the intent of the law, and preventing the specific duty from bearing the prescribed proportion to twenty per cent. on the value of the article. The act of 1832 itself, which the district attorney relies upon to support the custom-house method of calculation, plainly recognizes this difference of meaning. In the second section, it speaks of the value of wool under which it shall be free of duty, and in the fifteenth section, directs various charges to be added to the value to appraise the ad valorem rate. This distinction may also be seen in the eighth and ninth sections of the act of 19th May, 1828 (4 Story's Laws, 2116–2118 [4 Stat. 273]). It seems clear therefore that the twenty per cent. of the act of 1833, cannot be ad valorem, but on the value—the intrinsic value—of the article.

We are not to be governed in our construction of the laws by the directions of treasury circulars. The act of 1832 certainly allows the secretary of the treasury to make regulations for carrying the laws into effect, but it requires that it must be "not inconsistent with law;" and such has been the decision of our courts. Karthaus v. Frick [Case No. 7,615], in the circuit court of the United States for the Maryland district; Elliott v. Swartwout, 10 Pet. [35 U. S.] 137. Both our claims for credit or set-off rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is, therefore, not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted colore officii, and is therefore not voluntary, and may be admitted as a set-off. Act March 3, 1797, §§ 3, 4,—1 Story's Laws, 464 [1 Stat. 512]; U. S. v. Wilkins, 6 Wheat. [19 U. S.] 144; U. S. v. Bank of Metropolis, 15 Pet. [40 U. S.] 377; Elliott v. Swartwout, 10 Pet. [35 U. S.] 137; Morgan v. Palmer, 2 Barn. & C. 729; Ripley v. Gelston, 9 Johns. 209; Clinton v. Strong, 9 Johns. 377.

H. D. Gilpin, for defendants.

This is a simple case of construction of language, by which we are to infer the intention of congress. In cases where two constructions may be given, the United States uniformly and on principle adopt that which will produce the most duty, nor is such a course open to any great blame so long as the decisions of courts are, as they have been, generally adverse to the construction adopted by government. The construction of the various laws affecting this importation which the custom-house has adopted produces a duty to the United States of $1,585.65, and that which the defendants think right gives them but $1,454.04, being

a difference of $131.61, a small sum in itself, but involving, as the district attorney has truly said, the propriety of the payment of immense ones. Between these two constructions it is now to be decided.

The whole question is as to the propriety of charging duty on the packages containing the molasses, the value of which was $1,645.18; or, in other words, whether that sum is to be added to the value of the molasses. Under the laws regulating duties on this importation, they were to be charged at the rate of five cents per gallon thereon, provided that charge did not make the duty amount to more than twenty per cent. on the value of the article imported, and if it did exceed twenty per cent. on "the value thereof" then four-tenths of that excess was to be deducted. But the article imported was the molasses, not the package which contained it, and therefore the value meant must have been that of the molasses alone. This is very apparent from the words of the act of 1833 itself, and also from its well-known intention to prevent complicated calculations, to fix a horizontal standard, and to reduce the duties. How far the duties would be reduced under the system of calculation adopted at the custom-house may be easily seen. Suppose an importation of flour: 196 lbs. at a half cent per lb. would be 98 cents per barrel; the value of the flour is $4.50 and of the barrel $1.50, in all $6.00; but twenty per cent. on $6.00 is $1.20,—an increase of duty, not a reduction; while, on our system of calculation, the specific duty being 98 cents, twenty per cent. on $4.50, the real value of the article, is 90 cents,—a reduction of 8 cents per barrel. The distinction between "value" and "ad valorem" may be seen from the opposite meanings attached to them in various acts of congress. Acts March 2, 1799 (1 Story's Laws, 626 [1 Stat. 627]); 27th April, 1816 (3 Story's Laws, 1588 [3 Stat. 310]); 20th April, 1818 (3 Story's Laws, 1680 [3 Stat. 433]); 1st March, 1823 (3 Story's Laws, 1884 [3 Stat. 729]); 22d May, 1824 (3 Story's Laws, 1942 [4 Stat. 25]); 19th May, 1828 (4 Story's Laws, 2113 [4 Stat. 270]); 14th July, 1832 (4 Story's Laws, 2317 [4 Stat. 583]). The act of 1832 offers us a strong case to show the error committed by the custom-house in construing the "value" of the article to be the same as that on which duty is assessed "ad valorem." By that act, wool, the value whereof does not exceed eight cents per pound, is free, but when its value is over eight cents per pound, it pays forty per cent. ad valorem; now if 100 lbs. of wool, worth seven and a half cents per pound, are imported in a wrapper costing fifty-six cents, and the value is taken by the custom-house system, this wool must pay forty per cent. duty, though it is really worth only seven and a half cents per pound, and therefore, by the express words of the law is free.

Another objection to which this custom-house calculation is open is, that it really charges a duty of four-tenths of twenty per cent. on the packages, though it is admitted that they are not dutiable. It does indirectly what is forbidden if directly attempted. That such is its real effect can be easily shown. We have seen that, while the custom-house deducts but $215.90 from the specific duty, as the required four-tenths of its excess over the twenty per cent. on the value of the molasses, the defendants would deduct $347.51, and that by this means the custom-house gives the United States $131.61, in addition to the specific duty, when reduced by four-tenths of its excess over twenty per cent. on the real value. What is this $131.61? It is four-tenths of twenty per cent. on the value of the packages in which the molasses is contained. This is not denied. The custom-house calculation is, therefore, two operations combined in one, and when shown at length, will appear in this form:—

Specific duty, at 5 cents per gall. on 36,031 gals.		$1,801 55
Value of the molasses...	$4,663 82	
Twenty per cent. thereon	932 76	
Deduct four-tenths of this 20 per cent.		347 51
Duty on molasses		$1,454 04
Value of the packages..	$1,645 18	
Twenty per cent. thereon	329 03	
Add four-tenths of this twenty per cent.		131 61
Whole duty on molasses and packages		$1,585 65

The action of the custom-house officers, therefore, is simply an imposition of duty forbidden by law and decision. Karthaus v. Frick [supra].

For these reasons we claim to set off $65.80½, one-half the overcharge on this importation.

The second set-off we urge arises from past payments by the defendants of similar overcharges, and amounts to $345.22. The laws of the United States have been very careful to allow any equitable credits, provided they have been presented and disallowed at the treasury as these have been. Act Sept. 24, 1789, § 26 (1 Story's Laws, 62 [1 Stat. 87]); Act March 3, 1797, §§ 3, 4 (1 Story's Laws, 464 [1 Stat. 512]); U. S. v. Wilkins, 6 Wheat. [19 U. S.] 144; U. S. v. Macdaniel, 7 Pet. [32 U. S.] 12, 16; U. S. v. Ripley, Id. 25; U. S. v. Fillebrown, Id. 48; U. S. v. Mann [Case No. 15,716]. If these charges were wrongfully imposed, there must be a right to have them refunded, and this right will found an equitable set-off. It is said, however, that the payment of this amount was voluntary and without protest, and that as it could not be recovered under such circumstances, it cannot be set off. We answer:—That there is evidence for the jury, that the payment was not voluntary, and that there was a verbal protest; a written one being unnecessary. That there was no payment to the United States at all in strictness of law. The charges were illegal, and the officers of government may not receive any payment but such as is according to law; the money, therefore, was

never properly in the treasury. That a payment demanded and made under the instructions of a treasury circular is by compulsion. That an erroneous payment to a public officer is never voluntary, and that, even if this were not law, where there is an evident error, and the question is between original parties, equity will interfere. Dew v. Parsons, 2 Barn. & Ald. 568; Morgan v. Palmer, 2 Barn. & C. 734–738; Ripley v. Gelston, 9 Johns. 209; Astley v. Reynolds, Strange, 915; Hunt v. Rousmanier, 8 Wheat. [21 U. S.] 215. As to Elliott v. Swartwout, it was not a case between parties having a right of mutual set-off, but it was against an agent for wrongly paying over. So of Bank of U. S. v. Bank of Washington, and the case in 9 Cow. 674. The act of 1839 was never intended to apply to set-off; it is a mere regulation of finances. The questions to be decided, then, are simply: what is meant by "the value" of the article imported, and whether the law allows a charge of duty both on that article and on the package containing it.

Mr. Watts, U. S. Dist. Atty., in reply.

The defendants take two positions: First that "ad valorem" and "value" have a different meaning, and, second, that because the custom-house officers did not recognise this difference, the defendants were wrongfully obliged to pay excessive duties, which they now ask on equitable grounds to set off against the United States. Under the first position they claim credit for $65.80½, under the second for $345.22. He who claims equity must do equity. As to the second credit, the defendants, if they have been wrongfully charged, have been repaid by the consumers to whom they sold, and if they are now allowed to set off prior payments, will really have been twice paid the amount they set off. They are not out of pocket by their payments heretofore, and have no equitable position before this court, at least so far as regards the claim for $345.22. Other objections also apply to that set-off, which we shall take up hereafter. The other credit, for $65.80½, is based upon an alleged misconstruction of law at the custom-house, and the assertion that "value" and "ad valorem," have different meanings. We think those expressions are identical; government thinks so, according to the treasury circular; people generally think so, according to the common use of the terms; the defendants themselves think so, according to their own invoice, which sets forth all possible charges, except insurance, as part of the value. The intention of the act of 1833, was merely to make a reduction on the excess of duty over twenty per cent.; not a reduction of specific duties; not to bring the duties at once to a low level, but to do so gradually. It is not denied that the reduction applies to duties on foreign imports, and it is fixed by law that the value of foreign imports shall include all charges except insurance. Undoubtedly, before the act of 1833, the value of packages was not included in that of articles which paid specific duties, but the law of 1833 changed this and prescribed a home valuation, which must include the value of packages, and other charges.

The decision of Chief Justice Taney in Karthaus v. Frick [Case No. 7,615], was under the law of 1832, and decides, as we have said, that under that law no duty was chargeable on the packages containing goods liable to specific duties. The act of 1833, however, imposes duties on the value—ad valorem duties on articles before subject to specifics; it prescribes a new method of calculation founded on both systems, and a sort of mongrel between them. Not being an act for specific duties, the decision in question does not apply to it. The fifth section expressly says, that its object is to reduce duties theretofore specific, to a duty of twenty per cent. ad valorem.

If we are right in this answer to the first set-off, we have also disposed of the other, for both rest on the same argument; but, even should we fail in that, the second set-off is liable to other and graver objections. Beside the want of equity we have before urged, we allege that it was a voluntary payment. The question on that is one purely of fact, and the jury will judge whether there has been any evidence of compulsion or protest worthy of notice.

RANDALL, District Judge (charging jury). This action was brought to recover the amount of a bond dated June 30, 1841, conditioned for the payment of $793 on the 30th of December, 1841, that being a moiety of the duties charged on a shipment of molasses imported by the defendants, in the brig Augusta, from Trinidad, Cuba, and entered at the custom-house on the day of the date of the bond. The execution of the bond is admitted, but it is alleged that the amount of the duties has been improperly assessed, and the sum of $131.61 overcharged on this shipment. By the act of May 29, 1830, it is enacted, that from and after the 30th of September, 1830, the duty on molasses (which by the act of 1828 was ten cents per gallon) should be "five cents for each gallon, and no more." By the act of March 2d, 1833, commonly called the "Compromise Act," it is provided that from and after the 31st December, 1833, in all cases where the duties which had been imposed on foreign imports by the act of 1832, "or by any other act," should exceed twenty per centum on the value thereof, one-tenth part of such excess should be deducted; on the 31st of December, 1835, another tenth; on the 31st December, 1837, another tenth; on the 31st December, 1839, another tenth; and from the 31st December, 1841, one-half the residue of such excess; and from and after the 30th of June, 1842, the residue of such excess.

The controversy in this case arises out of the mode of ascertaining what was the value

of the molasses on which the duty is to be assessed. On the part of the United States it is alleged, that the value is to be ascertained in the same way that the value of articles subject to an ad valorem duty is ascertained; while the defendants contend that such is not the true construction of the act. That the term "ad valorem," as mentioned in the various revenue laws of the United States, charging a duty on imports, does not always mean the actual value of the article at the place of exportation, is evident from an examination of some of the acts. The act of 1818, § 4 (3 Story's Laws, 1680 [3 Stat. 433]), directs that ad valorem rates of duty shall be estimated by adding twenty per cent. to the actual cost thereof, if imported from or beyond the Cape of Good Hope, and ten per cent. on the actual cost if imported from any other place, including all charges, except commission, outside packages, and insurance. The acts of 1823, § 5 (3 Story's Laws, 1884 [3 Stat. 729]), and of 1828 (4 Story's Laws, 2117 [4 Stat. 273]), provide, that to the actual cost or value the same percentage shall be added, and as to the charges only excepts that of insurance. The act of 1832 (section 15) directs that to the actual cost or value, all charges except insurance shall be added, but section 4 abolishes the addition of ten and twenty per cent. The seventh section of the act of 1832, directs that goods shall be appraised at their true or actual value, at the time of purchase and place of exportation, "any invoice or affidavit to the contrary notwithstanding." The third section of the act of 1833, provides that from and after the 30th of June, 1842, the duties required to be paid by law on goods, wares and merchandise, shall be assessed upon the value thereof at the port where the same shall be entered, under such regulations as may be prescribed by law: this section, however, was not in operation when these goods were imported. A letter of instructions from the secretary of the treasury, directing the mode of estimating duties under the law of 1833, has been given in evidence, and relied on by both parties, as supporting their view of the case: but such instructions, although they may be a justification for the officer enforcing them, are not binding on the citizen, unless they contain a correct interpretation of the law.

What, then, under these several acts of congress, was the true and legal duty chargeable on this invoice by the Augusta? It is said by the defendants that in addition to the value of the molasses, the custom-house officers have charged a duty of twenty per cent. on the hogsheads or casks in which it was contained. If they have done so, it is an error.

The various acts of congress imposing duties on the importation of foreign merchandise, have always had reference to the package, vessel or article in which such merchandise is imported, but in no instance have they imposed a separate or distinct duty on such article; thus, for instance, by the act of 1832, a duty of six cents per gallon is imposed on red wines of France imported in casks, while the same wine imported in bottles is subjected to a duty of twenty-two cents per gallon. By the same act a specific duty is imposed on bottles; yet it will not be pretended that the wine imported in bottles shall pay a duty of twenty-two cents per gallon, and the bottles in which it is contained a separate and distinct duty. The distinction is, that wine in bottles is sold with the bottle, and is thus of greater value than wine in casks; the duty is charged on the article in the state or condition in which it is exported.

Have, then, the duties on this invoice been charged on a sum greater than the value of the molasses at the time and place of exportation? The defendants contend that the duties are chargeable only on the first cost of the molasses, and if they could have exported it at that price they are correct, and the charge for the hogsheads should not be added. But was the value of the molasses at the time of exportation no more than when purchased at the plantation? Could it have been exported without the hogsheads or casks? Did not its being placed in these increase its value to the extent of the sum mentioned in the invoice? If so, the duties are correctly charged, as they are to be levied on the value and condition at the time and place of exportation, and not on the original cost of the article in the interior of the country. But if the jury should think that, in addition to the value of the molasses, the custom-house officers have charged a distinct and separate duty on the hogsheads, the defendants will be entitled to a credit on one-half of such excess in this suit, the bond being only for a moiety of the duties on this importation, and no part having as yet been paid.

The defendants also claim an allowance for a similar charge, amounting to $345.22, on sugar and molasses imported in the Hercules, which they have paid. If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question; should they think otherwise, then a new question arises for their consideration, and that is, were the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law; if they were so paid, they cannot be recovered back or deducted from the claim of the United States. It has been argued that a payment, to a public officer, cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands: this may be so where the party paying objects, at the time of payment, to the propriety and legality

of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to; but if paid without such objection, merely on a mistaken construction of the law, it is binding and cannot be recovered back, or set-off against another demand. Was there then any such notice or objection by the defendants at the time of payment? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased, his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector, Mr. Martin, the cashier, Mr. Bell, the ascertaining clerk, and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant, and Mr. Howell states that if such complaint had been made, it would have been within his peculiar duty to examine it, but he knows of none.

Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes or hogsheads, over and above the value of the sugar or molasses at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no such excess was charged, or if charged, that it was paid voluntarily and without complaint, it is binding on the defendants, and they will not be entitled to the deduction.

On the 28th March, 1843, the jury returned a verdict for the United States against Clement for $851, Newman having been discharged under the bankrupt law.

Case No. 14,816

UNITED STATES v. CLEMENTS.

[2 Cranch, C. C. 30.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

BASTARDY—RECOGNIZANCE—HOW TAKEN.

A recognizance in a case of bastardy cannot be taken by a justice of the peace, in Virginia, unless upon the application of the overseers of the poor.

This was a recognizance taken by a justice of the peace in Alexandria in a case of bastardy.

E. J. Lee, for defendant, moved the court to quash it because it was not taken at the request of the overseers of the poor, according to the act of assembly of Virginia of 26th December, 1792, p. 183, § 13.

THE COURT (THRUSTON, Circuit Judge, absent) ordered the recognizance to be discharged, unless the overseers of the poor should appear at this term and show cause to the contrary.

Case No. 14,817.

UNITED STATES v. CLEMENTS.

UNITED STATES v. REID.

[3 Hughes, 509; [1] Howison. Cr. Tr. 89.]

Circuit Court, E. D. Virginia. May 19, 1851.

WITNESS—JOINT INDICTMENT—NEW TRIAL—AFFIDAVIT OF JURORS.

1. In joint indictments one of the accused is not a competent witness for the others, unless he have been acquitted.

2. On motions for new trial in criminal cases affidavits of jurors ought not to be received to impeach their own verdict.

On the 4th of February, 1850, the schooner J. B. Lindsey, Captain S. S. Riggs, came into the port of St. Thomas, West Indies, with signals of distress, and on landing, the captain and two men, who composed the whole crew, reported that while at sea near Trinidad, the mate, John Heeney, and a passenger named John Walker, had been murdered by two of the crew, named Edward Clements and Thomas Reid, who had afterwards left the schooner in an open boat, and they were supposed to have landed somewhere on the Spanish main. The American commercial agent at St. Thomas, Charles H. Delavan, Esq., took prompt measures for their discovery and arrest. He had handbills printed and extensively circulated in which the men were described, and a reward of two hundred dollars was offered for their apprehension. Mr. Delavan addressed a letter to Louis Baker, Esq., American consul at Laguayra, Venezuela, inclosing one of the handbills, and earnestly asking his attention to the subject. In a very short time the following letter was received by the chief of police at Laguayra from the custom-house officer at Higuirote, a small port on the Atlantic, not far from Laguayra: "(Translation.) Custom-House, Republic of Venezuela, Comptroller's Office. Higuirote, February 11th, 1850. The Mayor of the County, Laguayra: I have passed to the honorable secretary of state on this day, under the number of 73, a communication where I inform him that a boat had reached this port with two Englishmen, who stated they came from Maracaibo in five days of navigation, and as they have not presented any document that will justify what they say, or the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

place they started from, and it being very strange that a small boat should have made such a long navigation as that from Maracaibo to this port, and having stated that their voyage was for Laguayra, this custom-house has ordered the two Englishmen to pass to the port of Laguayra in the Venezuelan sloop, St. Johns, captain Elestino Ganis, and that they be presented to the mayor, so that they may be examined, and that their consul may make convenient investigation, for no civil authority whatever is in this port now that could do it. The boat, with it appurtenances, remains in this port, which you will dispose of, though said Englishmen have offered it for sale for the sum of forty dollars. I remain your obedient servant, Juan Jose Ferrai."

When these men arrived in Laguayra, Consul Baker saw them, and, comparing them with the description in the handbill, was convinced they were the same therein mentioned. He immediately wrote to Mr. Delavan, who communicated with Commodore Parker, of the United States West India squadron, and the sloop-of-war Germantown, commander, Charles Lowndes, was sent to Laguayra. In the meantime, by request of Mr. Baker, the boat, with two pistols, a dirk knife, and some other things found in it, was sent from Higuirote to Laguayra.

On the arrival of the Germantown, Lemuel Franklin and James Jackson, two of her crew, recognized the two men as Edward Clements and Thomas Reid, with whom they had served aboard the United States sloop Saratoga at Norfolk. Judicial examinations were made by the Venezuelan authorities; the tribunal of justice took the depositions of witnesses, and certified them to the office of the American consulate. In one of these depositions James Jackson testified: "Que habiendo ahora dias ido á la carcèl le preguntaron duos individuos que se decia a bordo de ellos; que si sabia lo que les harian; que el esponente entonces les pregunto si era cierto que habian matado el piloto y el pasajero, y Clements le contesto; qui si no hubiera sido por tres botellas di brandi que tenian a bordo no habiera sucedido nada; pero como el piloto le pego con un pasador, lo mato con un cuchillo; que entonces el pasajero corrio á auxiliar al piloto, y como estuviese Reid gobernando el timon lo dego, y corrio sobre el pasajero y lo hecho á el agua;" que el declarante, "then asked them if they had wounded the captain, and they replied they did not know he had been wounded; they had no such intention, as the captain was a very good man." On the 10th of April, 1850, by order of the president of the republic, transmitted through the governor of the province, the two men were placed at the disposal of Consul Baker, together with the boat and its accompaniments. The Germantown sailed with them for the United States, and on the 5th of June, 1850, they were brought into Norfolk by the United States steamer Vixen, lieutenant commanding, Ward, to whom they had been transferred from the Germantown. After examination they, the two men, were sent to Richmond for trial in the United States circuit court.

William T. Joynes, U. S. Dist. Atty., for the prosecution.

William P. Byrd, William A. Cocke, and Joseph M. Carrington, for Clements.

Wednesday, November 27th, 1850.

The prosecution was under the act of congress, 30th April, 1790, art. 3168,—Gord. Dig. 929, 930 [1 Stat. 112]: "If any person commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which, if committed within the body of a county, would, by the laws of the United States, be punished with death; or if any captain or mariner of any vessel shall piratically and feloniously run away with such vessel, or any goods or merchandise to the value of fifty dollars, or yield up such vessel voluntarily to a pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be brought."

The indictment contained five counts, charging the prisoners jointly with the murder of John Heeney, on the 27th of January, 1850; the murder was charged as done "piratically, wilfully, feloniously, and of their malice aforethought," on the high seas, not within the jurisdiction of any state, or of any of the United States, but within the jurisdiction of this court. (1) The first count charged the murder as committed with a pistol, discharged by Reid, Clements present, aiding and abetting. (2) The second charged the murder as committed with a pistol discharged by Clements, Reid present, aiding and abetting. (3) The third charged the murder as committed with a dirk, held by Reid, Clements present, aiding and abetting. (4) The fourth charged the murder as committed with a knife held by Clements, Reid present, aiding and abetting. (5) The fifth charged the murder as committed by both, with instruments and weapons to the (grand) jurors unknown. The indictment farther said, that the Eastern district (Fourth circuit) of Virginia, is the district and circuit to which the accused were first brought.

The prisoners elected to be separately tried, and the case of Edward Clements being ready, his trial proceeded. He appeared to be from twenty-five to thirty years old, had

light-brown hair, high cheek bones, light-gray eyes, and rather well-shaped features; his height was probably five feet nine inches. He pleaded "not guilty" to the indictment. The arraignment was joint, and each prisoner pleaded the same plea.

THE COURT (HALLYBURTON, District Judge). A question may arise as to the mode of obtaining the jury. I am of opinion that I might proceed according to the law now in force in this state, but as it has been heretofore held in full court that a prisoner is entitled to his peremptory challenges, and as I do not wish, sitting alone, to change the rule, I will allow the usual number of peremptory challenges, and then proceed to organize the jury according to the existing state law. This course will be most favorable to the accused.

The following were the jury: Peter Crew, Robert P. Richardson, Leonard Slater, W. L. McMinn, J. B. Dupuy, John A. Lancaster, William Boothwright, John D. Shell, Alex. Garrett, Charles Stebbins, Peyton G. Bayley, E. M. Porter.

For the United States:

Solomon S. Riggs, sworn.—I was captain of the schooner J. B. Lindsey during the past winter; the prisoner was on board as a sailor before the mast. On the 27th day of January, Sunday morning, we came out to sea from Port of Spain, Trinidad; we got out between 8 and 9 o'clock in the morning; things went on pretty well during the day; that afternoon a pistol was fired on deck; I was lying in my berth; I was alarmed and went on deck, and asked the mate what the pistol was fired for? He said he did not know, he would go forward and see. The mate, John Heeney, then went forward, and after awhile returned and said he would soon give me an account of it. I went to my cabin; in a short time the mate handed me two pocket-pistols; I took them and said: "They are more of men than I took them to be." My watch was out at 8 o'clock; Clements and Castello were in my watch; Reid was in the mate's watch, which was from 8 to 12. Before I left the deck I said to Clements: "Keep a good lookout, will you?" He spoke kindly and said: "Yes, sir." It was a fine moonlight night; I left the passenger, John Walker, at the wheel; the mate was also on deck; I went to the cabin and turned into my berth. Between 10 and 11 o'clock I was awakened by a sound—it may have been a pistol-shot or a shrill scream. I jumped up, caught in my hands two small pocket-pistols, and ran upon deck; the cabin had two doors, each opening to the stern; the starboard door was shut; the larboard open. When I got on deck I saw persons on the starboard side running forward, half bent, between the cabin-house and the side of the schooner. I found the mate lying by the wheel, a stream of blood running from his body to the larboard; he was groaning and crying: "Lord! have mercy on me!" I tried to encourage him and to get him into the cabin; presently I heard some persons running aft on the larboard and starboard sides of the cabin-house; I don't know who was on the starboard, but the man on the larboard was Reid; I saw him, and saw the flash of his pistol as he fired at me; I felt myself hurt and staggered back, and fired my left-hand pistol, but missed him; I got into the cabin and sought to close the door; the cook was with me; I found my shirt bosom was all bloody; immediately afterwards three heavy blows were struck on the starboard door, and a voice, which I took to be Clements's cried: "Cook! come out and be murdered!" I think this was only to draw my attention, for instantly Reid again fired at me through the open door; I returned his fire, and when the smoke cleared I saw him lying on the deck; I think my ball struck him somewhere between the mouth and the eyes. I said to the cook: "I have got one down," and I think I said: "Now don't you look pretty, you old pirate," or something like that; I told the cook to look for my powder; I thought it was in my chest, which was opened, but presently I found it in my pocket, and loaded both my pistols; in the meantime the man lying on deck got up and went away; the cook took the two little pistols that had been handed to me by the mate, and loaded them. I put some brown paper on my throat and breast, and drank vinegar during the night; I bethought me of a small after-cabin, behind and lower than the chief cabin; I said to the cook we would get in there and defend ourselves; I slipped aside the slide, and got in and left the slide open one or two inches. We staid there until after day. Some one came on the top of the cabin-house; I went into the cabin and tried to shoot him through the stovepipe hole, but I could not get a chance, and could not see who it was. The cook and I remained in the cabin and after-cabin during Monday. In the afternoon I saw Clements in the forecastle; I could see through the run, under the cabin-deck, and a plank was off the bulkhead of the forecastle; about dusk, the cook was in the after-cabin; he cried out: "Captain! they are coming aft;" I heard one of his pistols snap, and then he fired another; we heard a noise in the hold; after awhile the cook came out and loaded his pistol, and we kept guard over the open (larboard) door. The next morning (Tuesday), at about daybreak, we saw some birds, "large landbirds," sitting on the taffrail; thinking from this that nobody could be near, the cook stepped out and shut the door, and we secured it with a lanyard. After this we heard a pistol fired in the hold, the ball from which, as I afterwards found, struck the forward bulkhead of the cabin. About 9 o'clock I looked through a crack in the forward folding door of the cabin, and saw Clements walking up and down from the mainmast forward with a horse pistol in each hand. He was too far

for me to shoot him. I did not then see Reid, but after awhile I saw him on deck, with his face tied up in a handkerchief and a pistol in each hand. Presently I heard Clements cry out to me: "Give us the boat; if you don't give us the boat we will scuttle the vessel." I made no reply that I remember. In a short time the man Castello came aft with a cutlass in his hand to the starboard cabin-door, and said something; I did not hear what he said, I was so eager to shoot him; I raised up the binnacle door and levelled my pistol at him, close at his head; the pistol snapped! Castello left and went forward. The boat was hanging astern at the davits; Clements cried out: "What do you say, can we have the boat?" I said: "Take the boat if you will go off and leave us alone." He asked: "Won't you shoot us?" I said: "No, I will not shoot you," but nevertheless I intended to shoot them through the binnacle-holes when they came aft; I thought, under the circumstances, I was justifiable in doing this. As they came aft, I saw Reid with his face tied up and a pistol in each hand. Clements and Castello had no arms that I saw. One whom I did not see shut the binnacle-slides with the muzzle of a pistol, so I could not see them; I heard the boat fall into the water; they carried her forward. Through the crack in the forward cabin-door I saw them take two coffee-pots and a tea-kettle and a pan from the galley, and I saw them cut the foot-rope of the square sail yard. I sat on my chest feeling very sad. I suspected that they would scuttle the vessel. I heard two blows struck, and thought they were scuttling her. I said to the cook, that if they scuttled her we would rush on deck and kill or be killed—that was our only hope. After this, all was quiet for a time; I heard some one running aft; it was Castello; he seemed frightened; he said: "Captain, the boat is astern!" He pulled at the door; I said: "If you pull open that door, I will kill you, if my pistol will fire." He pushed aside one of the binnacle-slides and said: "Captain, the boat is astern, if you don't believe me, look out!" I ordered him forward; he obeyed and then I opened the door and saw the boat about three hundred yards astern with Clements and Reid in it. I came out, and as Castello approached me I presented both my pistols at him, and said: "Your life is in my hands." He said: "Captain, I am innocent of this killing." (Stopped by prisoner's counsel.) I asked if he had any arms. He said he had one pistol, which he gave to the cook, who fired it off to leeward. The boat seemed to be pursuing us; we got up part of the mainsail and got under way; the last I saw of them and the boat they were bearing off easterly. Our schooner was of 119 tons, and with only two men and myself disabled we had much difficulty, but we got safely into St. Thomas.

By Joynes.—Reid, the mate, and the passenger were on deck when I went below Sunday night; I saw Walker at the wheel at 8 o'clock that night, and have never seen him since. I saw Clements in the forecastle Monday. The cabin-house is above the deck, and from its forward door you could see the whole deck forward. A pistol was fired Tuesday morning. Clements was walking backwards and forwards from the mainmast; he had two horse-pistols (here two were produced), these are like them. The binnacle for the compass is abaft the cabin and has lights, so that when the hanging door inside is open the cabin is lighted from the binnacle. The aft larboard door had been hooked back, and remained open until Tuesday morning; before it was closed we had seen large birds sitting round on the taffrail, probably drawn by the body of the mate, which was becoming offensive. After the boat was nearly out of sight I had the body moved; it looked badly and was very offensive; I did not examine the wounds; I felt badly; it is probable the rudder ropes had chafed the legs, they had black marks upon them. I told Castello to sew him up in a hammock, and put a bag of sand to his head and feet. I read a prayer over him, and told them to commit him to the deep. I turned my back and did not see them. I never saw Castello during the affair until Tuesday morning. There were but two men in the boat; they were Clements and Reid. I got on deck about 10, and at 12 o'clock got an observation of the sun; I think my latitude was 13° 32'. When I left the deck Sunday night we were under mainsail, foresail, jib, and flying jib; when I came up the foresail was hanging, torn to pieces; I suppose the peak lashing gave way, and the throat lashing held on, and so, the gaff dropping, the sail swayed from side to side and was torn. The J. B. Lindsey hails from Norfolk, and is owned by Daniel E. Simonds, of Norfolk, William W. Simonds, of Elizabeth City, and Wallace Bray, of North Carolina.

Cross-examined by Byrd.—There were seven persons on board at 8 o'clock, Sunday night, Heeney, Walker, Reid, Clements, Castello, Smith the cook, and myself. When I was aroused and came on deck, I do not know how many persons were running forward on the starboard; I did not see Castello; the cook was in the cabin; I was in such circumstances of excitement that I could not tell how many persons were on the starboard.

Cross-examined by George Blow.—(Mr. Blow had been counsel in Norfolk and attended during part of the trial, but did not stay to argue the case before the jury.) I shipped Reid and Clements at Elizabeth City; I had found Castello aboard the J. B. Lindsey when I took her; she had just returned from Boston. Reid and Clements acted well in the cruise to Trinidad; I liked them and spoke highly of them. At Trinidad they went ashore, and two black men came alongside and said these men had sent them to

work in their places. The day we sailed, a white boy, about eighteen years old, was brought aboard without my knowledge; I thought it wrong and had him sent off. Clements after that offered to pay his passage; he said he was an acquaintance of his, and he wanted him to go to the United States; Clements and Reid went ashore with this boy. We ballasted the 26th; I thought they looked and acted "a little suspicious" then; when the mate handed me the two pistols, Sunday afternoon, and I said "they were more of men than I thought," I little thought they had a chest almost full of arms; I don't say a chestful, but I think five pistols are part of a chestful at least. When I ran out I was in my drawers, bareheaded and barefooted, with a pistol in each hand; I was alarmed because of the noise, and because I heard a man crying, "Lord! have mercy on me." I can't tell anything of the distance between the wheel and the house; the cabin floor was three steps under deck, and the top was high enough for a man to stand upright with his hat on; the larboard door was fastened back by two nails, one in the door and the other in the house. No, sir, I did not fire my pistol first at the man, at the corner of the house; he fired first; I fell back upon the wheel; I did not strike my throat on the nail in the door; I do not know that the surgeon of the Germantown ever examined me; when the pistol was fired, I did not think I was shot by the ball; I thought it probable 'twas the powder; I have never felt the ball, but it may have clipped my neck. At 10 o'clock I suppose Reid ought to have been at the wheel; with the sail that I left on the schooner if the wheel had been left she would probably have run up into the wind's eye, and shaken; I did not hear anything of this sort while in my berth. When Castello came to the door with the cutlass in his hand, I did not trust him. We found a mashed ball in the cabin, which had passed through the lid of my chest; I have no doubt this was the second ball of the two that Reid fired at me.

Re-examined by Joynes.—I did not find any more pistols, but saw balls which were brought to me from the forecastle—they were large; the mashed ball we found had too much lead in it to have been a pocket-pistol ball. After I had shot Reid and he fell, Clements cried out: "Give us the boat." I told him he should not have her, I wanted to shoot another of them. I felt encouraged having Reid down. I bought these pistols in Trinidad; I felt suspicious after the lad was found aboard, and I heard—(stopped.) I bought them because I felt suspicious. At Elizabeth City, Clements and Reid came aboard together, and Clements asked if I could give them a berth; I told them I could give one; he said one could not go without the other, so, as another man whom I had expected had not come, I shipped them both. The mate, when I found him wounded, made no statements as to who did it. The J. B. Lindsey sailed under the "Stars and Stripes." We went into St. Thomas with colors at half-mast and Union down. Many persons boarded us, the American consul among them.

Thursday, November 28th, 1850.

Thomas Castello, sworn.—I was aboard the J. B. Lindsey. We sailed on the 27th of January, which was Sunday, from Five Islands, Port of Spain. In the afternoon, between two and four o'clock, while I was at the wheel, a pistol was fired forward. Captain Riggs was lying down in his berth; he came on deck and said something to the mate; the mate went forward; I looked forward and saw Clements with a small pistol in his hand, and one of his fingers was bleeding. In a short time Clements came up and gave the mate two small pocket-pistols, and said: "I am very much obliged to you." Nothing else occurred till about eight; Clements was at the wheel from six to eight. At eight the passenger, John Walker, took the wheel. I went forward, and Reid and Clements stood just about amidships; they had a bottle and very politely asked me to take something to drink; I took the bottle but did not drink anything. I went to the forecastle and turned in to sleep. Some time during the night I was awakened, I suppose, by the noise of pistols; I can't say what time of night it was. I got out of my berth and was going on deck, but found the forecastle doors shut; in this hot climate I generally slept with them open. I made some noise and tried to open them, but found them fastened. Presently Clements came to the forecastle with a pistol in his hand, and said if I would stay below and make no noise I would not be hurt. I did not then see Reid, but he came afterwards and told me to keep up a good heart, I should not be hurt; Clements came and talked the same way, and they kept running, first one and then the other, to the forecastle to see if I was there. I tried to get out by knocking a plank off the bulkhead of the forecastle, which had been started at sea, but finding I could not pass I lay down in my berth and took it coolly. Soon afterwards Reid came into the forecastle and said: "My God! I am shot;" Clements came directly afterwards, and stood on the steps; Reid said: "Go on deck and avenge my death, shoot somebody!" Then he said: "My pistol-ball, which I fired at the captain, was enough to knock down a horse, and yet his ball knocked me down." After awhile he said he did not believe he was as much hurt as he thought he was, and he got up, tied a handkerchief round his face, and went on deck. I then asked Clements what this row had all been about; he told me, after I came into the forecastle, Captain Riggs came on deck and told him to sway up the sails; he said he would do it about 12 o'clock; then Captain Riggs told the mate to knock him in the head with a handspike. Clements

then asked me what I was willing to do; before I could answer Reid called Clements on deck; nothing further occurred until Monday morning; I continued in the forecastle until, about 8:30 or 9 o'clock, they told me I could come on deck When I came up I saw the passenger, John Walker, lying in a pool of blood between the mainmast and the galley; I judged he was dead; Clements and Reid both had arms; each had a large pistol, and a cutlass was lying near; a small pistol was on one of them; Clements and I had quite a long conversation; I asked him who killed the passenger; he said—(here Byrd objected: We are not now on the alleged murder of Walker but of Heeney. The court said it was admissible evidence as part of the res gestæ and as illustrating the motive)—that Reid stabbed the passenger, and that he came very near getting Reid overboard and would have but for his assistance. I asked him where was the mate; he said he was abaft the house, dead! I asked who killed him; he said: "Reid stabbed him and I fired a pistol at him." Clements then told me that if I tried to go aft Captain Riggs would shoot me as quick as he would them. He then said that they wanted me to have nothing to do with the killing until they had killed the captain, then I was to kill Smith, the cook. He asked me if I was willing to join them and not try to go aft. To save my own life I told them that I would; our conversation stopped there. Nothing remarkable occurred till about 1 o'clock, when Clements asked me to help to bring the passenger forward; I went and helped; he was dead; Clements cut both the pockets of his trowsers out; there was nothing in them but a piece of tobacco and a knife. Clements asked me to help to put him on the rail; I helped, and when the body was on the rail he took him by both feet and flung him overboard. In the afternoon they asked me what I thought they had best do; I told them I thought the best thing they could do would be to take the boat and leave the vessel. Clements was the man who talked most, Reid had very little to say at any time. Towards dark Clements told me he wanted me to go down and get the boat-sails out of the hold; we went down into the hold; a pistol was fired from aft; I was about abreast of the mainmast. We came on deck again. Afterwards Reid went down into the forecastle; Clements took a seat not far from me and said he was going to sleep; he handed me a large pistol; I sat on the end of the windlass about an hour; I judged Clements was asleep; Reid was in the forecastle; I put the muzzle of the pistol within a few inches of Clements's head and pulled the trigger; the cap exploded, but the pistol did not fire! Clements jumped up and asked me what I snapped at; I told him I thought I saw somebody aft. As soon as the cap went off, Reid came on deck; Clements took the pistol and went into the forecastle; I don't know what he did; when he came up he and Reid sat down together and told me to go to sleep, but I did not! Nothing more occurred until Tuesday morning. We heard a noise in the cabin as if Captain Riggs was nailing something; Clements said he would go ask him for the boat; he went down into the forecastle and called to the captain, but we did not hear any answer that we could understand, and Clements could not understand either. He came on deck, gave me a cutlass (the same I had seen before), and told me to go aft and ask the captain for the boat. I went aft and asked Captain Riggs to let me come into the cabin; he made no answer; I suppose he could have shot me, as my head was where he might have blown it all to pieces. I heard no pistol snapped. I went aft and told them the captain said they might have the boat. Clements and I went down into the hold and brought up the boat-sail and rigging. He then took the fore peak-halliards and made them fast to the painter of the boat, which was hanging at the davits; he came forward and we then all went aft, and Reid got upon the house and shoved to the binnacle-slides; Clements and I cut the boat adrift; I used a small pocket-knife which I had; while we were there, Clements picked up from the larboard side of the deck a knife all covered with blood and handed it to Reid, who took it; no remark was made about it. Yes, sir, it was like this one, I think it was the same. (The knife shown in court was a dangerous weapon, with a dirk blade, about six inches long, fixed in the handle.) As soon as we cut the boat adrift we went aft and hauled her forward; the boat was on the starboard side; the schooner would come up to the wind and touch and fall off again; she was in a manner hove to. Reid went below and handed up his and Clements's clothes, mine were not touched. Clements and I rolled the water-cask forward; they sent me into the galley to bring out coffee-pots, a tea-kettle, and any victuals that might be there; I went to the galley and brought out two coffee-pots, a tea-kettle, a pan, with hardly enough of provisions for one man for a day. They filled the coffee-pots and kettle with water; Clements went down into the forecastle, and while he was there I heard a pistol fired, I suppose, by him. He soon came out; he said: "We will commence scuttling the vessel, that will entice the captain out, and we will shoot him;" I did not believe he would do it; he was all talk and gas. Previous to this I had taken the axe and hidden it behind the water-cask. Reid went into the boat, Clements and I passed in their clothes and all the other things. Clements stood behind me with a pistol in each hand; I got over the rail; Clements passed into the boat so far that he could not get back; I jumped back on board, seized the axe, and struck at the painter (boat-rope); the first blow I missed it—the second I cut it in two. I then fell down flat

on the deck, so that if they fired they might not shoot me, because of the bulwarks. They had asked me if I wanted my clothes. After lying awhile I rose and saw the boat astern; I went down into the hold, and sung out to the captain that I had cut the boat adrift, and she was astern. I heard no answer; I then went aft, turned aside the body of the mate, eased off the main sheet, and put the wheel amidships; then went to the cabin and said to Captain Riggs that the boat was astern; the captain came with a pistol and told he to go forward or he would shoot me; I went forward, eased off the jib-sheets, hauled them aft, and hoisted all I could of the foresail. I then walked aft; Captain Riggs and Smith were on deck, each with a brace of pistols; the captain said: "I have a great mind to shoot you;" I told him I had nothing to do with the row, and stated to him what I have stated here to you. He asked if I had arms; I gave him a small pistol which Reid had given to me; the cook fired it off. Some time afterwards the captain told me to take the body of the mate forward and sew it up in a hammock; one arm was in the sleeve of a large overcoat, the other sleeve was off; the coat was bloody and smelled badly; I took it off and hove it overboard. The mate's body was so offensive that I could not examine it, but I saw clotted blood on the left breast and right side; it was swelled so much that I could not make a large navy hammock meet around it. The task made me so sick that I vomited. The sides of the vessel were covered with large birds, called "boobies" in the West Indies; I did the best I could; I put a bag of sand at the head and one at the feet; the captain read a prayer, and Smith and I committed the body to the deep.

By Joynes.—I next saw these men, Clements and Reid, in the City Hall, Norfolk. I never saw them have arms before, except a small pistol; it is very common, however, for seamen to have a small knife, a dirk-knife, and a small pistol. The white boy Captain Riggs has spoken of, was at the Crown and Anchor, Port of Spain, Trinidad. Reid and Clements staid there; the mate and I sometimes went there; the boy had sometimes shown us round; he said he wanted to go to the United States; mate told him perhaps, if he asked, the captain would let him go. Reid and Clements came off Thursday night with this boy. I did not tell the captain, because I know that most rows and bad-blood aboard ship are caused by tales carried backwards and forwards between the forecastle and the cabin. The mate asked me if the boy was aboard; I told him to go and see. A black boy brought them off; I did not see any clothes. At Trinidad Reid and Clements were a good deal ashore, and they had two negro men to work in their places. The J. B. Lindsey's house was about four and one-half feet high; standing abaft I can see over the house; it may be three feet or more from the house to the wheel. I don't know who was at the wheel from 8 to 12, but I know Walker was there at 8; if nothing had occurred, my watch would have been from 12 till 4, and the captain and Clements would have been with me; I was in the forecastle from five to six minutes after 8 until Monday morning; I am sure I did not go out; when my pistol missed fire Monday night, if it had gone off it would certainly have blown Clements's brains out. It was within a few inches of his head.

Cross-examined by Byrd.—It was Clements who said they would scuttle the vessel and draw the captain out to shoot him. I had no right to believe or disbelieve whether they would scuttle her or not. I hid the axe with a view to cut the painter and cast them adrift; when the captain came on deck, I think the boat was so far astern that a pistol-shot would have done no harm. They may have gotten ashore sooner than we; we made almost as much leeway as progress. The mate and Clements were not on very good terms; the mate told me he did not like Clements because he had too much talk; he was generally called "Gassy Clements."

Captain S. S. Riggs, recalled by Joynes.—Aboard the J. B. Lindsey I had a little less than $500, in dollars, and a Colonial Bank bill for $1,154. This was known to the crew; I had cut off a third of the bill and sent it to the United States by the schooner May Flower; the crew did not know this.

Daniel J. Smith, sworn.—I was aboard the J. B. Lindsey the 27th of January, Sunday. I turned into my berth in the cabin at about 8 o'clock; the first thing I heard was, I suppose, a shriek from the mate; the captain ran on deck with his pistols; as he went up I heard a pistol fire; a short time afterwards I hear another, and the captain came running back and said he was wounded; he said to me: "I wish you would get my powder;" I went to look in the chest for it; in a short time I heard a voice which I took to be Clements's and several knocks at the starboard door; nearly at the same time I heard two reports of pistols; the captain fired one and, I suppose, shot Reid; I saw a man lying on deck whom I took to be Reid. After this, not much happened that I saw until Tuesday morning, when Clements called out to the captain to let them have the boat, and Tom Castello came aft with a cutlass in his hand; and not long afterwards he called to us that they were astern, and we went on deck and saw the boat with Clements and Reid in it.

By Joynes.—On Monday night, I think, I fired at somebody about the mainmast in the hold; my first pistol snapped, the second went off; this was the only pistol I fired until we came up; there was, I think, a pistol fired in the hold on Tuesday. I understood Clements to say to me, "Cook,

come out and be murdered;" the door on the larboard side remained open until Tuesday morning, when I shut it, and the captain and I made it fast with a lanyard; the binnacle-slides were open, but we saw them closed Tuesday morning. When we came up, I saw the mate's body; I did not examine it at all. I always slept in the cabin. In Trinidad I saw two small pistols in Clements's possession, which he offered to sell to the mate. I have seen such a knife as this (shown to him); it was lying on the deck with a couple of small pistols while we were in Trinidad; nobody had them. At Trinidad I heard Clements say, "What did the captain say about my sending off men to work?" I said, nothing. He said he had better not say anything, or he would wring his neck or his nose. In Trinidad I heard Clements say something to Castello about the freight, and heard something said about the money for the freight.

Cross-examined by Byrd.—I think the captain fired two or three times; I can't say whether he fired as he ran on deck. I was a good deal frightened: I crept into the after-cabin with the captain; when we came up, the boat was about a hundred yards astern; the boy who came aboard talked pretty good English.

Castello, recalled.—The boy was Irish; I saw no private conversation between Clements and Reid and this boy; I thought it was only for fun they had him aboard; he was about 18 or 19 years old. I don't know that he was a sailor; he attended at the bar of the Crown and Anchor.

The evidence for the prosecution closed.

For the defence, Thomas Reid was offered as a witness for the accused, who was jointly indicted with him.

Joynes.—He is incompetent.

Carrington, to sustain Reid's competency, cited Rosc. Cr. Ev. 141; 2 Starkie, Ev. 16, 17; Hawk. P. C. 4.

Joynes.—The cases relied on are either where the accomplice was a witness against the accused, or where the parties were separately indicted; I think no case can be found where the parties are jointly indicted, in which one (unless he has been acquitted) is competent for the other. Campbell v. Com., 2 Va. Cas. 314; 1 Hale, P. C. 903; Com. v. Marsh, 10 Pick. 57.

Byrd replied, citing Brown v. Com., 2 Leigh, 769; Russ. Crimes, 597; 2 Starkie, Ev. 21.

THE COURT.—If this were a new question, I should be inclined to admit the evidence. I confess I do not see much distinction in principle between cases of several indictments for the same offence and joint indictments. But the decisions are express that in the latter case the alleged accomplice is not competent for the defence unless he has been acquitted. I must exclude Reid's testimony.

The evidence closed.

Joynes, for the United States.—Rosc. 580. Where a homicide is proved to have been committed, the law presumes it to be murder, and it devolves upon the accused, from the evidence adduced either for or against him, to show that it is either manslaughter or justifiable or excusable homicide. He argued that the facts of this tragedy proved a combination between Reid and Clements, and that even though Clements had not struck a blow or raised a hand to fire a pistol, yet if he was present, ready to help, aiding and abetting, he was guilty of murder.

William A. Cocke, for the defence.—The accused is not guilty of piracy according to its legal meaning (act of congress, 1790), and according to the definition of piracy under the law of nations and the civil law. Story, Const. 405. He cannot be convicted of "making a revolt," because he is not so indicted. The act of congress makes murder on the high seas piracy, but the evidence does not make out a case of murder; it is manslaughter only at most, and that is a separate statutory offence, by act of congress. See article 3178, Gord. Dig. 933. Not being indicted for manslaughter, he cannot be convicted at all.

J. M. Carrington, for the defence, addressed the jury for an hour, commenting upon the law and the evidence.

Byrd assailed the testimony of the captain and Castello; and argued that if the jury believed a part of Clements's statement they ought to believe it all, and if they believed that the mate struck him with a handspike there was ample provocation to make the killing manslaughter. He spoke two hours, not concluding until Friday, November 29, 1851.

Joynes closed for the prosecution. He argued that there was nothing to prove that the mate struck the accused before the fatal blow was given; he vindicated the captain and Castello, and ended by an earnest appeal to the jury, fair alike to the accused and the United States.

The jury retired at about ten minutes past one, and in a quarter of an hour, returned with a verdict of "guilty."

United States v. Thomas Reid.

The prosecution and indictment were the same as in the trial of Edward Clements. The accused appeared to be from thirty to thirty-five years old, and about five feet, eight inches high; he had dark hair and eyebrows, and a dark complexion; a slight scar was visible on his face, near the nose and eyes; his expression was not forbidding, though firm. He pleaded "not guilty" to the indictment, as before stated.

The following were the jury: James H. Gardner, William M. Sutton, William Slater, Hiram Bragg, Ira Tichenor, Edward D. Eacho, Charles G. Thompson, R. M. Allen, Thomas W. Keesee, James Phillips, Franklin Stearns, Hugh Rileigh.

William T. Joynes, for the United States.
R. G. Scott, T. P. August, and A. Judson Crane, for the prisoner.

Upon request of the prisoner's counsel, the prisoner's affidavit was taken to certain statements, upon which the court directed a writ of habeas corpus ad testificandum to issue to the jailor of Henrico county jail to bring up three persons confined there, viz., Franklin Allison, Joseph J. Hall, and Edward Curtis.

Friday, December 13th, 1850.

Solomon S. Riggs, sworn.—I had some suspicions of these men in the Port of Spain. I arrived there the 17th of January, sold my cargo, went aboard the vessel, got my papers and got my cargo entered at the custom-house, engaged a large lighter called a "go-bar," and nearly loaded her; on the 18th we went on discharging. In the evening, after supper, Clements and Reid asked me for permission to go ashore; I gave it, but told them to be back by gun-fire. They were not aboard the next morning; I remarked I expected Reid and Clements were in the "calaboose." While we were working, two black men came alongside and said they had sent them to work in their places. After awhile I went ashore; at the landing Reid and Clements met me; Clements asked me how the men they had sent worked; I said: "Quite well;" Clements asked me if I would go up and take a glass of porter; in the afternoon they went aboard before I did; when I came aboard, the cook said to me he was afraid I would have trouble (stopped by Mr. Scott). On the 25th we went to Five Islands, and ballasted before sundown the 26th. In the course of the day Clements kept up a "monstrous hallooing and to do;" I thought it didn't look right; I told the mate we would go to sea early the next morning. As I was sitting aft, inclining my head near the (dacey?) I saw Reid, who seemed to be filing something; he was sitting forward on the windlass; every now and then he seemed to be peeping around the foremast at me; I did not see what he was doing, but heard the sound. These things made me a little wakeful; I did not sleep much that night.

Joynes.—Captain Riggs, where and by whom was the vessel owned?

August.—We insist that Captain Riggs cannot be permitted to prove these matters by his verbal statement; the best evidence of ownership is the register, and it ought to be produced.

Scott.—I remember that this question was before Chief Justice Marshall in a case in which I had the honor to be counsel. It was in the trial of a Chilian, accused of murder aboard a vessel which, I think, was alleged to be owned in New Bedford. The prosecution sought to prove that this vessel was owned by American citizens in New Bedford; the chief justice said the ownership must be proved, and that as the acts of congress required registry, that was the best evidence, and none secondary could be introduced. Roscoe, i; Gilbert's Ev.; Buller's Nisi Prius. I take the principle to be this, that the law has fixed what shall be evidence of title to the vessel, and this is required to be written and matter of record in the custom-house. If the J. B. Lindsey had papers, they ought to be produced; if she had none, then when she passed upon the high seas she was not an American vessel or not entitled to peculiar protection as such.

Joynes was about to reply.

THE COURT (stopping him).—This point has been frequently raised before me, and, I believe, always in criminal cases. Suppose no registry acts had ever passed and a murder had been committed on the high seas aboard an American vessel, would it not have been punishable according to the laws of the United States? I think it would. Then, as to the registry acts; they were intended to encourage and protect our commerce; but I think that an American vessel not registered is still a vessel of the United States, and that crimes committed on board of her would be punishable according to the acts of congress. But admit that she was registered, is there anything in the acts of congress or the general rules of law making the register the highest evidence of ownership? The registry is merely the oath of a party that the vessel is owned by certain persons, reduced to writing and recorded in the custom-house. It does not seem to me to be higher evidence than the oath in open court of a witness who knows the ownership. The objection is overruled.

Witness.—She was the property of (as before stated). I think she was built in North Carolina.

Cross-examined by Scott.—I cleared for Martinique; I think I went thither and then to Trinidad for a market; I had no money going out, except five or six dollars. In the voyage out I did not observe that Reid and Clements had any arms; they behaved and worked well. They paid the black men for working; I did not. When Clements hallooed so much Saturday, it surprised me, because he had not done it before, but it is not unusual for seamen in hoisting to halloo; he made a great noise. In Trinidad I received about $500 in specie, and brought it aboard in a little bag; this was late Friday evening. Clements and Reid were in the boat with me when I brought it off. The pistols handed to me by the mate I afterwards gave to another mate who shipped with me at St. Thomas; I gave them to him in Ocracock Inlet. I delivered my own pistols to the United States commissioner at Norfolk. There were eight berths in the cabin; the cook and I both lay in berths, he on the larboard, and I on the starboard side, but I don't know that any one outside could have seen either of us. When I ran out the mate was lying on the starboard side, his head to-

wards the rudder, his feet under the wheel-ropes; I was on the larboard side, with my head resting on a spoke of the wheel, when I heard them running back aft. I made no remark; I did not say, "Who is there?" had not time; I fired after Reid fired; yes, sir, I was alarmed; I got into the cabin as fast as possible. The second time he fired, he came round the corner of the house; his ball, as I afterwards found, struck the facing of the door and passed through the lid of my chest; I was right in front of a stand which comes out eighteen inches from the bulk-head. I fired back and he fell, with his feet near a ring-bolt in the deck.

Thomas Castello, sworn.—Reid said nothing when we were throwing the body of the passenger overboard; it took place about 1 o'clock Monday.

Cross-examined by Scott.—The city of Norfolk is my present residence. I shipped the 19th of November, 1849, at Boston, with the mate, John Heeney, aboard the J. B. Lindsey, Captain Hathaway. I have been a seaman twelve or thirteen years; when Captain Riggs sailed, we went first to San Dominique, then to Martinique, then to Tobago, then to Trinidad; there was a difficulty at Trinidad between the captain, Clements, and the cook, Smith; Reid and I were neutral; I can't say as to the day of the month; I did not keep the log-book. I introduced the passenger, John Walker, to the captain; I have seen Reid, Clements, and the passenger all pretty drunk together; when I saw them once, the passenger was beastly drunk and under the table, and Reid and Clements were fighting. The passenger said he was an Englishman and wanted to come to the United States. I must now mention what I omitted to state on my former examination. In Trinidad Clements asked me how much money there was aboard; I said five hundred dollars; he told me I was a damned liar, there was at least eighteen or nineteen hundred dollars.

Scott.—Why did you not state this before?

Witness.—Because I forgot it—it did not come to my mind. (Here a sharp colloquy took place between Mr. Scott and the witness.) I have never said since Clements's conviction that I came here to convict him, and was glad he was convicted. I deny it entirely. I never said it or anything like it, and I challenge anybody to show it.

By Joynes.—Clements's question about the money was on Monday; Reid, Clements, and I were then all standing together.

Saturday, December 14th, 1850.

Daniel J. Smith, sworn.—In Trinidad I heard Clements talk about the money; I never heard Reid say anything particularly one way or another; I heard Clements say to Reid, "I should like to take the vessel and get the money;" Reid made no reply, Clements said it would be a pretty good raise if they could get through with it; in the same conversation he said it would be all right if they could get me; they would put Tom Castello to death and I must kill the captain. I never heard Reid say anything more than "umph, umph." One evening I went ashore; Castello set me ashore in a boat; Clements and Reid asked us if we would take something to drink; Castello said a little beer would do. They wanted me to go up to a woman's, named "Yankee Lize;" after we got up there, they asked me if I would drink a little sweet wine; I said I didn't care, sweet wine would do as well as anything else. They sent out for a bottle; Clements was mixing a dose; I thought he might be going to poison—(stopped). After awhile they introduced me to "Yankee Lize," and I went with her; they went away.

Cross-examined by Scott.—I shipped aboard the J. B. Lindsey at Elizabeth City. 'Twas in January, I think. I shipped one day and was off the next. I am from South Carolina. We had been three or four days at Trinidad before I heard Clements say anything about the money. Some of our cargo was out. I don't guess they thought I heard them; I was standing near and heard. I did not state at the former trial that I heard Clement say all this about the money and taking the vessel, because I was stopped; I was commenced in the middle and stopped in the middle. Scott.—Who stopped you? Witness.—All hands and the cook. Scott.—Who? Witness.—I don't know who stopped me; I knew all this then and would have stated it, but I was stopped. Captain Riggs and I have had strife, but it is all over, and I suppose nothing is to be said about it now. The captain did once try to shoot me, but I suppose he was out of his head; he snapped one of his pistols at me the Friday after the Tuesday we came on deck; I think he must have been out of his head; at St. Thomas, the captain put me in irons, but I was taken aboard when we left and did my duty to Elizabeth City.

By Joynes.—He put me in irons because I got somewhat intoxicated; I don't know any other reason. When he snapped the pistol at me I think he was certainly out of his mind; he had been asleep not long before; I got up out of my berth and was going out when he roused up and snapped a pistol at me.

By a juror.—He said nothing, not a word was said. He gave me the pistols immediately afterwards, and told me to put them into his chest; I put them and a knife he had into his chest, and locked them up and kept the key. The captain was very unwell; he suffered a good deal from his wound; he did very little duty before we got into St. Thomas.

BY THE COURT.—I never saw any symptoms of derangement in him before.

Castello, recalled.—I do not know whether the captain snapped the pistol at Smith or myself or a tarpaulin. The man was not

rational, sir. This was on Saturday, the 2d February. He had been suffering much from his wound; I think he was not rational from his manners, his actions, his eyes, everything about him. He was often in a high state of fever. He did little or nothing in navigating the vessel; he tried to take an observation from the sun, and he made the latitude 17° 12′ when we were certainly in 17° 38′. Sunday night Smith and I were obliged to take the vessel from him. We got in on the 4th of February; the captain was taken ashore by a physician.

The evidence for the prosecution closed.

For the defence:

John R. Tucker, lieutenant United States navy, sworn.—I know Reid, the prisoner; he sailed with me about twenty-eight months in a voyage to the East Indies in the United States ship St. Louis. His character was very good; he was very quiet, industrious and attentive to his duties. From all my opportunities of knowing him, I believe he had a kind and tractable disposition. We left the United States in 1843, and got back in 1845. I think he was stationed in the foretop during the whole voyage. I do not think he knew anything of navigation; I should probably have found it out if he had known anything of it. His character and conduct must have been more than ordinarily good from the fact that in so long a cruise I heard no complaint of him.

Charles F. McIntosh, lieutenant United States navy, sworn.—I know Reid well; he was in the United States frigate Saratoga with me some twelve or fifteen months in 1847 and 1848. It was in the Gulf of Mexico; I believe his character was very good; he was a very quiet, good man, and I think a great favorite with the crew. He talked very little; I may say that Reid, like all other seamen, would sometimes go ashore and get drunk, and then he was a very reckless man, but when sober he was remarkably quiet and peaceable; he had no knowledge of navigation, I think.

Franklin Allison, sworn.—I have had some conversation with Castello in the jail. The day Clements came last from court I saw Castello and Smith; I asked Castello what was the result; he said Clements was convicted and it was what he (Castello) went for, and that if his evidence would convict Reid he would do it.

Cross-examined by Joynes.—Clements was upstairs; I was downstairs; I have the privilege of going up and down stairs: I have been confined about twelve months; I am charged with horse-stealing, have never been tried; never had any conversation with Clements about this trial; I spoke to both Smith and Castello, but don't know whether Smith heard; I think I mentioned this talk to Reid; I think some of the other persons heard me talking; I never mentioned it to Mr. Winston, the jailor, and never afterwards talked to Castello. This conversation was at the lower window; I don't know whether any person was at the window above. I mentioned this to Reid the same evening; I did not like to talk to Clements because he seemed low-spirited.

Joseph Hall, sworn.—I knew Castello in St. Thomas; he was a seaman aboard the J. B. Lindsey; I went aboard the third day after his arrival and conversed with him; I remember he showed me the place on the rail where he cut the painter; he said he struck two blows. I heard some talk in the jail between Allison and Castello at the window; I understood Allison to ask him how Clements came out at his trial. Castello answered: "I have convicted Clements, and intend to do the same for Reid if my oath will do it."

Cross-examined.—Curtis and I were standing at the stove; 'twas not in a room, 'twas in a passage; the stove was three or four feet from the window; I saw Castello's face, but saw nobody with him. I told Clements and Reid about this conversation the same evening; I said nothing to others, because Reid asked me not to, as he wished to have me as a witness. Joynes.—Why are you in prison? Witness.—For refusing to work without food. Four others were convicted at the same time. I was in no vessel in St. Thomas. I had been shipwrecked and was in charge of the United States consul; I came to the United States in the schooner Joseph Barker.

Edward Curtis, sworn.—I have heard Castello speak of Clements; two weeks ago last Friday, Allison, Hall and I were in the passage by the stove; Castello passed by the window; Allison asked him how Clements's case had gone; Castello said he had convicted Clements, and would do the same for Reid if his oath would do it.

Cross-examined.—I did not see anybody with Castello; I sluyed round and went upstairs: Allison and Hall did not follow me immediately; I went up and told Clements, and he said he hoped I would remember the words; I never mentioned it to Reid or anybody else. I have been in jail about a month for refusing to eat salt beef. I don't exactly know what the charge was; five of us were convicted at the same time.

At this point Mr. Joynes, at the suggestion of the court, and in justice alike to the witnesses Hall and Curtis and the United States, stated that they had been convicted at Norfolk, under the act of congress, for "conspiring and encouraging each other to disobey orders."

The evidence closed.

Mr. Joynes, for the prosecution, addressed the jury from a quarter to 2 until 3 o'clock.

Mr. Crane, for the prisoner, spoke from 4.15 to 5.30 o'clock, p. m.

Mr. August, for the prisoner, spoke on Monday, December 16th, from 10.30 a. m. until 12.15 p. m.

Mr. Scott, from 12.15 until 2.10.

Mr. Joynes closed at about 5 o'clock.

The jury retired, were kept together during the night, and returned into court on Tuesday, December 17th, 1850, at 2.30 o'clock, with a verdict of "guilty."

Thursday, December 19th, 1850.

A motion for a new trial in Clements's case was made and argued at length. The grounds assigned were: (1) That Reid's testimony ought to have been admitted. (2) That evidence had been admitted of the murder of Walker, another and a distinct offence, and the subject of a distinct indictment. (3) That the jury ought to have been charged as to manslaughter as well as murder; the prisoner's counsel, Byrd and Carrington, insisting that under this indictment he might have been convicted of manslaughter. (4) That new and material evidence had come to light since the trial (referring to the evidence of Allison, Hall, and Curtis).

Friday December 20th.

The court overruled the motion for a new trial.

Saturday, December 21st.

The prisoners were brought up for sentence. On being asked if they had anything to urge, Edward Clements said, in substance, that he had no hope that what he said would prevent the sentence, but he wished to make a statement: "At 8 o'clock my watch was out; I left Heeney and Walker on deck; Castello had gone to the forecastle; as my custom was, I took my blanket aft and laid down on deck to sleep; I was awakened by the mate, who punched me in the side with a handspike, and told me to get up and sway up the foresail; I told the mate it was not my watch, that there were two of them, and that in my watch I would do what it was my duty to do; John Walker said, if he had command of the watch, and if he were the mate, he would knock my brains out; the mate then said: 'Get up or I'll knock your brains out,' and struck me on the arm. I said I would report to the captain; a struggle took place, and I stabbed him with my sheath-knife, and he fell at my feet; the passenger interfered, and Reid killed him."

The court sentenced them, and appointed the last Friday in January as the day of their execution.

Thursday, January 16th, 1851.

A motion for a new trial in Reid's case was made by his counsel on two grounds: (1) That after the jury were sworn, and before they rendered their verdict, a copy of the Dispatch newspaper which contained a statement of the evidence, was read by several jurors without the consent or knowledge of the court or counsel. (2) That Reid ought to have been admitted as a witness for Clements and Clements for Reid, under section 21, c. 199, Code Va. (page 752), which reads thus: "No person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof." This statute seems to have escaped the attention of the counsel for both prisoners until both trials were over. They now contended that it gave the rule in the United States courts.

Joynes.—I shall insist that the jurors are not to be heard to prove any facts by which their own verdict is sought to be assailed.

This question was fully argued, the counsel for the prisoner relying chiefly on McCaul's Case, 1 Va. Cas. 306; Kennedy's Case, 2 Va. Cas. 510.

Friday, January 17th.

THE COURT.—It is undoubtedly true that the courts have not admitted without great reluctance and caution the affidavits of jurors, in order to attack their own verdict. In civil cases, involving only pecuniary interests, the public inconvenience which would result from hearing such affidavits is sufficient to exclude them, but in criminal, and especially capital cases, I think the favor of the law to life and liberty is more than the argument from inconvenience. I shall therefore hear the affidavits of the jurors.

Several jurors were sworn and testified. Among them—

Charles G. Thompson, sworn.—I saw a paper in the hands of some of the jury; I don't know what paper it was; it contained a statement of the evidence in Reid's case. I probably read a quarter of a column.

By Joynes.—I think what I read was a statement of the captain's testimony; I was not at all influenced by what I read; I do not think that report was entirely accurate; I think we had heard the evidence but not the argument; I believe I read the paper before the court was opened in the morning.

Hugh Rileigh, sworn.—I read a copy of the Dispatch containing a statement of the evidence in Reid's case. I read some part of it here and some part in the jury-room. I had the paper in my pocket; I do not know that it was read by any other juror; I think it was once spoken of; the report I thought accurate, but I did not read it particularly.

By Joynes.—I got the paper at my store; I am a subscriber for it, and pay by the week. I was not at all influenced by what I saw in the paper.

BY THE COURT.—I sometimes referred to it for the purpose of refreshing my memory, but if I found there any statement which I did not recollect at the trial, it had no influence on me; I read more from curiosity than otherwise. My impressions were not altered as to the question of "guilty" or "not guilty" from first to last.

The motion for a new trial was elaborately argued for the prisoner by Scott and Crane, and for the United States by Joynes.

THE COURT.—As these cases and the questions that have been raised are of great importance, I shall not now decide the motion, but shall adjourn it to the next term, when it is probable the chief justice may be

sitting here. In the meantime I shall set aside the judgments.

Friday, May 14th, 1851.

Hon. ROGER B. TANEY, Chief Justice of the United States, and Hon JAMES D. HALLYBURTON, District Judge, sitting.

The motion for a new trial in Reid's case came up for reargument.

Joynes.—I shall again insist that the jurors ought not to be heard at all against their own verdict, but for convenience and for the purpose of saving time this question may be argued with the others that arise.

TANEY, Chief Justice.—If it will not disturb too much the course of argument for which the prisoner's counsel have prepared themselves, the court would prefer that this question as to the admissibility of the juror's statements shall be argued first in order.

Crane.—1. As to the admission of the jurors' affidavits. 5 Bac. Abr. 369; Metcalfe v. Deane, 1 Cro. Eliz. 189; Com. v. McCaul, 1 Va. Cas. 306; Overbee's Case, 1 Rob. [Va.] 756; 5 Pick. 296; 13 Mass. 217.

As to the competency of Reid for Clements and of Clements for Reid, I cite first our statute, Code Va. 1849, p. 752. The construction of this seems plain, and I suppose if this prosecution were in the state court, the question would be promptly decided. Does this act give the rule of evidence in the United States courts? I insist that it does. Section 34, Judiciary Law 1789 [1 Stat. 92]; Gord. Dig. p. 125, § 534. The laws of the several states are rules of decisions in trials at common law. Burr, Tr. 481, contra; [Wayman v. Southard] 10 Wheat. [23 U. S.] 1; [Polk v. Wendal] 9 Cranch [13 U. S.] 98; [The Orleans] 11 Pet. [36 U. S.] 175; [McNiel v. Holbrook] 12 Pet. [37 U. S.] 84; Hamilton's Argument on the Judiciary in the Federalist.

3. As to the effect of the jurors' evidence in vitiating the verdict; Wheat. Cr. Law, 644, 645; 5 Bac. Abr. (Ed. 1844) 369; 2 Hale, P. C. 296; 2 U. S. Dig. 1849, p. 695; 5 Supp. U. S. Dig. 435; Overbee's Case, 1 Rob. [Va.] 756; 12 Pick. 496; 1 Pick. 337; 13 Mass. 217; Com. v. McCaul, 1 Va. Cas. 306.

Joynes.—1. The affidavits of jurors ought not to be admitted to prove their own misbehavior. This is the settled English rule, commencing with Vasie v. Delaval, 1 Term R. 11; 1 Chit. Cr. Law, 655; Grah. New Trials, 111; Straker v. Graham, 4 Mees. & W. 721; Burgess v. Langley, 5 Man. & G. 722. The same rule prevails generally in the United States. Whart. Cr. Law, 655. It is the rule in criminal as well as civil cases. Rex v. Wooller, 6 Maule & S. 366; State v. Freeman, 5 Conn. 348; Com. v. Drew, 4 Mass. 398; Suttrel v. Dry, 1 Murphy, 94; State v. McLeod, 1 Hawk, 344. In Tennessee such affidavits were held admissible in criminal cases in Crawford v. State, 2 Yerg. 60; but the practice has since been regretted and characterized as dangerous, and a disposition expressed to restrict it. Norris v. State, 3 Humph. 333. Commented on, McCaul's Case, Kennedy's Case, and Overbee's Case. In all of them affidavits of the jurors were either accompanied by other evidence or designed for their exculpation. See Cochran v. Street, 1 Wash. [Va.] 103; Moffet v. Bowman, 6 Grat. 219; Price v. Warren, 1 Hen. & M. 385; Shobe v. Bell, 1 Rand. [Va.] 39; Harwell v. Bennett, Id. 282; Harnsbarger v. Kinney, 6 Grat. 287.

2. As to the competency of the accused for each other. Section 21, p. 752, Code Va., gives no rule in this court. [Wayman v. Southard] 10 Wheat. [23 U. S.] 49; U. S. v. Marchant, 12 Wheat. [25 U. S.] 480; U. S. v. Shive [Case No. 16,278]; U. S. v. Wilson [Id. 16,730]; U. S. v. Insurgents [Id. 15,443]; 2 Burr, Tr. 481; Chase, Tr. 165, Append. 34. The thirty-fourth section, Gord. Dig. p. 334, adopts only rules of property. [Swift v. Tyson] 16 Pet. [41 U. S.] 1. See McNiel v. Holbrook, 12 Pet. [37 U. S.] 84. If it adopts rules of evidence in criminal cases, then there will be no uniformity, and a man accused of piracy would be acquitted in one state and convicted in another. But if section 21, p. 752, Code Va., gives the rule here, still I insist it has not altered the common law which excludes accomplices for each other. This section only applies to witnesses in support of the prosecution. 1 Rev. Code, 581, 582; Acts 1847–48, p 124; Rep. Revisors, 987. The construction of this act insisted on for the prisoner would deprive this court of its discretionary power as to granting separate trials to parties jointly indicted. See U. S. v. Marchant, 12 Wheat. [25 U. S.] 480.

4. As to the facts said to be proved by the jurors. They are no ground of new trial. Thomas' Case, 2 Va. Cas. 479; McCarter's Case, 11 Leigh, 633; 12 Pick. 496; 1 Hill. 207; 6 Leigh, 1; U. S. v. Gibert [Case No. 15,204]; Trial per pais, 218, 223, 225, 229; Grah. New Trials, 47; Rex v. Woolf, 1 Chit. 401.

Scott replied, commenting upon the authorities cited by Joynes, and citing Grah. New Trials, 109, 161; 5 Pick.; Grayson's Case, 6 Grat. 712. If the state law does not give the rule of evidence, a negro would be competent in the Southern states to testify against a white man in the United States courts!

THE COURT heard the statements of such of the jurors as were willing to make them, as to the reading of the Dispatch and its effect upon their minds.

Monday, May 19th.

TANEY, Chief Justice. Judge HALLYBURTON and myself differ as to two points arising upon this motion. (2) He thinks Reid's testimony admissible upon a proper construction and application of section 21, c. 199, Code Va. I should concur with him if I regarded this a mere question of evidence,

but I think it goes deeper, and affects the discretionary power of this court as to granting several trials upon joint indictments. This rests in the sound discretion of the United States courts, but if this act of Virginia applies as contended for the prisoner would have a right to insist upon separate trials. I think, therefore, the act does not apply. (2) Judge HALLYBURTON also thinks a new trial ought to be granted on the statements of the jurors. I do not think affidavits of jurors ought to be received to impeach their own verdict, but even if received the statements of the jurors in this case seem to me no ground for a new trial. Upon a certificate of this division of opinion between Judge HALLYBURTON and myself the question in these cases will go to the supreme court of the United States for decision.

Case No. 14,818.

UNITED STATES v. The CLEOPATRA.

[The case reported under above title in 14 Int. Rev. Rec. 29, is the same as Case No. 2,886.]

Case No. 14,819.

UNITED STATES v. CLEW.

[4 Wash. C. C. 700.] [1]

Circuit Court E. D. Pennsylvania. Oct. Term, 1827.

LARCENY — STEALING BY SERVANT — EVIDENCE — EMBEZZLEMENT.

1. Indictment against a person employed as a servant of the Bank of the United States, for stealing notes, the property of the bank. What evidence is necessary to convict the defendant.

2. The taking by the defendant of an article delivered to him, as a servant, to remove from one room to another, and converting the same to his own use, is larceny, and not embezzlement.

[Cited in Com. v. Berry, 99 Mass. 430.]

The defendant was tried upon two indictments; one for stealing bank notes from the Bank of the United States, and the other for embezzling bank notes, the property of that bank. All the counts in the first indictment charge that the defendant was, at the time the offence was said to have been committed, a person employed as a servant in the Bank of the United States. The offence stated in the first count is, that, on a certain day, he did feloniously steal from the said bank two notes of Stephen Girard for $1,000 each, being the property of the said bank. The other counts state the notes according to their tenor. The evidence is stated in the charge.

WASHINGTON, Circuit Justice. The defendant is charged in the indictment with a felonious stealing of two notes of Stephen Girard for $1,000 each, from the Bank of the United States, being the property of that bank, and also for stealing from the said bank, two notes of the said Girard for $1,000 each, the precise tenor of which notes is stated. To warrant a conviction of the defendant on that indictment, it must have been proved to your satisfaction that the notes described in these counts, or in some of them, were stolen by the defendant, he being, at the time, a person employed as a servant in the Bank of the United States.

The evidence is, that the defendant was employed by the Bank of the United States as captain of the watch, and porter. That the tellers of that bank were in the habit of always sending the defendant in the morning into the vaults to bring to them the notes of other banks which had been labelled and deposited there the preceding evening. That on the morning of the 11th of May last, these notes were brought out as usual, and, upon counting them, two notes of Stephen Girard for $1,000 each, Nos. 353 and 354, were missing. Payment of them was immediately stopped at all the banks in the city. In the course of that day, one of these notes was presented at the Commercial Bank to be exchanged, but was refused. This note, Mr. Sylvester has proved he received from the defendant, and that he delivered it to Freeman, a notary, to take to Mr. Girard's bank to demand payment of it there. The loss of the two notes at the Bank of the United States, being known at Mr. Girard's bank, the cashier of this latter bank retained possession of the note, and returned it to the Bank of the United States. The identity of the note, No. 353, presented by Freeman to Mr. Girard's bank for payment and retained, is fully established by the cashier of that bank.

The defendant having been called upon by the assistant cashier and the president of the Bank of the United States, to account for his conduct, denied that he had stolen the notes, but acknowledged that he found them under the counter of the bank, and that he took them, believing that if he did not do so they would be swept out and lost. When this confession was made, the notes were not shown to the defendant, nor were they in fact in the immediate possession of the bank. They were always spoken of to the defendant as "those notes," or "that money."

It is for the jury then to say, upon this evidence, whether the note, No. 353, the tenor of which is described in one of the counts, is sufficiently identified by the testimony of Sylvester and the cashier of Girard's bank, in connection with the other evidence of the defendant's general confession that he had taken two notes which he found under the counter of the bank. If this be not proved, yet, if they are satisfied that the defendant feloniously stole a note signed by Stephen Girard for $1,000, the property of the bank, that will be sufficient under the general count in the indictment.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

If the jury are satisfied that the confession of the defendant applies to either of the notes so described, it is sufficient to convict him; because, whether he found the notes under the counter in the bank, or on the counter, if he converted them to his own use, it was a felonious stealing of the property of the bank, within the words and meaning of the sixteenth section of the crimes act of the 3d of March, 1825 [4 Stat. 118].

As to the indictment for embezzling, there is no evidence on which the defendant can be convicted. These bank notes were not entrusted to the defendant to keep, but merely to convey from one part of the banking house to another, to those persons to whom the custody of them was confided. 3 Chit. Cr. Law, 918. If the jury so understand the evidence, they ought to find the defendant not guilty on that indictment.

Verdict, guilty on the indictment for stealing, and not guilty on the other indictment.

Case No. 14,820.

UNITED STATES v. COBB.

[4 Am. Law J. (N. S.) 145; 8 Leg. Int. 150.]

District Court, N. D. New York. Oct. 20, 1857.

CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE—RESISTING FUGITIVE SLAVE LAW.

[1. On preliminary examination, prima facie evidence of guilt is sufficient to hold to bail, until the offence may be examined by a grand jury.]

[2. Where a fugitive slave is arrested and lawfully restrained of his liberty under the provisions of the act of Sept. 18, 1850, all interference by third parties by word or act, for the purpose of favoring his escape, and tending to that result, is a violation of the act, rendering the offender amenable to its penalties.]

[This was an indictment against Ira H. Cobb, Moses Summers, James Davis, Stephen Porter, William L. Salmon, Harrison Allen, William Thompson, and Prince Jackson, for aiding in the escape of a fugitive from labor.]

CONKLING, District Judge. The specific charge on which the prisoners have severally been arrested and brought before me for examination, is that of having unlawfully aided in the escape of an alleged fugitive from labor, after he had been apprehended, and while he was yet in custody, in virtue of a warrant issued in a proceeding for his restoration to the person, a citizen of Missouri, to whom it was alleged his labor was due. In proceeding, now, as it is my duty to do, to decide upon the legal effect of the evidence before me, it is proper to premise that there is no testimony tending to fix upon the defendants the guilt of any higher offence than that just named. This, indeed, I understand to be tacitly conceded by the attorney for the United States. There is no evidence of previous combination and arming for the purpose of "levying war against the United States;" nor does it appear that the defendants and their associates had any object in view beyond that of defeating the execution of the law in a particular instance. These are therefore to be considered and treated as cases arising under the seventh section of the act of September 18, 1850 (chapter 60) entitled "An act to amend, and supplementary to, the act entitled 'An act respecting fugitives from justice, and persons escaping from the service of their masters,' approved February twelfth, one thousand seven hundred and ninety-three." The section referred to is in the following words: "And be it further enacted, that any person who shall knowingly and willingly obstruct, hinder or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such fugitives from service or labor, either with or without process as aforesaid, or shall rescue, or attempt to rescue, such fugitive from service or labor from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which such offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the district or territorial courts aforesaid, within whose jurisdiction the said offence may have been committed."

The accusation is that the defendants, in direct contravention of the act, did, on the first of October instant, at the city of Syracuse, "aid, abet, or assist" the fugitive to escape from the custody of Mr. Allen, the deputy marshal, by whom he had been apprehended. The defendants are not now on trial for the purpose of ultimately determining whether they are to be subjected to punishment. This is but a preliminary inquiry to ascertain whether they ought to be held to bail, or in default thereof to be committed to prison, for the purpose of securing their presence at the next stated session of the district court, to answer further in the event

of their being indicted by a grand jury; and it is a settled principle of law that for this purpose, prima facie evidence of guilt is sufficient. At the close of the examination on Saturday afternoon, although I then saw no ground for serious doubt concerning my duty in the premises with respect to either of the defendants, I deemed it proper nevertheless to hold the case under advisement until this morning. A careful consideration of the evidence has confirmed my original impression of its entire sufficiency to establish the guilt of each of the defendants for the purposes at least of this inquiry. Indeed, with the exception, at most, of Stephen Porter, their culpability appears to be placed beyond a reasonable doubt. The only witness against him is Page Newton, an intelligent and apparently honest and trustworthy man, of whose evidence it can at most only be said that the cry which it imputes to Porter, may possibly have been uttered by another; while on the other hand it appears very highly probable, from Porter's previous language and conduct, not only that the witness is not mistaken in this particular, but that Porter's interference was not limited to a single cry designed to urge on the more active assailants.

The proceedings on the part both of the commissioner and of the deputy marshal, appear to have been entirely regular. The fugitive was therefore lawfully restrained of his liberty by due process of law, and all interference by third persons, by act or words, for the purpose of favoring his escape, and tending to that result, is a violation of the act rendering the offender amenable to its penalties. The interposition of the defendants and their numerous coadjutors who have not been identified, was direct, palpable and unequivocal; its motive, if not in every instance openly avowed, was too obvious to admit of doubt; it was adapted to the unlawful end in view, and terminated in its accomplishment. My duty towards the defendants is therefore plain and imperative. They must severally be required to give bail for their appearance at the next term of the court to be held at Buffalo, on the second Tuesday of November, or, for want of sufficient bail, be committed to prison.

It is unnecessary to say more, and under ordinary circumstances, it might be impertinent to do so; and yet I would fain avail myself of the occasion, further to discourage, so far as my voice may be potential for this purpose, the repetition, in this district, at least, of the disgraceful scenes of lawless violence and outrage described by the witnesses in these cases. They must have been the fruit either of gross delusion or of wanton contempt of law and social order. For the purpose of effecting the liberation of a person from custody under process issued and executed in conformity with express and well known provisions of the constitution and laws of the United States, a building in the midst of a populous city was partially demolished, and deadly weapons were recklessly used, to the imminent jeopardy of human life, and to the grievous injury of several persons. The least reprehensible motive by which the aggressors can be supposed to have been animated, is the belief on their part that slavery is unjust and immoral; and that the laws by which it is upheld, may therefore be rightfully resisted by force. It must be the hope of all good men that the time may eventually come, when injustice and oppression in every form, including human slavery, if such be its character, will have been banished from the earth. But these wrongs exist, and are likely to endure, in other forms besides that of slavery; and if we have nothing better than lawless violence to rely upon for their removal, they will never cease. It is to advancing civilization alone that we can look for their gradual extinction. Wise men understand this, and shape their course accordingly. Bigots and fanatics are too blind to see it, or too impatient to heed it; and in their headlong zeal to redress particular wrongs, 'real ,or fancied, regardless of all other consequences, they commit other wrongs more aggravated and intolerable. Such is the grave error into which these defendants have fallen. Regardless of their civil and social duties, they have broken the public peace, set the law at open defiance, and with deadly weapons assaulted and wounded its officers while executing its mandates. In thus insulting the majesty of the law, did they expect to escape its vengeance? If so, their folly was equalled only by their criminality. What is the law in this country, but the declared will of the majority, to which, when thus expressed, all are bound, by a fundamental principle of the government, to submit, and which all its ministers are sworn to enforce. It often happens that laws are enacted contrary to the judgments, and sometimes to the moral sense of thousands of our citizens; and this must unavoidably continue to be the case. But no sane man imagines that he is therefore absolved from the obligation to obey them; still less that he has a right forcibly to prevent others from doing so. If he cannot submit to them consistently with the dictates of his conscience, he may seek a residence in some other country, if he can find one where he thinks he would suffer less from misrule; but so long as he continues to be an inhabitant of the United States, he must submit to the laws or pay the penalty of his disobedience. When this ceases to be true; when every man may transgress a law with impunity because he dislikes it, our government will have become a vain mockery, not worth preserving, for it will have ceased to afford protection to the rights either of property or of life.

The act in question has unhappily been fruitful of bigotry and fanaticism; and it is due to candor and truth to add, that it seems

to have bewildered the judgments and consciences of others besides the class of citizens to which the defendants belong. I am happy to be ignorant of the existence in this part of the state of New York of any of those persons—few I trust in number, anywhere—to whom I allude. The manly spirit and love of fair play, prevalent here, are an effectual antidote to the unhappy delusions under which these persons seem to labor. I doubt, also, whether they are to be met with in the states where slavery is tolerated; for I have always understood that our Southern brethren, whatever may be their faults in other respects, are likewise distinguished for the virtues I have mentioned. Judging from the language of these enthusiasts, more blind than amiable, on a recent occasion, one would be led to conclude that they suppose it to be the bounden duty of those who are charged with the execution of the fugitive slave act, as often as their powers are evoked for the restoration of an alleged fugitive from labor, to take care that he shall at all events be delivered to the claimant; and to that end, to take care also, so to interpret the law, as, at all events, to ensure this result. It may not be amiss to remind these well meaning people that the law, in the application of its provisions, is no respector of persons, and that judges are bound to administer it as they find it, intelligently, firmly and impartially. The day, I trust, is far distant when the rights vouchsafed by law even to a fugitive slave, will be less secure under the guardianship of American judges than of his master.

Case No. 14,821.

UNITED STATES v. COCHRAN et al.

[2 Brock. 274.] [1]

Circuit Court, D. North Carolina. Spring Term, 1825.

UNITED STATES—PRIORITY—DEBT DUE FROM REVENUE OFFICER—APPROPRIATION—SURETIES ON BOND—PAYMENT.

1. An act of congress—Act March 3, 1797, § 5 [1 Stat. 515]—declares, that where a revenue officer, indebted to the United States, shall become insolvent, the debt due to the United States shall first be satisfied, and that this priority shall extend to cases where a debtor, not having a sufficient property to pay all his debts, shall make a voluntary assignment thereof. *Held*, that although this act gives to a debt due to the United States a priority over debts due to individuals, it does not give to one part of a debt due to the United States a priority over any other part of it; nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment; nor does it affect the right of the debtor to apply a payment of money in his hands to either a bond debt, or a debt due by open account by him to the United States.

[Distinguished in Leggett v. Humphreys, 21 How. (62 U. S.) 77.]

2. Therefore, where a collector of the revenue at a port, had given bond with sureties in the penalty of $10,000, for the faithful discharge of his official duties, and being largely indebted to the United States, had made a deed of his property for their benefit, but previously thereto, had transferred $10,000 to his sureties, and directed them to apply that money to their exoneration, and the sureties accordingly did so apply it, by paying it into the treasury, and receiving from the treasury their obligation, without any knowledge at the treasury that the money so paid had been transferred by the collector himself to his sureties; it was adjudged that by applying that payment to the extinguishment of the bond, the sureties were discharged.

An information was filed in the circuit court of the United States for the district of North Carolina, against Robert Cochran, late collector for the port of Wilmington in that state, and J. E. and J. W., his sureties, to recover from the sureties the sum of $10,000, that being the penalty of Cochran's official bond. The information charged, that the said Cochran being largely indebted to the United States beyond his ability to pay, viz., in the sum of $145,361, two several suits were instituted, the one against Cochran, the principal, and the other against his sureties, and that judgments had theretofore been obtained against each in the circuit court of the United States for the district of North Carolina; that the judgment against the sureties (for $10,000) had been satisfied by them, but the execution sued out on Cochran's judgment had proved unproductive; that Robert Cochran, intending to defraud the United States, &c., on the 25th of September, 1820, conveyed by deed of that date, to W. W. J. and J. W., (the latter of whom was one of his sureties) all or nearly all of his visible property in trust, for the benefit of the United States, but that nevertheless the said Cochran was possessed of a large sum of money, which he placed in the hands of J. W., one of his sureties, or others, upon a secret trust, out of which the judgment against the sureties was satisfied. The information charged, that the original liability, by reason of the defalcation of their principal, was unimpaired by the payment by them of $10,000 out of the funds of Robert Cochran, and prayed for relief, &c.

The answers of Cochran and his two sureties disclosed, inter alia, the following state of facts, viz.: That on the 18th of August, 1820, in order to indemnify his sureties, Cochran had put up, in bills of North Carolina banks, the sum of $10,000, in two separate packages of $5,000 each, sealed up and addressed to the sureties respectively, which were placed in a trunk, and the trunk was deposited in the bank of Cape Fear, at Fayetteville, of which bank J. W., the surety, was cashier. Cochran, in his answer, insisted that he was thus divested of all right and title to the said money, though he admitted that he did not inform his sureties of the said transfer, believing it to be complete without any such communication. He farther answered, that he did not, at the time of making the transfer, contemplate the execution of the deed of the 25th of September, 1820, referred to in the information, or com-

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

mitting any other act of legal bankruptcy, by absconding or otherwise, but that the appropriation of the $10,000 and the subsequent execution of the deed, were totally distinct transactions in fact and in design: That a few days after the transfer of the money, he went to Wilmington in the execution of the duties of his office as collector, and having there received official notice of his reappointment, by which he was required to renew his bond in the sum of $30,000, in pursuance of the act of congress, and being resolved not to involve his friends by giving a new bond, the propriety of making an assignment of his property then first occurred to him, and without the counsel or knowledge of any person whatever, he executed the deed on the day of its date, at Wilmington. That he carried the deed with him to Fayetteville early in October, 1820, and deposited it in the trunk in the bank of Cape Fear, containing the package of money: That having determined to retire from office, and under the influence of feelings too poignant to endure the shock among his friends, which would be produced by the publication of his default, he determined to go to the North. From Baltimore he addressed a letter to J. W., one of his sureties, and cashier of the bank of Cape Fear, informing him that he had deposited the two packages of money in the trunk before referred to, and desiring him to deliver to his co-surety, J. E., the package superscribed with his name, and to retain the other. The sureties, in their answer, averred, that this letter was received, and the money applied to the satisfaction of the judgment against them accordingly, and that their bond was thereupon surrendered by the treasury.

MARSHALL, Circuit Justice. In this case Robert Cochran, collector at the port of Wilmington, being very largely indebted to the United States, made a deed of his property for their benefit. Previous to the execution of this deed, he deposited $10,000, the amount of the bond executed to the United States, for the faithful performance of his duty, in a trunk which was placed in the bank, and absconded. From Baltimore he addressed a letter to his sureties, requesting the trunk to be taken out of the bank, and the money to be applied to their exoneration. The money was received at the treasury and the bond given up. It being afterwards discovered that this was the money of the collector and not of the securities, this suit is brought to compel the securities to pay the amount of the bond, considering the money received as constituting no equitable discharge to them.

It is contended on the part of the United States, that the insolvency of Cochran, vested all his property, including this $10,000, in the United States, and that this sum being theirs could not be applied in exoneration of his securities. The act of congress declares, that where any revenue officer, &c., indebted to the United States, shall become insolvent, the debt due to the United States shall be first satisfied, and that this priority shall extend to cases where a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof. Act March 3, 1797, § 5. See 1 Story's Laws, 465 [1 Stat. 515]. This act does not transfer the property itself to the United States, but subjects it to their debt in the first instance. The assignee holds it as the debtor would hold it, liable to the claim of the United States, and if he converts it to his own use, or puts it out of reach of the United States, he is undoubtedly responsible for its value. But the property thus liable to the United States, is liable for the whole debt; for one part of it as much as for the other. It is as applicable to the bond in which the sureties are bound, as to that part of the debt for which the principal alone is responsible. No person will doubt the legal capacity of the United States to apply any sum of $10,000, to the discharge of the bond-debt, leaving the residue unpaid. Such an application of a payment would undoubtedly never be presumed from any equivocal act; but a plain and positive appropriation of a payment to the bond, could not afterwards be set aside. But the power of the debtor to apply his payments, is co-extensive with that of the creditor, and is to be exercised in the first instance. This principle has, it is believed, never been denied. If it be correct, then the power of Mr. Cochran to apply this sum of money in discharge of the bond, and in exoneration of the sureties to it, is co-extensive with that of the United States to make the same application of it. If, then, Mr. Cochran had, without any assignment of his property, paid this money into the treasury, with a direction that it should be applied to the bond, he would have exercised a right which the law gives to every debtor. If the money should be received under this direction, no doubt can be entertained of the obligation to apply the payment as directed. If it should be rejected, it might be tendered in due form, and to suits brought on the bond, and on the open account a tender might be pleaded to the suit on the bond, unless some distinction can be taken between this bond, and the common case of a bond given for part of a debt. The court has reflected on this distinction, and cannot perceive any legal difference between the cases.

Does the transfer of this money to the sureties change the law of the case? We think not. The sureties have paid it into the treasury in discharge of their bond, which has been delivered up. Had this transaction taken place, with the full knowledge of the treasury department that the money had been received by the sureties from Mr. Cochran, no question could have arisen respecting it. Is the payment the less valid because it was made without communicating this circumstance? If the United States

have sustained any injury by the concealment, equity will relieve against that injury, and place them in the situation in which they stood before the payment was made. If, with full knowledge of the circumstance, the money might still have been legally applied in discharge of the bond, then, the fact that it was not communicated cannot change the law.

It has been very properly argued, that the act of congress gives to the debt due to the United State priority over debts due to individuals, but not to one part of the debt due to the United States over any other part of it; nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment. It would seem to follow, that the right to apply payments while the money is in the hands of the debtors, is not affected by the act of congress, but remains as it would stand, independent of that act. If, then, the sureties had declared to the treasury department that the money was received from Mr. Cochran, to be paid in discharge of their bond, and had tendered it in payment thereof, we think the tender would have been valid, and might have been pleaded to a suit on the bond.

We are of opinion, therefore, that this suit must be dismissed as against the sureties.

Case No. 14,822.

UNITED STATES v. COCKRIN.

[Cited in Case of Pea Patch Island, Case No. 10,872. Nowhere reported; no opinion delivered.]

Case No. 14,823.

UNITED STATES v. COFFIN.

[Bee, 140.] [1]

District Court, D. South Carolina. May 10, 1799.

DEED—SEAL—WHAT SUFFICIENT.

A mark with ink, acknowledged by the maker of a deed to be his seal is sufficient to create a specialty, though no wax, wafer, or other similar substance be used.

This was an action of debt on a customhouse bond. An exception was taken to the validity of the seal which was in the following form (L. S.) No wax or wafer had been used; but the bond had been duly delivered, and that mark acknowledged by the obligor to be his seal.

It was contended for the defendant [Ebenezer Coffin] that as the ground of action was an obligation declared to be under the hand and seal of the party, and as the profert did not support this, debt would not lie, and the plaintiff ought to be nonsuited. That the action of debt must be founded on a specialty, to create which a seal was necessary. That the court would take as the seal of the party any substance on which an impression might be made; but that none such existed here. That if the reason of the law requiring a seal had ceased, the mode, perhaps, ought also to be done away; but that the power of dispensing with it rested with the legislature, and not with the judges, who must take the law as they find it. 2 Comyn, 635, 637; Esp. 96; Co. Litt. 35–37; Dyer, 13.

ELLSWORTH, Circuit Justice, delivered the opinion of the court that the seal in this form, having been acknowledged by the party to be his, was sufficient.

Objection overruled.

[1] [Reported by Hon. Thomas Bee, District Judge.]

Case No. 14,824.

UNITED STATES v. COFFIN.

[1 Sumn. 394.] [1]

Circuit Court. D. Massachusetts. May Term, 1833.

SEAMEN—INDICTMENT FOR MALICIOUSLY FORCING ON SHORE—JUSTIFIABLE CAUSE.

Indictment for maliciously and without justifiable cause forcing a seaman on shore, in a foreign port, against the crimes act of 1825, c. 276, § 10 [3 Story's Laws, 1999; 4 Stat. 115]. "Maliciously," in the statute means wilfully, against a knowledge of duty. "Justifiable cause" does not mean such a cause, as in the mere maritime law might authorize a discharge; but such a cause, as the known policy of the American laws on this subject contemplates, as a case of moral necessity, for the safety of the ship and crew, or the due performance of the voyage.

[Cited in U. S. v. Taylor, Case No. 16,442; Wiggin v. Coffin, Id. 17,624; Re Ah Tie, 13 Fed. 293.]

Indictment [against Thaddeus Coffin] for maliciously, and without justifiable cause, forcing a seaman of the ship Fabius on shore in a foreign port, to wit, at the Sandwich Islands, contrary to the crimes act of 1825, c. 276, § 10 [3 Story's Laws, 1999; 4 Stat. 115]. Plea, general issue, not guilty.

Mr. Dunlap, U. S. Dist. Atty.

Mr. Bartlett, for defendant.

STORY, Circuit Justice, in summing up to the jury, said: In this case, it is admitted, that the ship Fabius is an American ship, and Frederick Daniels was one of her crew, and the steward of the ship on a whaling voyage to the Pacific. It is also admitted, and indeed is proved beyond all controversy, that he (Daniels) was forced ashore by the direct orders and instrumentality of the master, at the port of Mahee, in one of the Sandwich Islands, against his will, and landed on the beach there with his chest, without any means of subsistence, for the purpose of finally separating him from the ship for the voyage. He (Daniels) is by birth a Dane, and (it is said) has been naturalized; but

[1] [Reported by Charles Sumner, Esq.]

that fact is not proved by the proper record evidence. Under these circumstances, it is contended, in the first place, that by the act of 1813, c. 184 [2 Story's Laws, 1302; 2 Stat. 809, c. 42], foreign seamen cannot be lawfully employed as part of the crew of an American ship; and in the next place, if they can, that the act of 1825, c. 276, § 10 [3 Story's Laws, 1999; 4 Stat. 115], on which the present indictment is founded, applies only to seamen in American ships, who are citizens. My opinion is, that the argument is not well founded in either respect. The act of 1813, c. 184 [2 Story's Laws, 1302; 2 Stat. 809, c. 42], declares, indeed, that after the then war with Great Britain, it shall not be lawful to employ on board of any public or private vessels of the United States any persons, except citizens. But the tenth section of the same act suspends the operation of the act, as to the employment of seamen, who are subjects of any foreign nation, which shall not by special treaty with the United States have prohibited the employment on board of her public or private ships of white citizens of the United States. Denmark has made no such treaty stipulation; and, therefore, the clause, as to subjects of that country at least, remains inoperative.

Then, as to the act of 1825, on which the present indictment is founded, its language is general, and equally applicable to all seamen constituting a part of the crew of an American ship, whether foreigners or natives; and I can perceive no public policy, which would justify the court in construing the words as confined to the latter. So long as foreign seamen are permitted by our laws to be employed on board of American ships, they must be deemed admitted to the protection of those laws; as they are certainly responsible both civilly and criminally for any violation of them. It would be a most extraordinary predicament to hold them liable for the latter, and at the same time to deny them all benefit of the former. No such invidious distinction is at present established in our legislation. The language of the tenth section is: No master, &c., "shall during his being abroad maliciously and without justifiable cause force any officer or mariner of such ship or vessel" (not any American officer or mariner) "on shore, or leave him behind in any foreign port or place, or refuse to bring home again all such of the officers and mariners of such ship or vessel, as he carried out with him, as are in a condition to return, and willing to return, when he is ready to proceed on his homeward voyage," &c. Now, it is plain, that the home here referred to is not the particular home of any seaman, native or foreign; but the home port of the ship for the voyage.

Then, what is to be deemed a "justifiable cause" in the sense of the act? It is argued, that whatever misbehavior would, by the general principles of the maritime law, constitute a sufficient cause to discharge a seaman in a foreign port, is a "justifiable cause" in the sense of the act. But it seems to me, that this is laying down the rule much too broadly. It is not, indeed, every offence committed by a seaman, which will, even by the maritime law, authorize the master to discharge him in a foreign port. It must be some offence of a high and aggravated character; or long and habitual disregard of duty; or other continued misconduct, unrepented of and unchanged. But the laws of the United States, from motives of an enlarged policy, have circumscribed the authority of the master, in cases of discharge, within much more narrow bounds. It is well known, that in former times the government were put to very great expenses for the relief and maintenance of sick, disabled and other seamen, who were discharged, or left abroad by masters of American ships under various pretences, often exceedingly frivolous, and sometimes from a spirit of revenge or passionate excitement. The evil became so extensive, and so burdensome, that by a statute passed in 1803—Act 1803, c. 62, § 1 [1 Story's Laws, 883; 2 Stat. 203, c. 9]—masters of ships on foreign voyages were required to give bonds with security for the due return of all the seamen who were engaged for the voyage; and by a proviso in that statute it was declared, that the bond so given should not be forfeited on account of the master's not producing any of the crew, who might be discharged in a foreign country with the consent of the American consul, or other commercial agent, in writing; nor on account of any of the crew dying, or absconding, or being forcibly impressed into another service. And another section of the act (section 3) provided for cases, when the vessel is sold, or a seaman is discharged with his own consent in a foreign country. Now, looking to the obvious policy of this act, it is impossible not to feel, that congress meant to admit no excuses under the bond, except in extreme cases, where the consul authorized the discharge, or the seaman died, or absconded, or was impressed. The present case does not fall within either of these classes of cases. But I am not prepared to say, that others may not exist, not mentioned in the statute, which yet would constitute a justifiable cause of a discharge. But I think the right to discharge seamen can result only from what may be deemed a moral necessity, analogous to the cases put in the statute. Suppose for instance, a seaman should make a revolt on board of a ship, or endeavour to make such a revolt; and should persist in his misconduct, so that his farther continuance on board would be hazardous to the master and crew, and the objects of the voyage; it seems to me, that it would constitute a good cause for a discharge. So, if a seaman should commit a manslaughter, or assault any of the officers or crew with an intent to kill, or otherwise conduct himself in such a malicious and gross manner as to render his presence on board dangerous to the crew and the safety of the

ship; the same result would follow. And I am not prepared to say, that even long continued, obstinate, and malicious disobedience of orders, or neglect of ship's duty, indicating a mutinous disposition, and deliberate intent to subvert the ship's discipline, and the government of the crew, would not equally justify a discharge; although it is not expressly within the purview of the statute. But I think the right arises only under extraordinary emergencies and in extreme cases, where otherwise the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline, would be put in jeopardy. The mere convenience of the master would not justify a discharge; much less such offences, as could be ordinarily suppressed by the common punishments administered in the sea service.

But it is not sufficient, that there should be a want of justifiable cause, to bring the case within the statute. The act must be maliciously done. Now, "maliciously," in the sense of the act, is not limited to acts done from hatred, revenge, or passion; but it includes all acts wantonly done, or wilfully done, that is, against what any man of reasonable knowledge and ability must know to be contrary to his duty.[1] Now, every man is presumed to know, what the law ordinarily requires of him in point of duty; and he cannot shelter himself from liability by any pretence of ignorance of that, which, in his station, every man must be presumed to know. Still, if the circumstances are such, that a master of reasonable judgment, acting bona fide, and not from passionate excitement, might fairly deem it his duty to discharge the seaman, he will not be guilty of the offence intended by the act. Every master in a foreign voyage cannot but be presumed to know, what the obligation of the bond given by him, to bring home the crew, who go on the voyage, imports. And he cannot but know, what are the excuses allowed by the act. If he goes beyond them, he acts at his peril, and can justify himself only in a clear case of moral necessity, such as I have stated.

Let us apply these principles to the present case. That the master forced the seaman on shore at the Sandwich Islands is (as I have said) admitted. The onus probandi, then, is on the master to establish, that the act was for a justifiable cause; for in the absence of such cause the law will presume, that he did it maliciously, until the contrary is proved. The defence is here mainly rested on the fact, that after the seaman (who was steward of the ship) was tied up to the rigging, and flogged with a cat-of-nine-tails, he never did any duty, until he was discharged; that is, from June to November, 1831; and that this arose from his wanton obstinacy and malice, and determination not to do duty, and not from inability. The answer on the other side is, that the flogging produced a rupture or hernia in the abdomen; and that the seaman was thus rendered wholly incapable of performing duty, and was really, not pretendedly, an invalid. Which of these statements is true? (Here the judge recapitulated the evidence.) If the jury believe, that the seaman was not injured, as he pretended, by the flogging; but was able to do duty, and obstinately and maliciously refused to do duty, in order to revenge himself, and to destroy the ship's discipline, and to incite others of the crew to disobedience, then the defendant ought to be acquitted. If he was in fact disabled; and the master by reasonable inquiries might have ascertained it; and he chose to act upon his feelings of disgust with the seaman; or rashly upon his own suspicion; then it seems to me, that he ought to be found guilty.

Verdict guilty. Judgment accordingly.

[1] See U. S. v. Ruggles [Case No. 16,205]; Philp's Case, 1 Moody, Cr. Cas. 264, 273; Bromage v. Prosser, 4 Barn. & C. 247, 255; Dexter v. Spear [Case No. 3,867]. "Wilful and malicious trespass," for the meaning of these words in a statute, 3 Bl. Comm. 214. See, also, Rex v. Harpur, 1 Dowl. & R. 222; Duncan v. Thwaites, 3 Barn. & C. 556; Pattison v. Jones, 8 Barn. & C. 578.

Case No. 14,825.

UNITED STATES v. COGSWELL.

[3 Sumn. 204.] [1]

Circuit Court, D. New Hampshire. May Term. 1838.

MARSHAL—ACCOUNT—FEES—TRAVEL—INTEREST—RENT.

1. In an account of the marshal for the district of New Hampshire against the United States, an item of two dollars was allowed for the service of each venire on the town clerks; also, an item for rent paid for an office, for the clerk of the courts of the United States; with interest on both these items. The court disallowed certain items, being the expenses incurred by the marshal, for the purpose of establishing and settling his accounts with the government; also, a charge for constructive travel and attendance at the monthly rules, held in the clerk's office.

2. Quære, how it would be, where the marshal actually travelled and attended at the rules.

[Cited in U. S. v. Smith, Case No. 16,346; U. S. v. Richardson, 28 Fed. 72; Harmon v. U. S., 43 Fed. 565; Re Lyman, 55 Fed. 35; U. S. v. Harmon, 147 U. S. 268, 13 Sup. Ct. 331.]

Debt on the official bond of the defendant, Pearson Cogswell, late marshal of New Hampshire. The defendant prayed oyer of the condition of the bond, which latter was as follows:—"The condition of the above-written obligation is such, that, whereas the above-bounden Pearson Cogswell is appointed marshal of the United States, within and for the district of New Hampshire, for the term of four years, from and after the fifteenth day of March, eighteen hundred and thirty-two. Now if the said Cogswell shall well and truly, faithfully and impartially, ex-

[1] [Reported by Charles Sumner, Esq.]

ecute the duties of the said office, so that the United States, or any person, shall not come to any damage on account of the proceedings of the said Cogswell, in his said official capacity, as marshal, then the above-written obligation to be void, otherwise to remain in full force." The defendant then pleaded, that he ought not to be charged, &c., because, he says, "That at the time of the commencement of this action, there was due and owing, from the said Cogswell, to the plaintiff, by virtue of said writing obligatory, according to the decision of the accounting officers of the treasury of the United States, aforesaid, the sum of five hundred sixty dollars and fifty-seven cents, and no more, and that the said United States, at the commencement of this action, was and still is indebted to the said Cogswell, in a much larger sum of money, than the money so due and owing from the said Cogswell, to the said United States, by virtue of the said writing obligatory, and the condition thereof, to wit, in the sum of four thousand one hundred forty-eight dollars twenty cents, for services done and performed by him, the said Cogswell, in his said office of marshal as aforesaid, to and for the said United States, and for moneys paid, laid out and expended by him, the said Cogswell, to and for the said United States, by the request, order and direction of the said United States, or the proper officers thereof, to wit, at Portsmouth aforesaid, on the day last aforesaid, out of which said sum of four thousand one hundred forty-eight dollars and twenty cents, the said Cogswell is ready and willing, and hereby offers to set off and allow to the plaintiff, so much money as will be sufficient to satisfy all the money due by virtue of the said writing obligatory, and condition, and all damages sustained by occasion of detaining the same." To this plea, the United States by their attorney, replied, that they ought not to be precluded from having and maintaining their action against the said Cogswell, because they were not nor are indebted to the said Cogswell, in manner and form as he hath alleged. And upon this replication, issue was joined.

At the trial, the only questions which arose were upon the set-off claimed by the defendant, a particular account of the items whereof was filed in the cause, and was laid before the jury. (1) One item was for the service of sundry venires on the town clerks of the several towns, from which the marshal (the defendant) was, by the grand venires (so called) directed to him by the circuit court, from time to time required to cause the grand and petit jurymen to be drawn from the jury-boxes of those towns, to attend the circuit courts. (2) Another item was for the travel and attendance of the defendant, as marshal, at the monthly rules, held in the clerk's office. (3) Another was the payment of office rent, for the use of an office for the clerk of the district and circuit court. (4) Another item was for the expenses of certain copies of papers from the clerk's office, as vouchers, to enable the defendant to settle his accounts at the treasury in Washington. (5) Another item was his, the defendant's, expenses to Washington, to settle his accounts at the treasury. On all these items the defendant claimed interest, from the time when they respectively became due. All these claims were presented to, and rejected by, the treasury department.

Mr. Hale, U. S. Dist. Atty.
E. Cutts, for defendant.

STORY, Circuit Justice. The first item depends upon the construction of the first section of the act of 1799, c. 125, § 1 [1 Story's Laws, 569; 1 Stat. 624, c. 19], by which it is provided, that the compensation of the marshals of the districts of the United States shall (among other things) be, "for summoning each grand and other jury, four dollars; provided, that in no case shall the fees for summoning jurors to any one court exceed fifty dollars; and in those states where jurors, by the laws of the state, are drawn by constables, or other officers of corporate towns or places, by lot, the marshal shall receive, for the use of the officers, employed in summoning the jurors, and returning the venire, the sum of two dollars, and for his own trouble, in distributing the venire, two dollars." Now, the latter part of this proviso, applies directly to the mode of drawing jurors in the district of New Hampshire, according to the state laws, which have been adopted by the act of congress, of May 13, 1800, c. 61 [1 Story's Laws, 792; 2 Stat. 82]. By the state laws, jurors are to be drawn from the jury boxes of the town by lot, at a meeting to be called for that purpose, in the presence of the official functionaries of the town. The respective venires for jurors from each town, are to be served on the town clerk. And by the practice of the courts of the United States, a grand or general venire, is addressed to the marshal, to serve the proper subordinate venires on the respective clerks of the towns. The item, now claimed by the defendant, and controverted by the United States, is for the service of these venires on the town clerks. Upon this statement, it seems difficult to find any real ground for controversy. The statute seems to us to provide directly for the very case; and, therefore, we are of opinion, that the claim ought to be allowed.

The next item, is for rent paid for an office for the clerk of the courts of the United States. This seems to us, a just charge against the United States, as an incidental expenditure, connected with the holding of the courts of the United States, and the due administration of justice.

The next item, is for travel and attendance at the monthly rules, held in the clerk's office, under the rules of the supreme court of

the United States, passed at February term, 1822. It is admitted, that the defendant, as marshal, did not, in fact, either travel to, or attend these rules at the clerk's office; and, therefore, his claim is for a constructive right, or a constructive travel and attendance, at the rules. But we are of opinion, that this charge, whatever might be its validity, if the marshal had actually travelled and attended at these rules is, under the circumstances, wholly inadmissible. To justify the charge, an actual travel and attendance are, in our judgment, indispensable.

The remaining items require no commentary. They are the mere personal expenses of the marshal, incurred by him for the purpose of establishing and settling his accounts against the government. They may, for aught we know, constitute a very sound claim upon the abstract justice and equity of the government, but they are not such as can be taken notice of, or enforced, by courts of justice.

Of course, upon these items, which are allowed by the court, the defendant has a fair title to interest. This, indeed, is not objected to on the part of the government.

Upon this intimation of the opinion of the court, a verdict was taken for the defendant, subject to the final audit of the account, upon a reference to the clerk of the court, as an auditor.

Case No. 14,826.

UNITED STATES v. COHEN.

[Cited in U. S. v. Blodgett, Case No. 14,611. Nowhere reported; opinion not now accessible.]

Case No. 14,827.

UNITED STATES v. COHN.

[7 Int. Rev Rec. 69.]

Circuit Court, S. D. New York. Feb., 1868.

INTERNAL REVENUE—VIOLATION OF LAWS—FRAUDULENT CIGAR RETURNS.

Solomon Cohn was charged with having made false returns of cigars made by him in August, 1866, under the law as it then stood. His return was 50,000 a month, at $12 per thousand. The government proved by the entries in his books, which they had seized, that he had sold one man more than 150,000, and that none of his sales were for less than $20 per thousand. Parties who bought of him were also called, and testified to the same rate of sales, and produced his bills. It was further proved that Cohn had had a quarrel with his wife, and that he had said that he did not dare to leave his books at home for fear his wife would get them. The defense claimed that it was not necessary under the law to include in the return sales of cigars bought by Cohn, but only sales of such as he manufactured. They did not, however, prove that these were sales of cigars that he had bought, and THE COURT (BENEDICT, District Judge) held that return of such sales must be made as the law then stood.

The jury found a verdict of guilty.

Phelps & Bell, for the Government.

Mr. Sedgwick, for defendant.

Case No. 14,828.

UNITED STATES v. COHN.

[See Case No. 14,827.]

Case No. 14,829.

UNITED STATES v. COIT.

[1 Car. Law. Repos. 346.]

District Court, D. New York. August, 1812.

SUMMONING OF JURY—DUTIES OF MARSHAL.

[A challenge to the array is properly sustained when it appears that the marshal summoned the jury without any designation by the court of the part of the district from which they were to be summoned, and not according to the mode of forming juries to serve in the highest court of law in the state.]

It has been the practice of the marshal of this district to select the jury, both as to the individuals who were to serve on it and the part of the district from which they were to come, at his own pleasure. In other words, it was completely in the power of the marshal to return at any time just such a jury as would answer the purposes of government, or of any of the officers of government having an interest in the cause to be tried. This power in the hands of a marshal disposed to use it for improper purposes is so manifestly dangerous to public liberty and private security that congress actually legislated on the subject, and directed that juries should be returned from such part of the district as the court should direct, so as should be most favorable to an impartial trial, and to avoid unnecessary expense, or unduly burthening the citizens of any part of the district with such services; and that they should be designated in each district respectively, according to the mode of forming juries to serve in the highest courts of law therein, so far as such mode should be practicable. Notwithstanding these plain and positive directions of the act of congress, the marshal has for years persevered in summoning such jurors as he at his pleasure thought fit, and from such parts of the district as suited his own views of propriety or convenience.

In the causes of the United States against Mr. Coit, for an alleged breach of some bonds executed by him as surety, during the first embargo, and which were noticed for trial at the above court, the counsel for the defendant, upon the district attorney's moving to bring on one of the causes, filed a challenge to the array, because the marshal had summoned the jury of his own mere arbitrary will and pleasure, without any designation by the court of the part of the district from which they were to be summoned, and because the

jury had not been summoned according to the mode of forming juries to serve in the highest court of law in this state, altho' it was practicable so to have summoned them. To this challenge the district attorney demurred, and the defendant's counsel joined in demurrer.

Sandford, Dist. Atty., D. B. Ogden, and Baldwin, for the United States.

Messrs. Brinckerhoff, Wells, Colden, Hoffman, and Emmett, for defendant.

The question was very fully argued by the counsel on both sides; and VAN NESS, District Judge, having taken time to consider of it, delivered his opinion in favor of the challenge, upon both points. The array was accordingly quashed and the jury discharged. The judge had reduced his opinion to writing. It was very ably drawn up, and the subject examined and discussed with remarkable clearness, precision and force. He shewed, not only from the acts of congress particularly applicable to this subject, but from a view of the whole judiciary system of the United States, that it was the intention of congress to conform the proceedings of the United States courts as nearly as possible to those of individual states respectively. By this decision, the valuable right of an impartial trial by jury, than which none is of more vital importance to the administration of justice, is secured to the citizens of this state in the district court, whose rights are no longer left to depend upon the will of an individual, but on the due execution of those laws, which, calculated to guard against abuse and oppression, have provided in our state courts for the selection of juries by ballot from all those who are qualified to serve.

It is proper here to add, in order to avoid mistake, that the counsel for the defendant did not impute to the marshal any improper conduct or design in summoning the jury in question, nor did the challenge involve any objections to the individuals composing the jury: It proceeded wholly upon the ground that the mode by which the jury had been summoned and returned was wrong in principle, and that the practice which had hitherto prevailed, was in violation of express and positive laws, whose strict observance was a matter in which even the humblest individual in the community had a deep interest.

Case No. 14,830.

UNITED STATES v. COLBY.

[1 Spr. 119;[1] 8 Law Rep. 496.]

District Court, D. Massachusetts. Nov., 1845.

SEAMEN — ASSAULT UPON BY MASTER — USE OF DEADLY WEAPON—WHEN JUSTIFIABLE.

1. The master of a ship, at sea, is justified in using a deadly weapon, to reduce a seaman to obedience, only in cases of necessity.

2. The circumstances of each case must determine whether such necessity exists.

3. Among these are, the situation of the ship, and the manifestation of a friendly or hostile disposition, on the part of the crew.

4. If the circumstances are such as to induce a master of ordinary firmness and discretion, in the exercise of an honest judgment, to believe the danger to be imminent, and to require the use of a dangerous weapon, to reduce to obedience a seaman in open mutiny, with deadly weapons in his hand, and therewith threatening the lives of the officers, and the master should make use of a deadly weapon from good motives, he will be justified in so doing, although subsequent events make it appear that less severe and dangerous measures might have answered the purpose.

Indictment for an assault with a pistol, upon one Fuller, a seaman. The evidence was somewhat contradictory, but the main facts appeared to be as follows;—Upon a late voyage of the ship, under the command of the defendant, Fuller, a seaman, was engaged in mending a sail, under the direction of the captain, on the quarter deck, when Fuller made some reply to Captain Colby, which the latter deemed insolent, and thereupon reminded Fuller that he must give him no insolent answers. Fuller replied, "I give you no more insolence than you give me." The captain struck Fuller with his hand Fuller immediately seized his sheath knife, which lay by his side, and threatened to stab the captain; the latter thereupon called to his mate to secure the man. The first and second mate came to the assistance of the captain, and were met by Fuller, who made two dangerous passes at each with his knife, threatening to run them through, if they approached him. The defendant ordered his mate to knock Fuller down with a capstan bar, if he could not otherwise disarm him. Fuller thereupon retreated to the forward part of the ship, and seizing the cook's axe, placed himself underneath a boat, which was raised, upside down, and supported athwart ships, about seven feet from him, and swore he would cut down the first man that came near him. There was evidence tending to show that some of the crew were inclined to render assistance to Fuller. Fuller was repeatedly ordered by the captain and officers to put down his axe and knife, and go to his duty, but refused with an oath. The officers all testified that, from his appearance and manner, they were afraid to approach him, or attempt to disarm him; that, in their opinion, it would have been dangerous for any one so to do. The captain then went to the cabin, loaded his pistol with shot, came forward where Fuller was, and twice or three times ordered him to lay down his axe and go to his duty, or he, the captain, would fire upon him. This, each time, Fuller, with an oath, refused to do. The captain thereupon fired, and the shot took effect in the face and head of Fuller, by which he lost one eye, and the other, at the time of the trial, was much affected. It appeared, also, that the man at the wheel left his station, and that

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr. Esq., and here reprinted by permission.]

the ship, during the affray, caught aback. The case was submitted to the jury without argument.

R. Rantoul, Jr., U. S. Dist. Atty.

G. T. Bigelow and M. S. Clarke, for defendant.

SPRAGUE, District Judge (charging jury) The law, gives to a captain of a ship, at sea, a power entirely unknown on land, out of the military service and places him in a situation, in respect to those under his control, quite different from that of a master towards his servant or apprentice, or that of an employer towards those employed by him. This authority is conferred for the preservation of the lives and property committed to his care, and is often as essential to the safety of the crew, as of the officers and ship. Hence the law has ever required of the seaman prompt and respectful obedience to all lawful orders of the captain. Even though the captain be in the wrong, or gives his orders in a harsh and insolent manner, or punishes without sufficient cause, still the seaman, while at sea, must submit to the wrong, and wait for redress till his return to port, rather than resort to violence, unless the wrong threatened to be done will work an irreparable injury. A seaman is not bound to submit to a permanent injury, for which no adequate redress can be given, such as the loss of a limb, an eye, or any enormous bodily harm, before resisting his superior officer; for the courts cannot afford complete redress for such wrongs. If the wrong threatened or done is such that it can wait for redress, the seaman is bound to wait, and will not be excused in forcible resistance to official authority For the use of this unusual power, the captain is amenable to the law; and for all abuse of it, whereby a seaman suffers, a remedy is provided upon his return to his country. In the case at bar, a dangerous weapon was used by the captain, whereby a lasting injury was done to a seaman. And the rule of law is, that no officer is authorized to use such a weapon, unless in case of necessity. This alone will be a justification. In the present case, the defence is distinctly placed on that ground. It is obvious, that the circumstances of each case must determine the question of necessity. The captain must not use a deadly weapon from anger, from pride of authority, or from passion, nor upon any occasion, when the circumstances are such that he can safely wait for the passion of the seaman to subside, and reason to resume its control, so that he may be able to induce, or compel, the mutinous person to return to his duty, by the use of milder means. It must be remembered, however, that the captain is to judge of his duty at once, with no time to wait and nicely weigh probabilities, and oftentimes with no time at all for deliberation or counsel. He cannot stop to inquire into suspicious circumstances, nor can he, at all times, be confident of the obedient dispositions of his men. The officers are generally the weaker party, and hence it becomes necessary for the captain to quell a mutinous disposition, before it has spread so far, as to be beyond his control. Hence the rule of law is, that if the captain, acting as a man of ordinary firmness, in the exercise of a sound discretion, and judging honestly from the circumstances, as they appeared to him at the time, did sincerely believe that the danger was imminent, and did require the use of a dangerous weapon to reduce to obedience a seaman actually in mutiny, and made use of such a weapon from honest motives, then he is justified in so doing, although subsequent events should make it appear, that less severe and dangerous measures might, perhaps, have accomplished the purpose. In such cases it becomes important to inquire, what was the situation of the ship, and what were the indications on the part of the crew If the captain saw his men hastening to the assistance of his officers, and manifesting a disposition to reduce the mutinous person to obedience, it would be a circumstance to show, that the use of a deadly weapon might not be required. If the crew left their stations, without openly manifesting such a disposition, even though they made no attempt to assist or encourage the mutinous person, still the captain might honestly regard that as a suspicious circumstance; because a seaman, in time of difficulty between the officers and any of the men, ought not to leave his station unbidden, unless he intends to render active assistance to the officers. In the case at bar, several of the men left their stations, and hurried towards the scene. And though they might have done so from honest motives, still the captain, at that moment, had the right to judge, from appearances, whether or not they came with hostile designs. A very important circumstance was, that the man at the wheel left his station, and the ship caught aback, and lay at the mercy of the waves. One other man, also, openly encouraged the mutineer, who was resisting the authority of the officers, armed with a dangerous weapon. There was some evidence tending to show, that at the commencement of the matter, an order had been given to seize Fuller up, and that it was in resistance of this order that he seized the axe, to prevent its execution. It is well known that this order precedes, and is usually preparatory to, the infliction of corporal punishment. Still it is not always inflicted, although the man is actually made fast to the rigging. Often he is released upon his promise of obedience, after he has been admonished by the seizing up, that he is in the power of the officers. This order, therefore, would not justify Fuller in using a dangerous weapon.

If the jury, then, believe that Fuller was brandishing a deadly weapon, and threatening the officers with it, and that there were

indications that others of the crew were about to co-operate with him, and that all the circumstances were such as to induce a captain of ordinary firmness and discretion, to believe that the use of a pistol was necessary to suppress a mutiny, and that the captain in this instance did so believe, then the defendant at the bar would be justified; but, if no such necessity, or apparent necessity, existed, then he would not be justified.

The jury returned a verdict of not guilty.

[For a libel by Fuller against the master on account of the same assault, see Case No. 5,149.] See Roberts v. Eldridge [Case No. 11,901]; U. S. v. Lunt [Id. 15,643]; and U. S. v. Borden [Id. 14,625].

Case No. 14,831.

UNITED STATES v. COLCHESTER.

[2 Int. Rev. Rec. 70.]

District Court, S. D. New York. 1865.

INTERNAL REVENUE—LICENSE—JUGGLERY—SPIRITUAL MEDIUMS.

The indictment charges Chas. J. Colchester with "practising as a juggler without license." The act of congress under which the defendant is indicted provides that every juggler shall pay a license fee of $20, and further "that any person who performs by sleight of hand shall be deemed a juggler." The defendant denies that he is a juggler. It appears that he offered to take out a license as a "spiritual medium," but the government officials refused to give him a license unless he would take out such license as a juggler, in other words consider himself a juggler. This the defendant absolutely refused to do, but offered the assessor to pay him whatever he might ask for a license as a spiritual medium, or to be known by any other appropriate appellation the official might choose to apply to his calling. The officer, however, refused to grant a license to him, other than as a juggler. The defendant declined the terms of the government officer, whereupon he was arrested, indicted, and the trial of the case transferred to this city. The defendant, upon being arraigned before the court, pleaded "not guilty" to the charge contained in the indictment, whereupon a jury was empaneled.

Mr. Dart, U. S. Dist. Atty., and Charles H. Tappin, Asst. U. S. Dist. Atty.

Josiah Cook and George B. Hibbard, for the defence.

[The following is a report of District Attorney Dart's address to the jury:]

"The prisoner at the bar, Charles J. Colchester, stands indicted for the offence of practising the trade or profession of a juggler, without having procured a license therefor, as required by the 'act to provide internal revenue, to support the government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864. The case seems to be one simple of solution, and involving no great public concern, and such I apprehend will be its result. The performance of singular and extraordinary feats of rappings, answering questions inclosed in envelopes, and the like, publicly, and for fee and reward, will not be seriously contested, perhaps admitted. The peculiar defence of the prisoner I can only gather from newspaper reports and public rumor, which assert that the prisoner will prove, or attempt to prove, that in the performance of these feats of apparent legerdemain, he is the mere passive instrument of spiritual control, and that he does not practice sleight-of-hand. I see assembled here a great multitude, not 'the spirits of just men made perfect,' but of men and women in their corporeal form. While I concede the inestimable value of the press, I cannot forbear the remark that it has been made the instrument of magnifying this case into undue proportions, and to cause the public to believe that it is a contest between the United States and a large body of citizens calling themselves spiritualists, and an endeavor on the part of the former to crush out a religious sect, and to expose its heresies, if it has any, and that the result of this trial will establish the fact whether spiritualism is true or false. Nothing can be further from the truth. The result of this trial can accomplish no such thing. It is a simple inquiry whether Charles J. Colchester is practising sleight of hand under the guise of spiritual control; and if he is, it is quite as important to professed spiritualists that he should be exposed, as it is to the public, whom he is deluding, and to the government, which he is defrauding. I trust, therefore, should there be a believer in this faith upon the jury, he will not look upon me as a persecutor, but will go hand in hand with me in my endeavor to expose his impositions if he is an impostor, and to compel him, if a juggler, to contribute his proportion to support the government, to pay interest upon the public debt, and for other purposes. There are and ever have been tricks in what used to be known as the 'Black Art,' a jugglery, which has baffled the inquiries of the curious, and are known only to the practisers of that art, and I will proceed to adduce evidence to prove that the prisoner is a disciple of that school."

[The case was tried before HALL, District Judge.]

After a lengthy trial, during which several witnesses versed in diablerie were examined, the case was submitted to the jury, who soon returned a verdict of "guilty." This, in fact, determines "paying mediums" like Mr. Colchester, to be jugglers within the meaning of the excise law, and as such liable to license.

Case No. 14,832.

UNITED STATES v. COLE et al.

[5 McLean, 513.] [1]

Circuit Court, D. Ohio. Oct. Term, 1853.

CONSPIRACY TO DESTROY VESSEL—EVIDENCE—ACTS DONE—DESTRUCTION OF VESSEL—WITNESSES—GUILT—REASONABLE DOUBT.

1. The 23d section of the act of congress of the 3d of March, 1825 [4 Stat. 122], which punishes a conspiracy to destroy a vessel or cargo, with the intent to defraud the underwriters is constitutional.

2. The object of the act is, to protect commerce, and the protection to underwriters is incidental.

3. The act applies to our internal as well as to our foreign commerce.

4. The mischief is as great in the one case as in the other.

5. And the opportunities to commit the offense, are much greater in our internal, than in our foreign commerce.

6. This congress has as full power to do, for the protection of commerce among the several states, as for the protection of commerce with foreign nations.

7. After prima facie evidence has been given of a conspiracy, the statements of those implicated, though not included in the indictment, is evidence.

[Cited in Cuyler v. McCartney, 40 N. Y. 244.]

8. This is, on the principle, that where a combination of individuals has been formed, to commit an unlawful act, they have assumed an individuality in doing the wrong, and the conduct of each one in doing or promoting the act, is chargeable on the whole.

[Cited in People v. Marble, 38 Mich. 130; Spies v. People, 122 Ill. 230, 12 N. E. 976, and 17 N. E. 898.]

9. The burning of the vessel is not necessary to complete the offense.

10. Any combination of two or more persons to destroy the vessel or cargo, consummates the offense under the law, though neither the vessel nor the cargo is injured.

11. The act strikes at the incipient stages of the crime.

12. In its object it is preventive, by punishing the design to do the act.

13. Circumstantial evidence may be as satisfactory to a jury as positive. Sometimes it may equal positive proof.

14. The destruction of the vessel by the defendants, or by any one of them, identified with the defendants as conspirators, would be conclusive against them.

[Cited in People v. Richards, 67 Cal. 415, 7 Pac. 830.]

15. The burning of the vessel is not punishable under the act of congress, but it operates as evidence, against the defendants.

16. The testimony to show the unlawful combination does not end at the destruction of the boat.

17. After, as well as before that event, the acts of the confederates may be examined to show their guilt.

18. Their entire acts, in relation to the subject matter of the indictment, which conduce to show a guilty purpose, may be proved.

19. The jury are the exclusive judges of the credibility of witnesses

20. The manner in which a witness testified, the opportunity he had of knowing the facts he swears to, and his whole deportment in making his statements, will necessarily have an effect with the jury, in giving or withholding their confidence in his statements.

21. In coming to a conclusion of guilty or not guilty, the jury will weigh the evidence and exercise their best and most deliberate judgment.

22. They will not convict unless their minds are clearly convinced of the guilt of the accused.

23. But if so convinced, they will not be deterred from a conviction of the defendants, in whole or in part, as the evidence may require, from the consequences which may follow.

24. We have, in this trial, only to look at the facts and the law. With consequences we have nothing to do.

25. But if the jury are not satisfied of the guilt of the defendants, beyond reasonable doubts, an acquittal should follow.

[This was an indictment against Lyman Cole, William Kissane, John N. Cummings, George P. Stephens, William H. Holland, Benjamin W. Kimball, James W. Chandler, James G. Nicholson, Adams Chapin, Amasa Chapin, Rufus Chapin, and Lorenzo Chapin, charging them and one Lucius L. Filley, deceased, with entering into a combination and conspiracy to burn the steamer Martha Washington, and with afterwards setting on fire and burning said boat. Heard first upon motion to quash indictment, afterwards upon trial and charge to jury.]

Mr. Stanbery, Mr. Morton, U. S. Dist. Atty., and Mr. Ware, for the Government.

Ewing, Walker, Swayne, Pendleton & Ward, for defendants.

OPINION OF THE COURT. Before the jury were called, a motion was made by the defendants' counsel to quash the indictment. The main ground upon which the motion to quash was urged was, that the act under which the indictment was found, applied, exclusively to offenses committed on the high seas, and not on our rivers and lakes. It was also urged that the act was unconstitutional, if it was intended to apply to our internal commerce. These points were argued elaborately, on both sides, and with ability.

In deciding the motion, McLEAN, Circuit Justice, said, that the court would proceed to give its impression upon the case, which had been so ably argued. The law under which the prosecution was commenced, is embodied in the 22d section of the act of the 3d of March, 1825. It provides, "that if any person or persons shall, on the high seas, or within the United States, willfully and corruptly conspire, combine and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or procure the same to be done, with intent to injure any person or body politic, that hath underwritten, or shall thereafterwards underwrite, any policy of

[1] [Reported by Hon. John McLean, Circuit Justice.]

insurance thereon, or on goods on board thereof, or with intent to injure any person or body politic, that hath lent or advanced, or thereafter shall lend or advance any money on such vessel, on bottomry or respondentia," &c.

The first position of the counsel who concluded the argument on the motion was, that the act was unconstitutional and void. He contends that the object of the law was, to protect insurance companies, and that congress has no power to pass such an act.

This act does not purport to be for the protection and regulation of insurance offices. It is clear that congress can exercise no power over contracts of insurance. It has been decided that when a policy of insurance was on a ship on a sea voyage, as the policy operated upon the water, and not on the land, that it was a marine contract. This is contrary to the English doctrine, as it requires the contract to be made on the water to give it the character of a marine contract. The courts of common law, in England, have been strongly opposed to the admiralty jurisdiction. And the rule is well settled there, that it cannot be exercised within the body of a county. It can be exercised over no water where the tide does not ebb and flow. The supreme court of the United States have adopted a more reasonable doctrine, long established by the civil law, that a maritime jurisdiction may be exercised over navigable waters. Navigableness is the true test, and not the flowing of the tides. It is known that in England there are few if any rivers navigable higher than the flowing of the tide, and this is generally the case with the rivers in the Atlantic states. This, was, no doubt, the cause why the English rule was first followed by our courts in this country. There seemed to be no good reason why the same rule should not be applied in both countries, as the navigable waters of both were made navigable by the tide. It was a convenient term, at first used to describe the extent of navigable waters in England. We have adopted the fact rather than the definition of it. Wherever commercial crafts may float between two or more states, the maritime jurisdiction extends. But independently of this view, under the constitution, congress has the same power to regulate commerce among the several states, as with foreign nations. As regards the present case, no distinction need be stated, if any exist, between the regulation of our foreign and domestic commerce.

Is the scope of the act in question to protect policies of insurance? What is clearly the object of the law? The conspiracy charged is against a vessel and her cargo, upon a river under the protection of the commercial power of the Union. The protection of commerce is the object of this law; the protection of insurance policies is merely incidental. Congress might have punished the burning of the vessel, but it was not thought proper to do so; it has leveled its enactment at the incipient stages of the offense. The law in its object is preventive; by inflicting the penalty on the determination to commit the crime. It does not go behind the overt act to the motive, as the laws of omniscience; but it strikes at the first manifestation of the intent. Whether the conspiracy is formed on the high seas, or within the United States, is of no importance. The offense is so far consummated as to come within the act when the conspiracy is formed. It was wise to strike at the first step, as it gives time for reflection and repentance. The words of the section apply as forcibly to vessels on our rivers and lakes, as on the high seas. The mischief is as great in the one case as in the other. But the opportunities and motives to commit the offense against our internal commerce are much greater than against our foreign commerce. Under such circumstances can any court hesitate to consider the law according to the express language used, as punishing the offense, whether committed on our internal or foreign commerce. The invoices are alleged in the indictment to have been false, and if they were really so, it is argued there could be no conviction, as the conspiracy charged is to destroy the cargo.

Can the defendants claim an exemption from the penalty of the statute, by committing a double fraud? A fraud in having false bills of lading, and another fraud in conspiring to destroy the cargo. False invoices or bills of lading would establish the fraud charged. If a party is not liable under the act of congress when the shipment is fictitious, he would be protected from punishment by his own fraud. This is inadmissible in any code of morals, and especially is it against the law. We have not time to read the indictment through, but our impression is, on hearing it read, that it is sufficient. The defendants can avail themselves of any fatal defect in the indictment at a future stage of the proceeding. The motion to quash the indictment is overruled.

The jurors being called, Messrs. Morton and Stanbery, on the part of the government, demanded the exercise of their peremptory challenge after the defendants had challenged.

Judge Walker had never heard of the violation of the rule that the government should challenge first, and then the defendants exercise their right, except in two instances.

THE COURT decided that the challenge should be exercised alternately.

Counsel for the government had no objection to the jury if the defendants had not. They waived the first challenge.

Judge Walker proposed to propound the following question to each of the jurors: "Have you, by conversation with others, or by the reading of newspapers, acquired such a bias as will prevent you returning an im-

partial verdict according to the law and the evidence?"

THE COURT allowed the question to be put.

Mr. Van Slyke answered that he had formed an opinion unfavorable to the defendants; and for that he was excused for cause. The other eleven replied in the negative.

Judge Walker challenged a juror peremptorily. Dr. Mœller was called to fill the vacancy, and begged to be excused because he had formed an acquaintance with Kissane, as physician to the jail. Further discussion took place between counsel. Juror was interrogated by THE COURT. He replied that his sympathies had been somewhat excited for Kissane—had had conversations with him with respect to this case on one or two occasions. Had not such a bias as would prevent his returning an impartial verdict. Had patients that needed his attendance.

THE COURT excused Dr. Mœller.

Mr. Slocum was called to fill the vacancy.

Judge Walker put the question he had before propounded to the other jurors, to Mr. Slocum.

The juror had no bias.

Judge Walker challenged another juror peremptorily.

A. J. Clark was called. Question put by Judge Walker, and answered in the negative.

Judge Walker asked the defendants whether they desired he should make any further challenge.

Mr. Stanbery now claimed to exercise the right to peremptory challenge for the government.

After consultation between the judges, THE COURT allowed it.

A. J. Clark was challenged by Mr. Stanbery.

Judge Walker challenged the juror who was called in Mr. Clark's place.

Benj. Tresenrider was called to fill the vacancy. Question put and answered in the negative.

Mr. Slocum was challenged for the defendants.

John R. L. Seegur was called. Question as to bias put and answered in the negative.

Dr. Toland was challenged by counsel for defendants.

James L. Farren was called. Question put as to bias by Judge Walker.

Juror:—"Know nothing about the case—would rather be excused from serving—just stepped into the court five minutes ago to see who Judge McLean was. Had no idea of being called as a juror."

Mr. Miner was challenged for the defendants.

Henry Wellhamer was called, and came in crying—I wish to be excused, judge.

McLEAN, Circuit Justice: Very likely—but for what reason?

Juror:—I have just set out on a journey.

Mr. Wellhamer was excused for that reason by the court.

Mr. Taylor called. Question put as to bias—answered in the affirmative, and was therefore excused.

William Blynn called. Question put as to bias—answered in the negative.

Another juror challenged by Judge Walker.

Geo. W. Slocum called. Question put—answered "no."

Another juror was challenged.

A. McCrea was called. Question put—answered: he had read the preliminary trial and formed an opinion. Excused.

A. Tyler called. Question put—answered in the negative.

Mr. Tyler was challenged.

There being no prospect of completing the panel, the court adjourned.

Friday, October 21, 1853.

The calling of jurors to complete the panel was proceeded with. Some jurors were excused on the plea of sickness or inability to endure the confinement attendant on the trial. The jury, as finally constituted, stood as follows: Joseph Newell, Levi J. Haughey, Wm. L. Brown, E. B. Sacket, Jas. L. Farren, Geo. W. Slocum, Wm. Aston, S. V. Martin, John Miller, F. C. Sessions, C. W. Kent, Henry Miller.

Mr. Morton, Dist. Atty., opened the case for the United States, as follows:

The grand jury of the United States, for the district of Ohio, at the last April term of this court, returned as a true bill, a bill of indictment against Lyman Cole, William Kissane, John N. Cummings, George P. Stephens, William H. Holland, Benjamin W. Kimball, James W. Chandler, James G. Nicholson, Adams Chapin, Amasa Chapin, Rufus Chapin and Lorenzo Chapin, charging them and one Lucius L. Filley, deceased, with entering into a combination and conspiracy to burn the steamer Martha Washington, and with afterward setting on fire and burning said boat. The time and place of the conspiracy is laid as of the fifteenth day of December, A. D. 1851, at Cincinnati, in the district of Ohio. The burning of the boat is alleged to have taken place on the fourteenth day of January, A. D. 1852, near Island Sixty-Five, in the Mississippi river, about sixty miles below Memphis. The object of the conspiracy was to injure and defraud underwriters who should thereafter underwrite policies of insurance upon the hull and cargo of said steamer. The first count charges the conspiracy in general terms in the language of the statute, without specifying any overt act. The remaining seven counts charge the offense in the same manner, together with divers overt acts, done and performed by some or all of the defendants in furtherance of the common design. All of the remaining counts particularly set forth and describe policies of insurance, which were obtained by the defendants, and the sixth count alleges that divers other policies of insurance were pro-

cured by the defendants from underwriters to the grand jury unknown.

Nine only of the defendants are now on trial. James G. Nicholson, the clerk of the boat, was arrested before the finding of the indictment, and was discharged on bail. He did not appear, and his bail bond was forfeited at the last term of this court, and he is still at large, as also are Stephens and Chandler. Although the most diligent search has been made for them, they have not been found. The others (save Filley, who died before the indictment was found) are now on trial. To this indictment the defendants have plead not guilty, and you are now impanneled to try the issue between them and the government. It is the duty of the government to preserve the peace and good order of society, and for this purpose laws are enacted defining those acts which constitute a crime, and fixing a penalty for its perpetration. When a person is legally accused of a crime or misdemeanor he must be tried, and if found guilty, must suffer the penalty of the law. The welfare of the community, the very existence of civilized society depends upon the due administration of law. But it is also a high and sacred duty of the government to protect the innocent and unoffending in the enjoyment of their rights, and when a man is accused in the courts of justice, it is incumbent upon the officers of the law to afford him every possible means of establishing his innocence, and to prevent any unfairness to be practiced in procuring his conviction. The high character of the judges who compose this court, and the distinguished ability and learning of the professional gentlemen who appear on behalf of the defendants, and (if I may be permitted to allude to it without giving offense) the number of counsel employed, is a sufficient guaranty that they will have a fair and impartial trial, and if innocent will certainly be acquitted. You, gentlemen of the jury, are too well informed of your duty as jurors and the obligation of the oath you have just taken to permit any thing but the truth as it shall be given you in evidence, to affect your judgment or influence your verdict. You will direct your attention to the law and the testimony, and carefully exclude from your consideration every statement or rumor which you may have heard or read, calculated to prejudice these defendants. You have already discovered that this investigation is to be a protracted and laborious one, and will call for the exercise of all the patience and candor of which you are possessed. That such an accusation as is contained in this indictment should be allowed to pass without legal investigation, or that after conviction the offender should escape the severest penalties of the law, would be an everlasting stigma upon our institutions of government. A distinguished lawyer and statesman of Ireland, speaking of the administration of law in the courts of England, said that with a coach and six any man could drive through an act of parliament. For the honor of my country I hope the time may never come when this may ever be truly said of the courts of the United States. Of the courts of republican America let it ever be said that here the stream of justice flows ever pure and uninfluenced by affection, unintimidated by power, and undefiled by corruption.

Let us inquire now for the law upon which this indictment is founded. What is the mischief designed to be prevented by it? It is to prevent combinations and conspiracies to burn any ship or vessel with intent to defraud any underwriters. Three things must exist to constitute the offense—the confederation or agreement of two or more persons, to burn a ship or vessel, for the purpose of defrauding underwriters. If the conspiracy be proved and the intent be established, viz: to defraud underwriters, yet if it be to burn a house it would not sustain this indictment. The fraud which this law is intended to prevent is that alone which can be effected by the burning of a ship. We can clearly see then that it was that great department of the business of the country which is carried on by means of ships or vessels, that is intended to be protected by this act.

Several important inquiries arise upon the law of this statute, but this is not the proper stage of the investigation for their examination. It is sufficient to say, "ita lex scripta est." Thus the law is written. We must observe the law without enquiring into the reasons of it. But the necessity of this law is obvious. We are a commercial people, made so by our vast industrial and agricultural resources. Our rivers furnish exhaustless supplies of power for propelling machinery as well as do our mountains of coal and great forests. The mineral wealth of the country needs not to be transported to great distance to be manufactured, for here both the raw material and the motive power are found in the same region of country. But of what use are manufactories without a market? and there is no market without commerce. Our own wants are already supplied in every species of product of our own industry. We must exchange our own for those of other nations or we derive no profit from our labor. Consider next the agricultural wealth of this country. Here is the granary of the world, the Egypt of modern times. Here lie the rich valleys, the fertile hills, the broad plains and illimitable prairies of the Great West, all teeming with the luxurious products of the soil. But what of all these, and of what value are they to us if we have not commerce? Our richest treasures turn to ashes in our hands if we can not carry them to the people who inhabit less favored regions of the earth. But we have the means ample and sufficient for all these wants. We have steamers, we have sail ves-

sels, we have the stately ship and the humble navigator of the creek and canal. Every river and lake, every pond and basin from Newfoundland to Mexico, from the Alleghenies to the Rocky Mountains, is agitated and kept in motion by these vehicles of commerce. Byron said, in describing the movements of a ship, "she walks the water like a thing of life." I would improve the simile by saying that these instruments of commerce make the very waters instinct with life and action.

The amount and value of property daily floating upon our navigable waters is vast almost beyond the reach of calculation. To those not engaged in commercial pursuits, and not accustomed to study commercial statistics, a statement approximating any where near the truth would be considered exaggerated and wildly extravagant. But commerce is a hazardous pursuit, peculiarly so. Out of the necessities of this immense commerce associations of underwriters or insurance companies have sprung up all over the country. Some have been fortunate and successful; others have been overwhelmed by losses, and those engaged in them brought from affluence to poverty. Their office is to protect commerce by assuming its hazards and risks. The influence of these associations of underwriters has been in the highest degree salutary to the commercial interests of the country. When the merchant or the producer embarks his entire fortune upon a frail ship for a distant market, these associations are ready to assume all the hazards of the voyage, and to guaranty its safe arrival at the port of destination, for a small proportion or per centage of its entire value. In case of a loss, the calamity, instead of falling with crushing weight upon the owner, and consigning himself and family to beggary, is distributed upon a great number, who, by a contribution of small proportions, are enabled to restore to the owner the entire value of his property, generally without serious damage to any one. Thus the loss is assessed upon the whole commercial community—a worthy and enterprising member of it is saved from ruin, and his business is continued without interruption. Thus, by means of the principle of insurance, a pursuit in itself the most hazardous, is rendered entirely safe, and greatly facilitated and encouraged. The protection and fostering care of the government has been extended to these associations, whose prosperity has justly been considered a matter of great national concern. The people in the formation of the constitution of these United States took care to remove this subject beyond the reach of the cupidity and selfishness of individual states, and entrusted it to the keeping of the national government. Hence the passage of the law by congress upon which this indictment is founded. The court has decided that congress has power to pass this law; if it could not elsewhere be found in the constitution, it seems to me it might properly be referred to the general grant of power to pass all laws necessary to the exercise of the power expressly granted. But this is not the time to discuss, nor is a jury the proper tribunal to pass upon that question.

The voluminous nature of the testimony, the multiplicity of the facts involved, render it impossible that I should at this time communicate to you a particular and detailed statement of the proofs which will be adduced on the part of the government in support of the indictment. I shall content myself with merely pointing out to you under general heads, the nature and kind of proof which will be adduced in testimony before you.

I. The relations of the defendants to one another will be shown. It will appear that a part of them were on the river Rio Grande, during the Mexican war, not as soldiers, but as followers of the camp, in pursuit of private gain. That they were intimately associated and closely connected together, while in that country. Those who were thus engaged on the Rio Grande, are Cole, Cummings, Holland, Stephens, Chandler, Nicholson, and two of the brothers Chapin. After the close of the war, they are found congregated at Cincinnati. Subsequently Kissane, and the two other brothers Chapin, and Filley, a partner of the Chapins, are admitted to their fraternity, and often seen in their company at divers places in and about Cincinnati, at unusual hours, and with no apparent business. They were often engaged in private consultation, the object of which was concealed from all but themselves. Save Filley and the Chapins and Kissane, none of them were engaged in any ostensible business, and some of them were strangers, sojourning only temporarily at Cincinnati. These interviews and consultations took place frequently before and for some time after, the burning of the boat.

II. It will appear that the defendants, in December, 1851, concocted the purchase of the steamer Martha Washington, an old and dilapidated boat, and caused her papers to be made out in the name of Lewis Choate, who was in no way interested in the purchase. The reasons for this purchase, and for the adoption of the name of a fictitious owner, it will be important for you to ascertain. For the prosecution it will be contended that this was the scheme of fraud intended to be perpetrated upon the insurance companies.

III. In order to procure policies of insurance and advances from consignees, the defendants pretended to ship large quantities of merchandise on board said steamer, and procured from the captain and clerk of the boat (who are charged as conspirators in this indictment) false bills of lading by means of which they succeeded in obtaining policies of insurance and advances to a very large amount. Most of these were effected upon

the sixth and seventh days of January, and from that time up to the 12th of January, 1852, in the short space of six days and at numerous places in parts of the country remote from each other.

IV. The boat left Cincinnati on the night of the 7th of January, 1852. While on her way down the river, goods were put off at different ports which were marked as consigned to New Orleans and more distant ports. The boat was burned near Island Sixty-Five, about sixty miles below Memphis, on the Mississippi river, at half-past one o'clock on the morning of the 14th of January, 1852. The captain, mate, and clerk of the boat were all up, neither having yet retired to their berths, and neither of them were on duty at the time.

V. After the burning of the boat the defendants entered upon a concerted course of action to render each other mutual aid in effecting the payment of the policies thus obtained by means of false papers and false oaths. The insurance companies demanded proofs of quantities and values of the goods on board at the time of the burning. These defendants made false invoices to one another in order to consummate the fraud on the companies, and added the crime of perjury to that of conspiracy, arson and murder. Consignments of inferior articles of trifling cost, described as being articles of a superior kind and great cost, will be shown to have been made by these defendants upon this boat. Some of the defendants failing to produce original bills of purchase, pretended that the same had been destroyed as papers possessing no value. It will be shown that the amounts of property pretended to have been shipped by these defendants are incredible, considering their limited means and credit. The quantities of particular kinds of goods are incredible for any one house or person to be possessed of at that time in the year and state of the market with reference to supply and demand. They were pretended to be shipped from Cincinnati to New York, when they were actually worth and would command a higher price, if they had them to sell, in Cincinnati than in New York, and the goods were of a kind to meet a ready sale for cash, as there was a scarcity in the Cincinnati market. The goods I now refer to are hides and leather, of which it is claimed immense quantities were shipped by some of these defendants on board of this ill-fated boat. We shall offer proof to show that if the goods which these defendants procured to be insured had been on board, she could not have floated them and the goods actually shipped by other persons. It will appear that there were goods on board of this boat which were lost but they were not the goods of these defendants and upon which these insurances were effected.

VI. Having thus proved to you that the defendants are guilty of this unlawful combination and conspiracy by the testimony to which I have alluded, we shall then produce the confession of Lucius L. Filley, one of the conspirators, now deceased, made in his life time, in which he gives the details of this horrible crime, and fully discloses all the parties engaged, and the part which each performed in the tragedy, which resulted in the destruction of a large amount of property, and the lives of sixteen at least, innocent, unoffending human beings.

Thus, gentlemen, I have briefly stated the kind of evidence relied upon by the government for a conviction in this case. By keeping these general divisions in view, I believe you will be enabled to perceive the application of all the testimony which will be submitted on the part of the prosecution.

After a large number of the witnesses in favor of the prosecution had been called and sworn, the counsel for the defendants observed to the court, from the nature of the prosecution, and the circumstances attending it, they deemed it important to have the witnesses separated, so that they should not hear the statements of the one under examination. This was not objected to by the counsel for the prosecution; and it being a motion often made, rarely objected to, and never denied in a criminal case, the court entered the order.

The witnesses for the prosecution were then called and examined in the following order:

Robert McGrew, Sen.—Stated that he lived in Cincinnati in 1851, on 7th street, between Main and Walnut. He knew Holland, Kissane, Cole, Nicholson, and Stephens. In October or the beginning of November of that year, Stephens and Edwards came to his house to board. Holland came next; was brought to his house by Stephens. Young Cole was introduced by Holland. Cole and Kissane came to see Holland. Cummings was brought to his house to dine by Holland. Capt. Cummings and Kissane were often there. Never saw Cole, the defendant, there but once. Saw Holland at Kissane's pork house. Holland said he became acquainted with Cole and the Chapins in Mexico, on the Rio Grande. Holland, Edwards, and Stephens, with Cole, and some others, were engaged in running a steamboat on the Rio Grande. It was here objected that the statement of Edwards, who is not a party on the record, could not be received as evidence against the other defendants. THE COURT stated that the conspiracy must be proved, before the statements of those who were engaged in it, but were not indicted, could be received as evidence against the defendants. But as the prosecution proposed to prove the combination, the court would, for the present, hear the witness.

In a few days after the above, the witness states that Edwards and Stephens left the house of witness, as they said, for New Orleans. Edwards said he was going in January on the Martha Washington, to take command of a boat on Red river. Holland returned after the burning of the Martha Wash-

ington. Sometime afterward Stephens returned. Stephens first came to the house of witness, and afterwards, brought Holland to the house. Stephens remained three or four weeks. Holland remained longer. Saw Nicholson once when he called to see Holland. He appeared to have no business. Stephens said he came to receive the insurance for the goods lost on the Martha Washington. Heard Kissane say that he had never known Holland or Stephens, until he saw them at the house of witness. On cross-examination, witness says, that when Kissane called at his house, he saw the persons above named in the public room. He talked about having some tanks, and requested Stephens to call and see the tanks. At the time Holland was at the house of witness, the river was frozen over.

William Northup—Witness lived in Cincinnati in 1851. His place of business was corner of Court and Walnut. In 1842 the witness lived on Fourth street. In the winter of 1851, before Christmas, saw Kissane call frequently on Cummings.

Robert McGrew, Jr.—States substantially, facts, as related by his father. Mr. Walker, one of the counsel for defendants, made the objection again that no confessions of a party, not in the indictment, should be received to inculpate the defendants, until the conspiracy shall be established. 2 Starkie, Ev. 327, was cited. 2 Russ. Crimes, 700, and Rose. Ev. 417, were read to show that the declaration of a stranger to the record could not be received as evidence THE COURT stated it was a matter of practice in such a case, whether the court would hear the confessions of persons not on the record, to implicate the defendants, when an assurance was given by the prosecution that they would connect the person with the conspiracy. But THE COURT observed, that the better and safer rule was, not to hear such confessions, before prima facie evidence was given to connect the witness with the conspiracy. 3 Greenl. Ev. 58, 34 Eng. Com. Law, 400; 2 Russ. Crimes, 677. The witness, McGrew, further stated, that Stephens paid his father for the board of Edwards, and also furnished Edwards with some clothing. Edwards had no boxes of merchandise at his father's. Holland, when he returned, had but little property, after the boat was burnt—a carpet bag was all.

Mr. Penniman—Witness lives in Terre Haute. In 1851–2, lived in Maysville, Kentucky. He was acquainted with several of the defendants. The winter before witness was acquainted with Nicholson at the City Hotel in Cincinnati. Nicholson spoke to witness at Maysville; said he was on his way to see his wife at the Esculapian Springs, in Kentucky, before the Martha Washington sailed. Said he had purchased that boat. Witness boarded at the Walnut Street House, in the spring of 1852, and saw Kissane, Nicholson, and Cummings walking on the street. Also he saw Nicholson and Cummings at Kissane's place of business. Had some conversation with Capt. Cummings, who said the boat took fire on the larboard side.

Mr. McGregor—Was one of the owners of the boat Martha Washington. Saw an advertisement saying some persons were desirous of buying a steamboat; addressed a letter to Mr. ——, as directed, and received in reply a letter from Capt. Cummings. Witness told him that he owned one half of the boat. Sold both halves eventually for nine thousand dollars; asked at first ten thousand. Capt. Cummings had only three thousand dollars. Finally, Capt. Cummings was to pay on the return trip, nine thousand dollars. On his return he paid six thousand dollars. Capt. Cummings said he had left his money, two thousand dollars, with Kissane. Kissane promised to pay the two thousand dollars, and promised to loan Capt. Cummings one thousand dollars Kissane offered a draft by Cole, on Boston, which witness did not take. Witness loaned seven hundred dollars to Capt. Cummings, and paid for him a bill, for stores, bought of Cassilly, for three hundred dollars. When the purchase of the boat was first made, Capt. Cummings said he had bills maturing for ten thousand dollars. The boat was four and a half years old; carried six hundred and forty tons. Witness shipped on board the boat the fourth or fifth of January, 24 hogsheads of bacon; 87 barrels of whiskey; 123 barrels of pork, and other freight. Witness recommended Kissane to ship on board the Martha Washington, who said he would if he could. Afterwards Kissane told him the Capt. had refused to take any more freight, and that he had shipped on another boat fifty hogsheads.

Capt. Pierce—Was on the levee when the cargo was being put on board the Martha Washington. Saw her at sun-set the day she left; appeared to be about half loaded. The vessel measured by enrolment 290 tons, but she actually measured more than that. He thinks she had not more than 350 tons on board. Does not recollect whether any persons, at the time he saw the boat, were engaged in loading her. A boat loaded in the stern would elevate the prow of the boat. He thinks the boat was worth seven thousand dollars. Nosing of the boat is that which is a prominence on a level with the lower deck.

Lowel Fletcher—Shipped on board the boat 104 barrels of whiskey, amounting to about 15 tons. Saw a great deal of freight on the landing about 3 o'clock of the day the boat left.

Franklin Calliday—Was at Cincinnati, January, 1852. Went to Louisville; the Martha Washington was then there, the 8th of January; left Cincinnati the 7th. Witness went on board the Martha Washington, at Louisville. Saw Capt. Northup in the cabin. Capt. Cummings said he did not go on as a fog was rising on the falls. The boat was

not fully loaded. Cummings said he waited for insurance—that he had about two-thirds of a load.

Lewis Clawson—Witness in 1852 lived in Cincinnati, was secretary of an insurance company. On the 9th of January, 1852, insured $8,000 worth of merchandise on board the Martha Washington. Did not describe the kind of merchandise. The papers being called for: 1st. Bought of Lyman Cole articles amounting to $6,359.50. 2d bill—bought of Smith & Kissane $248.80. Bought of ——, 13 casks of brandy, &c., $708.80. The bill of lading was in the handwriting of Kissane & Smith, beef and pork packers, manufacturers of candles, also of lard oil. The color of the ink of the signature of the bill of lading, was different when he first saw it from what it now is. An open policy—thirty-three insurances—all except the above, of business in which the insured were engaged.

Mr. Carter—Lived in Cincinnati in 1852. Was agent for Fireman's Insurance Company, —also the Etna of Hartford. Mr. Stephens insured six boxes of merchandise, $5,361. Witness took the insurance. After the loss of the boat, Stephens called; witness told him he must produce the invoices and bill of lading. Copies were afterwards furnished, but not the originals, purporting to be of goods purchased from John Edwards, $5,361. The bill of lading was signed by Capt. Cummings. Witness inquired of Stephens when Edwards had gone South. Stephens referred him to Kissane and Capt. Cummings. Kissane said he had known Stephens a good while, and that he was an honest man, and all right. Capt. Cummings said about the same thing. Witness did not pay the amount of insurance. Cole issued an attachment, and summoned the company as garnishee. It has expended money in procuring testimony, &c. Burton was employed, witness understood, to attend to the business. On the cross-examination, the witness said he believed several insurance companies agreed to pay something to look up evidence. The company in which witness was engaged, paid $500. If the same amount were paid by all the companies, would make the sum of $3,000. Josiah Lawrence, president of the company, was rather opposed to this arrangement. Did not think that Kissane could have committed the fraud.

Mr. Love—Shipped on board the Martha Washington merchandise to the amount of 9½ tons.

William Emerson—Shipped 100 barrels of pork, making 15 tons.

Mr. Leahmer—On 200 barrels of lard oil, amounting to 30 tons, advanced $4,709.65. It was destined to Philadelphia. Lard manufactured by Smith & Kissane, January, 1852, $4,400. On candles, &c., witness also advanced. Charged five per cent. for advances. The bill of lading was signed by Nicholson.

Mr. Mack—Was agent for the Insurance office of Hartford, and made insurance for merchandise on board the Martha Washington for Stephens, 76 cases of boots, shoes, and hats, $3,369.50. Stephens said he bought the goods from Lyman Cole. Had invoices which witness said were unnecessary. After the Martha Washington was burnt, Stephens called to know what papers were necessary to claim the insurance. He had certified copies of the invoice and bill of lading. The originals were required, and they were afterward produced. Invoice of goods shipped, amount $3,372.75, 7th Jan'y, 1852. Stephens referred to Cole, and he spoke well of him.

Zenas Knowlton—Lives in Hamilton county. Knows Lyman Cole. Keeps a tavern. Saw Cole and Cummings at his house in 1851; thinks it was in the fall; might have been in 1850. Had seen Capt. Cummings on the road to Oxford. Saw a good many people travel on the same road.

John Shultz—In January, 1852, lived in Cincinnati. Shipped on board the Martha Washington 203 barrels of flour. Went on board the boat on the evening of the 7th January, 1852. The guards of the boat were two feet out of water. Passengers were at supper. Saw but very little freight on the shore. 25 or 30 boxes were on deck, near the social hall. Does not recollect whether there was a wharf boat or not, near the Martha Washington.

Samuel W. Smith—Witness is of the firm of Smith & Co. They shipped on board the Martha Washington 100 barrels of whiskey.

John S. Brown—Lived at Cincinnati in 1852. He shipped on the Martha Washington 56 barrels of lard oil; 25 boxes of cheese; 2 hogsheads of bacon sides, amounting to 3 tons. Witness saw Chandler; requested National insurance; 4 boxes of revolving pistols, &c.

Mr. Ray—Shipped 264 barrels of red oil, and from 370 to 80 barrels of oil, not red.

Mr. Page—Lived in 1852 at Evansville, Indiana. The Martha Washington, in descending the river, landed at his wharf, and the following articles of freight were put on board of her there: 37 bbls. of lard; 25 bbls. of turnips; one hundred pounds to a barrel; 942 sacks of corn; 140 bbls. of ——, 2½ bushels in each; 332 sacks of corn. Bills of lading signed by Nicholson as clerk. Names on two bills of lading, Smith and Kissane erased, and Nicholson's name inserted.

Samuel P. Hibbart—Witness is a steamboat agent. Engaged freight for the Martha Washington. In 1852 lived in Washington. Capt. Cummings told him not to engage any more freight, as he had engaged a large amount. Witness engaged 525 tons, one hundred barrels not shipped. It is usual for captains to engage freight. Kissane said he had shipped 600 boxes of candles; 600 boxes to another person.

Mr. Morse—Lives in Cincinnati. Was sec-

retary for National Insurance Company. Was applied to for James W. Chandler. Insured $2,200 worth of merchandise on the Martha Washington. At the time of application no invoice was presented. But when payment was claimed after the loss of the Martha Washington, certain papers were in the hands of Chandler, who was arraigned before the commissioner, but discharged by him. Since that time he has absconded. He proposed to prove copies of the papers he took with him, which was admitted. Chandler said he bought these goods from Crane, living on Fifth street, as a boarder; no such man is known to have lived there. Objection being made by defendants' counsel, THE COURT held that before a person, not a party on the record, can by confession charge the defendants, he must be shown, by prima facie evidence, to have participated in the conspiracy. On the cross-examination of Morse, he said that Chandler did not speak of Crane as a fixed resident in Cincinnati. Mr. Raul came with Chandler to the office. Raul is a respectable merchant. Chandler brought Southgate afterward, who gave an affidavit that he saw the boxes that were shipped by Chandler. The witness states that the fund of five hundred dollars paid by his company, was not contributed to aid in a criminal prosecution.

Mr. York—Identified a document.

Mr. Brown—In January, 1852, lived in Covington. Stated no fact of importance.

Mr. Duval—In January, 1852, witness lived in Memphis. The 13th of January, the Martha Washington landed at Memphis, and put off there 15 barrels of lard oil, and 40 boxes of candles. Nicholson, the clerk, left them in care of witness, until he should call for them. The boat was burnt sixty odd miles below that place. After the boat was burnt, Nicholson called for the articles, and sold them to witness for $636.70. Paid cash $90, and a note for the balance, which was cashed by a broker in the town.

Doct. L'Hommedieu—In 1852 witness resided in Cincinnati. Went to the Walnut Street House in 1851; Cole was boarding there, and Nicholson was there. Kissane was there with them frequently. Witness says Kissane came to see them. Was not personally acquainted with Cole. Cole and Nicholson were said to be sporting men, and his attention was attracted by Kissane, a business man, being with them.

Charles Flournagler—Lives in Kentucky—deals in boots and shoes. Witness was at Cincinnati in the winter of 1851. He bought of Chapin's, red sole leather, 17th Nov., 1851, 150 boxes of boots. He purchased between fifty and a hundred sides of sole leather. He bought no kip boots; wanted two or three cases of them.

Mr. Murphy—Lives in Meigs county, Ohio. Was at Chapin's store, 1st Nov., 1851. Called to examine their stocks; he wanted different kinds of articles. They had some red sole leather; their stock was not large. Witness purchased shoes of others.

Mr. Ward—Proves a bill of lading. Between the 1st and 5th of January, 1852, Mr. Dupler called to purchase 10 casks of brandy, and afterwards he bought five more. The first he paid 65 cents per gallon; for the last, 25 cents. Two of the casks of brandy were returned; could not be received on the Martha Washington. Kissane paid for 13 casks $578.90, in soap and candles. The bills for the candles were in Kissane's handwriting. The brandy was directed to be sent to the Martha Washington. The two casks were returned by the drayman, who said that the boat would receive no more freight.

Mr. Casselly—In 1852, the Mechanics' Fireman Insurance Company, at Madison, insured an invoice of goods bought of Lyman Cole, on 1st January, 1852, for 13 barrels of brandy, $1,792.25. After the boat was burnt application was made at the office for payment, and the amount was paid. On the cross-examination witness says he does not know of any arrangement with the insurance offices in Cincinnati, to pay Burton any money. Being again examined in chief, the witness said; a short time after the insurance was paid, he felt suspicious that something was wrong. Lawrence was then alive. Company had a meeting, agreed to pay persons to investigate the matter. Mr. Ross and Mr. Scarborough were employed.

James Chew—In January, 1852, witness was agent for the Utica Insurance Company. Nicholson insured on his for five hundred dollars, and six hundred dollars on two boxes of merchandise. Mr. Laws, who insured for Nicholson, said the boxes contained ladies' cloaks.

Mr. Cranis—Witness in 1852 lived in Cincinnati, and carried on the leather business. He was a creditor of Chapins. He held their notes for $832. He was through their establishment about the time they sold to Cole. White sole leather is tanned with chesnut-oak bark, and it is better than red sole leather. There was a good demand for white sole leather in 1851-2. Did not know of two hundred rolls of sole leather in the city unless Taylor had them. When he went through the establishment of Chapins, did not see any white sole leather. He saw about 20 dozen of sheep skins. On a cross-examination—Chapins gave their note, payable in 60 days; said they had insurance on a large shipment. Their establishment was more extensive than any other in Cincinnati. One hundred and fifty men were employed in the factory, beside outside laborers.

J. K. Thomas—Witness shipped 20 barrels hams on board the Martha Washington.

Mr. Zimmerman—Lives in Lexington, Kentucky; is in business there, and makes his purchases in Cincinnati. In 1851, bought some small bills of Chapins. The next spring bought from them 100 cases of boots, and

10 cases of a different quality. But in Lexington such articles could be purchased lower than in Cincinnati. On the cross-examination, witness said the stock of the Chapins did not appear to be heavy, and in the spring of 1852, it was very small. Burton called on witness to know what he could prove.

John H. Ballance—Lives in Cincinnati. Tans sheep skins. There was a demand for them in the winter of 1851–2. 1600 dozen of sheep skins; never saw so many together. In a bale there are from 200 to 240 pounds.

Wm. Parvin—Witness lives in Cincinnati, and is engaged in the trunk business, which requires the use of sheep skins. In 1851–2 several such establishments in the city who use sheep skins. Never saw a lot of 1600 dozen of sheep skins at one time.

Samuel J. Raney—Has been engaged in the leather business fifteen years. In December, 1851, and January, 1852, the market was heavy. White sole leather was very scarce. Two hundred bales of white sole leather would require 1200 sides. Witness had no knowledge of that amount of white sole leather in Cincinnati. Red sole leather is worth 16 cents; white, 20 cents.

Mr. Thornton—Is a manufacturer of sheep skins and morocco; calf skins. In 1851–2 knew no one who had 1200 dozen of sheep skins.

Mr. Kesler—Witness is a leather dealer and manufacturer of leather. White and red in Cincinnati and New York. Two hundred bales would be a large amount to have in the fall. Witness never saw two hundred dozen sheep skins at once. He has known the firm of Chapins for some years.

Mr. Caton—In 1851–2, was reporter to the chamber of commerce. Took an account of all the freight, and recorded it. Such a report THE COURT held was not evidence unless sworn to.

John Sheier—Witness is a map publisher in Cincinnati. He shipped on the Martha Washington three boxes of charts. Nicholson inquired if he had not better send on board of some other boat. He said that he was part owner of the boat. He said he had invested every thing he had. Said he was insured, and would make a spoon or spoil a horn. Nicholson said he owned the bar.

Mr. Crammond—Witness was on the river, in January, 1852, about one hundred miles below where the Martha Washington was burnt; stopped at the place Saturday night; next morning went on board the wreck. On Monday went on board as wreckers. Commenced their work on Tuesday, and continued Wednesday. Found on board, oil, soap, grease, oil kegs, and butter. Found no rolls of leather, or sole leather; no pistols. The bow of the boat was lying up the stream. Witness asked the mate how the boat took fire. He said he supposed it must have caught in the brooms piled on the larboard side of the boat from the chimney. The deck was burnt. Witness found 20 bbls. of pork; 50 kegs of lard; five or six barrels of flour; five or six kegs of butter; five or six barrels of whisky; some soap grease. Not one of the barrels bore the marks of fire; nor the sacks of corn which they found. Holland ordered the wreckers to desist, but they refused, and said he had no right. The other party of wreckers,—for there were two parties,—carried away the property, with a good many threats. Chandler made his appearance at the wreck, and claimed to be agent, and exhibited some papers. He remained two or three hours, and then left. Chandler claimed no property; only claimed to be agent.

Mr. Burdell—Witness lives in New York; is a part of the firm of R. H. Burdell & Co. Messrs. Smith & Kissane shipped to the company 300 barrels of pork. Witness proposed he should ship it at $12 per barrel. Said they had shipped on board the Martha Washington. Insurance was taken at $15 per barrel. Worth that at New York.

Mr. Taggart—Lives in Arkansas, near the wreck. Found on the boat, whisky, pork, oil, &c. Nicholson requested witness to take possession of the property saved from the wreck. Chandler and Cummings came together in a skiff. Chandler took charge of the property for New Orleans. Heard Capt. Cummings call Chandler by name. The property was to be left with a man called Jordan at New Orleans if Chandler should not be there. On his cross-examination, the witness says, Cummings called Chandler by name. Heard nothing of any other individual called by the same name. Did not know Chandler. He was to reclaim the property wherever it could be found. McNeal was to go with Chandler. Cummings sold some of the pork, which was not good, the brine having leaked out of it. He sold it at $11 per barrel. It was seven or eight days after the burning before Capt. Cummings came to the wreck.

Mr. Wheeler—Lives in Boston. Secretary of an insurance company. Took a risk on board the Martha Washington, through the instrumentality of James Lee & Co. Property insured, 250 barrels of mess pork, 100 tierces of oil. Total, $5,347 50,—for Lyman Cole. The bill of lading or invoice was in Kissane's handwriting. Shipped also, 167 barrels mess pork: 6th Jan. Smith & Kissane, 83 barrels mess pork, 100 tierces of lard. Papers in the handwriting of Kissane. Mr. Lee accepted; papers were handed over when the insurance was paid.

M. L. Neville—In 1852, witness was secretary of Fireman's and Mechanics' Insurance Company. Insured for Capt. Cummings, $2,500, payment made by Casselly to McGregor. Paid some to Kissane. Cummings said he lent the money to him. This company refused to contribute any thing for the investigation of the case.

Mr. Davenport—Lives in Boston, and is a

manufacturer of boots, and shoes, &c. Received a letter from Capt. Cummings, dated 15th October, 1851, for certain cases of boots, &c. 150 dozen sheep skins were insured by witness for Filley & Chapin; loss paid to the acceptor of their bill. The letter stated the loss was total. Amasa Chapin was authorised to collect debts due Filley & Chapin.

Mr. Tabor—Witness lives in New Bedford, Massachusetts. On the 8th of January, 1852, he received a letter from Lyman Cole, dated at Cincinnati, requesting an insurance on goods on board the Martha Washington, to about $2,000, on 100 tierces of lard; the bill of lading was signed by Lyman Cole, but was in the handwriting of Kissane. On the 26th January, witness received a letter from Cole; wrote another letter dated Oxford, complaining that he had received no answer.

Mr. Riley—Witness saw Nicholson a short time after the boat was burnt, at New Orleans. He asked McDano, captain of a steamer, to bring some freight down from Memphis, on the bow of the boat. Witness said, on his cross-examination, since 1832, he had been on the river as pilot and captain. He stated that the Martha Washington carried a large amount of freight when loaded down to the guards, and, in addition, could carry one hundred and fifty tons.

John S. Tappan—Lives in Brooklyn. Was vice president of Union Insurance Company in 1852. Mr. Kemble came to his office, 12th January, 1852, and applied for an insurance; said he had $10,000 to insure, and witness concluded to take the risk to New Orleans. 26,000 pounds of white sole leather, 200 rolls, in his own name. He held his hand over the names of Filley & Chapin and Lyman Cole. Kemble said he did not insure to New York, because the freight might be sold at New Orleans. On the 16th January, 1852, saw in the Courier and Enquirer of New York, that the George Washington had been wrecked, and that the Martha Washington had been burnt. On the 31st of January, 1852, received a letter from Kemble, stating the loss of the Martha Washington. A despatch of the loss from Capt. Cummings was received by Kemble, and an inquiry was made whether they would pay; the witness answered no. Kemble stated to witness once his interest in the cargo was equal to his insurance. At another time he said it was not, and that some one else was concerned with him. He never showed to witness that he was entitled to this property, except the invoice covering the names signed. Cole had an interest, and another person. Kemble refused to state the other name. Said he would write to Cincinnati; but did not. On the cross-examination, witness said the articles invoiced were, as appears from the paper, 26,000 pounds of sole leather, and 1,600 dozen of sheep skins. The writing was rather a bill of sale than a consignment.

Eliza Martin—Was chambermaid on board the Martha Washington, and was in bed in the last berth but one in the ladies' cabin. Late at night heard the cry of fire. Went to the folding doors; saw fire in the gentlemen's hall—inside of it. Witness went to the hurricane deck. Carswell helped her from the deck to the land. The boat was landing when she got off.

Mr. Whitney—In January, 1852, witness was secretary to the Madison company. Agent of that company at Louisville took a policy. A. Chapin took the insurance; 200 cases kip boots, signed Filley & Chapin. More than a month after the loss, Mr. Chapin called at the office in Madison. The amount of the insurance was $4,200, which witness did not pay.

Mr. Jones—In New York, in January, 1852, witness was an underwriter in the Atlantic Insurance office. On the 7th of January, 1852, took an open policy—300 bbls. of pork, $4,500; 264 bbls. of pork. Smith & Kissane shippers of the first, Ray of the latter.

J. B. Wilson—In March, '51, witness was assessor. Stock of Filley & Chapin assessed at $3,500.

Mr. Clark—Lives in Cincinnati. Knew Filley & Chapin. Made them temporary loans in the fall of 1851. Made to them weekly loans from one to three hundred dollars. He had difficulty in collecting the loans, &c.

Mr. Lane—Mate of the steamboat Martha Washington at one time. She would carry 550 tons.

Mr. Scarborough—Lives at Cincinnati. Had two invoices in his charge, as counsel for investigation. Insurance on the invoices amounted to $5,458. The Chapins said Cole was interested. Had frequent interviews with one of the Chapins, but received no explanations with which witness was satisfied.

Mr. Shepard—Knew Chandler in Covington. Was a sportsman. Saw him in March, 1852, in New Orleans. As witness was walking the street Chandler came out of a house to see him. Stated that he was on board the Martha Washington. Reached the land by a line on the stern of the boat. Said that he had been employed by Capt. Cummings, at $5 per day. Witness said that Chandler had consulted him as counsel, and that he was not bound to disclose.

Mr. Morton, Dist. Atty.—Read a copy of a letter from Kissane to Nicholson, after his arrest, and was about to state the circumstances under which the letter was abstracted from his papers, when the defendants' counsel objected that such statements could not be received as evidence.

THE COURT—As the abstraction of the letter was a penal offense, for which the person taking it was liable to be indicted and punished if found guilty, the act of purloining the letter could not be received as evidence; but they said, as explanatory of the transaction, and to show the motive of taking the letter, they would hear the statements of the witness.

Mr. Morton then proceeded to state that the original letter, the copy of which he had just read, was with his other papers, carefully

tied up and left in his desk, the door of his room being locked, while he took a short ride in the country. On his return he found that his papers had been handled—were in confusion, and the original letter of Kissane had been abstracted. And other facts were stated, conducing to prove that Kissane took the letter. In the absence of the witness the chambermaid probably entered the room.

Mr. Taylor—Lives in Cincinnati. Has been engaged in the leather business, and carries on the largest establishment in the city. White sole leather is more valuable than red; the white is tanned with chestnut oak bark, and will weigh from eighteen to twenty pounds a side. In the winter of 1851–2 white sole leather was scarce and in demand. Witness had no idea that there was any thing like 200 rolls of that leather in the city, or that there were 1,700 dozen of sheep skins. On being cross-examined, the witness says that leather would sink when saturated with water, also sheep skins would sink under similar circumstances.

Mr. Walker—Walker & Co. shipped on board the Martha Washington in 1852, 100 bbls. of whisky and 360 bbls., as per bill. Delivered the 7th January.

Mr. Polard—In January, 1852, shipped on board the Martha Washington, merchandise, soap, candles, tobacco, ½ bbl. of butter, 2 doz. brooms, 4 bbls. rectified whisky, 2 do crackers. On 7th January, 1852. Copy of invoice: Kissane & Smith, 7th January, 1852. Amount $3,360. Destined to Freeman & Sons.

Mr. Carpenter—Lives in Cincinnati. Business, loaning money. Loaned money up to the time of the failure of Filley & Chapin. When they failed they owed him $250. Went to them and bought $750 worth of goods. Witness settled with Cole, who required him to buy as above.

Mr. Pomroy—Lives in Cincinnati. Firm of Robins & Pomroy. Engaged in shoe business. Manufacture in Massachusetts. In the summer and fall of 1851 purchased 599 dozen sheep skins. Packed up at other places than their own house. White sole leather, witness thinks, was scarce in 1851. (A bill of lading read, signed by Nicholson. Shipped for Cooper 25 tons of goods.)

Mr. Hubbard—Is the superintendent of the House of Refuge. Did the stitching of boots for the Chapins. In Nov. stitched 559 cases or dozens. In December, 257 doz. In October, 100 doz. Witness was at the Chapins' store almost every day. Did not see large quantities of leather on hand. On his cross-examination, witness said he never was in the cellar more than once or twice. Never in the two upper stories of the building.

Mr. Chew—Capt. Cummings applied for an insurance on the steamboat Martha Washington for $4,500, in the name of Lewis Choate, which was taken by the witness. After the boat was burnt, sent Charles Ross as an agent to look after the interest of the insurance company. In February following, Capt. Cummings and Capt. Choate demanded the insurance money. At the request of witness, certain deck hands were sent to the insurance office to give an account of the loss of the boat, who were examined in the absence of Capt. Cummings and Holland. Capt. Cummings referred witness to two deck hands on the boat who could give him information. They came and had a communication with the witness. A part of the conversation was in the presence of Cummings and Holland. Objection being made, THE COURT held that the statement of these hands in the presence of Cummings and Holland might be received, but that part which was made in their absence was not evidence. The statements received as evidence had no material bearing in the case. The reference to the deck hands was not such as absolutely to bind Capt. Cummings to whatever they might state.

Mr. Lee—Lives in Cincinnati. Shipped on board the Martha Washington 100 barrels pork and 200 barrels of flour, amounting to 37 or 38 tons.

Mr. Shellito—Shipped on board the Martha Washington 100 bbls. red oil, 50 bbls. soap—25 tons.

Capt. Irwen—Once commanded the Martha Washington. When loaded within six inches of her guards might have 450 tons. Loaded to the water, 500 tons. Carried 517 tons.

Mr. Cotral—Is a partner or agent in the City Manufacturing Company. Cole introduced Mr. Stephens, who bought brandy of witness—a number of barrels—and paid for it in staves.

Mr. Caton—Is agent of the chamber of commerce, and his duty is to take an accurate account of all shipments, &c. He presented his record of entries made of articles shipped by the Martha Washington. He could not state positively whether he took the list of articles from the agent of the Martha Washington for freight, or from the second clerk of the boat. His memory being refreshed by examining the book of the agent for freight, but he could not distinctly recollect where he got the items. THE COURT held that the entry of the articles could not be received in evidence. The witness was not able to say where he got the items, and much less could the court or jury decide this fact, on which the admissibility of the evidence rested.

Mr. Carswell—Belonged to the boat. He was asleep in a berth in that part of the boat called Texas. The bell being violently rung by Capt. Choate, the pilot, waked him. He heard also violent stamping on the hurricane deck. This was about one o'clock at night. Witness saw the chambermaid and carpenter. Helped the chambermaid down to the lower deck, then the carpenter, and then the witness got down. Saw the fire extending back to the stern of the boat. The bank at which the boat landed was high. The boat was not fastened to the shore, the

rope being frozen, and it soon floated from the shore. The Charles Hammond came along in about an hour. The passengers generally got on board of her, wet and almost frozen. The chambermaid, cabin boys, &c., got on board of the James Shillinger, which was going up the river. The fire took place about five miles from the wood-yard. After the alarm of fire it was not more than ten minutes before the boat was in a blaze through the cabin No power could control the hands. Every one escaped for his life.

Mr. Murray—Lives in Cincinnati. Is a drayman, and was engaged in the same business in 1852. He run from six to eight drays. He hauled for the Chapins. Hauled six loads for them. Load of sheep skins; red sole leather. There were four or five large loads of leather, and some boxes.

Charles Gibson—Worked in the establishment of the Chapins about five years, including October, 1851. The store was the corner of Pearl and Main.

R. C. Lepper—In 1848 witness was clerk on board the Martha Washington. The witness recollects once she carried 585 tons.

Capt. Ross—Witness for many years has been on the river as captain or pilot. He was appointed agent for the underwriters, and proceeded to the place where the boat was burnt. It floated down the river about six miles from that place and sunk. Witness went on to New Orleans. Was referred to McGregor, at New Orleans, as the agent of the boat. He was twenty-four hours in finding Jordon, the consignee of the cargo. Nobody seemed to know him. He was a dealer in pamphlets. He could give witness no information. Jordon said Chandler had nothing to do with the cargo. He did not know him. By the bill of lading Chandler was the shipper. Another bill of lading was to Jordon. The Martha Washington will carry 575 tons. Witness got no satisfaction from Jordon.

Mr. Wheeler—Worked nearly three years with the Chapins. His business was to put bottoms to boots. Worked in January, 1852, and he thinks, in February, for Cole. Worked for Filley & Chapin through the summer of 1851. In September boots did not sell as fast as they were made. Never worked white leather in kip boots—put white sole leather in calf boots. Never saw sheep skins, except what were necessary for use.

Mr. Carswell cross-examined—While at the boat, the impression was that the fire was accidental. Heard nothing to the contrary until about two months afterward. Capt. Cummings appeared like a crazy person, by his gestures and exclamations at the loss of lives.

Mr. Remur—Remur & Sons, of Baltimore, made an advance for 600 boxes of candles, $2,360. Insured to New Orleans. From the insurance witness paid his advance, and the balance was paid to Kissane.

Mr. Wheatley—Was a clerk of Smith & Kissane. Witness accompanied the latter to swear to the shipment of 600 boxes of candles, and witness swore to it, not knowing any thing about it, and this was known to Kissane. After they left M'Guffey, the person who administered the oath, Kissane said to witness he would never hear of it again. Afterward witness swore to the same fact before a commissioner. He was in the habit of getting bills of lading. He did not see Kissane tear out this bill of lading from the book.

John Phillips—Worked as a boot bottomer for Filley & Chapin. Was in the store every week. Used red sole leather and white. No more leather of either kind was necessary to carry on their business.

Mr. Ford—Witness worked for the Chapins in September, 1851; left them the latter part of that month. Had worked for them three years before that time. Don't know that he saw a large stock of leather while there.

Mr. Butler—Worked for the Chapins three years ending in the fall of 1851. Hands pushed to send boots to Louisiana. There were three crimpers employed.

Lewis Choate—Was pilot at the time the boat was burnt, and was on watch. While at the wood-yard he was in the social hall. Capt. Cummings and Nicholson were there also. He remained there until the wood was in, and then ascended to the pilot-house. Capt. Cummings came up; stood in front of the pilot-house; turned round and came into the pilot-house. The boat had not proceeded more than five or six miles from the wood-yard before he smelt paint burning. Witness said to Capt. Cummings, there was fire. He ran down fronting the pilot-house, looking over the hurricane deck, and said, You are mistaken. Witness replied he was not. Capt. Cummings then ran down to the cabin deck. The mate (Holland) was on the hurricane deck. Said the wood taken on board was very dry, and said he would go down. Witness rang the bell violently and stamped; made a good deal of noise. In a very short time after smelling the fire (a minute or two) the fire burst out. Heard no noise in the social hall. The clerk (Nicholson) said he was sitting in the social hall, with boots off and sleeping. Did not know of the fire till witness gave the alarm. He then alarmed the passengers. The fire was bursting some of the windows. While the boat was at the wharf at Cincinnati, Capt. Cummings introduced witness to Nicholson, and said he had promised the clerkship to him at the Springs, in Kentucky. Witness communicated to Capt. Cummings something he had heard said of Nicholson, not favorable. Capt. Cummings went to the person who had made the remark, and inquired of him about the matter, and, on his return, said he could ascertain no definite facts. Cross-examination—Capt. Cummings owed $1,500 in New Orleans, and was afraid the boat might be attached; and it was on this account that the title to the boat

was vested in witness. Witness advised Capt. Cummings to leave Cincinnati late at night, as he would gain more by doing so than by remaining. The boat was about three hundred yards from the shore when he first saw the flames. Thinks the fire could not have been extinguished. He had no suspicions at the time that the boat had been set on fire. Such a suspicion was not uttered by any one. Witness heard Capt. Cummings call Ross agent, and proposed to pay over to him the money, and show him the invoice of the sales of the freight saved from the wreck. Ross said he did not feel himself authorized to receive the money. Witness called with Capt. Cummings for the insurance on the boat. On the second call Chew said he had received a letter from Capt. Ross, who advised the company not to pay. Witness saw the board of underwriters, and before them insisted that the parties on the boat should be arrested. A second time witness insisted that the parties should be arrested, in order to bring the matter to a full investigation. Mason charged Capt. Cummings with burning the boat. Shortly afterward when the Capt. met Mr. Mason at the Burnet House, he knocked him down, &c. The Underwriters said their object was to protect themselves. Witness did not think Capt. Cummings was guilty of burning the boat. Since the above witness has seen some things which he did not like as to the boat being burnt—not in reference to Cummings. Where the chimney rests on the boiler fire may be communicated. In thinking there was something wrong witness referred to Nicholson.

Mr. Favor—Witness came up the river on steamboat Breakland. Capt. Cummings, Capt. Choate, and Nicholson, were on board. All on board of the Emperor. Had some conversation with Nicholson, who said when the fire broke out in front, he first heard the alarm. Ran into the ladies' cabin. Said the boat was well sold. This was the 25th, 26th, or 27th of January, 1852. (Other witnesses who knew Nicholson, and who came up on board the said boat, said he was not on board.)

Mr. Chew—Holland said to witness, after the boat had wooded, and as she was rounding out, he went into the social hall, where Nicholson was sitting asleep. Sat half an hour. Went to the bar, drank something. After some time saw fire in a state-room where mattresses were deposited. Boat was turned toward the shore, was made fast, and the passengers were taken off. That he was left in charge of the wreck. As property was taken on shore it was stolen; there was only one honest man there. The line was not made fast, and when the starboard engine ceased working the boat swung out into the river. On his cross-examination, the boat was insured for $4,500. At the meeting of the company it was not intimated that the boat had been burnt designedly. Choate said that if there was fraud the defendants should be arrested. Nicholson remained in the social hall asleep, as Holland stated, until the fire burst out.

Mr. Traner—Lives in Cincinnati. Engaged in the shoe business in November and December, 1851. In November bought seven bills, one a case of kip boots, of the Chapins. In making these several bills, witness was in the Main street store and cellar. Saw three bales of white sole leather, 29th November, 1851. Saw sheep skins in the upper rooms; five bales at one time. White sole leather fluctuates. On being cross-examined, witness stated the cellar under the Main street store was dark, and that there might have been rolls of leather in the cellar which he did not see. There were 408 cases in the lower store or room.

J. A. Dugan—Was at New Orleans; saw Nicholson there.

Here an objection was made by defendants' counsel, that after the boat was burnt the act was consummated, and that the confessions of one can not afterwards implicate the other defendants. And it was urged that the boat, to charge the defendants, must have been burnt with a fraudulent intent, to injure the insurance offices. And it was insisted if the insurance companies resist the payment of the money, and the defendants shall fail in the recovery, the offense charged would not be sustained. And to sustain the points urged, there was cited Whart. Ev. 6; L. 261–263; 8 Car & P. 297; 1 Phil. Ev. 97; 1 Greenl. Ev. p. 136, § 111; 3 Greenl. Ev. p. 88, § 94. The prosecution contended that the partnership or combination was not ended until the money was obtained, and cited 2 Starkie, Ev. 32; 1 Greenl. Ev. 111; 11 East, 584; [American Fur Co. v. U. S.] 2 Pet. [27 U. S.] 364; 4 Wend. 261. THE COURT held that it was not necessary to prove the burning of the boat to sustain the indictment against the defendants. If they conspired to burn the boat to defraud the insurance offices, the offense was consummated. In this we see the wisdom of the law. The crime was committed before the perpetration of the overt act. The punishment of the conspiracy to do the act makes the incipient stages of the offense as criminal, and by that means intends to arrest the consummation of the crime. The act of burning the boat is evidence in the case, as it may, connected with other facts, show a conspiracy, or conduce to show it. But this is not a point in the evidence beyond which the prosecution can not go. The conspiracy may be inferred from attempts to obtain the money. The entire transaction is a matter for investigation, by which the innocence or guilt of the defendants may be shown. As the burning of the boat is not, necessarily, an act to consummate the offense, it can have the effect only, like any other fact which conduces more or less to show the nature of the transaction. The witness may proceed in his statement.

Mr. Dugan continued—Nicholson said that

he had been in bed; heard a roaring; got up and saw the fire.

A. Jones—Lived in Cincinnati in 1851–2. Is a relation of Filley, the partner of Chapin. Filley died the 28th of October, in the year 1851.

Mr. Mason—Lives at Buffalo. Was at Cincinnati in the spring of 1852. Called on Nicholson to ascertain the facts of the loss of the boat. He said he got up about midnight at the wood-yard where the boat stopped to wood, and paid for the wood. He said that he sat down in the social hall; fell asleep, and was awaked by the ringing of the bell. At first saw nothing, but soon discovered fire bursting from the state room near the chimney. Witness wished a memorandum of articles, which he could not give. Nicholson introduced witness to Capt. Cummings, who knocked witness down. Davis & Co.'s bill of lading, 11,477 lbs.

Mr. Carson—Lives in Baltimore. The insurance, according to the invoice, one hundred dollars more than the amount and upwards of five hundred dollars above the amount advanced to Smith & Kissane. The surplus was paid over to them.

Mr. Johnson — Witness is a confectioner. Was cook on board of the Martha Washington. When loaded at Cincinnati her guards were from six to ten inches out of water. Nicholson kept the Esculapian Springs, in Kentucky. He and Cummings agreed to purchase a boat, and the Martha Washington was purchased. The fire occurred in the room aft the chimney on the larboard side. The carpenter was in the same room with the witness. The clerk's office was on the starboard side—partition between the room and chimney. Nothing in the first room aft. Was awakened by the ringing of the bell, and stamping. Looked through the inner door—saw fire in the social hall. Waked the carpenter, who was sleeping in the same room. Passed through the social hall into the cabin. Saw Nicholson running (towards the hall) in the cabin. Witness then went down to the lower deck—there saw Holland and Nicholson. When witness first saw the fire it was about four feet at its base, and its blaze ascended to the ceiling. Boxes were piled up on the larboard side of the social hall—on these boxes were piled several bundles of brooms, and of brown paper. The fire was burning on this paper three or more feet. Nicholson kept quiet. Capt. Cummings in great distress returned to the boat. He was without hat or coat, and used great exertions to rescue the passengers. A man could not live more than two minutes in the water, the cold was so intense. The witness believes the fire was communicated to the boat from the chimney.

Mr. Heartwell—A bill of lading of Smith and Kissane, dated early in March, 1852, appeared to have been written only a few hours before, signed by Nicholson, was presented. When he first saw the bill the ink was blue and fresh; afterward it became black. Burton at this time was not known to the underwriters. Loaned Burton $2,000, indorsed by Dennison. Afterward made another loan of $1,000. No interest has been received. The note has been twice renewed. Insurance offices agreed to take the notes without indorsements. In January, 1853, the company advanced $850. Subsequently advances amounted to a little more than $4,000.

Mr. Lee—Lives in Boston, and was engaged in the commission business in 1852. In pursuance of a request of L. Cole, witness insured for him, for mess pork on board the Martha Washington, $5,000. Insured 10 per cent. profit. Register of the Martha Washington given in evidence, specifying it to be 350 tons, &c.

Mr. Burton—Lives in Ohio City. He became acquainted with two of the Chapins in 1846, within which year they failed. He knew L. Filley, the partner of Rufus Chapin, and did business with them and continued to do business with them until the 3d December, 1851. He sold to them 160 dozen, of sheep skins, and deposited with them 182 dozen. A short time after witness returned home, Rufus Chapin came to Cleveland, and calling on the witness, said he wished to procure a note discounted for six hundred dollars. Witness went with him to the bank, but could not procure the discount of the note. Chapin wanted to buy white sole leather. Witness went with him to a large leather dealer in Cleveland, but he would not sell on the terms offered. Witness again went to Cincinnati about Christmas Eve. Called on the Chapins the next morning, and found Lyman Cole with them. He inquired for the 182 dozen sheep skins which he left on deposit, and with the view of securing the Chapins for a note they had indorsed for him. He applied for the sheep skins, Cole being in possession of the property. Cole said: Let Burton go to the devil with the rest of the creditors. Filley, and Burton, and Earl, witness says, made an estimate of the stock, amounting to the sum of $8,500. Witness saw all the Chapins at R. Chapin's, and also Kissane. Cole and Capt. Cummings were at the Chapins. They had not 200 rolls of white sole leather. Saw a very small amount of that article. Witness also met Adams Chapin. The witness was greatly displeased that the bales of sheep skins which he left on deposit were not delivered to him, and threatened to bring suit. It was arranged that witness should be made secure through one of the insurance offices. This was after the loss of the boat. The insurance in the name of Kimball was the office designated. Adams Chapin promised that the insurance papers should be ready. Having received the papers, witness went to Owego to Kimball. Witness found him keeping an eating house near the railroad. He walked with him some distance and sat down on a log. Witness informed Kimball that he had come to get his

money from the Chapins, and if he did not pay him in fifteen minutes he would blow up the whole plot. Kimball said if he did he would blow up $60,000. Kimball agreed to meet him in New York and pay him his demand, if the insurance money could be obtained. But he failed to obtain the money. Witness again threatened, and said he would expose the whole transaction. Kimball said Cole was never yet caught. Some time after this he saw Capt. Cummings, the Chapins, Cole, Kimball, and others, and told them that they had got to pay him. The Chapins complained that the offices would not pay. Witness asked for bills of purchase. Was informed that the bills had been burnt by Chaney, the purchaser from Cole, supposing they were of no importance. This was the forepart of June. Chaney was a brother-in-law of L. Cole, and had bought out Cole, and was carrying on the business at the same place. Adams Chapin said Filley & Chapin had put $5,400 in the boat. Witness saw Scarborough and had some conversation with him respecting the transaction. Also had some conversation with Filley, after his father had been out to see him. Cole and Kimball had an interest in the shipment. Witness told the Chapins they had never shipped the sheep skins. The next visit the witness paid to Cincinnati his life was threatened. Amasa and Lorenzo Chapin came into his room at the Dennison House, and inquired what he was going to do with or to them. This was the 20th October, 1852. Witness replied that he was going to take them through. They said they were too hard for that. The witness replied, we will see. The witness received letters from Filley & Chapin, asking him to forward to them sheep skins. At the time the witness sold to the Chapins 160 dozen of sheep skins, he deposited with them 182 dozen, which were stored. Chapins gave him a note for his accommodation, to pay for the skins sold by him. The defendants said they had not bought 50 dozen of sheep skins, except from him. This remark was made by Adams Chapin, Filley, and Rufus Chapin. On cross-examination, the witness said that the 160 dozen were all the skins which witness sold to the Chapins the last time. Paper presented, signed by witness, for 112 dozen afterward. Witness took 2,900 dozen sheep skins in the years 1849-50 to New Orleans; 5,000 dozen during the spring and summer of 1850; 6,000 dozen in 1851. He says 100,000 dozen might have been manufactured in Cincinnati in 1851. The firm of Filley & Chapin, at the time of its failure, owed the witness $2,560. Adams Chapin asked him of whom they got the sheep skins. Said they got them from the witness, and the witness answered it was right. The witness, then inquired of whom they got the sole leather. They replied, from different persons. Witness asked in regard to several sums of money alleged to have been received by him from certain insurance offices, which question was objected to; but the court held that the witness might be called to explain the facts attempted to be proved, as to moneys received by him, as such facts were intended to be used against him. The witness admitted the receipt of $5,500 from the insurance offices, and, in addition, $7,000, which had been advanced by his brother, who lives in Vermont, as a loan.

Mr. Darr—In Milne's office payment was made for the Martha Washington. A deposit was made, to secure the purchase, in Milne's bank. The following sums were paid: By McGregor, $1,000; check of Smith & Kissane, $1,000; by Capt. Cummings, $1,100; in currency, $1,700; transferred credit to McGregor, $2,000.

Capt. Ross—Boat was registered in the name of Choate, because there was a judgment of fifteen or sixteen hundred dollars against Capt. Cummings in New Orleans. One trip in the name of Choate.

Mr. Bretonhall—In 1851 lived in Cleveland. In the winter of 1851 Chapin applied to him for white sole leather, and said he could not get white sole leather for use. Said he could not get it at Cincinnati. This was before Christmas.

The testimony on the part of the prosecution having closed, Mr. Ewing, of counsel for defendants, moved that Kimball be discharged, on the ground that no evidence had been given which inculpated him, in any respect.

The defendant rose as soon as his counsel had closed his remarks, and expressed a wish that the motion made by the counsel should not be insisted on. That he would abide the fate of those who were associated with him in the indictment. The counsel then waived the motion.

The counsel for the defendants called their witnesses. Many of them answered to the call—others did not. An inquiry was then made of the court by the defendants' counsel, whether it was necessary the witnesses should be sworn, to entitle them to claim their fees. The court intimated that it might be considered necessary for the witnesses to be sworn, by the accounting officers of the treasury, and that it would be the safer course to swear them. At the same time the court said they did not consider it necessary. The counsel then observed that they did not intend to examine all the witnesses summoned, but only those that were considered the most important. And as it was near the adjourning hour, the defendants' counsel stated that if the court would adjourn for dinner, it being within thirty minutes of the time, the counsel would so arrange their testimony as to shorten the time of examination. On that condition the court rose until two o'clock.

After the close of the testimony by the United States, Judge Walker, in the defense, made the following statement:

May it please the court: The duty of mak-

ing a preliminary statement of the points for the defense has been assigned to me. And, as I am, in this, to speak for all the counsel, and all the defendants, it became necessary, as I thought, to reduce this statement to writing, and submit it to my associates for their approbation. The same reason makes it proper that I should confine myself now to what I have written. I therefore ask leave to read to the jury what I have now to say. I think this course will conduce both to brevity and precision.

Gentlemen of the Jury: You have listened to the preliminary statement on the part of the government, and have seen how far the promises then made have been performed. You are now to hear from the other side, and in the theory of jury trials, your minds are still as open and uncommitted as when you first entered that box. This is the theory; and I trust it is the fact. I hope and trust that you are prepared to listen to our defense patiently, candidly, earnestly and without bias. The parental government under which we live desires no victims. These defendants are as much her children as you and I; and she has deputed you, their brethren, to try them, under a solemn injunction to presume them innocent until guilt is proved. The burthen of this proof she takes wholly upon herself, giving to the accused the benefit of every doubt. For it is better, far better, that ninety-nine guilty persons should escape human punishment, than that one innocent person should suffer it. The meaning of "verdict" is a "true word"; and this true word you have sworn to pronounce as to each of these prisoners. You are not required to find the same verdict as to all. You can convict some and acquit others, if the testimony so requires; but you can convict no one unless your minds are forced to that result by evidence which is irresistible. I do not say that you must find innocence impossible; but I do say that you must find guilt morally certain. It must be one of those strong probabilities, bordering so closely upon certainty, that in any of the most grave concerns of life, you would treat it as a certainty, and as such, stake your life or liberty upon it, if the occasion required. Your verdict is to be in form positive—"Guilty" or "Not guilty." But in practice this does not mean that you feel absolutely sure of guilt, or sure of innocence. If you say "Guilty," it implies that the evidence so clearly preponderates that way, that you do not find room for a reasonable doubt. If you say "Not guilty," it implies that guilt is not satisfactorily proved—not that the defendants are necessarily and undoubtedly innocent; but that they may be innocent—perhaps are innocent. It means what the Scotch verdict of "not proven" means—that government has not performed what it undertook, namely, to convince you of guilt.

I shall make no appeal to your sympathy, but only to your perception of truth, and sense of justice. Be sure of guilt before you pronounce the irrevocable word, for, so far as you are concerned, that word will remain irrevocable until the day of judgment; and not only be sure of guilt, but of the particular guilt charged in the indictment. No matter what other acts, whether criminal or illegal, these defendants, or some of them, may have committed, if they are not proved guilty of this very crime, they must be acquitted.

What, then, is the charge perferred against these men? It is, that they conspired together to burn this boat with intent to injure underwriters. You have been told that the offense is complete, when the conspiracy is formed,—that no overt act is necessary, and the like. This is true. But then the conspiracy must be definitely found to have been formed for this object, namely, to burn the boat; and with this intent, namely, to injure underwriters. A conspiracy for any other object, or with any other intent, is not within the indictment. You might, for instance, be satisfied that there was an intention to commit fraud; but if it were against any other persons than underwriters—as creditors, for example,—or against underwriters by any other instrumentality than the burning of the boat, you could not convict. You are tied down by the statute and the indictment, to the fact of a conspiracy for this single object, with this single intent. You are to find that all these men, or so many of them as you convict, actually agreed together to burn this boat with this intent. It need not be proved that they all met together at any one time, or in any one place; or that they wrote their names or plighted their oaths to this agreement. But, in some way or other, and at some time or other, before the burning of the boat, all who can be charged as conspirators, must have actually entered into this specific agreement; and this great leading fact as the soul and body of the offense, must be established by such definite and cogent proofs, as leaves no room for any other conclusion. I would lay great stress upon this position; and, therefore, I repeat that the actual formation of this specific agreement and none other—including this very subject, object, and intent—must be substantively and conclusively proved.

Now the proof offered in this case is wholly circumstantial. No eye saw, no ear heard them actually conspiring together. No two of them were ever seen together under circumstances not entirely compatible with perfect innocence. I mean precisely what I say. No witness ever saw any two or more of these men together, when their being so, created in his mind the slightest suspicion that they meditated crime. They met as acquaintances, openly and publicly, and chatted as acquaintances, and that was all. The evidence, then, is wholly circumstantial, and, in the strictest sense of the word, not merely not positive, but the farthest from it possible. And although I do not deny that a verdict may properly be found on circumstantial evidence alone, if it

be strong enough, yet I do not aver the settled rule to be, that in weighing circumstantial evidence, every circumstance is to be rejected, as proving guilt, which can exist consistently and compatibly with innocence.

There is another important rule with reference to the amount of evidence, which is, that it must be proportioned to the enormity of the offense. You would not convict for murder upon as slight evidence as for assault and battery, or petty larceny. This rule proceeds upon the idea that men are not fiends or devils—that in the most depraved there is still some good left, something to which stupendous crime is still abhorrent. Now, the charge here is of a stupendous crime—one of the deepest dye imaginable. When you come to analyze it, you can hardly conceive that men stamped with the form of humanity, could concoct or perpetrate it. And hence you will require the very strongest evidence to make you believe it—almost the ocular proof—for the first impulse of every person, not utterly depraved, is to say, "it is incredible—I cannot believe it—it is too monstrous for belief—I should almost doubt my own eyes," and the like strong expressions.

There is one error which jurors not accustomed to weigh circumstantial evidence, are very liable to fall into. It is, to have regard for the number of the circumstances rather than their nature. And upon this the prosecution appears to have calculated largely. Now, circumstances are not like faggots, where each faggot adds just so much more to the bundle, but rather like the separate links of a chain, where the strength of the chain depends not upon the number of links, but upon the strength of each individual link. We might not be able, and certainly cannot be required to break this entire bundle of faggots, which government has tied so industriously together. But in this chain of evidence, which has been so long and so laboriously forging, we may be expected, and certainly shall be able to break many of the links, and so, we trust, sunder the entire chain. And in what manner we expect to do this, it is now my province to inform you.

Previous acquaintance.—We expected to satisfy you that this acquaintance was not general, but quite limited; that each was not acquainted with all the rest, but some were strangers down to the time of arrest, never having even seen each other. But the fact that some, who are proved to have met, were acquaintances, so far from being cause of suspicion, would fully account for their occasional meetings. It was the most natural thing in the world, that they should meet, and meet often; and it is therefore, most strange, and indicative of a desperate case, that this fact of previous acquaintance, should be turned against them.

Relationship.—The four Chapins are brothers, and Cummings and Kimball married their sisters. But what has this to do with proving a conspiracy? I submit to any juror, looking into his own heart, to say whether the last person whom he could make a confidant of crime, would not be his own brother—whether some hallowed memories would not cry out against it. But, however this may be, the fact of being brothers entirely accounts for their being together so often, and acting so much with and for each other.

Meetings—Much time has been taken up in proving that some of these parties did, several times, meet and talk together—at McGrew's boarding-house—at the Walnut Street House—at the store of Law—and at the store of Filley & Chapin—not that all or so many as half, even, did meet at any one time or place,—or in any secret or suspicious place—any den, dark room, or cavern,—or that they kept a watch or spoke in whispers, or wore disguises, or started at strange sounds, as conspirators would be likely to do, but simply that they met in open day, in the most public places, and talked politics, and laughed and joked, like any other persons. This is the whole extent, and it looks like arrant trifling, unless more were proved. It may show, that being thus together, and knowing each other, they could appoint meetings somewhere else, to form a conspiracy, if so disposed; but it does not even tend to show that they were so disposed, or did meet elsewhere, or did conspire. I would refer you, as a specimen of this whole class of witnesses, to L'Hommedieu, the president of a bank, who came all the way from Cincinnati to testify, that while boarding at the Walnut Street House, he saw three or four of these defendants, talking together three or four times—two certainly—exactly as they talked with all their acquaintances, and as all other people talk together.

Motives—When a great crime is charged, we naturally look for an adequate motive; and where several persons are charged with committing it, we expect an equally powerful motive as to all. This proceeds upon the idea that the veriest human monster, not absolutely insane, will not gratuitously and in mere wantonness, commit a great crime. Now the only motive here presented is, gain by false insurances—and this could only apply to those who had effected insurances either wholly fictitious or greatly overvalued—and could not apply, either to those who had no insurance, or had insurance under the actual value; because they must inevitably be losers by the destruction of the boat. And we submit that there is no sufficient proof that any one of the defendants had an insurance wholly fictitious, or overvalued. At the very most a suspicion only is created in any instance; and although it is impossible, generally, to prove a negative, we expect to come so near to it, as to remove any suspicion which has been thrown over these insurances.

As to the insinuation that here was a joint stock concern, or co-partnership, in which all were to share the gains in some agreed propositions, it is a mere insinuation, unsupported by a particle of proof. There is no evidence which even tends that way.

Purchase of the boat.—It is claimed that this was the first overt act in pursuance of a conspiracy, previously formed. But we expect to satisfy you, that in this there was nothing in the slightest degree suspicious—that Cummings was the sole owner, though Choate's name was used, to avoid a seizure at New Orleans—that he paid $9,000, which was all the means he had, and raised at the moment with no small difficulty—a difficulty which all the alleged conspirators together could not have experienced—that the value was less than first asked, and not an extravagant one—that the season was one of the best, and she would probably have paid for herself in three or four trips—that so far from being consummated in a hurry, the negotiation was postponed for one whole trip, to get the means together, and, in short, that every thing connected with the purchase, had the appearance of a fair business transaction—and so with the insurance. The boat was only insured for half her cost, $4,500, and the freight list for about two-thirds, or $2,500, which last would have been considerably less, but for the advice of McGregor and Choate.

The alleged false shipments.—The proof by the government is wholly of a negative character. Dealers in leather do not believe Filley & Chapin had 200 sides of white sole leather; nor dealers in sheepskins that they had 1,600 dozen of them. Those who casually visited their store and factory, do not believe they had so many boxes of boots, &c., as purport to have been shipped. McGrew and his son think Edwards must have been a pauper dependent upon Stephens, and Stephens an adventurer without much means. These are fair specimens of this whole class of evidence. Now, we expect to meet this negative testimony, as to all who are here upon trial, by positive evidence that the goods were there. In this we shall not assail the veracity of the government witnesses, because they swear to no facts. But we shall satisfy you that one affirmative is worth a hundred such negatives. With respect to Filley & Chapin, we do not deny that they were attempting to place their property beyond the reach of their creditors. This, though not proper, is what many men in failing circumstances have done before; and so far from tending to prove a conspiracy, it actually explains many circumstances which might otherwise appear suspicious. It accounts for the sale to Cole, their largest creditor, which was a real transaction. It accounts for their consignment to Kimball, and for the shipment by Adams Chapin. They were threatened with executions, and were determined to keep in their own hands the means of compounding with creditors. We do not contend that this was right, but we shall satisfy you that it was the fact. And, that in this view they did not regard a little loss by shipping to an Eastern market. To them it was not like sending coals to Newcastle.

The capacity of the boat.—Here again we shall array positive against negative testimony. We shall show that the boat was loaded to her utmost capacity; and that, too, by the advice of the pilot, that she might run better through the floating ice. We shall also show that her capacity was fully equal to all that was claimed to be on board, whether we regard weight or bulk.

Developments of the wreck.—It is claimed that as no remains of leather, or skins, or boxes, were discovered, they never could have been on board. If we had not positive proof to the contrary, as we have, this inference would not be justified, because we shall satisfy you of the probability, at least, that what was not consumed by the flames, was washed out and sunk, before the wreckers took possession. As to the conduct of Holland in leaving the wreck as he did, no one can blame him; and even if he deserved blame, it does not either make a conspiracy or prove one. The same remarks apply to Chandler, who received the savings by order of the captain, and offered to pay over the proceeds, but was refused. As to Holland, he certainly appropriated nothing to himself, but lost all. His life was threatened by those land pirates. He had no suitable clothing or shelter, and he could do no good by remaining. As to Cummings, he came to the wreck by the first boat, and did all he could through Taggart & McNeil. He put nothing in his own pocket, but simply made the things saved pay the salvage. The rest was placed in charge of Chandler, who is not here to answer for his conduct. He may have pocketed some of the savings, but this is no proof of a conspiracy. He certainly was not on or near the boat when burned, but came up with Cummings from New Orleans.

The suspected insurances.—I presume it is evident that no investigation was ever conducted with greater pecuniary means, or with more zeal, industry, and ability—which money can always purchase—than this. And yet, with all this outlay, there has not been discovered a single instance of double insurance, or a single instance of over insurance, or a single instance of simulated freight. By this last I mean, that nothing of cargo has been found which was not what it purported to be—no barrels or boxes filled with bricks, or stones, or scraps of iron, or sand, or any other false contents. Yet, any one who has read the cases of conspiracy to defraud, either by false shipments or false insurances, must be aware that these are the contrivances generally resorted to. While here, the insurances are either wholly real, or wholly

fictitious. There were no effigies. The goods were all there, or none there; and there was no seeming substitute. There was the actual thing, or nothing. This is one very remarkable feature of the case; and another is, that most of the insurances are proved by the government to have been real. The insurance on the boat was real, and for only half her actual cost. The insurance on the freight list was real, and for much less than its actual amount. Cummings would have had it about one-third, but was persuaded by McGregor and Choate to put it up to $2,500, which was still much below its real value. So the bar insured by Nicholson in his own name—not in the name of Laws, as was testified by Chew—was a real thing; and no one who has traveled on steamboats can doubt that $500 was a small valuation for the right to the bar, and the fixtures and liquors. Kissane's insurance was all the way to California—a useless waste, if the boat was never to reach New Orleans. The same remark applies to the ample outfit of the boat, and the supply of wood immediately before the burning. Conspirators for money would have been more saving.

The letter of Kissane.—I trust you will read this letter very carefully, and more than once. I have done so; and it seems to me to be the natural outpouring of an almost broken-hearted, but innocent man. It has the hope and faith of an innocent man. Its caution to Nicholson, not to be arrested at present, and to take care of his papers, are justified by his own experience, when arrested, manacled, and searched, "like a dog," as he says; and by the public clamor then so rife against all concerned. Its reference to Pugh and Gallagher does not in any way implicate those gentlemen, and simply looks to a fair trial, conducted by a prosecutor not hostile, and before a jury not packed. Its reference to the Chapins, though not altogether kind, is entirely harmless, referring only to placing their property beyond the reach of creditors. In short, there is not a word in it which an innocent man, whether under accusation or not, might not write to a friend who was under such an accusation as this; or such a suspicion as is referred to in the beginning of the letter—I mean that of the forgery—which may have been the object of writing the letter. As to obtaining possession of this letter, it is manifest that he considered its interception an outrage, which justified its recaption in any manner, and in this he will find many to agree with him. This violation of letters, for any purpose, is in itself a high crime.

Burning of the boat.—This is charged as the object of the alleged conspiracy. The boat was actually burned, and you are asked to infer that the burning was by design—that she was set on fire purposely, and in pursuance of a previous agreement. This is the whole strength of the case made by the prosecution. If it fails here, it fails altogether. But why are you required to draw this inference? Certainly not from the mere fact of burning. Hundreds of boats have been burned before, and the same boat has been on fire fifty times in a year—so says Captain Irwin—and no such inference was drawn. But it is said the circumstances indicate design; and I admit that if this be so—if this boat was designedly and not accidentally burned—then some of these defendants ought to be convicted; but, on the other hand, if this boat was accidentally and nor designedly burned, then there is not proof enough to create even a suspicion of guilt. Here, as I said, is the turning point of the case. Now, no eye saw how the fire originated. The evidence is wholly circumstantial, and the conclusion must be drawn from a comparison of probabilities. The time was shortly after midnight. The weather was the coldest ever known. The place was the middle of the river, where the water was fifty feet deep, and the distance to the shore some 300 yards. That shore, too, was a steep, bluff bank, almost perpendicular, and with no shoal water. If the tiller rope should take fire, the boat would never reach the shore. If it did reach the shore, there was no place for fastening, and she could not be stranded. If any should plunge into the river, to save themselves by swimming, they must be chilled instantly. In a word, when the fire was first discovered, the probabilities were a hundred to one, yes, a thousand to one, that not one soul would escape. Nothing but the wonderful self-possession and precaution of the pilot—first, in turning the boat to the shore when he smelt fire before he saw it; and secondly, in directing the engineer to keep one of the engines working after the boat reached the shore, in order to keep her there, when she could not be fastened, because the rope was frozen—together with the blessed escape of the tiller rope from the rapid flame—nothing but this saved one soul from perishing. Besides, if the boat was to be burned, there was no occasion for doing it then and there, but everything—even the horrors of suicide and murder—suicide of the three conspiring officers, and murder of all the rest, passengers and crew—against the selection of that time and place. The boat had just wooded; been locked to the shore for nearly an hour. Why not fire her then; when all the persons who might detect the act were busy on shore, and when every soul on board might escape? Why so uselessly heap up crime; murder upon arson, and both upon conspiracy? Why create the necessity of those heroic acts, by which, after the burning wreck reached the shore, the captain and mate would have lost their lives, but for the accident of a skiff from a flat boat coming to their deliverance? Why play a game of hazard against such tremendous odds? Why not avoid gratuitous murder, which was committed if they burned the boat, and motiveless suicide,

which was in the highest degree probable? We expect to satisfy you, beyond all doubt, that the burning was accidental, and that there was not even a rumor of suspicion to the contrary, until got up by the insurance companies long after.

The absence of three of the accused.—The government endeavors to make something out of the fact, that three of the accused are not here to stand their trial. Stephens has never been arrested, and we know not where he is. Chandler was arrested, but discharged upon the preliminary examination, and not again arrested. We know not where he is. So that neither of these can be truly said to have absconded. Nicholson, it is true, has forfeited his bail, and we know not where he is. But, as to these three, we assume these positions: First, the other defendants, who are here, are in no way responsible for their acts, any further than they are, by other evidence, connected with them; and, secondly, as a consequence of the first, they can not be expected to explain those acts. It is enough for them to be required to explain their own, or such of them as are susceptible of explanation. But acts, in themselves innocent, require no explanation. And as to the acts of the absent, it is enough to say, that any explanation by us is not to be expected, for want of the means of information. It would be requiring us to do the impossible.

The presence of nine of the accused.—If the absence of three of the accused affords any presumption against them, then the presence of the nine affords an equally strong presumption in their favor. We expect to show you that long before their first arrest they were apprised of the suspicions whispered against them, and might have fled without involving bail. That Holland, hearing of the arrest of others, gave notice where he might be found and arrested. That Adams Chapin, Rufus Chapin, and Kimball, never were arrested, but voluntarily surrendered themselves. That all the nine, except Kissane, have been on bail ever since, and he remained on bail until reasons not connected with this case, recently deprived him of this privilege. Yet these nine, with the most ample opportunities for escape, are all here to meet the gravest charge ever preferred against men. And because they are here, under these circumstances, we claim for them the benefit of the very strong presumption thus created in their favor. For, unless conscious of innocence, why are they here?

Combinations against them.—We expect to satisfy you that the merit of standing trial, although conscious of innocence, is greatly enhanced by two considerations. In the first place, a large and influential portion of the press—not all, for there have been some noble exceptions—has, from the first hour of arrest up to this hour, pursued them with a malignity and pertinacity wholly unexampled—piling up surmise upon surmise, rumor upon rumor, and falsehood upon falsehood, day after day, and month after month, until a public opinion has been manufactured which might well appal the stoutest heart. That this persecution has followed them into this very court-house, and poured forth its venom upon court and counsel, for the sole reason that in order to secure a fair trial, these poisoned influences were excluded from this room; yet these men thus hunted down and pre-condemned, are, nevertheless, here. In the second place, there is a combination back of these newspapers, not a whit less, but even still more formidable—a conspiracy among numerous corporations, wielding millions of capital, and reaching all over the Union, to procure the conviction of these men—some of them too poor to pay either counsel or witnesses; in pursuance of which conspiracy, venal newspapers have been subsidized, and agents of all sorts from respectable down to base and basest, hired at large expense to effect their purpose. Yet, these men, who might have been elsewhere, have dared to defy this tremendous moneyed power, exerting itself through these most formidable agencies. Why have they not long ere this placed themselves where no extradition treaty could reach them?—as, indeed, the district attorney, at the last term, predicted they would—and said that nothing short of Omnipotence could keep them here, if out on bail. Yet these men are here!

Sueing the insurance companies.—Much stress appears to be laid on the fact that, in every instance where the insurance money has not been paid, suit has been brought. We expect to satisfy you that this is a circumstance wholly in our favor—that it is precisely the course which honest men would and do take. Had they refrained from prosecuting when payment was refused, and the reason stated, viz; the intentional burning of the boat, it would have looked as if they feared to face an investigation. But, by commencing suits, and thus defying the insurance companies, they have either exhibited a foolhardiness which is inexplicable, or a consciousness of innocence which is irresistible. No one can doubt that if these claims had been given up, this prosecution would never have been gotten up. This is manifest from what transpired at the meeting of the underwriters, as testified by Choate. All they wanted was to avoid payment. Public justice was nothing to them then, and they even now say they have been opposed to this prosecution.

Conduct of the defendants.—The general character of the defendants has not been put in issue, and is not therefore a subject of comment. But their previous position in society, and their conduct generally, from the time when the conspiracy is alleged to have been formed, up to the present moment, are in issue, and are fair subjects of proof and comment; and in this connection I desire

to call your attention to several points. Most of them are heads of families, occupying respectable positions, and for whom they reputably provide,—and have wives and children who love and depend upon them. Most of them have been engaged in regular business, which they have pursued attentively and industriously, until they came to meet you here. In their transaction of business, connected with the lading of this boat, there are some matters which the government thinks suspicious; but so do not I. For instance, Kissane, without any disguise of handwriting, or otherwise, filled up some of Cole's invoices, he being better acquainted with such transactions, and having made sales to Cole. So Cole used Filley & Chapin's blanks, after his purchase, striking out their names, and inserting his. In like manner, some of Smith & Kissane's blank bills of lading were used on this boat for other persons, by striking out their names, and inserting others. Now, these things are precisely what conspirators, watchful to cover up every track, would not have done; and yet precisely what innocent men, thinking no evil, and therefore taking no precaution, would be very likely to do. And the same remark applies generally to the perfect openness and apparent unconsciousness which characterize all their conduct. It is to be remembered, that from a period not definitely fixed, but certainly anterior to the purchase of the boat, according to the hypothesis of government, each of these defendants had become the depository of a guilty secret—a horrid and horrible secret—one which the human heart was never made to hold—which would struggle for utterance continually—through every word, and look, and act, and if the possessor were one instant off his guard, must and would betray him; and yet, although by the most wonderful retrospection ever brought to bear upon the past, the behavior of these men during that awful period has been scrutinized, as it were, with an universal eye, not one word, or look, or act, has been discovered which indicates the hiding of so tremendous a secret. Think of this, gentlemen, more especially after the boat had started—could those who were left behind, in dread suspense, sleep as usual, eat as usual, or work, or talk, or act, as usual? It is not possible. The good God never made his creatures to be capable of such "seeming."

But this is not all. The boat was burned, many of the insurances paid, and then suspicions were excited. At first they were only whispered in the secret conclave of the underwriters. To that they were to be confined, and the conduct of the suspected most carefully and secretly watched. But there was one noble-hearted man—himself afterwards most treacherously charged, and then discharged—I mean Capt. Choate—who demanded an open proceeding by arrest, or he would make known the secret charge. The open proceeding was declined, and he did make known the accusation and machinations of this conclave of underwriters, of which one Mason was the most prominent actor. The first result was that Cummings chastised him. This would be the first impulse of an innocent, but the last of a guilty man. If the accusation was false, the verdict of every manly heart would be, "served him right." Most innocent men would right such a wrong in some way or other. They chose this way. But I am not here to defend the charge of assault and battery. However much Mason was battered, he has his remedy elsewhere. What I wish you to observe is, that from the moment of the first promulgation of suspicion—nay, from the moment it came to be secretly entertained, down to this moment—the conduct of these men has been watched with more than the eyes of Argus—not by retrospection, as before, but by direct and most concentrated vision. And yet I aver that since that time, and down to this, there is not one look, or word, or act, of any of the defendants here on trial, which is not consistent with perfect innocence. If there be, you will be able to put your finger on it. But I am entirely confident that their behavior will stand the severest scrutiny. They have not behaved like guilty men, and do not now behave so. I am satisfied that you must have expected to meet a very different sort of men, when you came to try so grave a charge.

General aspect of the evidence.—I think, gentlemen, that you must have been disappointed, as I certainly have been, in the kind of evidence upon which you are asked to find a verdict of conviction. The learned counsel has repeatedly said in your hearing that the evidence would "grow up" as the case progressed. I presume he meant as "tall oaks from little acorns grow." We have had enough of the little acorns to plant a forest, but I can not see one of the tall oaks. It seems to me that the spirit and vigor of the attack have not at all come up to the lofty phrase of the manifesto. Considering the long time for preparation, the vast expenditure of money and labor to get up the case, and the consummate ability of all sorts employed, to say nothing of some of the means—I say, considering all these things, it would not be unreasonable to expect some very clear and definite proof, both of the actual formation of the conspiracy to burn the boat, and of the actual burning of the boat by design, in pursuance of such conspiracy. For this conspiracy, as charged, is a very distinct and definite thing. It must have had a subject, object, and intent,—a beginning, middle, and end. Some one must have first suggested it to some other one, and he to another, and so on, until all were initiated as conspirators. There must have been a time, place, and manner of doing all this. And there must have been some momentous details to be arranged—as how many and who were to be let into the perilous secret.

Should passengers be received for gratuitous murder? Should cargo be taken on board for gratuitous destruction? To what extent should useless supplies be taken, or useless insurances be effected? When and where should the boat be burned, and who should apply the torch? All of these and many more details entered into the idea of this conspiracy, if there was one. And yet there is not a single item in this vast account as to which you have any definite proof. You can not say with whom, or when, or where the conspiracy originated, or how it was formed, or how it was to be executed. All is vague, shadowy, and uncertain. Instead of that clear light by which you might see the truth unmistakably, you are asked to grope along, through mist and fog, and feel your way from fact to fact, until you get through this "mighty maze," without a plan. You are asked to construe negative testimony into positive—possibilities into certainties—proof of what men could do, into proof of what they did—to supply from imagination what is wanting in the testimony—in short, to convict these men upon private suspicion and public clamor, all got up and fomented by interested corporations—bodies politic and corporate, but without souls. Are you prepared for this? I trust not, and I think the evidence now to be introduced will make clear the innocence of the defendants.

The witnesses for the defense were then examined in the following order:

Isaac Cough—Was the partner of Capt. Choate. He was asleep on the starboard side, in the front room. Looked over the larboard side when waked by the ringing of the bell and stamping of Capt. Choate, and saw the fire breaking up near the chimney. Went down on the derrick to the lower deck, where he found the hands in great confusion. Capt. Cummings was without a coat, exerting himself to the utmost to rescue the passengers. The cold was intense.

Mr. Williams—Was on board the Martha Washington in 1848 and 1849 as mate. The boat was apt to take fire. It was on fire fifteen or twenty times while witness was mate. The boat was liable to take fire on the larboard side from the chimney. Witness never knew a boat sink from overloading. The fires spoken of by witness generally took place from the chimney on the larboard side of the boat, the same where the fire occurred when the boat was burnt. The boat will carry 650 tons. On being cross-examined, the witness stated that in the last up-river trip of the boat, she took fire three times in one day, from the same chimney. This was on the Mississippi river under the command of Capt. Irwin. Never knew fire to take place on the starboard side from the chimney.

Andrew Wilson—Witness has been on the river since 1841. Has been a mate on other boats. The Martha Washington will carry 700 tons.

Jesse Campbell—Has been on the river ten or twelve years. The steamboat Charles Hammond is the same size as the Martha Washington. The Charles Hammond can carry 700 tons. After her guards are reached by the water, the Charles Hammond could carry 150 tons. Witness says it is a common occurrence for boats to take fire from the chimney. The Daniel Webster took fire from chimney, and thirty persons on board of her were lost. The witness was at the place where the boat was burnt. It was a most unfavorable place for landing. The banks were high and steep—in some places almost perpendicular.

John Bergamire—Witness was assistant engineer on board the Martha Washington. Was on her two months before as third engineer. Saw candle boxes piled up on deck on both sides—extended back to wash house on the larboard side. While fires were being made at the wharf in Cincinnati saw persons engaged in carrying sole leather on board the boat. The witness thinks from seventy-five to one hundred rolls were taken in, noticed or observed by him. Witness don't remember that he ever saw a boat more heavily loaded than the Martha Washington. Was sleeping in the second room; was awakened by the cry of fire; saw fire on the larboard side; went down to the lower deck on the starboard side; jumped from the bow to reach the log in the river, which extended to the shore; did not reach it and fell into the river; the boat was some twenty or thirty feet from the shore; swam to the shore. The witness was cross-examined as to the sole leather. Did not count the rolls; estimated them.

Mr. Painter—The Martha Washington would carry 650 tons and upwards. Twenty tons in addition would have little effect. Witness has been a mate; says the mate directs the loading to be put on board. Fires on boats are common; generally from the chimney. The Charles Hammond will carry rather more freight than the Martha Washington.

C. E. Nourse—In December, 1851, the stock of Filley & Chapin was large; three rooms fifty or sixty feet deep; contained boxes filled with boots and shoes. The Chapins owned, as they said, $40,000 or $50,000 worth of stock. Witness advanced them money at different times. They owed witness between two and three thousand dollars. They paid him in March, 1852. Witness did not look into the boxes—they were piled upon each other. Chaney made the arrangement for loans, after Cole's purchase.

Mr. Titus—From the 26th December to the 6th of January, 1852, witness was through the houses of Chapins. Made an estimate of the stock at from $20,000 to $25,000. Witness had several conversations with Burton. He said he thought they would fail. Said they had sold their stock to Cole. They had stock in the second and third stories.

James F. Painter—Was mate on the Martha Washington four or five months. Has seen

the boat take fire around the chimney outside the casing; also from below. The Martha Washington could carry 650 tons; might carry more, but can't tell. Witness was never on a boat which was not liable to take fire. Tin cased the chimney, but it cracked in 1850, so that one could see on the bulkhead.

John Lynch—Was on the Martha Washington under Capt. Cummings as bar keeper. Is now employed on one of the Lake Erie boats. There were piled up in the social hall of the Martha Washington, boxes, rolls of paper, and brooms. The witness slept next door to the office. When he awoke the social hall was on fire. Witness knows Brown, owner of the America, on which boat witness is engaged on Lake Erie. Never told Brown he believed the boat was set on fire, nor that he could do the defendants no good. Never heard any suspicion expressed, about the time of the fire, that the boat had been set on fire.

Wm. Grady—Lives at St. Louis. Followed the river five or six years. He was pantryman on board the Martha Washington. Saw sole leather carried down about dark, before the boat left the wharf at Cincinnati. The leather was put down the hole. Boxes were piled up in and outside the social hall; paper bundles were laid on them, and brooms were laid on the paper. There was plenty of provisions on board for the trip to New Orleans. The boat was loaded within six inches of the guards. When witness first heard the bell he saw the blaze through the green slats near the chimney, extending to the social hall. These slats were on a false door on the larboard side, near the chimney. The witness says the blaze was through the slats, but the paper was not then on fire. Witness saw sheep skins piled up nearly to the roof. Saw delivered to the boat, at Cincinnati, three or four dray loads of white sole leather.

J. C. Waller—Witness lives near Louisville, Ky. Went down the river as a passenger on board the Martha Washington, on business, to St. Joseph. He slept on the second berth of the gangway; went to bed about eleven o'clock. Heard the bell ringing, and stamping on the deck, and a cry of fire. The boat was very heavily loaded—passengers complained of it.

John Snethen—Witness is a farmer. Was four years on the river, and was fireman on the Martha Washington the last trip. Witness saw leather brought on board at Cincinnati, in the afternoon and after night. When the alarm of fire was given witness went forward. Saw the fire at the chimney on the larboard side. He took the cable on shore; jumped to a log and fastened the cable to a tree. The boat was loaded very deep. Heard no suspicions that the boat had been set on fire. On cross-examination, witness was inquired of whether he had been with Clark, the attorney. Witness said he had been twice to see Kissane, but had not been with Clark. He saw white sole leather on board; was piled pretty nearly over all the freight. Sheep skins were stowed on deck, and in the hold. Hands sat upon the sheep skins—some of the firemen ate there.

Mr. McLaughlin—Witness helped load the boat; was hired for that purpose the 6th or 7th of January. Large quantities of candle boxes were brought on board, and also large quantities of leather in rolls—some of these rolls were put in the engine room, more in the hold. One hundred bales of sheep skins, more or less, were brought on board. The hands were loading the boat until eleven o'clock at night. On cross-examination, witness said white sole leather was put on board at Cincinnati.

Robert Lemon—In 1851 witness was employed by Filley & Chapin. The hands made a week from 100 to 150 pairs of boots; never less than from 70 to 75. The usual amount of sole leather on hand was from one to three thousand sides—kept in the second and third stories of the building occupied by them. In the stores the leather was kept in the cellar. They had an unusual quantity of calf skins. They had the largest stock he ever saw. The witness has been at Cincinnati four years. There were on hand twenty-five or more bales of sheep skins, and as much more stored. This witness prepared for the shipment, early in January, 1852, 200 cases of boots. The hands were busy in preparing the shipments. Remembers that the 200 cases of boots were let down from the second story of the building. Two persons nailed the boxes. Twenty-five rolls of sole leather were also let down. There was a much larger quantity in the cellar of the store. There were twenty-five or thirty bales of sheep skins at the factory. After the shipment there was very little of the stock left. There was nothing left in the Main street store. Mr. Chaney carries on the same business. One half the sole leather was white, or, at least, there was that proportion of white sole leather. On cross-examination, the witness says the sheep skins were brought down the river about the same time. Saw a man marking the boxes which contained the boots. Lyman Cole bought out the establishment about the middle of December.

Benjamin Earl—The witness has lived in Cincinnati nine years. Was the salesman of Filley & Chapin a year, and up to the sale to Cole. The firm owed witness five or six thousand dollars. To secure this sum the Madison policy was assigned to witness. Witness believes that by the sale to Cole, and the shipment, they intended to cheat their creditors. Witness having borrowed, on his own credit, $1,200 from Kissane, for Filley & Chapin, and to secure the payment, he assigned to Kissane, on the above policy, $1,500. When the loan was made it was to be returned in a few days. Filley & Chapin had borrowed money from Cole, and the sale was made to him to pay the borrowed money. Burton never went with witness through the rooms of the factory or other buildings occupied by the Chapins, and

if Burton went through the rooms it must have been after the sale to Cole. The Chapins had rising of twelve hundred sides of sole leather. They dealt largely in sheep skins. The shipments were made by the Chapins to get the money into their pockets. Kissane got boots from the company. The books of the firm were not kept as the witness would have kept them. Soon after Cole took possession, bought great quantities of sole leather, white and red. He remembers fifty bales were bought at once, which was the largest purchase at one time. Burton left the 182 dozen of sheep skins—took notes, which he was to protect, if skins should not be sold. Ninety-eight cases of boots the greatest number sent to the store in one week. There were employed in the establishment from 150 to 175 hands. Two hundred rolls of white sole leather (by drayman's certificate) and 1,600 dozen sheep skins were sent on board the Martha Washington. Ninety odd cases of boots and shoes were sent. Fifty cases were directed to Horace Cole, California. Two hundred boxes of boots were shipped for Adams Chapin from the factory. Witness did some of the marking on the above boxes on the sidewalk. Of the boxes letter C was marked shipped to Brownsville, Texas. A variety of hats, shoes, boots, &c., above seventy cases. Burton told witness that they (the Chapins) had offered him six or eight thousand dollars. Said he could get the money if he had the bills of purchase. Burton came into the store and said he had Filley's dying confession; that he would fix them. Witness replied that it was as false as hell; not one word stated by him (Burton) was true. Burton then said he was only waiting a telegraph to fix the irons on him. Witness (to use his words) told him that he was a damned old scoundrel, and observed to him, have me arrested. Witness then said he should do his duty, regardless of threats; that if the Chapins were guilty they ought to be arrested; and the witness further said he hoped if the boat was purposely burnt, the guilty persons would be punished. Afterward the witness went to the Dennison House with Burton. On their way he proposed if the witness would come out and show fraud he should have $2,500. Burton offered to secure him $2,000, and said he would set him up in business. That Carpenter would take him into partnership. On being cross-examined, whether he had not said to Dr. Case that he could send the Chapins to the penitentiary, witness replied that he could not say whether he had said so or not. He was also asked whether he had not said to the same person that the defendants had shipped to ——, of Texas, articles of no value. Witness replied he had not said so, and explained that articles had been sent to Texas which were not saleable in Cincinnati, and which had been purchased by Chapin in New York, and which were saleable in Texas, particularly low quartered shoes for women, &c. Cole said he would sell on time. In regard to Stephens' purchase, witness says he became acquainted with him, and shortly afterwards he inquired for a room in which to deposit stores. Had no room. Stephens purchased between two or three thousand dollars worth. His boxes were marked G. P. S.; not positive there was an S.; directed to the care, the witness thinks, of some one in New Orleans; cases weighed about fifty pounds each. Cooley's shipment—witness says Cooley was not at Cincinnati at the time of the shipment. Horace Cole's shipment—brother of L. Cole, defendant: 200 bales of white sole leather were shipped. The leather was principally taken from the cellar under the store. The cellar was dark—the leather could not be seen except by candles. Sixteen hundred dozen sheep skins were shipped. Sold the red sole leather at Louisville. Three drays were loaded six or eight times with sole leather. The principal part of the sole leather was sent on the 7th of January, 1852. The sole leather was piled up in the cellar under the store, extending two sides and several rolls in depth. The assignment of the Madison Insurance office was dated back some twelve or twenty days. The sales of white sole leather were weighed. Some of it in the second and third stories of the factory, the other part in the cellar of the store. This he stated on cross-examination. Also, he said he never knew Filley & Chapin to purchase sole leather which was not in rolls, except leather brought to the factory or bought in the city. The marks on the boxes the witness has described as nearly as he can.

J. S. Oliver—Was in the employ of the Chapins. They had one hundred and fifty hands, and made between seventy-five to eighty cases of boots weekly, each case containing one dozen boots. In the cellar of the store, on the left hand as one entered, the white sole leather was laid five or six rolls high, and extended thirty feet. This was the cellar of the Main street store. Ladies' shoes were in boxes in the second story. In the third story there were hats. The witness speaks of the last of December, 1851, and the first of January succeeding. In the first story of the store there were boxes of boots and shoes. The store was about sixty feet deep; five or six boxes high extended round the room, 120 feet inside the elbow. The boxes contained boots and shoes. About the time of the shipment saw the hands lowering sheep skins from the store. On cross-examination, witness said he had been at the jail a number of times. When the shipment was being made, witness carried a message from Cole to Kissane, about shipping pork and lard that day on the Martha Washington.

George Burris—Witness is a ship carpenter. On the 14th of January, 1852, was on

a flat-boat near where the Martha Washington was burnt. This was near the foot of bend Sixty-five, on the Mississippi. Came near with the flat-boat while the Martha Washington was on fire; jumped into a skiff, and rowed round the boat. The wind blew from the Arkansas shore. The bow of the boat had been at the shore, but was floating out into the river. The flames caused witness to row off. Saw seven or eight men—some of them jumped into the yawl, and appeared to be greatly excited. Witness saw Capt. Cummings trying to climb up to the stern. Witness asked him to get into the skiff, which, after some time, he did, and witness took him to the shore.

Mr. Conine—Knew Capt. Cummings. Saw him on the Rio Grande. He was doing business as a merchant, and had a respectable establishment.

Capt. Kendrick—The Martha Washington was worth $10,000. The trip down worth at least $4,800.

Mr. Bruck—Purchased, at Cincinnati, flour, corn meal, and bread, amounting to at least $36.

John Henry—Lives eight miles from Cincinnati. Was fireman on board the Martha Washington. There were many boxes on board; white sole leather—does not remember the quantity of white sole leather. Witness helped load the boat: there was a large amount of sole leather; great numbers of boxes. Witness speaks of the burning as other witnesses. He fell into the river. Capt. Cummings pulled off his coat and gave it to him. Capt. Cummings went on board anxious to save some children that were on board.

Col. Austen—Knew Capt. Cummings in Mexico, selling goods. Saw him frequently.

Charles Smith—Also knew Capt. Cummings in Mexico—engaged in selling goods.

Mr. Huhilt—Witness lives in Newport, Ky. Engaged in freighting. The Martha Washington would carry from 650 to 700 tons. She was apt to take fire from her chimney. Witness has seen a boat loaded so deep that a current ran across her. Letters from New Bedford read, recommending the shipment of pork and lard to that place, dated 3d Dec., 1851.

John Myers—Shipped 125,400 cigars for California, the 7th January, 1852, on board the Martha Washington.

Andrew Lytle—Witness has been on the river since 1846. The Martha Washington will carry 650 tons, and 150 tons might be put on her after her guards touch the water. When the chimney becomes red hot the fire may be communicated to the bulkhead, through the case which surrounds the chimney.

Mrs. Thayer—Is sister to the Chapins. She left Massachusetts and arrived at Cincinnati on the 9th of January, 1852, with the intention to go down to New Orleans with Capt. Cummings, her brother-in-law. But the boat having left Cincinnati on the 8th, she did not go.

Mr. Kebler—Cole called, with Filley & Chapin, on the witness. The company were desirous to assign certain merchandize, a schedule of which was presented. Witness wrote a bill of sale, and filled up notes for the purchase money, after deducting between six and seven thousand dollars, the whole amount being eighteen thousand dollars. Cole came to the office and requested witness and Judge Walker, who practice in partnership, to garnishee Stephens' insurance. An attachment was issued, and the insurance company was garnisheed for the debt due by Stephens to Cole, for goods purchased from Cole. Some time after Burton came to the office to see paid the money on the insurance at New York by Kimball, and it was suggested that $8,000 be paid on that policy. Burton was anxious to get an assignment of the policy, so that he might obtain the money. Kimball refused to make the assignment. Burton sought evidence to show the fairness of the shipment. After Kimball refused to assign the policy, Burton said he did not believe the goods were shipped. Witness spoke often to Burton afterward respecting the matter; the shipment was made on the 8th. Burton said he arrived on the 9th, and was at Chapins' store and saw no such property as is alleged to have been shipped. Cole made insurance at a Detroit office, with the agent at Cincinnati. The agent would not settle unless an adjustment should be made. The assured were determined to prosecute. Suit was commenced on the policy, has been continued and not pressed. The branch of the office has been withdrawn from Cincinnati. Mr. Scarborough requested to see the books of the firm and papers. Witness offered the books which he declined. Afterward he called for the books, which witness refused to produce. White sole leather they got, as witness understood, down the river and from the canal, by exchanging made-up articles, &c. The witness stated the number of notes given by Cole on the purchase, and the notes being produced he identified them.

James Riley—The witness is second mate. The Martha Washington and the Charles Hammond are about the same size. The Charles Hammond carries seven hundred and twenty or twenty-three tons.

Lieut. Moore—Capt Cummings was engaged in the merchandizing on the Rio Grande.

Wm. Trumper—Saw Nicholson at the Walnut St. House. He was treated as a gentleman.

Mr. Defray—In 1852 was at the Walnut Street House. Saw nothing peculiar in Capt. Cummings, Nicholson and Kissane.

Mr. Duffler—Bought 1849 gallons of brandy, 13 casks for Kissane, to be paid for in candles, for which witness received five per cent. At Smith & Kissane's candle factory there were made daily one hundred boxes of candles.

Mr. Meader—Lives in Cincinnati. Is a creditor of Filley & Chapin. A person from Kentucky represented he had a large quantity of white sole leather to sell. The man said he

would ship it to New York if he could not sell it in Cincinnati. Witness directed him to Chapins, but does not know whether he called, nor whether they purchased his leather. Witness saw on the floor above the cellar many boxes. The weather was cold the latter part of December, so that the river was closed. Witness supposed the goods on hand amounted to between twenty and twenty-five thousand dollars.

Mr. Cliff—Was drayman on the 7th of January. Hauled six or seven boxes of cigars, and brandy to the Martha Washington, from Kissane's factory. Also candle boxes and lard in barrels. He was engaged in hauling as much as four days. At the same time two other drays were employed in the same business. Twelve hundred boxes of candles were hauled from the same place to the Martha Washington, and 13 casks of brandy.

F. Gilgress—Lives in Cincinnati. Is a drayman. Hauled one cask of brandy; also two other casks to the Martha Washington. This was about dark on the 7th of January. Hauled boxes for Filley & Chapin—fourteen perhaps more. Knew another person that hauled boxes of candles. Hauled also from pork house to the Martha Washington. Three or four other draymen were also hauling lard oil, &c., and candle boxes for Kissane to the Martha Washington.

John S. Powers—The witness was flour inspector in Cincinnati in the fall of 1849. He knew Horace Cole. Was one of the deputy sheriffs at San Francisco. Has a strong likeness to his brother, Lyman Cole. Witness was acquainted with Perkins, firm Perkins & Ingart. Witness returned from California July 7th, 1851. Kissane told witness he was desirous of shipping goods to California to his old friend Perkins. Witness advised him to ship boots of a certain kind, called Hungarian boots, and shoes. This was in the fall of 1851 and January, 1852. About New Year the river opened. From the 5th to the 7th of that month noticed a large amount of shipping going on. Lard and pork and candle boxes. Understood from the defendants that they were shipping by the Martha Washington lard oil in addition to the above. Witness saw half a dozen drays at Kissane's pork house, and also the same number at the candle factory. Boots sold in California at $48 per pair. Kissane shipped 300 bbls. mess pork, 600 boxes of candles, and 600 boxes again of do. Witness saw the bill now in evidence torn from the book. It contains 13 casks of brandy, 6 boxes of cigars, 155 boxes of boots, &c. The above were shipped to California. Letter handed by Kissane to Lawrence, introducing Capt. Cummings to Smith & Kissane. After the boat was burnt heard Kissane regretted it very much, as if his goods had gone to California he would have done well.

A. M. Holman—In 1851 witness was employed by Filley & Chapin, and afterwards was employed by Chaney. He took to Lexington a large number of boots and shoes, and sold them. He was never on board the Martha Washington. Witness swore to certain papers, does not now know what.

John Arnet—In 1851–2 witness worked in Kissane's candle factory. From 75 to 100 boxes of candles were made a day. Lard oil and red oil were also manufactured. Remembers the Martha Washington was burnt. There was shipped from 1,000 to 1,200 boxes of candles, 400 or 500 barrels of oil. Seventy-five barrels of oil made a day. Three hundred sheep skins in one tank. Had four tanks. Sometimes they killed two thousand hogs a day; at other times two or three hundred. The witness says there were shipped from Kissane's establishment 1,200 boxes of candles, 400 or 500 bbls. of lard, 200 bbls. of lard oil, about New Year's.

Charles Matthews—Is a teacher in Cincinnati. By accurate measurement the Charles Hammond will carry 796 tons.

Philip Patt—Witness worked for Smith & Kissane. In the early part of January, 1852, candles were shipped. Nailed up the boxes, but can not state the number of them.

John Owens—Is a drayman. Nine drays engaged with witness. Three hundred boxes of candles; witness got the tickets. This was late in the evening (near supper time) on the 7th of January, when the boxes were delivered on board the Martha Washington.

Wm. Mowry—Is a plasterer. The first week in January, 1852, met Anderson, a drayman, hauling boxes and barrels, several days. There were engaged with him ten or fifteen drays. Anderson said they were hauling for Kissane to the Martha Washington. This was objected to as the mere statement of Anderson. THE COURT admitted the evidence as competent; was a part of the res gestæ, when the work was being done, and when there could have been no motive to misrepresent.

John Arthur—Lives in Cincinnati. Kept two drays four or five days engaged in hauling to the Martha Washington from the different pork houses. Eight or nine drays went down the last load to the Martha Washington. This was in the evening.

James Burns—Lives in Cincinnati. Was draying for Thos. Anderson. Hauled from the candle factory. Kissane had fifteen or twenty drays. Three or four loads, perhaps more.

Daniel Sheets—Is a drayman. Hauled 5th of January from candle factory, one load of lard oil

Patrick Crow—Is a drayman. Hauled lard from Smith & Kissane's steam house. Oil one load. Three or four others.

Thomas Bradley—Is a drayman. Hauled one load same time with Crow from Kissane's steam house.

Martin Reese—Drayman. Hauled for Anderson to the Martha Washington from Kissane's factory.

Henry Neiter—Is a cooper. Made for Kis-

sane & Smith five or six hundred pork barrels the latter part of December, 1851.

Patrick Keeley—Worked in Smith & Kissane's pork house in January, 1852. Many barrels of pork were shipped.

William Kirkpatrick—Good pork was packed at Smith & Kissane's pork house.

Smith Anderson—From fifteen to thirty drays were employed in hauling for Smith & Kissane articles for shipment in the fore part of January.

A. C. Cooper—Lives in New Harmony, at Mt. Vernon, Ia. Hailed the Martha Washington as she descended the river, when she came to. Witness wanted to freight twenty-five tons and upwards. The boat was heavily loaded; water run on the lower deck. Capt. Cummings hesitated whether he would take any more loading. Went on the upper deck, returned and said he would take it. Went some miles below and took on board 1,000 bags of corn. Was the last loading taken on board. After midnight on the morning of the 14th of January, while in his berth, witness heard the bell ringing violently. Sprang out of his berth, ran into the ladies' cabin, met the chambermaid, who appeared to be stupefied, and said nothing. Saw Holland, the mate, immediately after, who was knocking at the doors of the cabin and crying fire at the bow. Witness returned to his berth, snatched up a part of his clothes, retreated to the starboard side, got on the lower deck, and saw the blaze in the social hall. The fire seemed to run through the boat as lightning. Witness saw the boat was nearing the shore. He stood on the lower deck and was the first or among the first to jump to the shore. He ran up some distance on the land as he was apprehensive that gunpowder was on board. He returned to the fire. Capt. Cummings was there, without a coat, raising his hands and exclaiming, "O Lord! where are the children?" He was greatly affected.

Moses Parmely—In January, 1852, was engaged in draying. Saw Anderson's drays delivering pork, lard and lard oil. A great deal of loading was on the wharf near to and opposite the Martha Washington.

E. J. Wood—Witness knows Anderson was draying for Smith & Kissane. He employed a great number of drays on an emergency.

Samuel Bebee—Draying in Cincinnati. Draymen exchange works in cases of emergency. Witness hauled four loads from the factory of Kissane to the Martha Washington shortly after the river broke up.

Thomas Anderson—Followed draying in 1852. The principal house he drayed for was the house of Smith & Kissane, and McGill. He hauled twelve hundred boxes of candles from the candle factory to the Martha Washington. He had some eleven or twelve drays under his direction. Hauled two hundred barrels and tierces of lard, also three hundred bbls. and tierces in addition, two hundred and fifty bbls. of pork, from the pork house. Six or seven days drays were engaged in hauling. Three hundred bbls. of pork were at first directed to be hauled to the Statesman steamboat. It refused to take more freight. The witness was then directed to haul the same to the Martha Washington. Fourteen casks of brandy, 250 bbls. of pork for Cole were hauled. Saw the boxes, &c., at the Martha Washington, being loaded. Also, there was hauled to the same boat, 300 bbls. of beef, in doing which witness was not employed.

Henry Chapin—In January, 1852, witness went to the 4th story, with his uncle, Rufus Chapin, where he saw ten or fifteen bales of sheep skins let down, which were sent on board the Martha Washington. There were no other skins at that time in fourth story. Witness knew other skins had been there and had been removed.

Mr. Powers—Has made a strict calculation of the measurement of the freight on board the Martha Washington, which amounted to 720 tons; and he has measured the capacity of the boat, according to the most approved rules of measurement, and he finds that the boat could carry from 30 to 50 tons more than was on board of her.

Mr. Riddle—Stated that a short time after this case was heard by the commissioner, before whom Burton was sworn as a witness, and who testified that he had received no compensation and expected none for his efforts in relation to this prosecution, Burton said to witness, in a conversation, afterward, that he did not expect to lose a dime. Witness understood him to say that he expected to be saved from expense by the insurance offices.

Mr. Brown—Several packages of sheep skins being brought into court, the witness stated that No. 1, 9 lbs., 16 dozen in a bale, which would weigh 144 lbs., and which multiplied by 100, would make 14,400 lbs., being 7 tons.

Rebutting evidence was called by the prosecution.

Dr. Kates—Lives in Cincinnati. Is acquainted with B. Earl. He frequently said to witness that the Chapins were all concerned, and that he could send them to the penitentiary, and would do so. The witness was asked by a juror as to Earl's general character for truth, and he answered that he had never told him a falsehood.

B. Earl—Being called and examined in relation to the statement made to the above witness, states that he had borrowed money from Dr. Case for Filley & Chapin—some two hundred dollars. The witness was engaged to be married to a lady in the East, and was obliged to postpone it, because he could not get money from Filley & Chapin which they owed him. That at this disappointment he was displeased and disappointed, and if he made the threat against the Chapins, as stated by Dr. Kates, it was in ref-

erence to the conveyance of their property to defraud their creditors, which he supposed was punishable. Witness had been in the practice of borrowing money for the firm.

Mr. Barnum—Being called by the prosecution, was asked in relation to Burton's general character for truth and veracity.

The defendants' counsel objected to this evidence on the ground that the general character of the witness had not been assailed. By the prosecution it was insisted that general character for truth may be given in evidence, where proof has been given of contradictory statements made by a witness. THE COURT admitted the evidence. The witness stated that he knew nothing against the truth of Mr. Burton, and would believe him under oath. To the same import were the statements of Mr. Hughes, Mr. Powell, and Mr. Paine, all of whom are acquainted with the witness, and some of them live in his neighborhood.

Several of the defendants' witnesses, when called, were asked by the prosecution whether they had been examined by Clark, and their testimony taken down and signed by them. These questions were objected to by defendants' counsel. They avowed the fact that Clark, being one of the counsel of the defendants, had been requested to ascertain the facts within the knowledge of the respective witnesses, in order that they might be classified, and called so as to produce to the court and jury a connected relation of the facts. And they alleged that the counsel concerned in court, from the great number of witnesses, could not ascertain the necessary facts so as to examine them intelligibly. And they insisted on the right, as professional men, to understand from the witnesses to what points they could testify. The prosecution alleged that it was training the witnesses, and would necessarily influence them favorably for the defendants.

THE COURT directed Clark to be called, and being sworn, he stated that being a member of the bar, and employed as counsel for the defendants, he had taken down the statements of facts to which they would testify, from several of the witnesses, which they had signed, and which statements he had given to the defendants' counsel, in order that they might know how to call them for examination. He further stated that he had asked the witnesses no leading questions to influence their statements, but had put down on paper what they said voluntarily. That in two or three instances these statements had been taken down in the presence of two or three other witnesses.

THE COURT remarked that they could not control the intercourse between the defendants' counsel and their witnesses, unless they have been guilty of unprofessional conduct. That they supposed it was not improper in counsel to ascertain from the witnesses, facts, especially in a case like the present, where hundreds of witnesses were in attendance, that they might shorten the examination by calling the witnesses who had a knowledge of the same facts. The witnesses, or at least many of them, had been examined before the commissioner originally, their testimony taken down and published in a book, which is in the hands of both parties.

THE COURT further observed, that under the circumstances of the present case, they would direct the counsel, Clark, not to take down the statements of the witnesses, and no further statements were taken, known to the court, except a short one by one of the counsel engaged in court, which was presented or offered to be handed to the opposing counsel, but was waived by them, no objection being stated.

The testimony being closed, the counsel for the prosecution asked the court to suspend further proceeding in the case until the arrival of rebutting witnesses, which they expected from Cincinnati. That they had requested the witnesses by telegraph to come, and they were expected. This was about twelve o'clock, the usual time for adjourning the court, and the court observed that they could not suspend the proceedings in the case on account of the absent witnesses. And they stated that public notice had been given, in open court, before the adjournment of the court the day before, that the defendants would close their testimony by twelve o'clock the ensuing day, which afforded ample time to bring the witnesses. That one train of cars, after the notice, on the same evening, passed down to Cincinnati from Columbus, and that two trains of cars had arrived that morning from Cincinnati, in either of which the desired witnesses might have come. That no other train would arrive until after dark, and that as the witnesses had not come in the morning trains, it was not certain that they would be up in the evening. That three weeks had been taken up in the examination of the witnesses, and that the cause could not be suspended under the circumstances.

Other objections might have been added, as a reason why the case should not be delayed. If the witnesses were summoned and were paid by the government, unless their absence was with the consent of the prosecution, a motion for an attachment should have been made, on which the court would, as a matter of course, delay the cause and send for the witnesses. The witnesses were not absent with the consent or knowledge of the court, but if the prosecution permitted them to be absent, they were not liable to an attachment, as they were not absent in contempt of the process of the court.

Before the examination of the witnesses for the defendants commenced, on their being called to be sworn, it was distinctly announced in open court, by one of the counsel for the defendants, that only such of the

witnesses would be examined as were most important; and that they were called and sworn that their per diem might be allowed them. And on the same day, before a witness was examined for the defendants, the leading counsel for the defense, in the presence of the presiding judge, observed to the leading counsel for the prosecution, that they would not take up more than a week, as they should examine only their important witnesses. And during the recess of the court, at twelve o'clock, the day before the testimony closed, in conversation with the presiding judge, in the presence of the leading counsel for the prosecution, the counsel for the defendants observed that they would close the testimony by twelve o'clock the next day. This is admitted by the leading counsel. The witnesses were telegraphed, but failed to come. There was time to have brought the witnesses more than three times the distance of Cincinnati.

There was no intimation made to the court on the part of the prosecution, that the rebutting evidence was material in the case, nor to what facts or persons it could apply. Nor was there any suggestion of surprise by any of the facts proved. There would seem to be no ground for such a suggestion, as the testimony of all the principal witnesses had been written down before the commissioner and published, and during the trial was in the hands of the counsel on both sides. These circumstances, connected with the extraordinary effort and ability with which the cause had been prosecuted by the counsel who represent the government, induces the court to believe that the evidence referred to could not be deemed important.

But, in addition to all these considerations, no court, except under very peculiar circumstances, could permit the proceedings to be suspended. If the prosecution is to be indulged to send for witnesses, after the close of the testimony, the defendants could claim the same privilege, and this would extend the investigation for any length of time the parties might desire. No such rule has been recognized by any court.

At the meeting of the court in the afternoon, Mr. Morton, the district attorney, commenced his opening argument, and continued it that afternoon and the following day. After the close of his argument, Mr. Ewing, in the defense, made known to the court, that they would submit the cause to the jury, without argument, on the charge of the court.

Mr. Stanbery, on the part of the prosecution, stated to the court the submission was altogether on the part of the defense; for the prosecution they desired to argue the case.

THE COURT observed that they regretted the course, in this respect, of the counsel in the defense. That the court could not control the counsel in the discharge of their duties to their clients. But when no argument has been made in the defense, and the prosecution, by the district attorney, has had a full opening, commenting at large on the testimony, which occupied the court a day and a half, further argument on that side could not be heard. The court said that they would charge the jury the next morning.

McLEAN, Circuit Justice (charging jury). The indictment in this case is found under the 23d section of the act of the third of March, 1825. It provides, "that, if any person or persons shall, on the high seas, or within the United States, willfully and corruptly conspire, combine and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or procure the same to be done, with intent to injure any person or body politic, that hath underwritten or shall thereafterward underwrite, any policy of insurance thereon, or of goods on board thereof, or with intent to injure any person or body politic that hath lent or advanced, or thereafter shall lend or advance, any money on such vessel, on bottomry or respondentia, or shall within the United States, build or fit out, or aid in building or fitting out any ship or vessel, with intent that the same shall be cast away, burnt, or destroyed, for the purpose or with the design aforesaid, every person so offending shall, on conviction thereof, be deemed guilty of felony, and shall be punished by fine, not exceeding ten thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years."

The defendants are charged with having wilfully and corruptly conspired to burn and destroy the steamboat Martha Washington and her cargo, with the intention to injure certain underwriters who had insured the same. Two or more of the defendants must be found guilty, or the conspiracy charged will not be established. To consummate the offense, under the statute, it is not necessary to prove that boat was burnt, or that the insurance offices were injured. It is enough to show that the defendants conspired to destroy the steamboat, with the view of injuring those offices. A conspiracy is rarely, if ever, proved by positive testimony. When a crime of high magnitude is about to be perpetrated by a combination of individuals, they do not act openly, but covertly and secretly. The purpose formed is known only to those who enter into it. Unless one of the original conspirators betray his companions and give evidence against them, their guilt can be proved only by circumstantial evidence. This kind of evidence often satisfies a jury of the guilt of the accused. But in such a case the circumstances must be so strong as to be inconsistent with the innocence of the accused. It is said by some writers on evidence, that such circumstances are stronger than positive proof. A witness swearing

positively, it is said, may misapprehend the facts or swear falsely, but that circumstances can not lie.

The common design is the essence of the charge; and this may be made to appear, when the defendants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. And where prima facie evidence has been given of a combination, the acts or confessions of one are evidence against all. This rule of evidence is founded upon principles which apply to agencies and partnerships. And it is reasonable that where a body of men assume the attribute of individuality, whether for commercial business or the commission of a crime, that the association should be bound by the acts of one of its members, in carrying out the design.

To sustain the prosecution the conspiracy must be proved, and that it was entered into to injure the underwriters. This it is insisted has been done: (1) By evidence showing prima facie, that the defendants being known to each other and associated in this enterprise, formed the combination as charged. (2) By using false bills of lading and invoices. (3) By obtaining insurances thereon. (4) By representing a greater amount of tonnage on board the Martha Washington than its capacity could carry. (5) By burning the vessel.

That the defendants have endeavored to recover the insurance money, is not controverted, nor that the boat has been burnt. The destruction of the boat is not punishable under the act of congress, but if it appear from the evidence that it was destroyed by the defendants, or by one who had combined with them, it is strong, if not conclusive proof of a conspiracy to do so. So if it appear that the bills of lading were false, it shows a combination to injure the underwriters. Stephens, Nicholson and Chandler are included in the indictment, but they are not parties to this proceeding; still, if they entered into the conspiracy with the defendants their acts and confessions while carrying it out are evidence in this case.

It appears from the evidence of Robert McGrew, who keeps a boarding house on Seventh street, in Cincinnati, between Main and Walnut, that Stephens, Holland, and one Edwards, boarded with him—that Cole, Capt. Cummings and Kissane called to see them occasionally; and from their conversations it appeared that they became acquainted with each other on the Rio Grande. That Cole and Holland had been engaged in running a boat on that river. They had no private conversations to the knowledge of the witness, but appeared to be ordinary visitors, sitting in the public room. In the winter of 1851, William Northrup, who lives in Cincinnati, saw Kissane, Cummings, Cole and Nicholson frequently together. Mr. Penniman saw Nicholson in the fall of 1851, at Maysville, who said he was on his way to the Esculapian Springs, in Kentucky, to visit his family, before he left on the Martha Washington, which boat he had purchased. Other witnesses proved that the defendants above named associated with each other, and that they were intimate with the Chapins. Mr. McGregor sold to Capt. Cummings the steamboat Martha Washington, which was owned by the witness and the Messrs. Irwin, for $9,000, which sum Capt. Cummings was to pay on her return trip. The insurances charged to have been made on false bills of lading and invoices, will now be stated with the evidence applicable to the same. Wm. Kimball, of New York, insured in the Union Mutual Insurance Company of the city of New York, $5,200 on leather, and $4,800 on sheep skins. This insurance covered two hundred rolls of white sole leather, and sixteen hundred dozen of sheep skins, which it is alleged were transferred to him by Filley & Chapin, in December, 1851. In the same month Lyman Cole is alleged to have purchased from the same firm boots and shoes, amounting to the sum of $18,000. The consideration is represented to have been borrowed money in part, and for the residue notes were given, which are in proof. Cole claims to have shipped two hundred and fifty barrels of mess pork, two hundred tierces of lard, ninety-seven cases of boots to Cooley, fifty-four cases of boots to Horace Cole. Adams Chapin claims to have shipped two hundred cases of boots.

Several witnesses have been examined to show that Filley & Chapin, or Cole, their assignee, had not the articles in their store stated in these bills of lading.

Mr. Burton, a witness, states that on the 3d December, 1851, he sold to Filley & Chapin one hundred and sixty dozen sheep skins, and deposited with them one hundred and eighty two dozen. He returned home and shortly after one of the Chapins called on him at his residence and wanted him to assist in procuring the discount of a note for six hundred dollars. He also wanted to purchase white sole leather. Witness went with him to a large leather dealer, but he would not sell to him on the terms offered. Nor could the witness procure a discount of the note. Witness went to Cincinnati about Christmas. Made application for the skins he had deposited. Cole was then in possession of the property and refused to give up the sheep skins. Filley, Burton and Earl, the witness says, made an estimate of the property on hand, which amounted to eight thousand five hundred dollars. Chaney, the brother-in-law of Chapin, purchased the stock on hand, and carried on the business, to some extent, in which Filley & Chapin had been engaged. Witness told the Chapins, that the number of sheep skins stated had never been shipped. The witness received letters from Filley & Chapin requesting him to send them sheep skins. When he sold to

the firm one hundred and sixty dozen sheep skins, and deposited the one hundred and eighty-two dozen, the firm gave him a note for his accommodation, to be secured by the skins deposited The Chapins informed the witness that they had not purchased fifty dozen of sheep skins except from him. In the year 1849–50, witness purchased twenty-nine hundred dozen of sheep skins. In the year 1850 he sent to New Orleans fifty hundred dozen.

Mr. Taylor, a witness, is the largest manufacturer of leather in the city of Cincinnati. The white sole leather is more valuable than the red. In the winter of 1851–2 white sole leather was scarce and in demand. Had no idea that there was in the city two hundred rolls. He also deals in sheep skins, and had no knowledge of sixteen hundred dozen being in the city. Several other witnesses were acquainted with Filley & Chapin, had been in their stores and manufactory, and had seen little or no white sole leather, and not many bales of sheep skins.

Benjamin Earl, a witness for the defendants, was salesman for Filley & Chapin, up to the time of the sale to Cole. Burton never went with witness through the rooms of the boot and shoe factory, or of the stores. If he passed through the rooms it must have been after the shipment. The firm had rising of twelve hundred sides of leather in 1851. They dealt largely in sheep skins. Soon after Cole took possession, great quantities of sole leather, white and red, were purchased. The largest purchase made at once, within his recollection, was fifty rolls. The firm of Filley & Chapin employed from one hundred and fifty to one hundred and seventy-five hands. The witness prepared the articles for shipment, and he says that he forwarded to the Martha Washington, on drays, two hundred rolls of white sole leather, and sixteen hundred dozen of sheep skins, shipped to New York in the name of Kimball. The witness thinks that this shipment to New York, and the sale to Cole were designed to place the property of Filley & Chapin beyond the reach of their creditors; they having failed in business. The witness shipped on board the Martha Washington about one hundred and fifty pairs of Hungarian boots for Kissane. The witness also states that he shipped to Horace Cole, in California, at the instance of Lyman Cole, fifty cases of boots and shoes; ninety odd cases he shipped to Cooley; on Red river. Two hundred boxes of boots were shipped from the factory by Adams Chapin. To Stephens, of Brownsville, in Texas, Cole shipped a variety of hats, shoes, &c., about seventy cases. These shipments were all made under the superintendence of the witness, who saw the boxes and other articles, a part of which he marked. He did not see the articles delivered on board the Martha Washington, but he has no doubt they were delivered, from the dray tickets which were returned to him. He says that the white sole leather was principally deposited in the cellar under the store, which was dark, and could only be seen by candle light. It was piled up, about five rolls deep, against the wall, on the left hand in entering the cellar, and extended some thirty feet or more. Other rolls were in the factory, and other places. A great number of bales of sheep skins were in the same cellar. Other bales were in the factory building. The witness states that from seventy-five to near one hundred cases of boots were made in the factory weekly, each case containing one dozen pairs. The largest number that was made and sent to the store in one week, amounted to ninety-eight cases. Earl having borrowed twelve hundred dollars of Kissane, for Filley & Chapin, he assigned to Kissane in full payment, fifteen hundred dollars on the Madison insurance, which Adams Chapin had assigned to him for that purpose. This witness has been impeached by the testimony of Dr. Kates, who says he has been for several years acquainted with Earl. His intercourse with the family of the witness was almost daily. Several times the witness loaned money to Earl, on his responsibility, for the benefit, as witness supposed, of Filley & Chapin. Witness wanted the money and requested Earl to pay it. He complained that Filley & Chapin owed him at the time of the failure $——. He said he could send the Chapins to the penitentiary, and would do so if they did not pay him. Dr. Kates also says that Earl informed him that he had put a case or cases of articles that were worth little, and forwarded them to Texas, &c. On his examination in chief, Earl being questioned as regards this conversation with Dr Kates, says that if he stated that he could send the Chapins to the penitentiary, he was under excitement, and spoke with reference to the conveyance of their property to defeat the claims of their creditors. He stated that he was disappointed in not being able to go eastward, on a matrimonial engagement, which, for want of funds, he was obliged to postpone. In regard to the case or cases of articles sent to Texas, he referred to the articles being unfashionable in Cincinnati, and consequently unsaleable. They consisted of Hungarian boots and low quartered shoes for ladies, which were not worn in Cincinnati, but which were good articles and saleable in Texas. Dr. Kates, on being asked by a juror, what was the character of Earl, answered it was good—that he had never told him a lie.

Robert Lemon was employed by Filley & Chapin as foreman in the factory. The usual quantity of sides of sole leather was from one thousand to three thousand sides, kept in the second and third stories of the building. At the stores such leather was kept in the cellar. They had the largest stock the witness ever saw. He prepared for shipment two hundred cases of boots, each case containing a dozen pairs. After the shipment there was but a

small amount of stock left. Cole's purchase was made about the middle of December.

Smith & Kissane claim to have shipped on board the Martha Washington twelve hundred boxes of candles, three hundred barrels of pork, one hundred and fifty-five cases of California boots, ten hundred and forty-nine gallons of brandy, and two hundred barrels of lard oil. Witnesses have been examined to prove that these articles were shipped on the Martha Washington. Mr. Cliff says that he hauled, with several other draymen, for Smith & Kissane, candle boxes and barrels of lard. He was engaged, as he thinks, four days. He believes twelve hundred boxes of candles were hauled to the above steamboat on and before the 7th of January, 1852. He also states six casks of brandy were hauled to the boat, at another time six casks, and one another, making thirteen casks.

F. Kilguss was also engaged in the above service as drayman—he hauled one cask of brandy to the boat. Also, he hauled thirty-three boxes of candles for Smith & Kissane. He also hauled from the pork house lard oil; from the factory candle boxes—there were three or four other drays engaged at the same time.

John Arnet, a drayman, says there were shipped from one thousand to twelve hundred boxes of candles, four or five barrels of lard, two hundred barrels of lard oil to the steamboat. Several other draymen corroborate the above statements. Thomas Anderson, a drayman, who did the hauling for Smith & Kissane, employed other drays when his own could not do the work required. He states that from the candle factory of Smith & Kissane, twelve hundred boxes of candles were hauled to the Martha Washington. Also, two hundred barrels of lard oil. From the steam house two hundred barrels and tierces of lard, one hundred of which were shipped by Cole to Lee, Boston; and one hundred to Taber, New Bedford. Two hundred and fifty barrels of pork belonging to Cole, and in addition, three hundred barrels of pork which the draymen were directed to take to the Statesman boat, but as that boat could not receive them, its cargo being completed, they were taken to the Martha Washington. He also states that fourteen casks of brandy were hauled for Smith & Kissane from Ward's, a liquor dealer, to the Martha Washington. He saw the above articles on the wharf opposite the Martha Washington, and hands were engaged loading them. This was in the evening. The above articles are similar to those claimed by Smith & Kissane to have been shipped on board the Martha Washington. And also two hundred and fifty barrels of pork, included in the shipment of Cole. Also, one hundred tierces of lard, and about one hundred and fifty cases of Hungarian boots, and six boxes of cigars. This, with the evidence before given, purports to cover the entire shipments of Cole and Kissane, also of Kimball and Adams Chapin. And about seventy cases of shoes and boots to Stephens, thirteen barrels of brandy were sold by Cotteral, a witness, to Stephens, in exchange for stoves. This leaves six boxes of merchandize unaccounted for, which were said to contain ladies' cloaks, but there is no evidence where they were purchased, or as to their value.

Nicholson's insurance covered his liquors for the use of the bar and two boxes of merchandise. The bar is stated to have been well supplied with liquors. Of what the two boxes of merchandise consisted no account is given. Chandler's shipment consisted of two boxes of merchandise, but the contents of the boxes are not known. Chandler was discharged by the commissioner, but he was included in the indictment. Neither Chandler, Nicholson nor Stephens are before the court, and it may be owing to that circumstance that the articles shipped by them, or at least a part of them, are not in evidence.

Mr. Powers, a witness, states that after his return from California, in the summer of 1851, he recommended Kissane to ship to California Hungarian boots, and other articles, to Perkins & Engard, who were personally known to Kissane. Boots, the witness said, were selling there at $48 a pair.

The shipments made below Louisville are important only in regard to the capacity of the boat to carry the amount of freight stated. It appears that insurances were effected on the above shipments—by Stephens for $10,702 04; by Capt. Cummings on the boat $4,500, and to cover freight $2,500, making the sum of $7,000; by Kimball, $10,000; by Lyman Cole, $5,458; by Kissane, $8,000; by Chapin, $4,200; by Nicholson, $1,200. If these insurances were made on false invoices or bills of lading, it would afford conclusive evidence that the intention was to injure the underwriters. And it would authorize a presumption against the defendants, that they had done any thing necessary to be done to effectuate their object. And if the insurance was greatly beyond the probable value of the articles shipped, at the place of consignment, it would be ground on which the fairness of the transaction might well be questioned.

By the bills of lading, and other evidence, does it appear that there was a greater amount of tonnage on the boat than its capacity could carry? This is assumed as proved by the prosecution, and on this ground it is contended that there was fraud in the shipment. Witnesses differ as to the amount of tonnage the Martha Washington could carry. Mr. Powers, by measurement, ascertained that the cargo amounted to seven hundred and twenty tons. And it appears from the mathematical calculation of Mr. Matthews, that the Martha Washington could carry, in addition to that amount of freight, more than thirty tons When the Martha Washington left the wharf at Cincinnati, the tops of her guards were from six to eight inches above the water line.

After her freight was all on board, the water, as some of the witnesses state, was over her railing at midships. It will be for you, gentlemen, to consider and determine, from the evidence, the fact as to the amount of freight.

It will be for you to determine, gentlemen, whether the Martha Washington was burnt accidentally or by design. This is a most important inquiry in the case. As before remarked, the burning is not necessary to establish the conspiracy charged, but if the fact be proved, that it was burnt by design, and by one of the defendants in this case, or by one clearly shown to be concerned in the incipient stages of the transaction, it will be very strong, and perhaps, conclusive evidence to establish the conspiracy charged. If the shipment was bona fide, yet if the conspiracy was to burn the boat, with the view to charge the underwriters, the defendants are guilty. The offence charged is of the highest criminality. It not only tends to destroy all confidence in commercial transactions, but in carrying out the intention, it must often involve the destruction of human life.

Lewis Choate was pilot of the Martha Washington. He was on watch at the time the fire occurred. The boat had wooded a short time before, and while thus engaged, the evening being intensely cold, he was in the social hall warming himself; he resumed his place as soon as the boat was ready to move. Capt. Cummings came up, stood in front of the pilot-house, but soon turned and came into the pilot-house. After running five or six miles the witness smelt paint burning, and so stated to Capt. Cummings, who ran down fronting the pilot-house, looking over, said the witness was mistaken. Witness said he was not mistaken. Capt. Cummings then ran down to the cabin deck. Holland, the mate, was on the hurricane deck, said the wood was very dry, and that he would go down. Witness then rang the bell violently, and stamped. In a very short time after smelling the fire, a minute or two, the smoke appeared, and fire. Heard no noise in the social hall. Nicholson, the clerk, said that he was sitting in the hall, his boots off, asleep. Did not know of the fire till witness gave the alarm. When he awakened the passengers, the fire was bursting some of the windows. The boat was about 300 yards from the shore when witness first saw the flames. He thinks no effort could have extinguished the fire. The boat was thrown to the land by the action of the starboard wheel in a few moments, and the passengers on deck jumped to the shore. One of them fell in the water. Capt. Cummings pulled off his coat and gave it to him. He and the mate were seen in the yawl at the boat, aft the wheel, where a passenger was standing on the guard, the fire around him. He was forced into the yawl, which moved toward the stern of the boat, when Capt. Cummings and the mate were seen on the guard, endeavoring to ascend into the ladies' cabin. Holland, with the aid of Cummings, got on the upper deck, and was forcing open the doors of the ladies' cabin. The smoke and fire filled the cabin. The yawl, shortly after it was left by the captain and mate, pushed off. The two persons in it, from excitement or alarm, could not manage it; and it floated down the river. The boat not being fastened at the bow, floated a considerable distance from the shore. Such was the progress of the flames, that the mate and captain must have been destroyed in a few minutes, if a skiff, which belonged to a flat boat, had not taken them from the burning wreck. The captain was often besought by persons on the shore to get into the skiff and save himself, but he seemed to be so determined to rescue some children on board, that he paid no attention to his personal safety, until the fire forced him to get into the skiff. So intensely cold was the weather, that no one could swim more than a few feet. When the captain came to the shore he was frenzied by excitement and was constantly raising his hands and exclaiming, "O! Lord! Where are the children?" The fire was first seen in the social hall, on the larboard side, opposite the chimney. There was there deposited a number of candle-boxes, and on them bundles of brown paper, and on them bundles of brooms were laid. Opposite the chimney there was the appearance of a door, the upper part of which was made of painted Venetian blinds. The cabin of the Martha Washington was taken from the Era. It was old, and had been frequently painted. Around the chimney there was a case of tin or sheet-iron to prevent the heat of the chimney from setting the boat on fire. Several of the witnesses say, that the boat was liable to take fire from the larboard chimney. That on its trip up the river a short time before, it had taken fire from the chimney three times in one day. One of the witnesses, who had been employed on board of the boat, had known her to be on fire nearly fifty times. Another witness says when he saw the fire first, the flames were seen in the slats of the false door. Nicholson, from his own confession, was in the social hall when the fire broke out, asleep, and was wakened by the bell. Seeing the fire, he awakened the passengers.

As to the burning of the boat there is no positive evidence; and in such a case, unless circumstances raised a probability of guilt, the jury may well inquire into the motive of Nicholson or of some other individual, to do the act. Admit that he owned half the boat, and had an insurance that would cover the liquors in his bar, and two boxes of merchandise, still his interest would not lead him to burn the boat. It was insured for only one-half of the sum paid for it, so that his loss would greatly exceed the amount of his insurance. Men are seldom, if ever, prompted to commit a crime, except from motives of gain or revenge.

There are a great many circumstances connected with this case, which have been brought to bear upon it, and which may

have no direct relation to its merits. The clerk of Kissane, who now states that he swore, without objection on his part, to a bill of lading, not knowing that the articles had been shipped, affords no evidence of intentional fraud, if the proof be clear that the articles were shipped. The copy of a letter of Kissane, charged to have been taken surreptitiously from the papers of the district attorney, is in evidence. Some testimony has been given as to the abstraction of that letter, but as the act of taking it as charged is an indictable offense, you cannot in this case convict him of the act. The court permitted the evidence to show the motive, with which the letter must have been taken. There can be no doubt, from the history of this case, the defendants were acquainted with each other, and that in the purchase of the boat, and in the shipment of the cargo from Cincinnati, they were engaged in the commercial enterprise. Their shipments were made, as appears, not for the benefit of the whole, but for the benefit of the shippers individually, as stated in the bills of lading. But, notwithstanding this individuality of ownership, if they united in a conspiracy to burn the boat, in order to charge the underwriters, they are guilty under the act of congress. But in this, as in all other cases, guilt cannot be inferred by vague surmises arising from acts which had not a direct tendency to form the conspiracy or carry it out. If the jury shall be satisfied from the evidence that shipments were made according to the bills of lading and invoices furnished, the injury to the underwriters can only arise from the conspiracy to burn the boat.

It is the province of the jury, and not of the court, to decide on the credibility of witnesses. Earl, who is the principal witness, so far as the Chapins and Cole are concerned, is a man, as the jury must have perceived, of intelligence. He being the salesman of the house of Filley & Chapin, had a much better opportunity of knowing the facts stated by him than any other witness. He is unimpeached, except by Dr. Kates, which is explained by Earl in his evidence in chief. Mr. Burton and he differ in the fact, that an estimate was made of the stock on hand by them and another individual. The discrepancy between these witnesses may be explained without an impeachment of either, if the principal view of the stock by Mr. Burton was after the shipment, or if he did not enter the dark cellar, where the white sole leather, as stated by Earl, was stored. Mr. Kepler, a witness, says, that Burton came to Cincinnati on the 5th of January, the day after the shipment was made.

You will examine, gentlemen, and weigh the evidence, and decide this great case, under the law, as your judgment shall sanction. I know of no higher function which a citizen can be called to discharge, than to sit in judgment on his fellow-creatures. It should remind us all of that day when we shall be judged. In the discharge of a duty so awful, how careful should we be to examine ourselves and see that no lurking prepossession or prejudice should influence our judgment. Ke know the case only as it has appeared to us on this trial. Whatever may have been said in regard to it elsewhere, is unfit to be considered here. Even those sympathies so honorable to our natures, are not to influence us here. Nothing but the facts and the law, should govern you. You will not convict, if you have reasonable doubts. But if such doubts have no place in your judgment, your verdict will be against the defendants, or such of them as you may find guilty.

The jury, before they retired, requested to have, in their retirement, the charge of the court. The counsel having no objection, the court handed the charge to the jury, but afterward withdrew it, that it might be printed for the use of the jury. The printed copy, corrected by the judge, was handed to the jury the same evening.

The jury, after being absent a considerable time, including the Sabbath, returned into court, with a verdict of not guilty.

Case No. 14,833.

UNITED STATES v. COLLIER.

[3 Blatchf. 325.] [1]

Circuit Court, S. D. New York. Oct. 2 and Nov. 30, 1855.

SPECIAL VERDICT—COLLECTOR OF CUSTOMS—CONSTRUCTION OF STATUTE — PROCEEDS FROM SALE OF SEIZED PROPERTY — LIABILITY FOR STOLEN MONEY—RECEIVERS OF PUBLIC MONEY.

1. A special verdict, which seemed to be incongruous in finding that, in any event, a defendant was entitled to certain items of allowance, and yet declaring that such allowances depended upon questions of law to be submitted to the decision of the court, construed as not restricting the authority of the court to pass upon the whole subject matter, including those items.

2. The act of March 3, 1849, "To extend the revenue laws of the United States over the territory and waters of Upper California and to create a collection district therein" (9 Stat. 400), construed, in reference to the compensation of the collector of the district of Upper California, appointed under it

3. In the construction of a statute, the court will look out of it to other statutes in pari materia, or of a similar purport, especially in respect to revenue laws, which, although made up of independent enactments, are regarded as one system, in which the construction of any separate act may be aided by the examination of other provisions which compose the system.

[Cited in The Viola, 59 Fed. 635.]

[Cited in Ketcham v. Hill, 42 Ind. 72.]

4. The facts and circumstances which led to and surrounded the passage of the said act of March 3, 1849, as derived from the journals of the two houses of congress, the documents laid

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

before congress, and the debates in congress, considered, in construing the said act.

5. Contemporaneous, antecedent, and subsequent enactments on the same subject matter, considered, in construing the said act.

6. Where the United States, in adjusting the accounts of a collector appointed under the said act, treated him as having acted as collector under said act until the 14th of January, 1851, and adopted his acts until that time as being official, *held*, in an action against him to recover an alleged balance in his hands as such collector, that the United States were estopped from claiming that he was not entitled, during the whole time he so acted as such collector, to the compensation provided by said act of 1849, notwithstanding the passage of the act of September 28, 1850 (9 Stat. 508).

7. Such collector was entitled, during the whole time he so acted as such collector, to a salary of $1,500 per annum, and also to the fees and commissions prescribed by the thirty-fourth section of the act of February 18, 1793 (1 Stat. 316), and by the second section of the act of March 2, 1799 (Id. 706), notwithstanding the passage of the said act of September 28, 1850.

8. Where such collector seized, as forfeited to the United States, certain liquors, as being imported contrary to law, and, without procuring any condemnation of them by legal process in Louisiana or Oregon, under section 5 of said act of March 3, 1849, because such proceeding was impracticable, sold them, with the assent of their owners, and received the proceeds, and the United States, with notice of such want of condemnation, received, to the use of the United States, the one-half of the proceeds of such sales, and entered the usual credits, in such collector's accounts, for such amounts, *held*, that such collector was entitled, under section 91 of the act of March 2, 1799 (1 Stat. 697), to retain to his own use the one moiety of such proceeds.

9. Such collector was entitled to such moiety, although the secretary of the treasury had, on the application of the owners of such liquors, made allowances to them as and for the cost and value of such liquors before their importation.

10. Where such collector took bonds to the United States, on the delivery up of seized vessels and goods, and, on leaving office, returned them into the treasury department, and they had not been collected, nor had any proceedings been taken by that department to collect them, and it appeared that, if they had been collected, such collector would have been entitled to the one-half of their amount, *held*, in such action against such collector, that he was not entitled to a credit for such one-half.

11. A collector's right to a share in seized property applies only to the proceeds obtained from its condemnation and sale, and does not attach to the property itself.

12. The additional duties of 20 per cent. ad valorem, imposed for undervaluation by section 8 of the act of July 30, 1846 (9 Stat. 43), are not fines or penalties. *Held*, therefore, that such collector was not entitled to a moiety of them.

13. Such collector was not chargeable with a sum of money stolen from the deputy collector at Monterey, appointed under the said act of March 3, 1849, such sum having been stolen without neglect or default on the part of such collector, and having been disallowed to him as a credit at the treasury department.

14. The legal relation between public officers and their sworn assistants, even when they are acting directly in connection, is generally not that of master and servant, or principal and agent; and the liability of the official superior for defaults of his assistants arises only in case of his own misconduct or neglect.

15. In an action by the United States against a disbursing officer or agent, or other individual, for the recovery of moneys claimed of him, the defendant is entitled, on the trial, to the allowance of all equitable demands of his against the United States, if the same have been submitted to the proper accounting officers of the government and disallowed by them.

16. A balance equal to the amount of the money so stolen from such deputy collector at Monterey, having, as the result of the principles so settled in this case, been found to be due to such collector from the United States, the court ordered such balance to be certified, without allowing interest to either party.

17. The treasury department acts in a judicial capacity, in determining the charges to which a collector is subject, and cannot vary that adjudication subsequently, to his prejudice.

18. Where the treasury department made up five statements of the account of such collector, three before suit brought, and two afterwards, and did not claim interest against the defendant in any of them except the last, which was made up after such collector had paid to the government, in settlement, an amount which the court found overpaid the government, and the balance stated in each of such accounts was more than was due from such collector, and the action was brought upon the first account that was made up, and it appeared that the account was, in effect, open and running until the fourth account was made up, and that that account was grossly erroneous, *held*, that the United States were not entitled, in such suit, to charge the defendant in account with interest on the balance in his hands when such suit was brought.

19. The first section of the act of March 3, 1797 (1 Stat. 512), subjecting a receiver of public money to the payment of interest thereon, if he neglects or refuses to pay into the treasury the balance reported to be due to the United States upon the adjustment of his accounts, does not apply to the case of such collector.

This was an action commenced on the 10th of May, 1852, to recover from the defendant [James Collier] a balance alleged to be due from him to the United States on his official bond as collector for the district of Upper California. He acted as such collector from the 3d of April, 1849, until the 14th of January, 1851. The defendant filed a plea of the general issue, and a notice that he claimed against the plaintiffs various specified credits, which exceeded their demand, and had been presented by him to the accounting officers of the treasury and disallowed; and he claimed that he was entitled to have a balance certified in his favor upon the whole accounting. At the trial, before Betts, J., in April, 1854, the jury found a special verdict, and the case now came before the court on a case made, which contained the evidence given on the trial, and the special verdict, and various exceptions taken on the trial to rulings of the court.

Charles O'Conor, for the United States.

Daniel S. Dickinson and John A. Collier, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. We do not consider it necessary to go out of or beyond the facts found by the special verdict and the

documents adopted by it, in stating the reasons for our judgment in this case.

The jury find, that the treasury department made up and stated the account of the defendant five several times, to wit: on the 7th of June, 1851, in which they claimed a balance of $791,065.31; on the 24th of September, 1851, in which they claimed a balance of $789,925.35; on the 26th of December, 1851, in which they claimed a balance of $750,933.80; on the 7th of March, 1853, in which the commissioner of customs made up the balance at $216,712.43, and the auditor stated it at $181,797.00; and fifthly, on the 22d of September, 1853, in which a balance was claimed against the defendant of $241,329.47. Each of those five several balances, as thus stated, the defendant, by letter from the treasury department accompanying the statement of account, was required to pay to or deposit with an assistant treasurer of the United States. The account of September 22, 1853, contained no credit for the sum of $118,546.05, paid on the 16th of September, 1853.

This disaccord in the treasury statements of the defendant's account does not result from the admission or rejection of items on the exhibition of new evidence, but is owing chiefly to changes in the principle upon which charges and credits are inserted or withdrawn or modified, on the various reconsiderations of those statements. We shall, therefore, limit our observations to the particulars charged by the plaintiffs and objected to by the defendant, or submitted and claimed by him and disallowed at the treasury department, without undertaking to readjust the account and determine the result. That will be more conveniently and accurately done at the department, when it is possessed of our decision.

The disputed particulars consist substantially of five items, four of which take the form of claims of credit on the part of the defendant, the other being a direct debit charged against him by the plaintiffs. Still, the largest item, and that which has been the main subject of contestation between the parties, is of a compound character. It relates to the compensation the defendant is entited to receive, and is brought forward in a double aspect, partly by the plaintiffs, in the way of charges against the defendant for official fees and commissions received and retained by him exceeding a certain maximum, and directly by the defendant, as an entire credit to which he is entitled.

The finding of the jury embracing the particulars of compensation is, that the statement made up at the treasury department on the 7th of March, 1853, gave no credit to the defendant for his compensation, except the sum of $1,745.56 for salary, and no credit for any of his claims for commissions; that he officiated as collector of the district of Upper California, from the 3d of April, 1849, to the 14th of January, 1851, and, during that period, collected and received, for duties on imports and tonnage, $2,108,365; that, of that sum, he received, after the passage of the joint resolution of congress of February 14, 1850 (9 Stat. 560), and before the passage of the act of September 28, 1850 (Id. 508), $1,027,719.33, and, after the passage of the last-mentioned act, $625,656.27; that the defendant was credited in the account of September 22, 1853, with the sum of $30,831.58, as a commission of three per cent. on the sum received between the passage of the said joint resolution and of the said act, and also with the sum of $2,524.83, for his salary, at the rate of $10,000 per annum, after September 28, 1850, and, on account of his compensation prior to February 14, 1850, with the sum of $1,300; that neither of those sums had been previously credited; and that, in any event, he is entitled to those allowances, in the account to be stated pursuant to the verdict. The jury further find that, previous to the passage of the said joint resolution, the defendant received, as emoluments of his office (exclusive of the commissions aforesaid), the following sums, to wit: between the date of his entering upon said office and the passage of said joint resolution, the sum of $4,500; between the passage of said joint resolution and the passage of the said act of September 28, 1850, the sum of $11,250; and, after the passage of the last-mentioned act, the sum of $5,250. And the United States claim, that the defendant is bound to account for and pay over to the United States all the excess of the emoluments received by him beyond an amount sufficient to make his maximum compensation $3,000 per annum, except during the period between the passage of the said joint resolution and of the said act. The special verdict also declares, that inasmuch as the allowances or disallowances of the items in dispute between the parties depend upon questions of law which are proper to be submitted to and decided by the court, it is agreed that the verdict and finding of the jury shall be entered in the case after the decision of the court, and conformably to such decision. The defendant, on his part, claims that he should be credited, on his compensation account, with a fixed salary, at the rate of $1,500 per annum, during the whole period he served in the office, and with all the fees and commissions allowed by law which were collected by him. The seeming incongruity in the special verdict, in finding that, in any event, the defendant is entitled to certain specified particulars of allowances, and yet declaring that the allowances and disallowances in controversy in the account depend upon questions of law which are submitted to the decision of the court, is not, in our judgment, to be so construed as to restrict the authority of the court, or place any impediment in its way, in passing upon the whole subject matter, including those specified items.

The solution of the point in question de-

pends upon the true meaning and effect of the act of congress of March 3, 1849, entitled, "An act to extend the revenue laws of the United States over the territory and waters of Upper California, and to create a collection district therein" (9 Stat. 400).

The treasury department, in stating the defendant's account, have considered his compensation to be subject to the limitations of the tenth section of the act of May 7, 1822 (3 Stat. 695), by which it is provided, that whenever the emoluments of any collector of the customs (other than those particularly excepted) shall exceed $3,000, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall be paid into the treasury, for the use of the United States. The defendant claims that the compensation allowed to him by the act of March 3, 1849, is independent of all previous limitation, and is to be determined conformably to the meaning and effect of that act.

It is enacted by that law (section 1) that the revenue laws of the United States be, and they are hereby extended to and over the main land and waters of all that portion of territory ceded to the United States, heretofore designated and known as Upper California; that (section 2) all the ports, harbors, bays, rivers and waters of the main land of the territory of Upper California, shall constitute a collection district, by the name of Upper California, and a port of entry shall be and is hereby established for said district, at San Francisco, on the bay of San Francisco, and a collector of customs shall be appointed by the president of the United States, by and with the advice and consent of the senate, to reside at said port of entry; that (section 3) ports of delivery shall be established in the collection district aforesaid, at San Diego, Monterey, &c., and the collector of the said district of California is hereby authorized to appoint, with the approbation of the secretary of the treasury, three deputy collectors, to be stationed at the ports of delivery aforesaid; and that (section 4) the collector of said district shall be allowed a compensation of $1,500 per annum, and the fees and commissions allowed by law, and the said deputy collectors shall each be allowed a compensation of $1,000 per annum, and the fees and commissions allowed by law.

If the defendant's compensation is subject to limitation by any antecedent statute, we perceive no legal reason why the act of May 7, 1822, should be applied to the case, and the posterior act of March 3, 1841 (5 Stat. 432), should be disregarded. The fifth section of the latter act provides, that no collector of customs "shall, on any pretence whatsoever, hereafter receive, hold or retain for himself, in the aggregate, more than $6,000 per year, including all commissions for duties, and all fees for storage, or fees, or emoluments, or any other commissions, or salaries, which are now allowed and limited by law." It is manifest, that collectors whose compensation had been restricted by the prior statute to $3,000 a year, would, after the passage of the act of March 3, 1841, be relieved from that limitation, and be entitled to retain from their receipts a compensation of $6,000 annually; and the defendant can be placed in a no more disadvantageous position, by a constructive limitation implied under the act of March 3, 1849, than was incident to the office by the positive provisions of law in force when that act went into operation. In our opinion, therefore, if the defendant is restrained to a specified amount of compensation, under the laws in force when the act of 1849 was enacted, it would be to the latter and larger sum, and not to that first appointed, the act of 1841 being the latest expression of the legislative will on the subject. The condition in which the defendant is placed in this respect, depends, therefore, upon the purport and scope of the act of 1849; and we shall proceed to state concisely our views of its true construction and effect.

Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject matter; and its language is to be understood according to its natural and ordinary import. 1 Kent, Comm. (7th Ed.) 462, 463. The intention which forms the governing principle of the law is to be extracted from the entire enactment (Strode v. Stafford Justices [Case No. 13,537]); and, to ascertain the legislative will, courts not only search all the provisions of the particular statute, but may look out of that to others in pari materia, or of a similar purport, especially in respect to revenue laws, which, although made up of independent enactments, are regarded as one system (Wood v. U. S., 16 Pet. [41 U. S.] 342, 363), in which the construction of any separate act may be aided by the examination of other parts and provisions which compose the system. This doctrine is in furtherance of the general principle, that the statute itself must furnish, primarily and essentially, the indications of the will of the legislature; and, should the provisions in respect to the compensation of the collector be found to be obscure, the interpretation most favorable to him should be adopted. U. S. v. Morse [Case No. 15,820].

The act of March 3, 1849, creates new offices within a territory first brought by that statute under the revenue laws of the United States. The whole body of those laws is extended to and over the main land and waters of Upper California. We do not consider it necessary, in the examination of this case, to go into the inquiry, whether the transfer of the revenue laws embraced also the entire legislation of congress in relation to agencies and means employed or authorized for the purpose of collecting revenue from imports, and especially in relation to

incidental advantages and benefits allowed to revenue officers; for, in respect to the point in hand, the 4th section of the act of 1849 recognizes, as a part of the laws so extended, those which relate to fees and commissions to collectors.

The provisions appointing fees to collectors for their services under the revenue laws, are contained in the thirty-fourth section of the act of February 18, 1793 (1 Stat. 316), and in the second section of the act of March 2, 1799 (Id. 706). The particulars and amounts of the fees and commissions claimed to be payable under those laws, are not in dispute in this action, nor is it disputed that the defendant has retained the proper sum, and is entitled to credit therefor, provided the act of 1849 bestows them upon him without limitation. The question of restriction or qualification is the one in controversy between the parties. In that view, the fourth section of the act of 1849 is to be read as if the fees and commissions enumerated by the acts of 1793 and 1799 had been repeated in terms in that section; and the grant of compensation would then be direct and positive, both of the fixed sum of $1,500 per annum and of those specific fees and commissions. The general reference is equivalent to and of the same effect as the reiteration of the particulars, that being certain in law which may be reduced to a certainty; and, the tariff of fees and commissions being fixed, the collection of them would render this branch of compensation equally determinate with the other.

It is not denied that the act of 1849 means, that the defendant shall take, as his own property, the fees and commissions allowed by law. It is not directed that they shall be applied in satisfaction of his salary. The act guarantees the salary, with the possible implication that, if it is not obtained from other means in his hands, it will be paid him by the treasury. The question raised is, whether such direct devotement of fees and commissions is charged with the condition applied to antecedent grants of compensation to collectors, that salary and perquisites conjointly shall not exceed $6,000 per year. That limitation is supposed to be imparted by extending the revenue laws to California. We do not enter into that discussion; for, if such restriction might be implied, in the absence of any expression of the intent of congress, we think that the language of the fourth section of the act, establishing the compensation, indicates plainly that no limitation was meant to be applied in this case.

The act creates Upper California a collection district, and establishes a port of entry at San Francisco. It also establishes three other ports of delivery, and authorizes the appointment of a deputy collector to be stationed at each. It then declares, that the collector of said district shall be allowed a compensation of $1,500 per annum and the fees and commissions allowed by law, and that the said deputy collectors shall each be allowed a compensation of $1,000 per annum and the fees and commissions allowed by law. The same language is used in each of these paragraphs, and they are reasonably to be supposed to have been employed in a common sense. There is certainly no ground for an inference that congress designed to make a provision for the deputy collectors more advantageous to them than that applicable to the collector. The grant to them is not only affirmative and positive, but was an original one—that class of officers not being entitled, under the then existing revenue laws, to fees or commissions, or coming within the restrictive clauses of the acts of 1822 and 1841. The enactment must, accordingly, be understood as conferring on them absolutely, in addition to their salaries, the fees and commissions they collect, as making up their compensation, irrespective of whether the total produced be $6,000, or ten times that amount. The latter clause of the section thus manifesting plainly the purpose of congress to give to deputy collectors their salaries, together with all fees and commissions, the same expressions, used simultaneously in defining the compensation of the collector, must carry the same signification, unless restrained or extended by other language in the act. U. S. v. Freeman, 3 How. [44 U. S.] 556.

This construction deduced from the natural force of the enactment, may be considered as being corroborated by the particulars contained in the case, showing the facts and circumstances which led to and surrounded the passage of the act. Documents were laid before congress showing the exorbitant expenses to which the officers in charge of the revenue service in California would be subjected, and the necessity of immediate legislation extending the revenue laws to that territory. Executive Documents, 30th Cong. 2d Sess. Ineffectual efforts had been made by congress to organize the territory, and, at the close of the session, the act in question was pressed to its passage at the last hour of that congress, as being of urgent emergency, and was framed in general terms, to avoid the hazard of specific enactments and amendments. House Journal, 30th Cong. 2d Sess. p. 514; Senate Journal, 30th Cong. 2d Sess. p. 338; Congressional Globe, 30th Cong. 2d Sess. pp. 691, 692. The act was adopted only as a provisional measure, to be displaced at the next session by one adapted to the state of the country and its commercial business. No evidence was furnished at the time showing the extent of income to be expected from that collection district, or that all the fees and commissions received by the collector would afford him an unreasonable compensation; and it is fair presumption that congress intended, in leaving the collector to the chance of receiving no more than $1,500 a year, to give him the advantage of the contingency of the whole

emolument of fees and commissions which might be collected.

This presumption is justified by contemporaneous, antecedent and subsequent enactments on the same subject matter, in which congress has cautiously avoided, by positive provisions, leaving the subject of compensation open to hypothetical augmentations or diminutions. In acts approved the same day with the one in question, congress excludes, by explicit language, all implication on the subject of compensation, and signifies its design to make the limitation in plain words, when one is to accompany the grant of pay. In the second section of the "Act to establish the collection district of Brazos de Santiago, and for other purposes," approved March 3, 1849 (9 Stat. 409), it is provided, that the collector shall be entitled to a salary not exceeding $1,750 per annum, including in that sum the fees allowed by law, and that the amount he shall collect in any one year for fees exceeding the sum of $1,750, shall be accounted for and paid into the treasury of the United States. And, in relation to the deputy collector, it is provided, by the sixth section of the same act (9 Stat. 410), "that the compensation of the said deputy collector shall be the usual fees of office, and nothing more." So, in the second section of the act declaring Fort Covington in the state of New York a port of delivery, and authorizing the appointment of a deputy collector to reside at Chesapeake City in the state of Maryland, approved March 3, 1849 (9 Stat. 414), it is provided, "that the compensation of the said deputy collector shall be the usual fees of office, and nothing more." The omission of those qualifications in the California act becomes more significant, in connection with the fact that two of the last-cited enactments were passed in the senate on the same day with the act in question, and the other one on the day preceding. Senate Journal, 30th Cong. 2d Sess. pp. 297, 305, 315, 327.

The presumption referred to is forcibly strengthened by the third section of the act of September 28, 1850 (9 Stat. 509), which makes applicable to the collection districts in California the provisions of law in relation to the payment of expenses incidental to the collection of the revenue from customs, existing prior to the act of March 3, 1849 (Id. 398), entitled "An act requiring all moneys receivable from customs and from all other sources, to be paid immediately into the treasury, without abatement or reduction, and for other purposes." This manifestly imports, that congress did not consider the mere extension of the revenue laws to California as carrying with it the restrictions or directions of the prior act of March 3, 1849; for, it would be supererogatory and tautological to re-enact a provision already in force. And, that such was the judgment of congress, is also inferable from the fact, that the act of September 28, 1850, does not renew the extension of the revenue laws to the state, but they are treated as in force there by virtue of the act of 1849 making that extension.

So, also, in acts passed prior to 1849, it seems to have been assumed, that an appointment of salary or fees, or of the two together, to revenue officers, would operate without limitation of amount, unless restricted by the express language of the enactment, notwithstanding the existing acts of 1822 and 1841; and, accordingly, congress, in repeated instances, declared such limitation in positive terms.

The second section of the act to establish a port of entry at Saluria and for other purposes, approved March 3, 1847 (9 Stat. 182), gives to the collector of Saluria a salary not exceeding $1,250, including in that sum the fees allowed by law, and requires the excess collected above that sum to be accounted for and paid into the treasury. The third section appoints specific salaries to several surveyors; and, to the deputy collector at Aransas, the legal fees on the business he may transact, and no more. The fifth section gives to the collector at Galveston a salary not exceeding $1,750, including in that sum the fees allowed by law, and directs the amount of fees collected exceeding that sum to be paid into the treasury.

This series of legislative acts appears to us to be a plain recognition by congress of the principle, that every appointment of compensation to revenue officers will have effect according to the terms of the enactment; and that limitations or restrictions as to amount are not to be presumed, but, on the contrary, to take effect, must be expressed in direct terms, or be connected with the grant by necessary implication.

We think, also, that the act subsequently passed, creating additional collection districts in California, approved September 28, 1850 (9 Stat. 508), rests upon the assumption that, to restrain the right of the collector of that district to retain all the fees and commissions collected by him, there must be a different disposition of those emoluments by positive law. The second section gives to the collector and other officers resident at San Francisco, salaries not exceeding a specified sum; and to the other collectors in the state definite salaries, with an additional maximum compensation of $2,000 each, should their official emoluments and fees provided by existing laws amount to that sum. The sixth section gives the collector of Mackinac a salary, together with such commissions and fees as are authorized by existing laws. The eighth section provides a salary to the collector of Minnesota, with the declaration, that he shall not receive any other compensation whatever, in the shape of extra allowance or fees of any description whatever.

So, also, the provisions of the act to create additional collection districts in the territory of Oregon, approved February 14, 1851 (9 Stat. 566), are drawn up in view of the same

import of a general grant of fees. The second section grants to various collectors $1,000 each per annum, with an additional maximum compensation of $2,000 each per annum, should their emoluments and fees provided by existing laws amount to that sum; and allows to various surveyors, in addition to the fees authorized by existing laws, a compensation of $1,000 each per annum. The third section directs the appointment of several surveyors, whose compensations, in addition to the fees authorized by existing laws, shall not exceed $1,000 each per annum.

This course of enactments at periods before and after and concurrently with the act in question, denotes, in our judgment, that congress contemplated that a grant of fees, emoluments or commissions in positive terms, was free from the limitations and restrictions of the acts of 1822 and 1841, unless brought within those qualifications by other plain provisions in the law. We also think that the joint resolution of congress adopted February 14, 1850 (9 Stat. 560), if it has a bearing upon this case, is declaratory of the understanding of congress that the act of March 3, 1849, would be executed in that sense at the treasury.

The act of March 3, 1849, being the last statute applicable to the case of the defendant, we consider it to be the expression of the legislative will as to the amount and mode of the defendant's compensation in that service, and are of opinion that it is to be carried into effect conformably with its terms.

It is insisted, for the plaintiffs, that that act was superseded by the act of September 28, 1850, and that the defendant can claim for his services thereafter, until the time he was displaced in 1851, no compensation that is not authorized by the last-mentioned statute. The position is not taken, in terms, that the prior act is abrogated by the later one, but such is the legal import of the objection; and, no doubt, on general principles, the last enactment goes into immediate operation, and thus annuls and repeals all preceding ones inconsistent with it. Matthews v. Zane, 7 Wheat. [20 U. S.] 164; 1 Kent, Comm. (7th Ed.) 455.

It might, perhaps, be an open question, as respects third persons, whether the defendant could perform any official acts after the passage of the last-mentioned act, or maintain a claim at law, for his compensation. But we do not think that the plaintiffs in this action can avail themselves of that objection; and we are not called upon to consider what effect that act may have upon the rights of other parties than the United States, in their claims upon or dealings with the defendant. The plaintiffs, in adjusting his accounts at the treasury, and also in this action, proceed upon the assumption that he was clothed with the authority and responsibility of collector in respect to the government, so long as he continued to act in that capacity, without notice that his authority was rescinded. In exacting from him, up to that period, the services and responsibilities of collector, under the law authorizing his appointment, the plaintiffs must be held chargeable to him for all the rights and recompenses secured to him by that law, until he became apprised that his powers had ceased. The plaintiffs, by adopting the acts of the defendant between September 28, 1850, and January 14, 1851, as official and as within his legal competency, have sanctioned them, and rendered them valid, in so far as the claims arising therefrom in favor of the defendant and against the United States are concerned. In that point of view, it may probably be deemed, that the first organization of the collection districts in California, and the appointment of the defendant as collector, remained in force until the act of September 28, 1850, was put into execution. The act of March 3, 1849, extended the revenue laws of the United States over the territory of Upper California. The object and effect of that law have not been abrogated or suspended by express legislation; and it is not to be presumed that an interregnum in the administration of it was contemplated by congress in the enactment of the act of 1850—otherwise, there must have been a period in which no law for the imposition and collection of duties in that territory or state existed. The reasonable intendment would probably be, that the existing law was to remain in force until the new system or authority was put into operation in its place; and, in our opinion, the case of Cross v. Harrison, 16 How. [57 U. S.] 164, recognizes and applies a like principle to facts essentially analogous to that feature of the present case. But, whether this be so or not, we think that, in a transaction between the government and the collector, touching the adjustment of his accounts, the plaintiffs, by continuing an account with him as an officer duly acting under the law of 1849, have ratified those acts, and are concluded from denying his claim for a proper compensation therefor; and that the provisions of that act, being the one under which his services were rendered, afford a certain and appropriate measure of that compensation.

It is to be observed that the act of September 28, 1850, makes no different provision for the compensation of services rendered under the act of March 3, 1849, and cannot, accordingly, be construed as withdrawing the former provision, and substituting a new one for the compensation of those services. If it be apposite to the subject, it takes away all allowances in that respect, for it transmutes the single collection district created by the act of 1849 into six districts, each having all the officers and authority of an independent collection district, to each collector in which is appointed a specific compensation. There is no language in the act of 1850 indicating that any one of those allowances affords a

rule for determining the pay to which the defendant would be entitled for performing duties over the entire state; and, if the provisions of that act were in any way applicable to this case, the reason of the thing would seem to require that the whole amount allotted to the six collectors for the same territory over which the authority of the defendant was exercised, should be allowed to him, rather than either of the separate sums designated. We do not, however, propose to discuss this point, because we place our decision on one of a broader bearing, and which renders this special topic unimportant.

The defendant was placed in charge of an important service, in a remote section of the Union, and where notice of the cessation of his office was not and probably could not be made known to him before January 14, 1851. A public necessity accordingly existed for the continuance of his functions up to that period. In performing those duties, he received and disbursed moneys, and charged and credited them to the plaintiffs, in the capacity of collector. The treasury continued its accounts with him in that character. It not only debited him, as collector, with receipts, and credited him officially with payments, until January 14, 1851, but it carried forward the accountings in that character until September 22, 1853, when the final balance was struck against him for his official indebtment. This action is prosecuted to recover from him moneys collected officially and retained by him to cover credits which he claims in his character of collector; and the plaintiffs, under the facts, might be held, after so dealing with him, to be concluded from denying that he was collector de facto and de jure, under the act of 1849, until the time when his office was transferred to a new officer, on the 14 of January, 1851, and that he is entitled to compensation until that period conformably to the provisions of the act of March 3, 1849. The plaintiffs establish no legal title to the moneys demanded, except in subserviency to that principle. The treasury transcript would be nugatory as to all doings of the defendant out of office, and could afford no foundation for the recovery of a debt incurred by him after the passage of the act of September 28, 1850. The full rights of either party cannot be adjusted in this action on any footing other than the assumption that the act of 1849 virtually governed the entire transactions until that of 1850 was put in actual operation.

We think, accordingly, that the defendant is entitled, on legal considerations, to retain from the various moneys in his hands as collector, the full compensation granted to him by the act of 1849. And it matters not, to the just determination of this cause, whether the decision be placed upon the ground that that act remained in force to this end, as between these parties, or whether a proportionate part of the salary of $1,500, together with the fees and commissions which accrued between September 28, 1850, and January 14, 1851, be adopted as measuring the quantum meruit of his services. We accordingly decide, that the defendant is entitled to be credited, on his accounting with the treasury department, with his salary at the rate of $1,500 per annum, and with the fees and commissions allowed by law, during the whole period in which he continued to perform the duties of collector in California; and we direct the special verdict to be entered accordingly.

We proceed to dispose of the questions of law arising under the following finding of the special verdict: "And the jury further find, that the said James Collier, as such collector as aforesaid, during his said official term of service, seized, as forfeited to the United States, certain liquors imported into the district of Upper California contrary to the revenue laws of the United States under such circumstances; and that, unless the want of a judicial proceeding to ascertain and enforce such forfeiture, or the circumstances herein or in the case to be stated, shall be deemed an impediment to such right, he, the said James Collier, by virtue of the ninety-first section of the act to regulate the collection of duties on imports and tonnage, of 1799, would be entitled, as such collector, to one moiety of the said forfeitures. The jury further find, that it being impracticable, without an expenditure which would have consumed the whole value thereof in costs, to institute any regular judicial proceedings touching such forfeitures, the said James Collier caused the said seized liquors to be sold; that the proceeds of such sales were ninety-four thousand seven hundred and four dollars and sixty-six cents; that the costs and expenses of storing, preserving, and selling said liquors, amounting to twenty-four thousand eight hundred and seventy-three dollars and eighty cents; and that the nett proceeds of said forfeited goods, which came to the hands of said James Collier, amounted to sixty-nine thousand eight hundred and thirty dollars and eighty-six cents, of which the said James Collier claims the one half, being the said sum of thirty-four thousand nine hundred and fifteen dollars and forty-three cents. And, whether the said James Collier is accountable to the United States for all or any part of the proceeds of said liquors, or whether he is entitled to a credit, as collector, for the one moiety or half part thereof, being the last-mentioned sum, is submitted to the court. In each of such seizures, the said James Collier obtained from some owner, or from the carrier, master, or consignee, or other most accessible person, acting as agent for the owner in the importation of said liquors, or having the charge and custody thereof for the owner, a certificate, consent, or abandonment, similar in character to the certificates of abandonment which are inserted in the case as having been given in evidence on the trial.

He gave credit to the United States, in his periodical official returns to the treasury, for the gross sums so received on such sales, charged the said costs and expenses, and returned the appropriate vouchers to the treasury department, which returns were received without objection by the treasury department, from time to time, during his entire official term; and he claims to be entitled to retain to his own use a moiety of the said nett proceeds. After the commencement of this suit, the secretary of the treasury, assuming to act under the first branch of the fourth section of the act first above in this finding referred to, received applications on behalf of persons claiming to be owners of the said seized liquors, for remission of the said forfeitures, and made allowances to them, not as and for the proceeds of said sales, but as and for the cost or value of such liquors before their importation. A schedule of such allowances, with a statement of the amounts awarded or allowed as aforesaid, and of the amount paid out of the treasury of the United States under such allowances, and of the amounts remaining to be paid on demand and exhibition of power to receive the same, was given in evidence, is to be inserted in the case, and is to be deemed a part of this verdict."

We do not enter into the question whether, in the condition of things and under the exigencies stated in the special verdict at the time those moneys were received and paid into the treasury by the defendant, his proceedings constituted a legal forfeiture and disposal of the liquors seized and sold, or of their proceeds, as against the lawful owners. The precise question presented by the special verdict legitimately extends only to the inquiry, whether the United States have a right or title to the moiety thereof retained by the defendant, which enables them to collect from him or control that moiety. The special verdict presents considerations sufficiently direct and weighty to show that the official conduct of the defendant in the course taken by him in respect to those liquors, was based upon intentions to subserve the rights and interests both of the United States and of the owners of the property, and to exonerate him from all charge of a wanton misapplication of his powers and authority; and it shows, moreover, that the treasury adopted and ratified, so far as it was competent for that department to do so, the acts of the defendant in that behalf. In this posture of the case, it is not easy to produce any rule of law or equity which will enable the plaintiffs to disavow, at an after period, their approval of those acts, and hold the defendant responsible to them for the entire avails of the property. Nor are we satisfied that the United States acquired such title to the moiety retained by the defendant, as to enable them to maintain an action for its recovery against him.

We have put the decision of this point on the facts before us showing that the owners of the liquors seized, or their agents, assented to the sales by the defendant without the intervention of any court of law, and have never withdrawn or repudiated such assent, and that the treasury department, with full notice that no recourse had been had to the courts of the United States in Oregon or Louisiana, to obtain condemnation and sale of the property, received, to the use of the United States, the one-half of the proceeds of such sales, and entered the usual credits, in the accounts of the defendant, for such amount.

The proceeding by the secretary of the treasury to restore those proceeds to the owners of the liquors, after this suit was commenced, could not divest the right and title of the defendant to the one moiety which had been for a long period in his actual possession, and was received, as between him and the plaintiffs, in a manner tantamount to that of a formal distribution of the proceeds after condemnation by order of court. The authority of the secretary of the treasury to remit forfeitures under the revenue laws, has been determined to embrace also the interests of the officers entitled to share in the forfeitures; and such authority to remit may be exercised after judgment of condemnation. U. S. v. Morris, 10 Wheat. [23 U. S. 246; Id., [Case No. 15,816]. But the power ceases after the share of the forfeiture is received by the collector for distribution among his co-officers. Id. As the collector, in this instance, acted without the co-operation of a naval officer or surveyor, the entire moiety received by him was his legal share of the forfeiture, and is in his hands, with the same right on his part to the whole of it, that he would have possessed to his aliquot part of it, if it had been required by law to be divided between him and other officers. In our opinion, therefore, if the award of these moneys by the secretary of the treasury to the owners of the liquors seized, had been strictly in the form of a remission, under the authority of the first section of the act of March 3, 1797 (1 Stat. 506), it would be inoperative and void as to the defendant, after the moneys had publicly gone into his hands, and were held as his own property. The Hollen [Case No. 6,608].

The same principles would apply if the secretary of the treasury had acted under the fourth section of the act of September 28, 1850, and had directed the technical remission of the forfeitures; and this without respect to any question as to whether, the seizure and confiscation having been anterior to the passage of that act, it was not necessary, under the proviso to that section, to show the seizure to have been improper on the part of the collector.

Nor does it seem to us that a mere order of restoration of the proceeds of those forfeitures to the former owners, at the discretion

of the secretary, without the concurrence of the defendant, or notice to him that such an order was applied for or was intended to be made, can be regarded as a remission, within the provisions either of the act of March 3, 1797, or of that of September 28, 1850.

We are of opinion, accordingly, that the defendant is entitled to retain the sum of $34,915.43, being the moiety of such proceeds, and to receive credit for the same in his accounts.

The claim of the defendant to a credit of $12,300, being the one-half of the amount of bonds received by him for certain vessels and goods seized as forfeited, was disallowed by the treasury department. The special verdict as to that claim finds, "that the sum purporting to be secured by three certain bonds to the United States, set forth with the evidence in this case, taken by the said James Collier for seized vessels or goods delivered up, and which are in evidence, being the vessels or the cargoes of the Ocean, Calloony, and Lallah, was twenty-four thousand six hundred dollars; that the said bonds were returned by him, said James Collier, on leaving office, into the treasury department of the United States, and have not been collected, nor have any proceedings been had or attempted by the treasury department for the purpose of collecting the same; and they further find, that if the said last-mentioned sum had been collected and received, the said James Collier would have been entitled to the sum of twelve thousand three hundred dollars, being the one-half part of the amount of the said bonds; and the said James Collier claims a credit for that amount in his accounts, the same having been disallowed."

In our opinion, the defendant is not entitled to have those bonds regarded as money actually paid into the treasury. They were not accepted by the treasury in satisfaction of the value of the property forfeited, so as to raise an equitable credit, on that footing, in favor of the defendant. He received the bonds and transmitted them to the treasury department, to be dealt with there under their authority and not under his; and, even a laches by the government, if one may be imputed to it, in not enforcing the bonds, would not authorize him to treat those securities as so much money received by the treasury. He gives no evidence that the obligors are or were responsible sureties for the amount, nor that he demanded any action on the part of the government to enforce payment of the bonds. No higher right to the value of the bonds can be claimed by the defendant, than he would have possessed to the vessels or merchandise which they represent, had such property been detained, by order of the treasury department, under arrest and without adjudication; and it is plain that the collector's right to a share in seized property applies only to the proceeds obtained from its condemnation and sale, and in no way attaches to the property itself. There is no evidence before the court authorizing it to act upon those securities as money proceeds of the seized property. We are, therefore, of opinion, upon the finding of the jury, that this claim was properly disallowed by the department.

The special verdict finds, "that of the moneys so received by the said James Collier, twenty-eight thousand dollars was received for the additional duties of twenty per centum ad valorem, prescribed to be levied, collected and paid, by the eighth section of the act reducing the duty on imports and for other purposes, passed July 30, 1846, one-half of which sum the said James Collier claims as a credit in his accounts, the same having been disallowed." We consider the case of Ring v. Maxwell, 17 How. [58 U. S.] 147, as determining that the sum so demanded by the defendant did not accrue from fines or penalties, but was composed of duties chargeable by law on the merchandise imported. Accordingly, the defendant has no legal claim to that sum.

The special verdict finds, that "the said James Collier, in rendering his said periodical accounts, charged himself, as a part of a larger amount, with the sum of eight thousand one hundred and ten dollars and twenty-nine cents, received to the use of the United States by the deputy collector at Monterey, which forms a part of the debits so claimed against him by the United States in the several stated accounts. The said sum was stolen from the said deputy collector without neglect or default on his part, or on the part of the said James Collier, and the said James Collier, in the same account in which he returned the said last-mentioned sum as a charge against himself, claimed a credit per contra, against the United States, for the last-named sum thus stolen."

The deputy collector at Monterey was not made subject to the removal or control of the collector of the district. The collector had no other connection with his appointment than that of proposing him to the secretary of the treasury for his approbation; and the fourth section of the act of March 3, 1849, secures to the deputy a compensation independent of the collector, and gives to him, in his section of the district, the same standing, in respect to fees and commissions, as the collector had at San Francisco. This would rather render the deputy collectors in California agents of the government than of the collector personally. Whether this be so or not, the legal relation between public officers and their sworn assistants, even when they are acting directly in connection, is generally not that of master and servant, or principal and agent; and the liability of the official superior for defaults of his assistants arises only in case of his own misconduct or neglect. Dunlop v. Munroe, 7 Cranch [11 U. S.] 242; Story Ag. §§ 321, 322; Bailey v. Mayor, etc., of New York, 3 Hill, 531; Wiggins v. Hathaway, 6 Barb. 632.

Even if the defendant stands in law responsible for the conduct and liabilities of the dep-

uty at Monterey, and is to be regarded as the holder, for the benefit of the United States, of the funds purloined, still, it being found, by the verdict of the jury, that the money was stolen, the defendant, upon well-established principles of equity law, would be exonerated from all liability for them. Spence, Eq. Jur. 437, and cases there cited.

In an action by the United States against a disbursing officer or agent or other individual, for the recovery of moneys claimed of him, the defendant is entitled, on the trial, to the allowance of all equitable demands of his against the United States, if the same have been submitted to the proper accounting officers of the government and disallowed by them. Act March 3, 1797 (1 Stat. 515, § 4); U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135; U. S. v. Jones, 8 Pet. [33 U. S.] 375; U. S. v. Robeson, 9 Pet. [34 U. S.] 319; U. S. v. Hawkins, 10 Pet. [35 U. S.] 125.

On the finding of the jury, the charge in question must be rejected from the account against the defendant.

On a careful consideration of the whole case we shall order judgment to be entered therein to the following purport:

1. The defendant is entitled, under the fourth section of the act of March 3, 1849, to a credit, as compensation for his services as collector, to $1,500 per annum, and the fees and commissions allowed by law, without limitation or restriction, from the date of his appointment under the said act, and during the continuance of his services as such collector, down to the 14th of January, 1851, when he surrendered the custom-house to T. Butler King, who then appeared and took possession of the same, and entered upon the discharge of the duties of his office as collector under the act of September 28th, 1850, which organized the territory of California into six collection districts, and provided for the appointment of a collector in each district.

2. The defendant is not entitled to a credit for a moiety of the $28,000 received as additional duties of 20 per cent. ad valorem, under the eighth section of the tariff act of July 30, 1846.

3. The defendant is not entitled to a credit for a moiety of the $24,600 secured by bonds given upon the release of vessels seized for a violation of the revenue laws.

4. The defendant is not liable for the $8,110.29 charged against him, which was received by the deputy collector at Monterey, and which was stolen from him without default on his part or that of the collector.

5. The question of interest is reserved until the account is stated between the government and the defendant conformably to the principles here settled.

Subsequently, the case was submitted to the court upon the reserved question of interest, and upon an agreed exhibit of the counsel for the respective parties, showing that, upon the accounts stated conformably to the decision of the court upon the merits, there was a balance due to the defendant of the sum of $8,110.29, being the sum of money allowed to him by the special verdict as having been stolen from the deputy collector at Monterey; and the counsel were heard upon the question, whether either party was entitled to an allowance of interest upon any and which particulars of the account.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. We are of opinion that no interest be allowed to either party, and that a balance of $8,110.29, as due to the defendant, be certified in favor of the defendant against the United States, according to the terms of the special verdict.

In the argument before the court in support of the claim to interest, the counsel for the United States conceded that, according to the principles laid down in the opinion of the court on the case at large, the defendant had overpaid the government, unless he was chargeable with interest. The proposition maintained for the plaintiffs is, that the account should, under the decision of the court, be stated as follows:

Balance, as computed without interest, in the account made up on the 7th of March, 1853.....		$216,712 43
Deduct, by order of the court:		
One-half of nett proceeds of seized liquors	$34,915 43	
Commissions	63,250 95	
Money stolen at Monterey	8,110 29	
		106,276 67
		$110,435 76
Interest on this sum from January 14, 1851, to 16th September, 1853, at 6 per cent.....		17,721 88
		$128,157 64
Deduct payment, 16th September, 1853		118,546 05
Balance		$9,611 59

It is admitted that, applying the payment of $118,546.05 to the account, the debit side, independent of interest, is satisfied, with a balance over in favor of the defendant; but it is contended that the balance of interest remaining unpaid forms, from the time of such payment, a new capital, on which interest should be computed to the time of the judgment. On that hypothesis, the plaintiffs claim to be entitled to judgment for $9,611.59.

The jury find "that five several statements of the defendant's account were made up by the treasury department, and that the balance stated as due from the defendant to the United States in each of said five accounts was not due, a less amount, if any thing, being in fact due, and that none of the said accounts, except the last, contained any claim for interest, and, in the last of said accounts, interest was claimed, as therein stated." The last statement there referred to was made up September 22, 1853. This action was commen-

ced in May, 1852, upon the indebtedness charged in the account stated June 7, 1851.

It is at best questionable whether the comptroller had any authority to restate and augment the debit side of the account, at any time after the first statement had been adopted and repeated in the subsequent treasury statements of September and December, 1851, and March, 1853. Ex parte Randolph [Case No. 11,558]; U. S. v. Kuhn [Id. 15,545]. More particularly would the right of accounting officers to change the treasury statement, by adding a claim of interest, after a payment had been received from the defendant which overpaid the principal really due upon the account as it stood when the payment was made, be open to exception; for, it is the addition of interest to the demand after the 16th of September, 1853, when the defendant paid into the treasury $118,546.05, which produces the balance of $9,611.59, claimed to be due on the statement of September 22, 1853. The technical objection to varying the account is, that it creates a new cause of action after suit brought; but, one more vital to it on the merits is, that the treasury department acts in a judicial capacity in determining the charges to which the defendant is subject, and is not competent to vary that adjudication subsequently, to his prejudice. The decision of the department, within the rules prescribed for the exercise of its powers, is, in effect, final. U. S. v. Jones, 8 Pet. [33 U. S.] 375. We think, therefore, that the plaintiffs are not entitled to set up a charge of interest made in the restatement of the defendant's account on the 22d of September, 1853, and to renew that charge in this action.

But, if this objection is disregarded, and the right to interest is placed upon the footing that the defendant is liable, under the direct provisions of the first section of the act of March 3d, 1797 (1 Stat. 512), for the settlement of accounts between the United States and receivers of public money—or on the general principle of law, that a running account is to be deemed liquidated, so as to form a basis of liability for interest, from the time of its adjustment and statement at the treasury—or on the ground that a trustee is chargeable with interest on all sums in his hands, from the time they are received until they are paid over or applied to the use of the cestui que trust—the plaintiffs, in our opinion, fail to bring this case within the purview of either of those principles.

The statute subjects a receiver of public money to the payment of interest thereon, if he "shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account." Act March 3, 1797, § 1 (1 Stat. 512). The imposition of interest is made by the statute dependent on the refusal of the delinquent to pay into the treasury the sum or balance reported to be due. Upon the finding of the jury by their special verdict, the sum or balance reported to be due in the five different adjustments and statements of the defendant's account, was, in no instance, due; and this verdict relieves the defendant from the obligation to pay into the treasury either sum or balance reported to be due by him. It would be oppressive to exact a deposit of $791,065.31 in the treasury by the defendant, at the risk of his being subjected to the payment of interest upon any balance which might chance to be reserved out of a vastly surcharged account, during the indefinite period in which the subject might be kept in litigation.

There is strong reason for understanding the provisions of the act as being directed against wilful defaulters, whose delinquency is made clear. Interest in the nature of a penal infliction may then be carried into the account and enforced against them. This is not the position in which the defendant is placed by the proofs. There was no delinquency on his part in bringing his accounts to an adjustment. The evidence is full to show that his accounts and vouchers were promptly transmitted by him to the treasury department, and that the department was beset by himself personally, by his agents, and by correspondence, from the date of his return from California, with importunate urgency, to bring his accounts to an adjustment. The impediment to the completion of the accountings was in no respect with him. The fluctuations of balances in the successive statements, descending and ascending, between $791,065.31 and $181,797, and finally resting at $216,712.43, upon which he paid into the treasury $8,110.29 more than is found to be due to the United States, resulted from the varying views, among the accounting officers, of the proofs, which, from the beginning, had been one and the same before them. We do not wish to be understood as saying that, if the suit had been brought upon the statement of March 7, 1853, a jury might not, in passing upon the rights of parties embraced in a complicated and indeterminate state of accounts, have awarded interest on the sum paid in September, 1853, and which was found sufficient to extinguish the debt. But, in our judgment, the treasury statement so made up, is not to be accepted as a liquidated adjustment, fixing an indebtedness upon the defendant, and stands in law, when in contestation, and found to be grossly erroneous, no more privileged to claim interest, than running demands between parties, consisting of moneys advanced on one side and disbursements and services upon the other. We consider the accounts as open and running, in effect, until the plaintiffs and the defendant accepted the one of the 7th of March, 1853, made up during the pendency of the action, as that upon which the rights of the parties were to be determined. This charge was fully satisfied and extinguished by payment, and, had it included a charge of interest, we should have considered the plaintiffs entitled to interest, from the time the balance was ascertained, until its discharge. As that

account contained no such charge, and no undertaking of the defendant to pay interest is proved, we place the demand on the same ground of an unliquidated account, which it previously held.

To have our conclusions distinctly apprehended, it is proper to observe, that the plaintiffs gave in evidence, in support of their action, no other adjusted statement of the defendant's accounts than the one first made up, that of June 7th, 1851, and that the subsequent statements were given in evidence by the defendant.

This case was taken to the supreme court by writ of error, and the judgment of the circuit court was affirmed by a divided court. For that reason, the case does not appear in the Reports of the Supreme Court.

Case No. 14,834.

UNITED STATES v. COLLINS et al.

[4 Blatchf. 142;[1] 21 Law Rep. 37.]

Circuit Court, S. D. New York. April 1, 1858.

JUDGMENT—EXECUTION SALE—MORTGAGES—INJUNCTION—GOVERNMENT CONTRACT TO CARRY MAIL—LIENS.

1. Under the facts of this case, the government of the United States had no right to withhold from a party who had contracted with it to perform a mail service by sea, a portion of the pay provided for by the contract.

2. Under Act June 27, 1848 (9 Stat. 241), the power of the postmaster general to impose a fine on a contractor for the transmission of mails to and from foreign countries, for any unreasonable or unnecessary delay in the departure of the mails, or in the performance of the trips, is limited to the cases and for the causes specified in the act.

3. A recommendation made by the postmaster general to the secretary of the navy, to make a deduction from the pay of a contractor, on the ground that a portion of the service was performed by a steamer not of the class stipulated for in the contract, is not the imposition of a fine, within the terms of that act.

4. Where the creditor of a steamship company was proceeding to sell its steamers under an execution issued by a state court, and the government of the United States applied to this court to restrain such sale, on the ground that it had liens on the steamers, under chattel mortgages for advances made to build them, and a sale under the mortgages required a prior notice of six months: *Held*, that the rights of the execution creditors were superior to those of the government, so far at least as to allow them to sell the vessels subject to the lien of the government.

5. Whether the granting by this court of an injunction to stay such sale, is not forbidden by section 5 of the act of March 2, 1793 (1 Stat. 334), which prohibits the courts of the United States from granting an injunction to stay proceedings in any court of a state, quere.

[Cited in Yick Wo v. Crowley, 26 Fed. 208.]

This was an application for a provisional injunction against [Edward K. Collins] William Brown and others, creditors of the New York and Liverpool United States Mail Steamship Company, who had obtained judgments upon their demands against that company, in the courts of the state of New York, and had issued executions thereon to the sheriff of the city and county of New York, to restrain and prevent the sale, under such executions, of the mail steamers Atlantic and Baltic, upon which vessels it was claimed that the United States had liens, under certain deeds of trust or chattel mortgages, for moneys advanced towards building and completing those vessels.

Theodore Sedgwick, Dist. Atty.

Charles O'Conor, Francis B. Cutting, and Clarkson N. Potter, for defendants.

HALL, District Judge. It is not alleged that the judgments upon which the executions were issued were fraudulently obtained, or that there is any reason to doubt, that the demands upon which they were rendered, were legally and justly due to the plaintiffs in such executions. Indeed, no collusion whatever is alleged, and neither fraud nor bad faith is imputed to any of the defendants. The claim of the United States is based on the allegation, that they have a lien for advances upon the steamships named; and the equitable ground upon which the motion for an injunction is based, may be very briefly stated, in the very language of the bill. That language is as follows: "And the plaintiffs further show, that they have reason to believe, and do believe and apprehend, that if the said steamships are sold, any purchaser or purchasers of the said steamships will have the power to remove, and may remove, the same out of the jurisdiction of this court and of the United States, and in that case the plaintiffs would be wholly remediless."

The defendants, by their affidavits and by other papers read in opposition to the motion, strike at once at the foundation of the plaintiffs' rights, and insist that there is no longer any legal or equitable lien upon the Atlantic and Baltic, under the deeds of trust or chattel mortgages, because the lien for such advances has been, or should be, fully cancelled by the secretary of the navy. That officer has, as they allege, withheld from the owners of such steamships an amount due to them for mail service rendered to the government, much larger than that now claimed by the United States; and they produce a copy of an opinion of Mr. Attorney General Black, dated June 4th, 1857, and given at the request of the secretary of the navy, in which, after an elaborate examination, he decides that, upon the case presented to him, and which certainly was not a stronger one against the government than that presented upon this motion, the amount now claimed by the steamship company was improperly, and without authority, withheld. After a careful reading of this opinion of the attorney general, I cannot but assent to his conclusion, that the deductions made

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

from the sums claimed by the steamship company for mail service, have not been legally made.

Perhaps I might properly refuse the injunction in this case without stating any reasons for my judgment beyond those furnished by the very full and elaborate opinion of the learned attorney general; and certainly a court of equity should require very clear and satisfactory evidence that the attorney general had mistaken either the facts or the law of the case, before interposing, by injunction, to prevent the due execution of the final process of another court, issued in behalf of an honest creditor, to enforce his adjudicated and admitted rights, upon the mere ground that the execution of such process, and the enforcement of such rights, might possibly, or would probably, prevent the government from taking legal or other proceedings to enforce a claim which its highest law-officer had deliberately declared to be unfounded. It may, however, give more satisfaction to the parties and their counsel, if I state some of the reasons on which I base my opinion.

It is unnecessary to state in detail the terms of the original contract for the building of the steamships which have been known as the steamships of the Collins line, or even to give at length the deeds of trust, or chattel mortgages, under which the United States now claim. It has not been contended that the bill in this case can be sustained upon the ground that there has been a failure to perform the agreements contained in the original contract, and that the government has become entitled to an uncertain sum by way of damages; and the claim now made by the government is based entirely upon the assumption that there is a balance due the United States for the moneys advanced under such deeds of trust, or chattel mortgages. Those deeds of trust were severally intended as security for the advances made under them in pursuance of an act of congress authorizing such advances, and requiring the repayment thereof to be secured by a lien on such ships, in such manner as the secretary of the navy should require. They have been regarded as mortgages, as they are in substance; and it is alleged in the bill that they have been duly and annually filed in the office of the register of the city and county of New York, as required by the laws of New York, to make them valid and continuing liens, as chattel mortgages, against judgment creditors and subsequent incumbrancers. By the first of those deeds of trust, the then owners of the steamships Pacific (since totally lost at sea) and Atlantic, did bargain, sell and convey the said steamships, with all their tackle, apparel and furniture, to the trustee therein named, upon trust, nevertheless, that the said owners were to retain the possession of such steamships, and employ them in carrying the mails, &c.; and if, after the expiration of one year from the commencement of their employment in the mail service, under the existing contract with the United States, being required thereto in writing by the secretary of the navy, they should fail to repay in money, or to refund out of their compensation for mail service, for one year, or out of the value of said vessels, if, before the expiration of one year, they should be taken into the service of the United States, such outstanding balances as might be due on account of such advances, and the interest thereon, then the said trustee, being required so to do by the secretary of the navy of the United States, should, after advertising, for six months, in two newspapers published in the city of New York, the time and place of such sale, proceed to sell at public auction, for cash, the said steamships, &c., and, out of the proceeds of said sale, pay, first, the expenses of executing such trust, and secondly, such unsatisfied balances of advances, &c. This is the substance of the provisions of that deed of trust, so far as the same appear to me to be material to the questions presented upon the present motion; and the provisions of the deed of trust in regard to the Baltic, though somewhat different in form and language, are, in substance, very nearly the same. By those provisions, the rights and the remedies of the United States as against the vessels are precisely declared and limited; and, although it may now be seen that more summary proceedings for enforcing the repayment of the advances, by the sale of the ships mortgaged, would be more beneficial to the United States, if its claim for the large balance now demanded could be sustained, a court of equity cannot reform the contracts and introduce provisions which were never assented to by the parties, or intended by them to be embraced therein.

The United States insist that there is a balance of $115,500 due for advances made under those deeds of trust; and the defendants insist that there is a larger amount due to the steamship company for mail service in the year ending on the 31st March, 1857, which they are entitled to set-off, and which the government is legally and equitably bound to set-off, against the balance now claimed, so far as such set-off may be necessary, in order to extinguish the alleged indebtedness to the government. The government, on the other hand, insists, that the secretary of the navy has fully paid for the mail service rendered, and that nothing is now due therefor. The mail service for which compensation is so claimed, was agreed to be rendered by a contract made with the secretary of the navy, by which Collins and his associates agreed to build certain steamers—each to be of at least two thousand tons burthen and one thousand horse power—and with such steamers to carry the mails between New York and Liverpool, according to the terms of the contract. The mail service required to be performed by the contract, and the compensa-

tion therefor, were afterwards increased in pursuance of subsequent acts of congress, and the five steamers provided for in the contract, were, it is conceded, built by Collins and his associates, and those claiming under them, and were accepted by the navy department as having been built in compliance with the contract. Unfortunately, however, two of the steamers have been lost at sea. No fault has been imputed to Collins or his associates, in respect to either of those losses. In consequence of the loss of the Arctic, and the unexplained delay in the arrival of the Pacific —justifying the belief that she had gone down at sea—the owners of the remaining steamers were unable to transport the mails to and from Liverpool and New York in such steamers as were, by the contract, to be employed in that service. Under these circumstances, Mr. Collins, on the 17th of March, 1856, applied to the secretary of the navy, and solicited "permission to take a steamship to supply the place of the Pacific," and asked a telegraphic dispatch in reply. A favorable answer was communicated by telegraph, and, on the 22d of the same month, Mr. Collins inclosed to the secretary of the navy a duplicate of his letter of the 17th, and informed him that, in accordance with his telegraphic dispatch, they had chartered the Ericsson. In the same letter, he requested the secretary to write him confirming the telegraphic dispatch. On the 24th of the same month, and in reply to Mr. Collins' letter of the 22d, the secretary, having been thus apprised of the character of the Ericsson for the purpose of supplying the place of the Pacific, in the transportation of the mail, wrote to Mr. Collins as follows: "Navy Department, March 24th, 1856. Sir: In reply to your letter of the 22d instant, the department hereby confirms its dispatch to you by telegraph on the 19th instant, consenting to your supplying the place of the Pacific by substituting another steamship. Very respectfully, your obedient servant, J. C. Dobbin. E. K. Collins, Esq., No. 56 Wall Street, New York." On the 18th of April, 1856, Mr. Collins again wrote to the secretary of the navy, advising him of the launch of the Adriatic, and asking permission, in the event of the non-arrival of the Pacific, to substitute another steamer in her place, until the Adriatic should be ready for sea; and, on the 21st of the same month, the secretary wrote the following, in reply: "Navy Department, April 21st, 1856. Sir: In reply to your letter of the 18th inst., the department consents to the substitution of another steamship, in the place of the Pacific, supposed to have been lost, until the Adriatic is ready to be placed on the line. Very respectfully, your obedient servant, J. C. Dobbin. E. K. Collins, Esq., No. 56 Wall Street, New York." This correspondence is, in my judgment, sufficient evidence of the unqualified and unconditional consent of the secretary of the navy, that the Ericsson, or some other steam vessel, competent to the performance of the mail service required of a vessel of the Collins line, should be substituted for the lost Pacific, in the performance of mail service, not only for the trip referred to in the first letter of Mr. Collins and the telegraphic dispatch in reply, but also until a reasonable time to prepare the Adriatic for sea had elapsed. It is idle to suppose that the secretary intended to require that the service should be performed by a steamship built in pursuance of the original contract for such mail service, or equal in all respects to the other vessels of the Collins line; for it is safe to assume, upon the affidavits read and the admissions made by the district attorney upon the argument—and it might almost be assumed as a matter of public history, of which the court was bound to take judicial notice—that the secretary, as well as Mr. Collins, well knew no such vessel could be obtained for the service. If, then, it was intended to qualify such consent by a condition that a reduction in the amount of mail-pay should be submitted to, at the discretion of the postmaster general, or the secretary of the navy, or otherwise, the condition should have been expressly and distinctly made.

I shall not stop to inquire whether the secretary of the navy had authority to consent to this substitution for the purpose of mail transportation, but shall assume, as the postmaster general, the secretary of the navy, the attorney general, and the accounting officers of the treasury appear to have assumed, that he had such authority. Upon that assumption, large sums have already been paid for the mail service rendered by the Ericsson, and the authority of the secretary to make the arrangement was not questioned on the argument. The claim on the part of the government is not that the parties represented by Mr. Collins were not entitled, under their contract, to payment for such services, but that the government, or its officers, have a right to make a reduction from the stipulated compensation, or to impose a fine or penalty upon the contractors, upon the ground of inferior service, or delay, in the transportation of the mails. It is conceded that no provision, in the original or any subsequent contract, authorizes, either expressly or by necessary implication, the deduction made, or the imposition of any fine or penalty, under the circumstances of the present case; and, the contract having expressly provided that there should "be a forfeiture of the pro rata pay for the trip, either from New York to Liverpool, or from Liverpool to New York, when the trip is not made and the mails delivered," and having fixed no time within which the trips should be run, a forfeiture or deduction because one steamer was fourteen days making a trip, whilst another was able to make it in twelve, would not, of itself, subject the contractors to either fine, penalty or forfeiture. If these contracts and this correspondence were the contracts and corres-

pondence of private parties, I should certainly hold that the full amount of mail-pay might be legally claimed for each of the trips of the Ericsson, and the same measure of justice must be applied between the government and its contractors as between private parties to like contracts.

It was, however, very ably argued by the learned district attorney, that the deductions made were made under the provisions of the act of congress approved June 27, 1848 (9 Stat. 241); and that, that statute having vested in the postmaster general the power to impose fines on contractors at his discretion, subject only to the limitations prescribed in the act, his action was conclusive, and could not be reviewed in a court of law or equity. And it was insisted that the learned attorney general had omitted in his opinion, to refer to the provisions of that act; and that, therefore, the claim of the government might be sustained, and the injunction asked for might be granted, without repudiating the principles of the attorney general's opinion. It was also insisted, that the postmaster general's action was conclusive upon the parties and upon the court, and that he had the power of considering and determining, in the absence of the parties to be affected by his decision, and without appeal, not only the amount of fine or reduction, but whether the circumstances of the particular case justified the exercise of the power to impose a fine, or order a deduction, under the provisions of the act.

Waiving entirely the discussion of the question whether the congress of the United States can, by law, change the terms of an existing contract to which the United States government is a party, and not stopping to inquire whether the doctrine of this court, that one who invokes the exercise of its equitable jurisdiction must himself do equity, may or may not be applicable to the case, and not considering that this court, as a court of equity, does not lend its aid to enforce penalties and forfeitures, although it may, perhaps, relieve against penalties when they have been imposed under a mistake in regard to the facts of the case, and the parties interested have not been afforded an opportunity to be heard in opposition, there is, I think, a conclusive answer to the argument of the learned attorney for the United States. That answer is, that no fine has ever been imposed under the provisions of the act referred to; and, probably, for the simple reason, that no case has arisen justifying such action on the part of the postmaster general. The act referred to enacts, that, "to secure the regular transmission of the mail to and from foreign countries, the postmaster general be and he is hereby authorized and required to impose fines on contractors, for any unreasonable or unnecessary delay in the departure of such mails, or in the performance of the trip; provided, that the fine for any one default shall not exceed one-half of the contract price paid for the trip." Now, the whole action of the government assumes, that the trip was made by the Ericsson under the contract with Collins and his associates, and, if I am right in the conclusion, that the secretary of the navy, on behalf of the government, unqualifiedly and unconditionally consented to the substitution of that vessel for the Pacific, in the performance of the mail service required under the existing contract, the only question remaining open, and certainly the only one so far as the right to impose a fine under this statute is concerned, is, whether there was unreasonable or unnecessary delay in the departure of the mails sent by the Ericsson, or in the performance of her trips. No such delay has been shown. It has not been pretended that the mails did not depart at the proper time, nor has it been insisted that the Ericsson was not run with reasonable rapidity. Indeed, it was shown by affidavit, and virtually conceded, that the contractors, or those claiming under them, had procured as good a steamer, in respect to speed, size, &c., as could be procured for the service, and had, in good faith and with commendable energy, diligence and skill, earnestly endeavored to carry out their contract. There was, therefore, no case for the exercise of the power of the postmaster general under the act, and it is clear that he never, either in form or substance, assumed to exercise it in the case of the trips of the Ericsson, at least so far as the facts have appeared upon the hearing of this motion. The power to impose a fine is limited to the cases and for the causes specified in the act; and the power, though an administrative power, is so far judicial in its character, that it must appear that the officer clothed with the power has assumed to exercise and has in fact exercised it. It must, therefore, appear that the postmaster general has imposed a fine for the prescribed cause—that he has completed the exercise of the power in the particular case, not that he has advised the head of another department to make a deduction from the pay of a contractor, on the ground that an inferior service has been performed.

In this case, no order or adjudication of the postmaster general imposing a fine has been shown, and the only evidence of the action of the postmaster general, which has been furnished on this hearing, is a copy of a letter addressed by that officer to the secretary of the navy, under date of June 30th, 1856, and the statement, in the opinion of the attorney general, that such a letter was at that time addressed by the postmaster general to the secretary. That letter is in the following words: "Post-Office Department, Washington, June 30th, 1856. Sir: The certificates on the files of this department show that the Collins line of steamers have performed twelve trips between New York and Liverpool, carrying the United States mails, (six outward from New York and six inward,)

from the 23d of April to the 22d June, 1856, inclusive. Four of these trips (two outward and two inward) having been performed by the Ericsson, an irregular steamer, and not of the class stipulated for in the contract, I advise, by reason of the inferior service which has been given, that there be allowed $15,000 per round trip, or $30,000 for the four trips performed by the said steamer. The prices paid by government for each round trip performed by the Bremen line is $16,666.66, and by the Havre line $12,500, and fifteen thousand dollars a round trip is therefore considered a liberal compensation for the Ericsson. It is, therefore, recommended, that the sum of thirty-six thousand dollars ($36,000) be deducted from the mail-pay of the present quarter. I am, very respectfully, your obedient servant, James Campbell. The Hon. J. C. Dobbin, Secretary of the Navy." It will be observed, that the postmaster general, in this letter, entirely fails to notice the important fact, that the Ericsson had been unconditionally substituted for a regular steamer of the Collins line, in the performance of this mail service, by the consent of the secretary of the navy. A fact so important to the recommendation made would, as it strikes me, have been referred to by the postmaster general, if it had been within his official knowledge; and, if such fact had been duly considered by him, it is not probable that such a recommendation would have been made. But a more important feature of this letter is to be noticed. That is, that the postmaster general does not state that there has been any unreasonable or unnecessary delay in the departure of the mails, or in the performance of any trip; that he does not state that he has imposed or intends to impose any fine for any such delay; that he only advises and recommends that the secretary of the navy allow $30,000 for the two round trips performed by the Ericsson, deducting $36,000 from the contract price of such trips; and that he bases such advice and recommendation, not on the ground of unreasonable or unnecessary delay, but on the ground of the inferior service given, the trips having been performed by an irregular steamer, not of the class stipulated for in the original contract. The fact that he did not assume or attempt to exercise any power conferred by the act of 1848 before alluded to, is sufficiently evidenced by these circumstances, and by the fact that the deduction recommended exceeded by $3000 the highest fine which he could have imposed under that act. It appears, from the opinion of the attorney general, that this letter of the postmaster general was sent from the navy department to the fourth auditor without any direction or remark, and that the auditor struck off $36,000 accordingly. A like similar deduction, on substantially the same grounds, was afterwards made.

When this action of the postmaster general was made known to Mr. Collins, he addressed a letter to the secretary of the navy, remonstrating against the deduction, insisting that the substitution of the Ericsson had been consented to without any intimation that the government would withhold any part of the mail-pay, and stating that, having acted upon the absolute permission to employ another steamer, without any terms or conditions being imposed, he trusted that the secretary would reconsider the matter and direct the balance of the last quarter to be remitted. On the 16th of the same month, Mr. Collins transmitted to the secretary of the navy a duplicate of his letter of July 5th, and requested an early reply. On the 17th, the secretary of the navy acknowledged the receipt of the last-mentioned two letters, and added: "No reply has been given to the first, because it is still under the consideration of the department. When the matter has been decided, you shall be informed of the result." It is shown, by affidavit, that no notice that the matter had been finally decided by the navy department has ever been given. The attorney general's opinion shows that it was pending before him as late as June 4th, 1857, on which day —some months after Mr. Secretary Dobbin had left the department—he gave an opinion in favor of the contractors; and no evidence has been furnished that any final decision has since been made by the secretary of the navy. If such a decision has ever been made, the neglect to give the promised notice to Mr. Collins has probably been occasioned by the retirement from office of the secretary who promised to give the notice, and by the circumstance that the fact that such a promise had been made had never been communicated to his successor. It will thus be seen—although the fact, in a legal point of view, may not be of much significance—that there is no direct evidence that the secretary of the navy has not concurred, or will not concur, in the opinion of the attorney general.

Nor has it been shown that the secretary of the navy has, in writing, required Collins and his associates, or those claiming under him, to refund the balance now claimed on account of advances made on said steamships, in money, or out of the compensation due for mail service, as required by the provisions of the deeds of trust before referred to—the letters of the district attorney, written under the instructions of the secretary of the navy, not being a strict and technical compliance with the conditions of the deeds of trust. But I do not choose to rest my decision upon any technical ground, being entirely satisfied that the defendants have a right to insist that there is a larger sum due for mail service than that yet remaining unpaid on account of the advances secured by the trust deeds, and also to insist, in this court, that one claim shall be set off against the other.

If, however, I could reach the conclusion

that there would still be a balance due to the government, upon the equitable adjustment of its accounts with the Collins line, I should be unable to find any solid ground on which to rest a decision in favor of the United States, upon the present motion. The execution creditors have a present right to proceed to sell the Atlantic and Baltic, subject to the lien, if any, which the government has thereon; and, if that lien is good and valid as against those execution creditors, a sale under such executions must necessarily be subject to such lien. The execution creditors have a present right to sell under their executions. Such is the remedy given them by law. The United States have at best but a right to sell after a notice of six months, according to the express terms of their contract. Both are strictly legal rights. Certainly the rights, and even the equities, of the execution creditors, would even then be superior to those of the United States, so far, at least, as to allow them to sell the steamships, subject to the liens of the government. That they may be sold to some unknown person, that such person may possibly take them beyond the jurisdiction of the United States, and the existence of a vague fear that the claim of the United States may be endangered thereby, is no sufficient ground for postponing the claims of the execution creditors until the expiration of the six months required to perfect a sale under the deeds of trust or mortgages. This court cannot order a present sale of the steamers under the deeds of trust, and the neglect of the United States to provide, by those instruments, for a more summary proceeding to enforce their rights, and for taking possession of the property, upon a failure to repay the advances according to the terms of the contract, furnishes no equitable ground for relief against the execution creditors, whose rights, such as they are, are absolute and may be legally and equitably carried into immediate execution. I am, therefore, entirely clear, that the United States have shown no equities superior to those of the execution creditors, and that they are not entitled to the injunction prayed for.

It must not be supposed that, in thus expressing a decided and confident opinion against this motion, I intend to intimate that it was improper to present this case for the consideration of this court. The questions presented are judicial in their character, and properly belong to the courts of the United States; and the head of an executive department and the district attorney may, therefore, well decline, in a case of the magnitude and importance of that presented by the bill in this case, to take the responsibility of deciding, as administrative officers, against a claim of the United States which can be readily made the subject of judicial investigation.

It may be proper, also, to state, that if I had reached a different conclusion in regard to the equities of the parties, I should have felt bound to ask an argument upon, and to have seriously considered, a question not raised at bar, before ordering an injunction in this case. Section 5, Act March 2, 1793 (1 Stat. 334), prohibits the courts of the United States from granting an injunction "to stay proceedings in any court of a state." This term "proceedings" may properly, and, I think, must necessarily, include all steps taken by the court, or by its officers, under its process, from the institution of the suit until the close of the final process of execution which may issue therein. Cropper v. Coburn [Case No. 3,416]. But, as this question has not been argued, I do not rest my decision upon this ground.

The motion for a preliminary injunction is denied.

Case No. 14,835.

UNITED STATES v. COLLINS.

[1 Cranch, C. C. 592.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

BASTARDY—WITNESS—LIKENESS OF CHILD TO DEFENDANT—CONFESSION—JUDGMENT—BOND OF INDEMNITY.

1. The mother of a bastard is a competent witness for the United States on an indictment of the supposed father, under the Maryland act of 1781 (chapter 13), and may be cross-examined as to her connection with other persons.

2. Evidence of a likeness of the child to its supposed father is not admissible.

3. The confession of the defendant having been given in evidence, he was not permitted to give evidence of his declarations at the same time, that others also had had connection with her.

4. The only judgment which the court can give upon a conviction under the statute is, that the defendant give security to indemnify the county from any charge for the maintenance of the child.

5. The order for paying £30 a year can only be made by a justice of the peace, under the act of 1796 (chapter 34).

Indictment [against David Collins] for not supporting a bastard child, under the act of Maryland of 1781 (chapter 13). The mother was received as a competent witness, although she was to be relieved from the charge of maintaining the child, by convicting the defendant.

Mr. Jones, for the United States, objected to the cross-examination as to her connection with others.

THE COURT limited the inquiry to a period not more than twelve months nor less than six before the birth of the child. But permitted the examination within that period.

THE COURT refused to admit the testimony of witnesses to prove the likeness between the defendant and the child.

[1] [Reported by Hon. William Cranch, Chief Judge.]

The confession of Collins being given in evidence against him,

F. S. Key, for defendant, asked whether Collins did not at the same time say that other persons also had had criminal conversation with her.

THE COURT refused to permit the question to be put.

The jury found the defendant guilty.

THE COURT ordered the traverser to give security in $250 to indemnify the county; and for want of such security, committed him to the custody of the marshal. The next day he offered bail, and the counsel for the prosecution had included in the condition of the recognizance a clause that the traverser should pay £30 per annum to the mother so long as she should have the custody of the infant; but the court ordered it struck out, that being a matter within the exclusive jurisdiction of a justice of the peace, under the Maryland act of 1796 (chapter 34).

Case No. 14,836.

UNITED STATES v. COLLINS.

[2 Curt. 194.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.

SEAMEN—INDICTMENT FOR FLOGGING—CRUEL AND UNUSUAL PUNISHMENT.

Flogging is not "a cruel and unusual punishment," within the meaning of the third section of the act of March 3, 1835 (4 Stat. 776). The defendant should have been indicted for beating and wounding the seaman.

[Cited in Riley v. Allen, 23 Fed. 48; U. S. v. Trice, 30 Fed. 492.]

This was an indictment against [Walter Collins] the master of a vessel of the United States, under the act of March 3, 1835 (4 Stat. 776), for inflicting on one of the crew a cruel and unusual punishment. The case opened by the district attorney was that the defendant had inflicted the punishment of flogging, abolished by the act of September, 1850 (9 Stat. 515).

Dist. Atty. Brown, for the United States.

Mr. Potter, contra.

CURTIS, Circuit Justice. I do not think you can maintain this indictment by proving the case opened. The act describes four distinct offences. Beating or wounding, imprisoning, deprivation of suitable food and nourishment, infliction of any cruel and unusual punishment. Each of these is a substantive criminal act, when proceeding from malice, and without justifiable cause, and one of these offences cannot be properly described in the indictment by words used in the act of congress to describe another offence. If the defendant inflicted the punishment of flogging, from malice, he should have been indicted for beating and wounding the seaman, not for inflicting a cruel and unusual punishment. That clause was not designed to include the punishment of flogging, which was not an unusual punishment when the act of 1835 was passed. On the contrary, it was the kind of punishment then most usual, and known to and sanctioned by the law. However unjustifiably it may have been inflicted, it is not a kind of punishment against which these particular words in the act were directed, and consequently the defendant must be acquitted.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

Case No. 14,837.

UNITED STATES v. COLLINS.

RICH v. CAMPBELL.

UNITED STATES v. GARDNER.

[1 Woods, 499; 18 Int. Rev. Rec. 69; 5 Chi. Leg. News, 525; 5 Leg. Op. 93.] [1]

Circuit Court, S. D. Georgia. April Term, 1873.

JURY — SELECTION OF GRAND JURY — FOLLOWING STATE PRACTICE—SELECTION BY COMMISSIONERS —INCRIMINATING TESTIMONY—OFFICERS.

1. The act of congress of July 20, 1840 (5 Stat., 394), prescribing how jurors in courts of the United States shall be designated, does not require a minute adherence to the state practice on that subject by the United States courts.

[Cited in Brewer v. Jacobs, 22 Fed. 234; U. S. v. Richardson, 28 Fed. 69.]

2. It is not necessary, under said act, for the United States courts to employ state officers to perform for them any part of the duty of designating jurors. They may and should impose that duty entirely on their own officers.

3. The law of Georgia required that the names of jurors should be taken from the book of the receiver of tax returns; *held*, that this requirement was not binding on the courts of the United States. Those courts were only required to take care that their jurors had the same qualifications as jurors in the state courts.

4. A rule of the United States court for the Southern district of Georgia, which prescribed that the names of five hundred persons, having the qualifications of jurors under the state law, should be selected from the body of the district by the marshal and clerk and three United States commissioners, to be designated by the court, and that the names of grand and petit jurors should be drawn from such list by the marshal and clerk, by lot, is in substantial accord with the law of Georgia prescribing how jurors shall be selected, and is a compliance with the act of congress on the subject.

5. Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself.

6. An inquisitorial examination, under oath, of a party charged with an offense or misconduct, would infringe the spirit if not the letter of the fifth amendment to the constitution of the Unit-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 18 Int. Rev. Rec. 69, and 5 Chi. Leg. News, contain only partial reports.]

ed States, and would be repugnant to the principles of personal liberty embodied in the common law.

[Cited in U. S. v. Hammond, Case No. 15,294.]

7. One of the officers appointed to select the names of five hundred persons from whom jurors were to be drawn, applied to a reputable citizen of a distant county for the names of proper persons residing in his vicinity to be placed upon the list. The names furnished, in compliance with this request, were submitted to the board of officers whose duty it was to make out the list of five hundred names, and some of the names so furnished were put upon the list: *Held*, that this was a substantial compliance with the rule which required the selection of the names to be made by the board of officers.

8. A public officer cannot, by subsequent declarations, invalidate his own official act.

A motion was made in this case to quash the indictment, on the ground that the order of the court under which the grand and petit juries were selected and drawn, was illegal, not being in conformity with the requirements of the act of congress on that subject. The act of congress governing the subject is that of July 20, 1840 (5 Stat. 394), and provides as follows, namely: "That jurors to serve in courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled to, and shall be designated by ballot, lot or otherwise, according to the mode of forming such juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries in substance to the laws and usages now in force in such state; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may hereafter be adopted by the legislatures of the respective states for the state courts." On the 7th of December, 1872, the circuit court of the United States for the Southern district of Georgia (Judges WOODS and ERSKINE holding the court), revised its rules respecting the mode of selecting and impaneling grand and petit jurors; and, in pursuance of these rules, on the 10th of January, 1873, the officers appointed by the court to that duty made out and returned the jury list, from which the grand jury was drawn that found the indictment in this case. The defendant moved to quash, on the ground that the mode of designating and impaneling jurors prescribed by the revised rules does not correspond to that used in the state courts, and that the qualifications of jurors are not the same as the state laws prescribe. For the defendant, it was contended that the act of congress required strict conformity to the state laws in these respects.

R. F. Lyon and Julian Hartridge, for the motion.

H. P. Farrow, U. S. Atty, and A. T. Akerman, contra.

Before BRADLEY, Circuit Justice, and WOODS, Circuit Judge.

BRADLEY, Circuit Justice. A motion is made to quash the indictment in this case on the ground that the grand jury, by which it was found, was illegally selected and impaneled. The process and procedure of the courts of the United States are, of course, subject to the sole regulation of congress and of those courts. They are entirely independent of state laws and usages, except so far as these may be adopted, or followed as a matter of convenience. There is no fundamental principle which requires a conformity thereto. Undoubtedly the convenience of the legal profession, and the habits of the people will be best consulted by a general conformity as far as circumstances will admit. That is all. On the subject of selecting and impaneling jurors in the United States courts, congress at its first session, in the twenty-ninth section of the judiciary act, directed that they should be designated by lot, or otherwise, in each state, according to the mode therein practiced at that time, so far as practicable; and that they should have the same qualifications as required for jurors in the highest courts of the state; and should be returned from such parts of the district as the court should direct. This rule was subsequently modified and, in 1840, it was so framed as to adapt it to the changes which might, from time to time, be made by state legislation. By the act of July 20th, of that year, which is the law now in force (5 Stat. 394), it was provided "that jurors to serve in the courts of the United States in each state respectively, shall have the like qualifications, and be entitled to the like exemptions as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries, now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose the courts shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries, in substance, to the laws and usages now in force in such state," with power to make such changes in these respects as the legislature of the state may adopt.

It is pertinent to observe that congress does not adopt the respective state laws, but only requires conformity to them in certain respects, and then gives the courts power to make rules for the attainment of such conformity, in substance as far as practicable, in their different circumstances. The question now to decide is, whether the rules which

have been adopted by this court on the subject, conform to the requirements of the act of congress. There is nothing in the act that requires a slavish or minute adherence to the details of the state practice; and nothing which hints at the incongruous notion that the courts of the United States in the designation and impaneling of jurors are to employ any officers or agencies except their own, and those under their control. The great object is to obtain jurors of like qualifications, and to designate and impanel them in substantially the same way as in the state courts. And, of course, this is to be effected by the courts of the United States themselves and their officers, and not by the agency of state courts or their officers; for the act, in speaking of the mode to be followed, expressly says, "in so far as such mode may be practicable by the courts of the United States, or the officers thereof." It would be an inconvenient mixture of jurisdictions, and might seriously embarrass the proceedings of the courts, if they had to depend on the action of state officials, over whom they have no supervision or control. This disposes in limine of the objection that the jury list was not taken, and that the rule does not require them to be taken from the lists made by the state authorities. As state officials make up the jury lists for the state courts, even strict parallelism of practice requires that the United States officials should make them up for the United States courts. The harmony of the state and federal jurisdictions requires that each should act freely and independently of each other.

The question then recurs, whether the rules adopted by this court in reference to jurors accords with the act of congress, in adopting the state practice, so far as the courts of the United States and the officers thereof, independent of the aid of the state courts and officers, can practicably conform to such practice in the respects required by the act. Conformity is required by the act in two respects: First, in reference to the qualifications and exemptions of jurors; secondly, in reference to the mode of designating and impaneling jurors, as by ballot, lot or otherwise, which mode is to be conformed, in substance, to that pursued in the highest court of the state. It will be observed that the act does not require the court to make any rules with regard to the qualification of jurors, but only with regard to the mode of selecting them. Qualifications have respect to the juror personally, and may relate to his age, his property, citizenship, or anything else belonging to his personal character or standing. In the state of Georgia the only qualifications of jurors, expressly required by the constitution and laws, are that they shall be upright and intelligent jurors between the ages of 21 and 60. There is an implied qualification that they shall be tax payers, and therefore citizens, as the statute of February 15, 1869, requires that they shall be selected for the state courts in each county from the book of the receiver of tax returns. Of course, the placing of a man's name on the receiver's book is not a qualification; for it is the act of another man. It implies a qualification, however, namely, that of being a tax payer, or a person liable to pay taxes and to have his name placed on said book. Now all these qualifications are required in jurors by the rule of this court. The officers appointed for the purpose are to select from the body of the district five hundred upright and intelligent persons, citizens of the district (and of course tax payers), between the ages of 21 and 60 years, without regard to race, color, or previous condition, to serve as jurors. As before remarked, it was not necessary that the rule should have specified these qualifications. Jurors not having them could be objected to by a challenge to the polls without any rule of court on the subject. But the rule has specified them, and in doing so has adopted the qualifications which the state laws require. On this point the objection to the rules cannot be sustained.

The next question is, whether the rules of this court have in substance adopted the mode of designating and impaneling jurors, which is prescribed by the state laws, as by ballot, lot, or otherwise. The act of congress requires that they shall "be designated by ballot, lot, or otherwise, according to the mode of forming such juries," practiced in the highest court of law of the state, "in so far as such mode may be practicable by the courts of the United States, or the officers thereof, and for this purpose" (that is, for the purpose of securing the designation of jurors by ballot, lot, or otherwise, according to the mode practiced in the state courts), the courts of the United States "shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries, in substance, to the laws and usages" of the state. From this language of the act it is obvious that all that is required is, that the mode of designating and impaneling be substantially the same; not that the officers to carry it into effect shall be the same either in rank or in number; nor that the same kind of jury boxes, or material of which the boxes are composed, whether wood or iron, shall be the same; nor that they shall be kept and guarded in the same manner; nor that the same number of names shall be placed in the box; nor that in any other matter of detail, a minute imitation of the state practice is to be observed. In these matters the courts of the United States may exercise their discretion as to the best mode of securing the main object of the law, which is, to secure the service of properly qualified juries, selected and impaneled substantially according to the mode pursued in the state courts. Now, what is the mode pursued in these courts? The constitution of the state (article 5, § 13, par. 2) simply declares that "the general assembly shall provide by law

for the selection of upright and intelligent persons to serve as jurors," and that "there shall be no distinction between the classes of persons who compose grand and petit jurors." Not every person, not every citizen, is to be placed on the jury list. A selection is to be made; and the object of that selection is to procure those who are upright and intelligent. Who is to make this selection is left to the legislature to prescribe. Now, can it be possible that state or county officials may be vested with this power of selection, and that United States officials must be denied this power? Can it be the meaning of the act of congress that the courts of the United States must only take jurors whom the state officials may have selected? The considerations before referred to respecting the necessary independence of these courts upon the action of state officers and state courts, seem to afford a complete answer to these questions. On looking at the act of assembly before referred to, passed to carry the constitutional clause into effect, we find that it provides substantially as follows: That the ordinary of each county, together with the clerk of the superior court and three commissioners appointed by the presiding judge of the superior court (and removable at pleasure) shall meet at the court house on the first Monday in June, biennially, and select from the book of the receiver of tax returns, upright and intelligent persons to serve as jurors, and make out tickets with the names of the persons so selected, and put them in a box having two apartments, to be locked and sealed by the judge and placed in the care of the clerk, and the key in the care of the sheriff; and no grand or petit juror shall be drawn but in the presence of the judge in open court, and no person shall open the box, or alter the names placed therein. It further provides that at the close of each term, the judges of the superior court, in open court, shall unlock the box and break the seal, and cause to be drawn from apartment No. 1 not less than 18, nor more than 23 names, to serve as grand jurors at the next term; and then 36 names to serve as petit jurors—which names are to be deposited in apartment No. 2 until all are drawn from No. 1, and so on alternately. Directions are then given for issuing a precept to the sheriff to summon the jurors so drawn. Provision is also made for summoning talesmen in case of necessity.

Now with these regulations let us compare the rules adopted by this court. They are as follows: "Order of Court Amending Jury Rules.—The court shall appoint three of the United States commissioners residing in the Southern district of Georgia, and the said commissioners with the marshal for the district of Georgia, and the clerk of the court shall, within thirty days after the adjournment of this court, select from the body of the Southern district of Georgia, five hundred upright and intelligent persons, citizens of said district, between the ages of 21 and 60 years, without regard to race, color, or previous condition, to serve as jurors. And the clerk of the district and circuit courts for said district, and marshall, shall place the names of the persons so selected in a box, from which they shall draw within ten days after said names are so deposited, not less than forty-five nor more than fifty names, unless otherwise ordered by a judge, to serve as jurors in the circuit court, and not less than forty-five nor more than fifty names, unless otherwise ordered by the judge, to serve as jurors in the district court. And the first twenty-three names so drawn for each court shall be the grand jurors for such court, unless the court or a judge shall otherwise order. And within thirty days after each succeeding term of said courts respectively, unless previously drawn by the court, it shall be the duty of the marshal and clerk to draw from said box in the manner before stated, the same number of jurors to serve at the next succeeding term of said courts respectively, unless the number is changed by order of the judge. And if from any cause they are unable to procure from the body of the district, as before required, the names of the requisite number of qualified jurors, then in that event, the names of those they have been able to obtain shall constitute the list from which said jurors shall be taken, and the names of those so drawn shall be placed in another compartment of said box, there to remain until all the names shall have been drawn from the first compartment. The said box shall be kept locked, except when opened for the purpose of drawing or revising the list, and the clerk shall keep the box and the marshal the key. If from failure to draw, as hereinbefore directed, or from any other cause, there shall be a deficiency in whole or in part of regular jurors, the court may order that upright and intelligent persons from the body of the district shall be forthwith summoned as jurors or talesmen as the case may be. If the court should not sit at any term, the jurors drawn for that term shall stand over for the next term that shall be held. The marshal shall summon jurors by delivering to each personally, or by leaving it at his usual residence, a written or printed summons. The marshal, the clerk, and any one of said commissioners shall constitute a quorum for the purpose of carrying into effect this rule. And a deputy marshal may, in any case, whether in selecting or drawing jurors, or otherwise in the premises embraced in this rule, do whatever the marshal may himself do."

It seems to me very difficult to perceive any substantial difference between the mode of designating and impaneling jurors prescribed by these rules, and that prescribed by the state statute, after making due allowance for the different circumstances of the two juris-

dictions and the practicabilities of the case. In the first place a selection is to be made by officers designated for that purpose, in order to obtain upright and intelligent men. This selection is to be made from the body of citizens of the district, without regard to race, color, or previous condition. This is certainly in substantial conformity to the state law. It needs no argument to make it plainer than it is, by the mere statement of the fact. The qualification that the selection shall be made without regard to race, color, or previous condition, is in accord with the spirit of the fourteenth and fifteenth amendment to the constitution; by which all persons born or naturalized in the United States are citizens and entitled to full equality before the laws.

But it is objected that the marshal is substituted for the ordinary in the constitution of the board of commissioners, and that the ordinary is a judicial officer, whilst the marshal is not. There can be nothing in this objection. The conformity required is in substance only, and only as far as practicable for the courts of the United States and the officers thereof. The United States have no such officer as the ordinary. No officer could be more appropriately appointed than the marshal. But the comparison need not be minutely made between the officers. A board of responsible and suitable officers is constituted for the purpose of making the selection of jurors from the body of citizens. This is in substantial conformity to the state law. The disposition of the names when selected is the same. They are placed in a box on separate pieces of paper, and from that box the panels of grand and petit jurors are drawn from time to time as occasion requires, substantially in the same manner as in the state courts, due regard being had to the convenience of the court and the circumstances of the case. The objection that the drawing is to be made by the marshal and the clerk, within thirty days after each term, and not as in the state court, on the last day of term in open court, goes to a matter of practice and detail, and not to the substantial mode, of designating, or empaneling the juries, in the respects demanded by the act of congress. The mode adopted is the same. It is the drawing of the names by lot. The designation of the officers by whom it shall be done is left to the discretion and judgment of the court.

It seems to me, after a careful consideration of the objections which have been so ably urged, that the regulations adopted by this court are in substantial compliance with the act of congress. As it may be doubtful whether the question raised by this motion can be carried to the supreme court, and as the matter is one of great interest to this and other states, I shall avail myself on the first opportunity, of consulting the views of my associates on the supreme bench, and if any different result should be arrived at, this court will cheerfully modify its rules. As they now stand, whilst they seem to us entirely unobjectionable in point of law, they are in the most practicable and convenient form for the due administration of justice and the performance of the business of the courts.

The motion to quash the indictment for the cause now alleged is overruled.

In another case which came up after the foregoing decision was made—being the case of Rich v. Campbell—the panel of petit jurors was challenged on the ground taken in the previous case, and on the further ground that the officers appointed to designate and impanel the jurors for the United States courts had not complied with the rule, but had selected jurors from improper motives and for a special purpose. Evidence was taken on the challenge.

R. F. Lyon, for the challenge.

H. P. Farrow, U. S. Atty., A. T. Akerman, and A. W. Stone, contra.

Before BRADLEY, Circuit Justice, and WOODS, Circuit Judge.

BRADLEY, Circuit Justice. The array of jurors in this case is challenged by the defendant for several causes. One class of causes assigned consists of objections to the legality of the mode, adopted by this court by its general rule of the 7th of December last, of designating and impaneling jurors. This question has already been examined in the case of U. S. v. Collins [Case No. 14,837], and the objection was decided to be without foundation.

The other causes of challenge assigned are, that the jurors were not designated, selected and drawn in accordance with the rule, but that contrary thereto, they were designated with reference to their race, color and condition; and that they were selected, not by the persons appointed by the court for that purpose, but upon private information from irresponsible persons; and not from the body of citizens of the district, but from certain classes thereof, under private instructions from some of the persons appointed to make the selection as to the status, color and political bias of the persons whose names were to be furnished to make up the panel.

The challenge being traversed, evidence was adduced for the purpose of sustaining the charges made in the challenge. Amongst other witnesses the defendant called to the stand the marshal of the United States for this district, who is one of the officers appointed by the court to select and make up the list of jurors for the district, according to the rule made on the 7th of December last, and whose official conduct in that matter is impeached by the challenge. We refused to compel him to testify, for the following reasons: Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. To compel him to be so

would infringe the spirit, if not the letter, of the fifth amendment to the constitution of the United States, which expressly declares that no person shall be compelled, in any criminal case, to be a witness against himself. An inquisitorial examination, under oath, of a party charged with an offense, is repugnant to the principles of personal liberty, which are embodied in every fibre of the common law. The French system of procedure, which allows the defendant to be examined as to his whole previous history, and as to the private motives by which he was governed in all the transactions of his life, is abhorrent to our feelings of justice and fair play. I should regret ever to see that system obtain a footing in this free country. If the party chooses to waive his right and submit to an examination, it may be admissible where public interests will not thereby be affected. But even then, the practice may, in certain cases, be against the public interest and contrary to public policy. If the party stand upon his rights, it raises an implication, however unjustifiable, that there is some good reason (unfavorable to him) for his refusal to be examined. Such an implication ought in no case to exist. The immunity is founded on principles of public policy and a regard to the just liberties of every citizen; and, when claimed, ought to be regarded and claimed as a fundamental right which cannot be properly assailed.

Applying these principles to this case, it is apparent that the conduct of the officers concerned in the designation and impaneling of jurors is seriously impeached by the challenge, and that to subject them to an examination under oath upon the matters charged would be, in effect, to compel them to testify on a criminal charge against themselves, and would, therefore, be a subversion, not only of their rights, but an invasion of the rights of all good citizens.

The other evidence offered by the defendant was in substance as follows: He proved by Elijah Bond, the postmaster at Macon, that at the request of the marshal he made out a list of names for jurors from the county of Bibb, which was partially adopted by the officers as a part of their list for the district; that he conferred with one or two other gentlemen on the subject, one of whom was the ordinary of the county; that he tried to get good men, and thought he did; that he received no instructions from the marshal as to the manner in which he should select, except a request to furnish the names of good and substantial citizens; that he endeavored to do so without regard to color; that he avoided those who had been engaged in the late election riots, it is true, and tried to select men who were not extreme men either way, but fair men; that he had lived in Macon since 1839, and was an officer in the Presbyterian church in that place; that Mr. Swayze, one of the commissioners appointed by the court to select jurors, and who resided in Macon, was absent at the time out of the state, and he had no conference with him on the subject. This was the substance of his testimony as far as it was material.

From this testimony the defendant's counsel argued, that the officers appointed by the court to select jurors did not make the selection themselves, but left it to others; and that this rendered the list illegal. But it was very pertinently answered by the counsel for the officers, that the giving of information was very different from official action. Four of the officers—the marshal, the clerk of the court, and two commissioners, Messrs. Wilson and Wade—on the 9th and 10th of January last, met in Savannah (the clerk, marshal and commissioner Wilson having held a preliminary meeting about a month previous) and proceeded to execute the powers conferred upon them by the court, and formed a list of five hundred names of persons selected from the body of citizens of the district, and certified and returned the same to the court, as directed by the rule. This they did officially, on their official responsibility; and in their return they certify that the names designated and returned by them, were the names of upright and intelligent persons, citizens of the district, between the ages of twenty-one and sixty, selected from the body of the district without regard to race, color or previous condition. This official certificate of these officers must be regarded by the court as conclusive evidence that they have properly performed their duty, unless the contrary be clearly proven. The only effect of Mr. Bond's evidence is, to show that they took proper means to get the requisite information as to the proper persons to select, by applying to the most competent and reliable persons for such information. It was conceded that a more upright and reliable man than Mr. Bond, the witness, could scarcely be found. What other means the officers may have employed to corroborate the information received from Mr. Bond does not appear. It could not be expected that the officers should be personally acquainted with the entire male population of the district, consisting of more than eighty counties. They were necessarily obliged, in many cases to rely on information derived from others. If they acted in good faith in getting the best information they could, and made their selection accordingly (and nothing appears to the contrary, but that they did this), their action cannot be impeached or held invalid. Impossibilities cannot be required of any officers. We see nothing in the evidence of Mr. Bond to impeach the jury list; but the contrary.

Some further evidence of a very unimportant character was adduced, which it is unnecessary to notice.

The defendant's counsel, however, produced and read an article published by Mr. Swayze, one of the commissioners appoint-

ed to select jurors, in a newspaper called the Macon Daily Enterprise, on the 7th inst., vindicating himself and the commission from attacks made against them in other newspapers. From this article the defendant's counsel asks us to gather by inference the conclusion that the jury commissioners had a purpose in making their selection of jurors, of selecting such persons as would carry out a certain result, namely: the indictment and conviction of certain persons charged with being concerned in the Macon riot last October; or more generally, the furtherance of government prosecutions in the district. Now we have examined this article, and can see no such fact implied in it. So far as it bears on the point under consideration, the whole pith of it is, that the jurors as before selected, being taken from the lists prepared by the county officials, ignored the enforcement act altogether, and refused to find a bill—no matter what the evidence—against a single person out of some forty, who had been bound over on the charge of participating in the election riot before mentioned, in which some persons were killed; and that the court made the new rule for the purpose of obtaining jurors, who would regard their oaths and recognize the law of the land; and that the jurors selected are men of that character. If this were proper evidence in the case at all, it would only go to show that jurors were sought who would act fairly and honestly, and in obedience to the laws; not that those were sought who would do any man's bidding, or who would aim at any result other than the truth and the right. This is a very different thing from packing a jury-box for the purpose of attaining a particular result in a particular case. But it is not evidence in the case at all. The declarations of Swayze, made after the list was selected and returned, are nothing but hearsay. They cannot affect the list in the least. The truth of this proposition is so obvious that it is unnecessary to discuss it. A person cannot by mere declarations made subsequently, invalidate his own deed or official act. Untold mischief would ensue if such a doctrine were established. Besides, it appears from the return that Mr. Swayze did not act with the other commissioners in making the selection, although he subsequently appended a certificate that he had examined the list and approved of it. He appears to have been absent from the state when the selection was made. This circumstance is an additional reason, if any were needed, for disregarding his published article as evidence for any purpose in the case.

It seems to us that the challenge has not a shred of evidence to support it; and so far as appears from the characters of the persons composing the grand and petit juries of the present term, the selection has been eminently judicious and proper. The challenge is not sustained.

At the March term, 1873, of the United States circuit court for the Northern district of Georgia, several of the same questions decided in the foregoing cases were argued before ERSKINE, District Judge, in the case of U. S. v. Gardner upon a challenge to the array of petit jurors.

B. H. Hill, L. J. Gartrell, and C. Peeples, made arguments in support of the challenge.

H. P. Farrow, U. S. Atty., George S. Thomas, Asst. U. S. Atty., A. T. Akerman, and A. W. Stone, contra.

ERSKINE, District Judge. Before the perusal of the panel, comprising six white persons and six colored, defendant challenged the array on the ground that the jury was illegally constituted, and moved that the array be quashed: "First. Because the United States jurors are required to be selected by the United States statutes, according to the laws of each state where said United States courts are held. Second. Because there is no authority of law for the United States court to appoint commissioners to select jurors. Third. Because the rules of court under which said jury was selected and impaneled limits the number of jurors to five hundred. Fourth. Because the manner of selecting jurors heretofore practiced by the United States courts in this state has not been repealed by competent authority. Fifth. Because the rule of court, under which the said panel of jurors was drawn, selected, summoned and impaneled, is without sanction of law, and contrary to the statutes of the United States in such case made and provided. Sixth. Because said panel of jurors was not drawn, selected and summoned according to law." Other objections—corollaries from the foregoing—were advanced during the arguments. These authorities were cited and relied upon by counsel for challenger: Code, §§ 3842, 3858, 3859; article 5, § 13, State Const.; Act Feb. 15, 1869; Judiciary Act, § 29 (1 Stat. 88); Act July 20, 1840 (5 Stat. 394); U. S. v. Woodruff [Case No. 16,758]; Same v. Wilson [Id. 16,737]; Clinton v. Englebrecht, 13 Wall. [80 U. S.] 434; Act June 1, 1872 (17 Stat. 196). The second paragraph of section 13, art. 5, of the state constitution of 1868 says: "The general assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors. There shall be no distinction between the classes of persons who compose grand and petit juries." The third sentence refers to the compensation of jurors.

On the 15th of February, 1869, the general assembly passed an act to carry this clause into effect. [Laws Ga. (1869) p. 139.] This act contains eighteen sections—I will give the substance of so much of it as is applicable to the subject now before the court. It makes it the duty of the ordinary of each county, together with the clerk of the superior court, and three commissioners appoint-

ed for county by the judge of the superior court, to meet at the court house on the first Monday in June, biennially, to select from the book of the receiver of tax returns "upright and intelligent persons" to serve as jurors, and to make out tickets, with the names of persons so selected, and place them in a box, which shall be locked and sealed by the judge. And no grand or petit jury shall be drawn but in the presence of the judge in open court. But (by section 3) if the judge should fail to draw juries, then the ordinary, together with commissioners and clerk of said county, shall meet at the court house, within a certain time, and there draw grand and petit juries, all of which shall be entered by the clerk on the minutes of the court and signed by the ordinary. On reading the act just referred to, and which is entitled "An act to carry into effect the second clause of the 13th section of the 5th article of the constitution," it will disclose the fact that although it provides that the persons selected to serve as jurors shall be "upright and intelligent" (using the words of the constitution); yet it does not speak of the second sentence which declares: "There shall be no distinction between classes of persons who compose the grand and petit juries." Was this a casus omissus? Looking to the title of the act, there would appear to be some possible ground for this. But does not this very sentence carry itself into effect without legislative aid? Is it not per se operative and to be obeyed; and was not this probably the opinion of the legislature? My mind has always been impressed, with reasons too cogent to be discarded, that, notwithstanding the omission, it was the purpose of the legislature, by this enactment, to carry the entire clause into effect, and not to give force to a part only. During the first term of this court, after its organization, in framing the jury rule (to be considered presently), the substance of the second sentence was incorporated into it. If this setence is dormant, and requires legislation to bring it into action, then I may inquire, was the embodying of the substance of the sentence in the rules of court, going beyond the pale of the act of February 15, 1869—giving to it a too elastic construction?

By a rule of the United States district court (having circuit court jurisdiction) for this district, adopted at the March term, 1871, the marshal was instructed to procure from the superior court clerk for each county, comprising this district, a certain number of names of the "most upright and intelligent persons," between the ages of twenty-one and sixty years, to be taken from the jury lists of the county, without regard to race or color. Comment was made by counsel on both sides, during argument on the insertion of the word "most" before and in connection with, "upright and intelligent," in the rule of the district court. Whether the word "most" was in the draft of the rule which I wrote, I do not now remember; if so, it was unadvisedly there. But what impediment would it have been to justice? Can either side complain? Was not the word, by fair intendment, to be applied to each class, white and colored? At most the word but expressed moral fitness as necessary to the end proposed. But to return; nearly seventeen hundred names were forwarded to the marshal (before the abrogation of this rule) by these clerks who responded to his request, and for which the government paid them. While this rule was of force, more than two hundred and fifty names were drawn from the jury box by the court, or its officers; but strange as it may appear, every ballot drawn from the box contained the name of a white person. Now, as the ratio of the classes in this judicial district has been for years past, as eight white to five colored, or nearly so, it is obvious to the common mind that this mode of designating or selecting the jurors cast the entire burden of jury service in the federal court upon one of the classes only—white citizens; thus releasing colored citizens, who possessed the qualifications for jurors, from the performance of a duty which they, equally with the qualified white citizens, owed to their country. Not only the constitution of this state, but the recent amendments to the national constitution have made the colored man a citizen; habilitating him with all the rights, privileges and immunities enjoyed by the white citizen; therefore, he should perform his part of the public labor. On the first of June, 1872, congress passed an act taking away the circuit court powers from the district court for this district, and establishing a separate circuit court. At the first term a rule of court was adopted, and it was under this rule that the persons now in the traverse jury box were designated, summoned and impaneled. But, before passing to this rule, it may not be wholly amiss to mention that it is a copy—mutatis mutandis—of the rule which met the sanction of, and was adopted by the United States circuit court for the Southern district of this state, at the last November term. The court was composed of WOODS, Circuit Judge, and ERSKINE, District Judge.

Attention will be directed to the act of July 20, 1840 (5 Stat. 394): (1) "Jurors," says the act, "to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, (2) and shall be designated by ballot, lot or otherwise, according to the mode of forming juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States or the officers thereof; (3) and for this purpose the said courts shall have power to make all nec-

essary rules and regulations for conforming the designation and impaneling of juries in substance, to the laws and usages now in force in such state; (4) and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts." For convenience in the endeavor to interpret and construe this act, the clauses have been marked 1, 2, 3, 4. 1st. The qualifications of jurors, as mental capability, residence, age, etc. The second section of the first article of the constitution says: "All persons born in the United States and residents of this state are hereby declared to be citizens of this state." The requisite qualifications for persons to serve as jurors in the highest courts of law of this state, as declared by its constitution and laws, are that they be "upright and intelligent persons;" that they have resided in the county for six months immediately before they are called upon to serve as grand and petit jurors; that they are above the age of twenty-one years and under the age of sixty years. Code, §§ 3841, 3858. No property qualification is required in this state for a juror, and if it is not a mere rule of convenience for ordinaries, clerks and commissioners to select jurors from the book of the receiver of tax returns, and it be a necessary qualification that the juror must be a tax payer, then that qualification is included in the qualification of age. Acts March 18, 1869, and January 19, 1872. To be "white" was another qualification for a juror, but this no longer exists. The language employed by congress in this clause of the act of 1840 is direct and positive; it is also mandatory to the federal courts—that jurors, to serve therein, shall have like qualifications and be entitled to like exemptions as those of the highest courts of law in the state where the national court is held. Under this clause no discretion is given to the court. Clauses 2, 3 and 4 may be considered together. They provide for the designating or selecting of jurors by ballot, lot or otherwise, according to the mode of forming juries as practiced in the state wherein the federal court is being held, so far as such mode may be practicable by said court, or its officers, giving the power to said courts to make all necessary rules and regulations for conforming and adapting the designation and impaneling of jurors, in substance, to the laws and usages in force in the state at the time. Now, it was contended by counsel for the challenger that, for the designating or selecting of qualified persons to serve as jurors in this court, state authority—for example, a board comprising the ordinary of the county, the superior court clerk, and also three commissioners appointed by the judge of the superior court, is the proper agency to act in the premises; that it, and not the national court or its officers, is the agent to designate each particular juror to serve in this court, from the list on the books of the receiver of tax returns. The employment of state agency to designate or select jurors for the United States courts was not, in my opinion, contemplated by congress in making this law. The language of the act is, that the jurors "shall be designated by ballot, lot or otherwise, according to the mode of forming juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States or the officers thereof." Is it not the plain meaning of this, that the designation or selection is to be made by the national and not the state officers? But the argument of counsel, in its tenor, indicated that, at least, if the officers of this court are to designate or select its jurors, the names should be taken from the list of tax payers in each county in the district found on the tax receiver's books. If jurors, as the rule requires, are to be taken from the district at large, this would be virtually impracticable. And even if it were practicable to thus select them, I do not think the statute requires it to be done. The legal object is to select persons who possess the qualifications; it is not the mode in which this is to be accomplished that is imperative upon the court. In this matter a large discretion has been bestowed upon it by the statute itself.

Objection to the rule was urged for the challenger, "because the rule of court under which the jury was selected and impaneled limits the number of jurors in this district to five hundred." I have looked into this question, and I find nothing in any of the laws of congress as to what number shall be designated or selected. The acts of 1789 and 1840 apply only to the mode of selecting jurors and not to the number.

Counsel relied on the 5th section of the act of congress of June 1, 1872 (17 Stat. 196). This section declares (in substance) that the United States courts shall conform, as near as may be, to the practice, pleadings and modes and forms of proceeding in other than equity and admiralty causes as they may exist in like causes in the courts of record in the state at the time of holding the United States court therein. The act has no reference to the designating or selecting of jurors; nor, in my opinion, has it any application to the practice, pleadings or mode of proceeding in criminal cases as practiced in the state courts.

The case of U. S. v. Wilson [supra], was read and earnestly discussed. Two questions were before the court for decision in that case. The first was the construction of the act of July 20, 1840. Speaking of the first clause of the act, Wilson, J., said: "So far as relates to the qualifications and exemptions of federal jurors, the courts have no discretion." And the learned judge also said: "The courts from necessity were to exercise a discretion as to the practicability of desig-

nating and impaneling jurors according to the mode prescribed for selecting juries of the highest court of law in the state. They have the power and the discretion to change the mode from time to time. The court may exercise the power, or refrain to exercise it, as it may now deem practicable." The other question for decision was, whether where a grand jury, consisting of fifteen members, fourteen of them—the fifteenth being absent—return a true bill into court, the indictment was well found. The court held it was. But it further held, that if a grand jury has even one disqualified person on the panel, the whole jury is tainted, and an indictment found by such a body would be void. And this has been the doctrine as to grand juries in England for the past four hundred years, and it prevails in this country. Doyle v. State, 17 Ohio, 222.

Counsel also relied on Clinton v. Englebrecht, 13 Wall. [80 U. S.] 434. This case arose exclusively under a law of the territory of Utah. The court there, proceeding on the theory that it was a court of the United States, issued an open venire to the marshal, acting apparently on the hypothesis that it was to be governed in the selection of jurors, by the acts of congress. Chief Justice Chase, in delivering the opinion of the court, held that the territorial court erred both in its theory and in its action; and that the making up of the lists and all matters connected with the designation of the juries were subject to the territorial laws.

Reliance was likewise placed by counsel for the challenger in the case of U. S. v. Woodruff [Case No. 16,758]. The defendant objected to a trial, on the ground that the jurors had not been selected conformably to the act of congress of July 20, 1840. The court, Mr. Justice McLean, in delivering the judgment, said: "By an early rule of this court the clerk is required to issue a venire facias, commanding the marshal to summon twenty-four persons to serve as traverse jurors. * * * By the act of Illinois of the 3d of March, 1845, for the selection of jurors, it is made the duty of the county commissioners to select jurors. Now this court cannot call upon the officers of the state to do this duty, but we are bound to conform, as nearly as may be, to the state practice. The venire under the above rules leaves the selection of the juries to the marshal as his convenience shall permit. This does not, therefore, conform to the state practice. The jurisdiction of this court extends throughout the state, consequently the jurors should be selected from the state at large, and their names should be inserted in the venire. The court will therefore adopt a rule requiring the clerk and marshal to select the jurors from the state at large, previous to each term, and to conform in doing so, as near to the state practice as may be practicable."

The case of U. S. v. Wilson, instead of showing that the rule is not in conformity to the laws of congress, is to my mind, an authority which sustains its legality. The case of U. S. v. Woodruff is so directly applicable, so fully covers the whole question, and so clearly supports the rule that no other authority need be adverted to, or invoked.

The motion to quash the array is overruled.

Case No. 14,838.

UNITED STATES v. COLLYER et al.

[Whart. Hom. 483.]

Circuit Court, S. D. New York. 1855.

JURISDICTION OF FEDERAL COURTS—HUDSON RIVER—REGULATION OF STEAM VESSELS—DESTRUCTION OF PASSENGERS — INDICTMENT FOR MISCONDUCT AND NEGLIGENCE—JOINT AND SEPARATE TRIALS.

[1. A violation of a law of the United States, committed on board a steamboat upon the Hudson river, within the ebb and flow of the tide, is within the jurisdiction of the federal court, although the place is within the body of a county of the state of New York.]

[2. An indictment based on section 12 of the act of July 7, 1838 (5 Stat. 304), against the officers and employés of a steamboat, is sufficient if it charges them, substantially in the language of the statute, with misconduct, negligence, or inattention to their respective duties, whereby the lives of passengers are destroyed. It is not necessary that the particular acts of misconduct, negligence, etc., should be specifically set forth, or that the acts should be charged to have been committed feloniously.]

[3. In such an indictment, several defendants occupying different stations of employment, such as the captain, engineer, pilot, etc., may be joined, without showing that their acts were jointly destructive of the lives of those on board, or were joint in their commission.]

[4. If a number of persons jointly indicted be granted separate trials this does not entitle the first person tried to have the benefit of the testimony of the others; and hence the incompetency of such witnesses, in the case of a joint trial, is no ground for granting separate trials.]

[5. It is not necessary to a conviction under the statute to prove that there was willful or intentional mismanagement or misconduct on the part of the accused. It is not the intent which constitutes the essence of the offence, but it is an improper act of the kind designated, and having the results named, though such act be unaccompanied with any evil intent.]

[6. It is not sufficient, under the statute, to show misconduct, negligence, or inattention on the part of the accused, and that there was a burning of the vessel, which caused loss of life, but it must further be shown that such burning and loss of life were the direct consequences of the negligence or misconduct shown.]

[7. By "misconduct, negligence, or inattention" in the management of a steam vessel the statute means the omission or commission of any act which may naturally lead to the consequences made criminal; and it is immaterial what may be the degree of misconduct, whether slight or serious, if the proofs show that the destruction of the lives of persons on board was the necessary or most probable consequent of it.]

[8. To be a person "employed on board," within the meaning of the statute, it is not necessary that one should be employed under pay to perform any particular duty; but the statute applies to any one actually engaged in performing the duties of an officer or employé, as where, the captain being sick, another takes his place, and acts as captain, exercising the authority and control, and discharging the duties, of that officer.]

[9. If a captain has employed skillful and faithful subordinate officers and employés, then any act of misconduct, negligence, or inattention on their part, or the part of any one of them, is not imputable to him, and he cannot be held guilty under the statute, though such act directly results in destroying the lives of persons on board.]

The lamentable accident wherein the steamboat Henry Clay was destroyed on the banks of the Hudson river, and about eighty-five lives destroyed, is of too recent occurrence to need any particular recital of the same to bring it to the memory of our readers. This vessel started from Albany about 7 o'clock a. m. on the 28th July, 1852, with a large load of passengers and freight, bound for New York, to stop at most of the intermediate landings, and there to receive and land passengers and freight. The steamboat Armenia started from the same place, bound on a like voyage, with a smaller load of passengers, at about the same hour. It was alleged that shortly after starting from Albany, and somewhere in the neighbourhood of Hudson, which is thirty miles below Albany, and about one hundred and seventeen miles from New York, a contest of speed arose between the two boats, wherein the greatest exertion was made use of by the two boats to surpass each other in speed. The result of this contest was that at a point a little north of Kingston, the two boats came in collision, and it was alleged and believed by the public the Henry Clay endeavoured to crowd the Armenia on shore. This contest created excessive alarm on the part of the passengers, especially the females, on board of both boats. It continued until about Kingston, whereat the Armenia hove to for the alleged purpose of cooling her boilers and engine, which it was averred were overheated; but nevertheless, after a time the Armenia followed the Henry Clay, which latter proceeded on her course down the river, but with diminished speed, until her arrival in the vicinity of the Forrest House, two miles below Yonkers, and about fifteen miles from New York, when fire was discovered proceeding up from the fire room. Attempts were made to put it out, but without success, and finally the vessel was headed to the shore, and was beached, but unfortunately the progress of the fire was such that most of the passengers were prevented from reaching the shore, by the fire intercepting their passage through the gangways and over the promenade deck. They were gradually driven off the stern of the boat by the devouring flames, and all, or nearly all, who were at the stern perished. On the voyage down, it appeared that the captain was confined to his stateroom from sickness, occasionally giving an order. It was alleged that Collyer, who was principal owner of the boat, and who was on board, was in command, or had the principal charge and direction of the boat. The other officers were at their posts, and remained so until the vessel was beached, when they rushed in and endeavoured to save the lives of the passengers who were drowning. Many of them were saved by their exertions. It appeared, also, that before the boat reached the shore, numbers of the passengers plunged into the river, and the master of a boat who was near at hand went to their assistance, and saved a few. Many of them, however, were drowned.

Complaint was made in the public press, also, against the pilot of the boat, because of his beaching his boat at right angles to the shore, instead of in an oblique position. If the latter had been done, it was maintained that all might have escaped. Much indignation was expressed at an order which was said to have been given to the passengers by some one in authority, just before the vessel reached the shore, for them to go aft, which order was generally obeyed, and many of them who went aft were consequently destroyed. It was also charged that the vessel was insufficiently provided with boats, water buckets, life preservers, and pumps; that, if the vessel had been so furnished, all, or nearly all, would have escaped, or the flames would have been mastered. A coroner's inquest was held at Yonkers, a place about three miles from the place of the calamity, and was in permanent session for about ten days after the event, whereat evidence was taken of a very exciting and inflammatory nature. In New York, Dutchess, and West Chester counties, the grand juries of those counties were respectively charged by the judges of the supreme court, to take action in the premises. But the United States court first proceeded, and arrested the principal owner, Collyer, and the others above named, on the ——•day of August, 1852, and held them to bail in $10,000, to answer any indictment which might be found against them, under the section of the act of congress of 1838 [5 Stat. 304], which is as follows: "That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labour for a period not more than ten years." After their arrest at the instance of the United States courts, and bailing out, as above stated, the West Chester authorities, on the finding of the coroner's inquest, preferred a complaint against them for murder, under the following section of the New York Revised Statutes, viz. 2 Rev. St. (4th Ed.) p. 843, § 5. Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases: (1) When perpetrated from a premeditated design to effect the death of the person killed, or of any human

being. (2) When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. (3) When perpetrated without any design to effect death, by a person engaged in the commission of any felony.

The defendants were arrested and held in custody by the sheriff of West Chester county, but, before they could be removed to West Chester county, a writ of habeas corpus was sued out at the instance and on the petition of Dennis McMahon, Jr., who appeared as counsel for all except Collyer.

This habeas corpus was argued and discussed before his honour, Mr. Justice Edmonds, in the month of September, 1852, by Mr. McMahon, for all the defendants excepting Collyer, by Mr. Cutting and Mr. O'Conner, for defendant Collyer, and by District Attorney Wells, of West Chester county, and Mr. Lockwood, for the state authorities.

The argument and decision are reported. People v. Sheriff [1 Parker, 659]. The learned judge overruled the charge of murder, but held them to answer on the charge of manslaughter in the first degree, and held them in bail in $10,000. Shortly after this decision, the grand jury summoned to the United States district court in New York found an indictment for manslaughter against all the defendants, under the aforesaid section of the act of 1838. After the finding of this indictment, an oyer and terminer was subsequently held in West Chester county by the state court, and an indictment was there found against all the defendants for manslaughter in the first degree. To this indictment the defendants Tallman, Germaine, Hubbard, Jessup, Elmendorf, and Merrit, pleaded to the jurisdiction. To that plea the district attorney demurred. The other defendant, Collyer, pleaded not guilty. The demurrer to the plea of jurisdiction was never brought on for argument; the state authorities concluding to await the issue of the trial on the United States indictments.

The plea was as follows:

"In the Court of Oyer and Terminer held in, and for the County of West Chester. The People, &c., v. John F. Tallman, James L. Jessup, John Germaine, Charles Merrit, Edward J. Hubbard, James Elmendorf, imp'd with Thomas Collyer. And the said defendants, impleaded as aforesaid, come into this court of oyer and terminer, held in and for the county of West Chester, and having heard the indictment now here read, say that the said court of oyer and terminer ought not to have or take cognizance of the said offences in the said indictment against them preferred, because, protesting that they are not guilty of any of the said offences, they say that the same were committed on the waters of the Hudson river, near Yonkers, and within the county of West Chester, within the ebb and flow of the tide. And they aver that at the several times when the said supposed offences set forth in the several counts in the said indictment were, as therein alleged, committed, the said John F. Tallman was captain or master of the steamboat or vessel hereinafter named, and the said John Germaine was engineer thereof, and the said Edward Hubbard was pilot thereof, and the said James L. Jessup, Charles Merrit, and James Elmendorf were persons respectively employed on board thereof. And the said steamboat Henry Clay was at the several times when the said supposed offences, set forth in the several accounts of the said indictment, were as therein alleged committed, a vessel propelled in whole or in part by steam, duly enrolled and licensed under the enrolment and navigation laws of the United States of America, and engaged in the navigation of the navigable tide waters of the Hudson river, between the cities of Albany and New York, stopping at the intermediate places, on said river, at and above Sing Sing. And the said several persons mentioned in the several counts of the indictment now here, whose lives, as therein alleged, were destroyed, were persons respectively on board of said vessel at the time of the commission of the said supposed offences. And they aver that the said supposed offences were committed after the 7th day of July, A. D. 1838, to wit at the several times in the several counts of the said indictment declared. Wherefore they say that the circuit court of the United States, within and for the Southern district of New York, had at the several times when the said supposed offences set forth in the said several counts of the said indictment were as therein alleged committed, and have now, the sole and exclusive right to entertain cognizance of, and jurisdiction over, the offences in the said indictment described and set forth, and this they are ready to verify. Wherefore they pray judgment whether the said oyer and terminer ought and will further proceed against them. D. McMahon, Jr., attorney for defendants Tallman, Jessup, Hubbard, Germaine, Elmendorf, and Merrit."

"State of New York, City and County of New York.—John F. Tallman, James L. Jessup, Edward Hubbard, John Germaine, James Elmendorf, Charles Merrit, being duly sworn, say that the aforesaid plea is true in substance and matter of fact.

"Sworn to before me this 25th day of November, 1852, John Germaine. Allen Hand hurst, Justice of the Peace.

"Sworn to before me this —— day of December, 1852, by Benedict Levis, Jr., Commissioner of Deeds. John F. Tallman."

In January, 1853, the defendants Tallman, Germaine, Hubbard, Elmendorf, Jessup, and Merrit were called upon to plead to the United States indictment, when their counsel made a motion to quash the indictment, on the following grounds, namely: (1) That the indictment was defective in form. (2) That the first, second, third, fourth, fifth, sixth, seventh, thirteenth, fourteenth, and fifteenth

counts were defective in form. (3) That the different counts of said indictment charge the offence in the words of the statute, without setting forth with sufficient minuteness the offence and the circumstances constituting the same. (4) That it does not charge the offence as having been committed knowingly or feloniously, or with intent to injure any person on board the vessel. (5) All the counts want the fulness and precision required by law in describing a criminal offence; and connecting any person with it. (6) It does not describe any of the defendants as having been engaged in the actual navigation of the vessel at the time the lives were lost; nor does it describe that their duties were such as that a neglect thereof or inattention destroyed the lives. It indicts jointly for the same offence, in the same count, several different defendants, occupying different stations of employment on the boat, for a negligence or inattention to, and a misconduct in executing, their respective duties, without showing how, or in what manner, their different acts were joint in bringing about directly the destruction of the lives alleged to be lost.

The following is a synopsis of the indictment in question: First count. That Collyer, Tallman, Germaine, Hubbard, Jessup, Elmendorf, and Merrit, on the 28th day of July, 1852, on the navigable waters of the United States, and within the ebb and flow of the tide on the Hudson river, &c., were persons employed on board of the Henry Clay, propelled by steam, which vessel was then owned by persons, citizens of the United States, unknown, and did then and there, by their misconduct, negligence, and inattention to their several and respective duties, in their several and respective employments on board of said steamboat, cause the lives of Stephen Allen, Abraham Crist, A. S. Downing, Geo. F. Whittock, Julia Hoey, and divers other persons then being on board, to be destroyed. Second count. That the same persons, on the 28th July, 1852, on the Hudson river, &c., were persons employed on board the steamboat Henry Clay, which was then owned by William Radford, Thomas Collyer, and John F. Tallman; and did then and there, by their misconduct in their several and respective employments on board of said vessel, cause the lives of Stephen Allen, &c., and others unknown, on board of said steamboat Henry Clay, to be destroyed. Third count. Same as second count, except it uses the word "negligence" instead of "misconduct." Fourth count. Same as third count, except it uses the words of the statute, viz. "inattention to their several and respective duties in their several and respective employments." Fifth count. That said persons, &c., on the 28th July, 1852, in the navigable waters of the United States, and within the ebb and flow of the tide, that is to say, on the Hudson river, in the Southern district of New York, were persons employed on board of a steamboat propelled in whole by steam, called the Henry Clay; that is to say, Thomas Collyer, as part owner, and acting for the captain in command of the boat, Tallman, as captain, Germaine, as engineer, Hubbard, as first pilot, Jessup, as clerk, Elmendorf, as second pilot, Merrit, as assistant engineer, of said boat, which was then and there owned by Thomas Collyer, William Radford, and John F. Tallman, citizens of the United States, and did then and there, by the misconduct of the said persons in their several and respective duties, in their before mentioned and described employments, on board of said steamboat Henry Clay, cause the lives of Stephen Allen, Abraham Crist, and divers other persons unknown, on board thereof, to be destroyed. Sixth count. Same as fifth count, except it uses the word "negligence." Seventh count. Same as fifth count, except it uses the words of the statute thus: "By the inattention of them, &c., to their special and respective duties, in their before mentioned and described employments," &c. Eighth count. That said persons, on the 28th July, 1852, on the river Hudson, commonly called the "North River," within the ebb and flow of the tide, and within the Southern district of New York, &c., being then and there persons employed in the following capacities; that is to say, Collyer, as part owner, in command, the said John F. Tallman, as captain, the said John Germaine, as engineer, the said Hubbard, as first pilot, Jessup, as clerk, Elmendorf, as second pilot, Charles Merrit, as assistant engineer, on board of a steamboat propelled in whole by steam, called the Henry Clay, not regarding their several and respective duties, in their aforesaid respective capacities, did then and there, by inattention to their said duties, so negligently navigate, control, and steer the said steamboat, called the Henry Clay, as to cause one Julia Hoey, then and there, being a passenger on board said steamboat Henry Clay, to be overwhelmed by the waters of the said river Hudson, and in and by said waters she was drowned, and did die; and so the jurors say that the said Thomas Collyer, John F. Tallman, &c., the life of the said Julia Hoey by their negligence and their inattention to their said several duties feloniously did destroy, &c. Ninth count. Same as eighth count, except it charges "so inattentively navigate and manage the said steamboat Henry Clay, and manage and regulate the steam and furnace on board said steamboat, as to cause the said steamboat to take fire; by means whereof Stephen Allen and Abraham Crist, and divers other persons, were overwhelmed," &c.; and charges that the lives of said Allen, &c., were destroyed by the inattention of the defendants to their several duties, as aforesaid. Tenth count. Same as last count, excepting it calls Collyer "acting captain." It uses the words "misconduct and negligence, and by inatten-

tion to their respective duties, and so inattentively manage, regulate, and conduct the fires and steam on board said Henry Clay, as to cause her to catch fire, whereby they were cast and thrown from, and out of, the steamboat, into the water of the Hudson river; and that by their misconduct and negligence, and inattention to their respective duties, the lives of the said persons were destroyed." Eleventh count. Same as tenth count, except it uses the words "feloniously disregarding their respective employments, did so negligently and inattentively navigate, control, and manage the steamboat Henry Clay, and so negligently and inattentively manage and regulate the fires and steam, &c.," which said steamboat was then and there under the guidance and control of the said defendants, that by their misconduct and negligence the said lives were destroyed. Twelfth count. Same as eleventh count, except it uses the words "by misconduct and negligence, and by inattention to their respective duties, as aforesaid, so inattentively manage, navigate, and control the said steamboat Henry Clay; and so inattentively manage, regulate, and control the fires and steam on board said steamboat Henry Clay, as to cause said steamboat to take fire, by means whereof one Inock Simons, then and there being on board, was burned, and from such burning died; and charges his destruction to their misconduct and negligence, and inattention to their respective duties." Thirteenth count. Same as second count, except it charges the life of Inock Simons to be destroyed. Fourteenth count. Same as last count, except using the word "negligence" instead of "misconduct." Fifteenth count. Same substantially as fifth count, excepting it charges the death of Inock Simons, having been caused by fire, by reason of their inattention to their respective duties.

Argument was heard at great length on this question before his honour, Mr. District Judge BETTS, and a similar case, that of The Reindeer, was heard at the same time. In the latter case the defendants had pleaded to the indictment, but having faith in Mr. McMahon's motion, united with him in it on the part of their clients.

The following are the arguments of the defence and of the United States on that motion.

Mr. McMahon, for the six defendants above named, argued:

1. The circuit court of the United States of America has no jurisdiction of the offences described in the indictment, because: (1) It describes the offence as having been committed on the Hudson river. The court can take judicial notice that the Hudson river ends at New York Bay. All above New York Bay is entirely within the limits of the state of New York. Peyton v. Howard, 7 Pet. [32 U. S.] 322. (2) In U. S. v. Bevans, 3 Wheat. [16 U. S.] 336, it was decided that the courts of the United States have not jurisdiction of offences under the admiralty until congress have legislated on the subject. (3) Congress have no right to legislate respecting offences committed on navigable waters entirely within the limits of a state; and the Hudson river is a navigable stream entirely within the limits of the state of New York. The jurisdiction of the state of New York extends to low-water mark on the Jersey shore. Com. v. Peters, 12 Metc. [Mass.] 387; [The Genesee Chief v. Fitzhugh] 12 How. [53 U. S.] 443. (4) The act of 1838 does not, in terms, extend the jurisdiction of the United States courts to the navigable waters wholly within a state. It merely authorizes the general admiralty jurisdiction to apply, to take cognizance of what it describes to be an offence, and the general admiralty jurisdiction does not apply to waters within the body of a county, or fauces terrae. U. S. v. Wildbore, 5 Wheat. [18 U. S.] 76, 103, 104; S. C. Crimes Act, March 3, 1825 [4 Stat. 115], April 30, 1790, § 12 [1 Stat. 115]; United States v. Grush [Case No. 15,268]. (5) The court should be extremely chary of extending the act to apply to offences committed on the Hudson river, because, if the admiralty has jurisdiction, it is exclusive, and is a serious attack upon the rights of state sovereignty. This point is pressed in sober earnestness, as it happens that both the state, county, and the United States courts have here assumed jurisdiction, and intend to exercise it.

2. This indictment is defective in form, and describes no offence whatever: (1) It follows the words of the statute of 1838, in describing the offence, without stating in what way the defendants were guilty of misconduct, negligence, or inattention to his or their respective duties, or what were the respective acts of misconduct, negligence, or inattention constituting the offence. In any event, the first, second, third, fourth, fifth, sixth, seventh, thirteenth, fourteenth, and fifteenth counts are bad for that reason. (2) The offence being a felony, such a particularity is required, both at common law, and by the decisions of our courts. 1 Chit. Cr. Law, § 22; Archb. Cr. Pl. 50, 64; Starkie, Cr. Pl. 235; Reg. v. Barrett, 2 Car. & K. 343; Car. & P. 156; U. S. v. Mills, 7 Pet. [32 U. S.] 142; State v. Raines, 3 McCord, 533; Hampton's Case, 3 Grat. 590; Com. v. Stout, 7 B. Mon. 247; People v. Allen, 5 Denio, 76. (3) As the terms "misconduct, negligence or inattention" are very broad and indefinite, by the use of them alone no indication is given to the defendants of what they are guilty, and to meet such a charge they must be in great danger of conviction, because of their not knowing what description of misconduct, negligence, or inattention, they are to combat. Reg. v. Barrett, 2 Car. & K. 343; State v. Fields, Mart. & Y. 137. (4) The offence is not set forth as having been committed feloniously, or with intent to injure any person or persons on board said vessel. Archb. Cr. Pl. 64. (5) It sets forth that the misconduct, negligence, or in-

attention to their respective duties, &c., caused the lives of, &c., to be destroyed, without showing that such acts directly destroyed the said lives; and, under the principle of causa proxima non remota spectatur, the indictment shows no offence under that statute. Howel v. Com., 5 Grat. 664; Anthony v. State, 13 Smedes & M. 263.

3. The indictment is defective in substance because: (1) It indicts jointly, for the same joint offense, in the same count, several defendants occupying different stations of employment on the steamboat, for a joint misconduct, negligence, or inattention to their respective duties, without showing that their acts were jointly destructive of the lives of those on board, or became or were joint in their commission. (2) The statute of 1838, under which this indictment is framed, does not contemplate a joint negligence, because the phrases of the act are disjunctive or distributive, thus, every captain, &c., by whose misconduct, negligence, or inattention, respecting duties, &c. (3) The words "misconduct, negligence, or inattention" mean omission or ill conduct that is passive; action is not implied. The terms amount to an absence of will in what they do or omit to do, because, if there is will, then malice would be inferred, and they would be guilty of murder. If no will, then there is inertness of the mind, which in each one is separate, because the inertness of the mind of the captain is different from the inertness of the engineer, their duties being distinct, and the exemplification of that inertness being different.. The captain's misconduct, negligence, or inattention has reference only to his respective duty as captain. So with the engineer, so with the pilot, and so with the others. Each is guilty in his respective sphere. Their guilt is different, and the manifestations of that guilt are different, and in no sense are their acts, or causes conducing to those acts, joint. Where several commit a joint act, not of itself illegal, but which becomes so by reason of some circumstance applicable to each individual severally, and not jointly, they must be indicted separately. 2 Hawk. P. C. c. 25, § 89; Barb. Cr. Law, p. 338. Thus several partners cannot be indicted jointly for exercising their trade without having served an apprenticeship. 1 Salk. 382; 1 Strange, 623; 2 Strange, 921; Barb. Cr. Law, 338; 1 Burrows, 2, 4, 6. When several persons are engaged in publishing a libel, and the publication of each be separate, they must be severally indicted. Barb. Cr. Law, 338. So, on a joint charge for receiving stolen goods, a joint act of receiving must be proved. Proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. Rex v. Messingham, 1 Moody, Crown Cas. 257. See Russ. & R. 344. See Vaughan v. State, 4 Mo. 530; Weinzorpflin v. State, 7 Blackf. 186. The motion to quash is the proper way to moot these points, for, if the matters alleged in the indictment are not punishable by law, the indictment will be quashed. Whart. Cr. Law, 131; Archb. Cr. Law, 64. So the court may quash, in its discretion, for such insufficiency as will make any judgment erroneous, given upon any part of it against the defendant. Betts, District Judge, in U. S. v. O'Sullivan [Case No. 15,974], citing authorities; U. S. v. Goodwin, 12 Wheat. [25 U. S.] 460.

The United States district attorney, J. Prescott Hall, in rising to oppose the motion to quash the indictment in this case, said that he should not consider it any part of his duty to occupy much of the time of the court in discussing the exceptions taken to the indictment, because he knew his honour was familiar with the law and the principles laid down in several discussions in similar cases. Knowing the judge's general preparation in all matters, he would merely state, first, in answer to the objections as to jurisdiction, that the law was sufficiently explicit in bringing this offence within the terms of the act of congress, and that the objection was at an end, provided there is nothing in the law inconsistent with the constitution of the United States. The learned counsel then referred to the act providing for the better security of the lives of passengers on vessels which are propelled in whole or in part by steam. The twelfth section provides, that every captain, engineer, pilot, or other person employed on board any steamboat, by whose misconduct, negligence, or inattention life is destroyed, shall be deemed guilty of manslaughter. Yet it may be that congress had no right to pass the law. If so, there would be an end to the question; but he (the district attorney) took it for granted, that no court, at nisi prius, would take upon itself to assume that congress had violated the constitution of the United States, unless it clearly appear that it had done so. It would be enough for him (Mr. Hall) to show that congress have that authority, not only by the words of the constitution, but by express adjudications of the supreme court. It does not follow, as a logical deduction, that, because the states have jurisdiction over certain crimes, congress therefore has not. It does not follow that, because congress has jurisdiction over certain crimes, the states have not. The district attorney then referred to the case of Fox [v. Ohio], charged with counterfeiting, reported in 5 How. [46 U. S.] 434, and remarked that his honour, Judge Betts, had given the same construction to the act concerning the counterfeiting of coins which had been put upon it by the supreme court of the United States, in Marigold's Case, 9 How. [50 U. S.] 560. Even before that case was decided, the supreme court held, in those cases, that, although the states might have jurisdiction over certain crimes, yet, that congress might also exercise the same power in cases within their jurisdiction. In relation to the matter now before the court,

he submitted that it was not important whether it was exclusively under the authority of congress or not. It is part of that jurisdiction in which is included the power to regulate commerce, and that, also, includes the power to regulate navigation. If congress had the power to regulate navigation, they have the right to regulate it everywhere. The power extends to the land, as well as the sea. As to the point about the flow and ebb of the tide, that has been long since exploded. He referred to the case of the Ohio bridge, in which it had been decided that the admiralty power extends to the lakes, and the power of congress extends to the land, as well as to the sea, in matters of commerce. It is a question of power, not of discretion. If congress have a right to regulate navigation, there is no limit upon their discretion. It is for congress to say how, and in what manner, the regulation shall be made and exercised. But this is not a matter open for construction. The supreme court has expressed its opinion upon this very act, and has decided that it is applicable to all steam vessels, whether navigating the rivers, the ocean, or the lakes; and that its commands must be obeyed by all persons within its description and enumeration. The district attorney here cited and commented at great length upon the following cases, which he insisted had set the matter of jurisdiction at rest. New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. [47 U. S.] 394; U. S. v. Coombes, 12 Pet. [37 U. S.] 72; Waring v. Clark, 5 How. [46 U. S.] 461–465. In this last case, the supreme court say that the act of July, 1838, in all its provisions, is obligatory upon the owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a state or between states. Then, as to the forms of the indictments, the district attorney insisted that they were sufficient in all particulars, and conformable, not only to precedents, but to express adjudications. In setting forth a crime created by statute, it is sufficient to describe the offence in the words of the statute itself, and this rule has been followed in some of these counts, while in others, the particular mode in which the terrible calamity overwhelmed men, women, and children in one common ruin are particularly set forth. In some counts, death is attributable to the direct action of fire and steam; in others, water, in which the sufferers sought refuge to escape the still more dreadful ravages of flame. The district attorney then commented upon the objection made that there could be no such thing as joint negligence, and insisted upon it that, in practice, such inattention might exist, as in cases where two men are stationed at one point to keep common watch, and both neglect their common duty by gross acts of negligence. But in this case joint misconduct is charged, and in the Henry Clay's Case the indictment sets forth that he, Collyer, the owner, was acting as master; that the captain was also acting in conjunction, not only with him, but with the engineer, pilot, clerk, and others of the crew; that all these were acting together, each in his own department, the object being to surpass the Armenia in speed; that each and all were reckless; and that the consequence of this recklessness was the burning of the boat, and the destruction of her passengers. He insisted, therefore, that, both in theory and in practice, the indictments were good, and ought to be sustained, and he cited and commented upon many cases in support of his positions. The argument of the district attorney occupied upwards of two hours.

Mr. McMahon replied on the part of his clients. In the course of his argument, the judge interrupted him, saying that he would not take into consideration the question whether the law was unconstitutional. The only question he would entertain was whether this court had jurisdiction in the matter.

Mr. McMahon then continued his argument, and was followed by Mr. Noyes, on behalf of the parties implicated in the Reindeer catastrophe. The court then adjourned, the judge reserving his decision until morning.

THE COURT, after advisement, delivered an oral opinion, in which he considered at some length the objections, but finally overruled them, and ordered the defendants to plead to the indictment. The defendants all plead not guilty.

D. McMahon, for defendants Tallman, Jessup, Elmendorf, and Merrit.

Henry G. Wheaton, for Germaine.

George N. Betts and Ambrose L. Jordan, for Collyer.

J. Prescott Hall, late Dist. Atty., and Mr. Dunning, for the United States.

The prosecution moved on the trial of the defendants together. The counsel for the defence, on affidavits, asked for separate trials, principally because the defence of the defendants were antagonistic to each other, and that no fair trial could be had of all the defendants together, and that the evidence of the defendants was reserved for each other. This separate trial was opposed at much length by the prosecution.

After a long discussion, INGERSOLL, District Judge, decided against the separate trial, remarking as follows, viz.: "It appears to me that a great many topics have been discussed here which it is unnecessary to consider in disposing of this motion. They will properly be considered when the case goes to the jury; and as to what weight will then be given to them, under the instruction of the court, I do not think it necessary to intimate an opinion. The act of congress provides: 'That every captain, engineer, pilot, or other person employed on board any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respec-

tive duties, the life of any person or persons may be destroyed, shall be deemed guilty of manslaughter.' Now, the indictment at present under consideration is founded upon this act of congress, and it charges the individuals named in it with this misconduct and negligence. It charges them with a joint misconduct, and that by such misconduct and negligence they are all liable. It is not necessary for me to determine any questions which may have been had up before Judge BETTS heretofore, or to intimate what I think of his opinions; but, undoubtedly, I should have concurred in his opinion, after due consideration had by me. The question now is, whether the court will order a separate trial to Mr. Collyer, before the other defendants are tried, because it is evident that the object is to have Mr. Collyer tried first."

Mr. Jordan: "So far as we are concerned, we never asked anything of the sort, nor do we wish it."

INGERSOLL, District Judge: "It makes no difference whatever. The object is to have one tried before the other, and why? The reason is, and there can be no other legitimate reason, that unless there is a separate trial, there cannot be a fair trial; and then the question comes up, that being the reason, has there anything transpired by which it is made to appear that these parties cannot have a fair trial if they are tried jointly? And, if there is no reason made to appear that they cannot have such a fair trial, then it is the duty of the court not to order a trial separately. But if it is made to appear that they cannot be fairly tried jointly, then, as I conceive, it is the duty of the court, although it has often been said to be in their discretion, to order a trial separately. What are the reasons which are urged to induce me to believe that the defendants cannot be tried jointly? They are two. The first is that the defence of some of these defendants is so antagonistic to each other that they cannot have a fair trial; and, secondly, that they cannot be tried fairly without having the testimony of their codefendants in their behalf, as I understand it, and that, therefore, they should be ordered to be tried separately, so that they could have the testimony of their codefendants adduced in their behalf.

"One word as to this latter reason before I consider the first. Is there any ground, for that reason, that I should order a separate trial to be had in this case? Whether Mr. Collyer were tried first, or the captain, or the engineer, it is said that the one who is thus tried first ought to have the benefit of the testimony of the other, and could not have it, and it follows that it should be granted for that reason; and the question is, could he do it? This question has been often before the courts, not only in the states, but before the courts of the United States. It has been before the supreme court, in a case reported in Johnson, in a case in Massachusetts, of Pickering, where a separate trial was ordered, and where the party who was first tried offered the testimony of his codefendants, and it was refused, because the codefendant was not a witness. Two years ago the same subject was had up before the supreme court of the United States. It was a case that went up from Virginia, where two individuals were indicted for murder upon the high seas, and where a separate trial was ordered, and where the one first tried offered the testimony of the other one who was indicted, and not upon trial, and the question went up to the supreme court whether he was a competent witness for the one first tried, and the supreme court decided that he was not; although in the state of Virginia a law had been passed, prior to the time that the trial was had in the circuit court, that where a separate trial was had, the one first tried might have the benefit of the testimony of the other. The supreme court decided, although it was so in the State of Virginia, yet in the courts of the United States the one first tried could not have the benefit of the testimony of the other who was indicted with him, and therefore this reason which has been urged is not well sustained; for if this defendant was tried separately, the object would not be obtained, for he could no more have the testimony of those indicted with him upon that trial, than he could have upon a joint trial.

"Now, as to the other reason. Is the defence so antagonistic that the defendants cannot be fairly tried? I certainly do not think so. If I did, I should be inclined to grant a separate trial. It is not that any one who is acting as captain, or mate, or engineer, and him only, shall be liable under the statute, but it is any person; and in reference to the ground urged by the last counsel, that it is necessary for him to implicate the witnesses, in order to excuse the captain, whom he represents, I do not understand it so at all, if what he says is true, that the captain was sick, so that he was not able to attend to his duties on board the vessel, and did not so attend to them, and the command devolved upon the next officer. If he was sick, and could not attend to his duties, he has done nothing. If that is made to appear, then, as I view the case, unless there is something more in it, and this misconduct happened during his sickness, and he could not attend to it, then, in my judgment, he will be free, because he will not be implicated in that misconduct. His sickness would excuse him. I do not therefore see any reason, upon each of the grounds to which I have alluded, that the defence of the defendants is so antagonistic that they cannot have a fair trial if tried together."

Mr. Dunning, the associate district attorney, opened the case for the prosecution. He said: "The defendants have been indicted under the provisions of the twelfth section of the act of congress, approved July 7, 1838, entitled, 'An act to provide for the better security of the lives of passengers on board of

vessels propelled in whole or in part by steam.' That section says, 'And be it further enacted, that every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labour for a period of not more than ten years.' The indictment in this case contains various counts, and in substance charges that the defendants, on the 28th day of July, 1852, were the persons having charge of, and employed on board the steamboat Henry Clay, a vessel propelled by steam; that John F. Tallman was the captain, John Germaine, engineer, Edward Hubbard, pilot, James L. Jessup, clerk, James Elmendorf, second pilot, and Thomas Collyer acting as captain; that by their misconduct, negligence, and inattention to their respective duties, the lives of Stephen Allen, A. J. Downing, Abraham Crist, and divers other persons, were destroyed. It will appear that on the morning of the 28th July, 1852, the Henry Clay left Albany, freighted with human beings, having more than four hundred passengers on board, bound for this city. While on her passage down the river, at about three o'clock in the afternoon, when nearly opposite Yonkers, she was discovered to be on fire, and so rapidly did the flames spread that they soon gained the mastery, and it was found to be impossible to extinguish them. The boat at this time was near the middle of the river, but was soon headed for the shore, which she succeeded in reaching, her bow being run aground, her stern remaining in deep water. Then ensued a scene of horror that baffles all description. At the time the vessel reached the shore, most of the passengers were on the after part of the boat, having been directed to go there by those in command. The wind was blowing from the shore, and the fire, which originated near the middle of the boat, was raging to such an extent as to render it almost impossible to pass it. In their attempts to reach the shore, more than eighty of the passengers on board, with scarce a moment's warning, were hurried into eternity. The fearful alternative of perishing by the flames or the waves was presented to many of the unfortunate passengers of that ill-fated vessel; and each element, the fire and the water, received its share of victimes. No age, sex, or condition in life escaped. The mother and her infant, the old and the young, the man of four score years and the youth, shared a common fate. For a time the sad tidings of this catastrophe spread a gloom over the land, and well they might, for they brought sorrow and anguish to many a heart, and desolation to many a home. It is charged that this sacrifice of human life was caused by the negligence, carelessness, and inattention of the defendants, and it will be for you to say whether this charge is well founded. Your position therefore, gentlemen of the jury, is an important and a responsible one,—important for the defendants; important for the community. You stand between the living and the dead; for, although your verdict cannot reanimate the dead, it may save the living, may prevent the occurrence of similar calamities, may teach a lesson to those who have the charge and management of steamboats, much needed to be taught, that the safety and lives of passengers committed to their charge are not to be trifled with or taken with impunity. The frequency of occurrences of this character may well excite alarm. Scarcely a day passes but we receive intelligence through the public prints that life has been destroyed by the recklessness—the criminal recklessness—of those having charge of our railroad locomotives and steamboats. And where shall we look for a corrective, if not to a jury, when a proper case is presented for their consideration? Let the law be rigidly enforced, and such occurrences will cease. Let courts and jurors, ministers of justice, falter in the proper discharge of their respective duties, and such occurrences will be more frequent still.

"I have said thus much, gentlemen, to show you the importance of the position you occupy. I ask you to weigh the evidence for the prosecution calmly and dispassionately, and render such a verdict as will satisfy your minds, under the circumstances. I shall not attempt any minute statement of the evidence that will be introduced. I prefer that you should listen to the statements of the witnesses, and take the evidence as it shall fall from their lips, rather than any statements or conclusions of my own. We shall produce as witnesses many passengers who were on board, and saw the whole occurrence. We insist, and I think it will appear from the evidence, that on the 28th July, 1852, the day on which this awful calamity occurred, the Henry Clay was engaged in a fearful race—a trial of speed—with the Armenia, and that from that cause the catastrophe resulted. The vessels left Albany at nearly the same time; the Henry Clay being a few minutes in advance of the Armenia. That there was a race, we shall call a variety of testimony to prove. The witnesses will detail the occurrences that took place on that passage; and that the race for supremacy was contemplated before the vessels left Albany will also be apparent. So evident was it to the passengers on board that the boats were racing, and so much were their fears excited, that they remonstrated with the officers and Mr. Collyer; the captain being sick, and not on deck; they besought them to desist; but in vain. Their remonstrances were unheeded, and the race continued.

Many of the passengers who had paid their passage to this city landed at Poughkeepsie, and other points of stopping, being fearful to proceed further in the boat, and pursued their journey by other conveyances. This apprehension of the passengers, this desertion of the boat, would scarcely have occurred unless they were satisfied that there was a race. We shall show, also, that the boat that day did not make all her usual landings. They were so anxious to succeed in the race, that they passed the landings, to which some of the passengers had paid. The vessels were in such close proximity that at one time the Henry Clay ran into the Armenia. One of the firemen who went up to Albany on the Henry Clay on the 27th, refused to return on the 28th, fearful of the occurrence of some such calamity as actually happened. That the boats were engaged in a fearful contest for supremacy will, I think, abundantly appear from the evidence; and that each and all of the defendants contributed their efforts to enable the Henry Clay to succeed, will also be fully established."

Mr. Dunning then proceeded to state the other facts that he would adduce in evidence for the prosecution; that the race was continued notwithstanding the remonstrances of the passengers; that the vessel was certified to carry thirty pounds of steam to the square inch, and that she had much more; that the vessel was not provided with the necessary means of escape,—with life boats, life preservers, or the usual number of buckets, in case of fire; that each of these was deficient in number, and that the catastrophe resulted from a want of care in this respect; that the vessel was on fire the day before this catastrophe; that she was on fire at an earlier period on the same day; and that she had been frequently on fire before the 28th July,—and these facts, though not bearing on this case, go far to show a criminal negligence. They were notified, not only at an earlier hour on the same day, but they had been frequently notified previously. The passengers would tell the jury of these facts, and that some of them counted the number of revolutions the vessel made, though they may not be able to tell the exact speed she was going at. That, however, is not material. It will be for the jury to determine whether the defendants caused this destruction of lives. They would perceive that, by the statute, while the punishment may be ten years' imprisonment, it is within the discretion of the court to reduce it to one day. It was not necessary for the prosecution to show that the defendants, or any one of them, intended this calamity. It was enough for them to show that it was the result of misconduct, carelessness, or negligence. The learned gentleman then referred to the able and elaborate charge of his honour, Judge Betts, in the case of U. S. v. Farnham [Case No. 15,071], in which he says: "The indictment charges on the master of the Reindeer the crime of manslaughter, because, by his misconduct, negligence, or inattention at the time and place alleged, the lives of many persons were destroyed. The question at issue, on this indictment, is whether the government have, by legal and sufficient proof, convicted the defendant of the crime of manslaughter. In the first place, the law does not require the public prosecutor to prove willful mismanagement or malconduct by the accused. You are not to inquire if he was guilty of intentional negligence or inattention, but only if he did what is forbidden by the law. The point of inquiry before you is whether he was guilty of misconduct, negligence, or inattention, and whether the explosion and destruction of life arose from either of those causes. In order to determine that, we must have a clear and accurate understanding of the meaning of the terms used by congress in this law. By misconduct, negligence, or inattention in the management of steamboats is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct,—whether it is slight or gross,—if the proofs satisfy you that an explosion of the boiler was the necessary or most probable result of it."

Mr. Dunning concluded his address, which was listened to with marked attention by a crowded court, by saying that "it was neither the duty nor the inclination of the prosecution to urge the conviction of the defendants, unless the evidence we shall be able to introduce shall satisfy your minds of their guilt. We are not here to urge the conviction of the innocent. The law neither needs nor seeks such victims. It will be our purpose to introduce such evidence as is under our control and which, in our judgment, clearly tends to establish the guilt of the defendants. We shall strive to state the case fairly between the government and the accused, and, having done so, we shall have discharged our duty, and it will then be for you, gentlemen, to discharge yours."

Much evidence was given in on the part of the United States (the trial occupying fourteen days) to support the propositions of fact in their opening. The facts appeared in proof pretty much according to the previous statement, excepting that witnesses of the prosecution were principally unacquainted with steamboats and their management, and two or three whom they called, who were experts in navigation, approved of the conduct of the pilot of the vessel in putting her ashore.

The defence was opened by Mr. McMahon, who said:

"Before opening the case, I beg leave to submit to your honour one or two authorities and one or two propositions of law, in answer to the cases which have been cited very frequently by the prosecution.

"The first proposition is, 'that, under the act of congress of the 7th July, 1838, it must

appear that the deaths or the homicides must result directly and proximately from the misconduct, the negligence, or inattention complained of. In support of that proposition, I refer to the 12th section of the act, that 'every captain, engineer, pilot, or other person employed on board of any steamboat, or vessel propelled in whole, or in any part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person, or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof, before any circuit court of the United States, shall be sentenced to confinement at hard labour for a period not more than ten years.' The act declares that the death must be caused directly and proximately by misconduct and inattention to their respective duties.

"The second proposition is that mere negligence or misconduct, or mere inattention, although it be sufficient to charge the officers in a civil suit for damages, does not subject the defendants to this indictment, and that an error in judgment, such as putting this boat on shore, or in the confusion that ensued on that day, when the fire was discovered, in ordering the passengers aft, does not constitute the misconduct, &c., as used in the 12th section. It must be such negligence, or such misconduct, or such inattention, as would, when committed, be likely, in itself, directly to cause the homicide; thus, in a case of bursting boilers; for the engineers to put extra weight on the safety valves, or for the captain to engage in a race with a rival boat, and in such race his boilers would collapse from the extra strain put upon them; and the act of omission must be such as that its performance or nonperformance would be a notice to the officer doing, or omitting to do, the act, that he was guilty of criminal dereliction of duty. Rex v. Allen, 7 Car. & P. 153; Rex v. Green, Id. 156.

"The third proposition is nearly involved in the second; that the negligence, misconduct, or inattention must not be merely omissive, but it must be such gross negligence as is akin to fraud, under the law of bailments, or, as Judge Betts expresses it, 'intentional negligence.' 3 East, P. C. 265.

"My fourth proposition is that, under this indictment, it is necessary to show that each of the defendants, in the performance or nonperformance of his respective duty, was guilty of such misconduct, neglect, or inattention as that thereby they all directly caused the injury complained of, and that their acts converged to, and had in view, some great personal injury to the passengers. Now, with regard to the inferior officers of that vessel, for instance, the captain's clerk, it is necessary, we suppose, under this indictment, that the prosecution must show that he was guilty of such misconduct in the performance of his duties, in selling and taking tickets, so that they directly converged to this fire: because, under this 12th section, the homicide must be occasioned by the misconduct, negligence, or inattention to his or their respective duties. So with the assistant pilot, and so with the other officers of the vessel.

"The next proposition is that, even if there be, as claimed by the prosecution, a general concert of action towards this race, yet, under this act, the officers of this vessel, not in command, and not in charge of the fire, cannot be held responsible for the fire. I am assuming the claim of the prosecution, admitting nothing; for although, as claimed by the prosecution, they might be guilty of misconduct in assenting to the race, yet their misconduct had reference to the race, and not to the fire; and, in the absence of any evidence, as in this case, on the part of the prosecution, to show that this fire was a direct consequence of that race, they must be acquitted. One word as to the opinion of Betts, District Judge, in the case of U. S. v. Farnham [supra]. I happen to know something about that case, although I was not one of the counsel who tried it. The boilers of that vessel exploded on the North river, at Malden landing, and it was shown, affirmatively, on the part of the prosecution, that there was a violation of the act of congress on the part of the officers of that vessel, in not causing the safety valve to be raised at each landing place; and the prosecution claimed, and direct affirmative testimony was given to show, that that collapsing of the boilers arose from the pressure of steam, which pressure was occasioned, in a great measure, by the negligent act of the officers of that vessel, in not doing that which they are enjoined to do by the act of congress. I state these facts with reference to this opinion, in order that the court may see that it is entirely a distinctive case from the present. There was evidence to show that the collapsing of these boilers arose from the want of a performance, by the officers of that vessel, of the duties enjoined upon them by the act of congress. This was a charge to the jury. It was not brought up in any authoritative way, so that counsel upon both sides could discuss this particular question of law. The case was entirely distinctive from the present case, and I do not think that any more weight should be attributed to it than to those English cases which I have cited, and which were determined upon in solemn consideration by a bench of judges. May it please the court, gentlemen of the jury, the duty has now devolved upon me, to open this case on the part of all the defendants charged in this indictment. I represent, in fact, only four of these defendants; but, my colleagues not wishing to trifle with your patience in having three openings of this case on the part of the defence, the duty devolves upon me of representing all the defendants. It is with the most profound emotion that I rise to address

you upon this occcasion: We have here upon trial six men of the utmost respectability, who are charged here, after all, for nothing more than negligence, by the prosecution; and they are charged with an offence of the gravest magnitude, the effect of which will be to consign them to what would be worse than death to them,—a living tomb. I feel, gentlemen, the responsibility of the task which I assumed here in opening this defence. I look upon the one side, and observe two prosecutors, who, by their acts in this case, have shown their determination to convict these men of the offence with which they are charged before you,—an offence of the gravest magnitude. But yet, when I look to my clients, I feel reassured by the innocence of their looks; and, thus imbued with this profound conviction of their innocence, I rise to address you upon this occasion. Now, what is the offence with which they are charged here before you? So far as regards the act of congress under which they are charged, or so far as regards the particular indictment under which they are brought to trial before you, there is no fact—no circumstance—which would give any notice to these gentlemen of what they are to meet in this case, nor had they any notice, in point of law, of what they were to rebut, until the evidence was given on the part of the prosecution. I say, therefore, that they are bound to consideration in that respect. Men charged with the consequences of negligence, how difficult it is to show exactly, step by step, every act which they did upon that day. Yet this act of congress is very comprehensive. It is very general in its provisions. The indictment is equally general. It does not allege any duty which they are called upon to perform, nor any breach of that duty, except in most general terms; and, so far as regards the act of congress and the indictments, the defendants knew nothing, until they were brought into court, of what they were to meet. Now, gentlemen, on the 28th of July, 1852, a most appalling catastrophe occurred upon the North river, by which a number of human beings were sent into eternity. So awful and dreadful was this catastrophe, that immediately the public papers took it up, and the public jumped to the conclusion that these men were necessarily guilty of misconduct or negligence. It was spread through the land, and, when this case was referred to, it was called 'The Henry Clay murder'; and whenever it was brought up in any court of justice, the 'Henry Clay murder' was a constant expression. But, gentlemen, very fortunately, fifteen months have elapsed since that occurrence, public excitement has, to a great degree, died away, and, very fortunately for these defendants, they now stand before twelve men who are unprejudiced, and who come to this cause with no bias in their minds.

"Gentlemen, it is a fortunate circumstance, and one which these defendants rejoice in, that they are enabled, for the first time, to spread forth their defence before the public, and to justify themselves in the eyes of the world. What must have been the feelings of these men during the last fifteen months? How dreadful, how agonizing, must have been their thoughts, when at every turn they were charged with the most heinous of offences? But truth will prevail at last, and I appear before you now to develope what we conceive to be the truth in this case, and to justify every one of these men in what they did. We deeply deplore the calamity that ensued, but we will show you, by evidence and by facts that will not lie, that they are innocent of any guilt in the premises. The prosecution here claims that on the 28th of July the Henry Clay started from Albany a little in advance of the Armenia, and that, shortly after, a race occurred between those two boats. They claim, further, that that race was the cause of a fire which ensued some eighty-five miles below, where these vessels were shown to be in close proximity to each other. No evidence has been introduced here by scientific men, by engineers, or by any one who, by reason of their vocation, ought to know,—no evidence has been introduced,—to show that the fire was legitimately the result of that alleged racing. Let us suppose there was racing on that day. Does it follow that the vessel was set on fire by that racing? If the boiler had burst upon that, it would be perfectly legitimate to infer that the boiler burst from the race. But it does not by any means follow that, because there was a race eighty-five miles above the scene of the catastrophe, of necessity, that fire originated from that race. Now, gentlemen, in order to rebut any possible conclusion or inference upon your minds by the evidence which the prosecution has here introduced, we will put upon the stand engineers of the greatest respectability, who will show, by their scientific testimony, that this fire could not have occurred from any racing; that this vessel might have been driven to its extremity of speed upon that day, yet the boilers of the vessel were so arranged, water bottomed, the fire surrounded on every part by water, that it was impossible, in the nature of things for the fire to originate from that racing.

"We will not put upon the stand a man brought from Yonkers, who knew nothing about steamboats, nor had been engaged in any capacity on board a steamboat, but we will put upon the stand scientific men, who know what they are talking about, and to whose evidence you are bound, gentlemen, to give the utmost reliance. Was there any racing on that day? I shall not go over the evidence of the prosecution, for it is out of place in the opening of a case for a counsel to recapitulate in minute terms the evidence introduced upon the other side. I will merely generally allude to it. You have all heard the evidence of these excited passengers (Mr. Minturn and so forth), from the commencement to the end, a great many of

whom differ in the details of this occurrence. One of them makes this collision one and a half miles from the western side of the river, another makes it almost on the western side of the river, and a third places it just reaching Kingston dock. A number make it four or five miles above that place, and one goes so far as to say eight or ten miles above Kingston dock. We will put upon the stand pilots of long experience on this river, who will develope to you the channel of that river, and who will show you how devious and winding that channel is from Hudson down, and that it runs from one side of the river, and goes again to the other, until it reaches Kingston; and what struck these excited passengers as being racing, from the fact that the Henry Clay came out to meet the Armenia, was nothing more than the Henry Clay pursuing the natural channel in her navigation. We will put upon the stand pilots who will explain to you about the collision of these two vessels; that it arose from the principle of suction, and that, when two vessels of a class, or nearly of a class, as the Armenia and Henry Clay, are in close proximity, the principle of suction is such as would bring them together; and that what the officers of the Henry Clay did upon that day was perfectly proper, under the circumstances of the case. They had excited passengers on board, crying out, 'What must we do?' The Armenia was in their way. We will put upon the stand passengers who will show that the Armenia came out and met the Clay, and that the Clay endeavoured to avoid the Armenia, and for that purpose, on one occasion, run inside of a sloop, not a great distance from the eastern shore, in order to avoid her (the Armenia). We will put upon the stand witnesses to show that on that day the Henry Clay was not making her ordinary speed; who will prove that she could make twenty-seven and twenty-eight revolutions of her wheel in a minute, and that her speed was from twenty-one to twenty-two miles an hour; and, further, that at different landing places upon the river she was behind her time. When you connect that fact, gentlemen, with the fact that at the time she was run ashore she was an hour or an hour and a quarter behind her time, can you arrive at the result that there was racing on that day? It is absurd to talk about it. There was no racing on that day, and, for fear that there should be racing, an agreement was entered into between the owners of the two vessels, before she went on her trip to Albany, that there should be no racing, and that the Armenia should keep behind the Clay on the up trip and down trip. Yet, gentlemen, for fifteen months has it been bruited throughout the land that these vessels were engaged in a deadly strife, that pitch and tar were used, and that the utmost means were resorted to by the officers of that vessel to beat the Armenia. Why, gentlemen, it was, as stated by one of my colleagues, a 'cripple's race.' One witness testifies that he got on board the boat at Hudson, which is thirty miles from Albany; that he started a little before seven; and that she was going fourteen miles an hour. One witness gets on at Poughkeepsie at 12 o'clock, which is seventy-two miles from Albany, and she was then going about fourteen and a half miles an hour, and, at the time she was run ashore, it was from three and a quarter to three and a half o'clock p. m., being eight hours from Albany, a distance of one hundred and thirty-five miles, which would make her rate of speed from fifteen to sixteen miles an hour. If they had been going twenty-one or twenty-two miles an hour, for eight hours, they might have reached Sandy Hook.

"Thirty years ago, for a steamboat to go eight or ten miles an hour was considered extraordinary speed; but such has been the force of American energy and go-ahead-itiveness, that from that time to the present, improvements upon improvements have been made in the speed of vessels, and it is well known that there are now in our harbours vessels that go from sixteen to twenty-three miles an hour. But the prosecution says that in order to race they made extraordinary fires; that these extraordinary fires were made seven times hotter, in order to keep up the steam; and the safety valve was bound down, in order to run this vessel at the extraordinary speed of sixteen miles an hour. For that purpose, they have introduced some passengers who stood, on a hot day, on the promenade deck, in the vicinity of the engine room and her steam drum, and they found it hotter than they ever found it before. What they meant by that, gentlemen, does not appear before you, as these witnesses are not shown to have had any experience on steamboats. It is absurd and ridiculous for the prosecution to send six men to the state prison upon evidence like that. We have to meet that evidence, however ridiculous and absurd the testimony is, but we shall be able to place upon the stand witnesses who will put a quietus upon it. We shall show, in reference to the construction of the Henry Clay, that this steam drum or chest on the promenade deck was uncovered, and the reason of its being uncovered was for greater security against fire. It was found by one of the owners of this vessel that another steamship belonging to him had taken fire from the steam drum being covered, and, consequently, on this boat a different regulation was made use of. It would very naturally happen that persons standing on the promenade deck, with the steam drum uncovered, on a hot day, and but little breeze above the highlands, would feel very warm.

"Now, as to the subject of extraordinary fires. When steamboats intend to race, they take on board an extra quantity of coal, they employ extra firemen, they break them up in-

to many watches, and do a great many things in order to carry out the race; but we will show you that on that day no more coal was taken on board than usual, and that there was no tar, pitch, or rosin on board. Lackawanna coal was used, and that of the best quality; and no extra hands were employed besides the regular men. We shall show that there was but a little breeze above the highlands, and, further, that from the commencement of the voyage until Catskill, the pressure of steam, as indicated by the gauge, was much less than she was allowed to carry by law. One word upon that subject. They have introduced upon this stand an aged man, who, from his testimony, has shown his liability to make mistakes, for the purpose of proving that the certificate of that vessel only allowed her to carry thirty pounds of steam; but we shall show to you, by a number of witnesses, although that certificate has been consumed by the flames, that that certificate allowed her to carry thirty-five pounds of steam; and, further, that it was perfectly safe for the boilers of that vessel to bear fifty pounds of steam, and that they were built with the intention of carrying seventy-five pounds; but for greater security, and at the request of the engineer himself, the certificate was narrowed down in one year from sixty pounds to thirty-five pounds, and the reason was, not as Curtis stated, because he saw some defect in the furnace, but because, although the boilers could bear sixty pounds with safety, yet it might not be with safety to the other parts of the machinery of that vessel, for in the spring of 1852 an alteration was made in her spring cylinder, and a larger one was put on board. We shall show that the fire room of that vessel was better constructed than that of any other vessel of her class on the North river, and that with her boilers below deck, she had greater precautions against fire than any other vessel of her class. We shall show that she had—which few vessels were furnished with at that time—a steam cock, for letting off the steam, in order to extinguish the flames. We shall show that these boilers were properly covered with the usual covering; that they were far back, where no fire could reach; that the fire broke out on the starboard side of the starboard boiler, immediately under the grating, on the side of the vessel where no fire could reach. We cannot account for this fire. We did not set the vessel on fire, because, gentlemen, it would have been too great a loss to the owners of this vessel. They will lose by this catastrophe $200,000. It is a deep and abiding calamity to them. This fire occurred either from accident or design. If it occurred from accident, it was no accident that happened through the acts of any one of the firemen or the officers of that vessel. We can imagine how it occurred, but we are not called upon to show how. We could refer to the testimony of Mr. Wilkes, who was so prophetic upon that day, but who has never been so prophetic since. We could show that a lying, drunken fireman was discharged from his employ, and a great many other facts; but it is enough for us to show that on that day it occurred through no negligence, misconduct, or omission upon our part.

"The prosecution claims that, if the pilot had put that vessel ashore in an angular sidelong position, the passengers could all have escaped. For fifteen months has this been bruited about in the public prints of the United States. Men knowing nothing of steamboats have discussed eloquently upon this subject. That is one of the most cruel things that has ever occurred in this case, and I say that the pilot, instead of being indicted, should have received from those passengers who now malign him a testimony for his good conduct in putting the vessel on shore. That pilot is one of the best men of his class in the state of New York. He has a rough exterior, but a kindly heart; for, although his pilot-house was in flames, and the boards crackling at his feet, and although he ran the risk of being crushed by the steam pipe and walking beam, yet, like a Roman sentinel, he stood at his post, and did not abandon it. We shall produce evidence to show that, had the vessel been run ashore in an angular or sidelong position, she would have shot off into the stream, and every soul on board would have perished. We shall show, by the most competent witnesses, that the vessel was put on shore in the most proper and scientific manner. We shall put upon the stand, if we deem it necessary, the pilot of the Hendrick Hudson, who was run into by a sloop, and, in attempting to run his vessel sideways on shore, came very near losing her and all the passengers he had on board.

"It has been claimed by the prosecution, that if the officers on board the vessel that day had performed their duty, and had they given directions to the passengers what to do, the lives of all would have been saved; and it has been harped upon, in the course of the trial, that there was an order given to the passengers to go aft. Now, supposing that it was so, it was a perfectly proper order, as will appear by our evidence. This vessel was going to the shore head on, as was right and proper. If it had been a rocky bottom at the place where it struck, the effect would have been that the vessel would have been broken in two. If this had happened, her boilers would have collapsed, and all those who were forward would have lost their lives. Another circumstance was, the bow of of that vessel could not, by any possibility, hold a quarter of the passengers upon it. Suppose, then, that the order had been given to rush forward. In a body of four hundred excited passengers, having the fear of death before their eyes, how many of them would have found a place of security there? Why, as it was, when the vessel reached the shore, there was not standing room even for those who were already there. You would, therefore, have enacted there the same scene that

takes place where a theater is burned, and the doors are shut, and no one can get out. The same fears, the same struggle to get out and get forward, would have ensued; and yet the prosecution, in their ignorance of what they were talking about, got up and introduced testimony in order to poison your minds. But we shall show that so intense was the excitement that, even before the vessel had reached the shore, between thirty and forty (and some say as many as fifty) persons leaped off into the river. In such a state of things, there was absolutely no use in trying to restrain them. Many of us, indeed, did try to do so. The officers tried it, but it was found impossible to succeed. The passengers were panic stricken, and, like every panic stricken crowd, rushed they knew not whither. It was, as described by one of the witnesses for the prosecution, a beehive. Now, gentlemen, what could the officers have done on that occasion? Mr. Hubbard, the pilot, was in the pilot house. He did not abandon his position. We shall show you that Mr. Collyer, Mr. Elmendorf, the engineer, and the barman, were all engaged in pouring water down the fire room, in order to check the fire. We will show that one of the officers was on the lower deck, and ordered all to go forward; that persons were sent to the crowd to tell them that when the boat reached the shore, they should go forward; and that, when the vessel did reach the shore, every officer in the vessel, as soon as they saw persons struggling in the water for their lives, sprang forward to save them Now, for the last fifteen months, the brunt of this offence has been charged on Mr. Collyer. Every one has united in condemning that gentleman, and yet no one exerted himself more than that same Mr. Collyer. As soon as the vessel reached the shore, he did not spend his time in hunting after his carpet-bag, or standing on the shore, crying 'Oh dear!' but he sprang to a fence, broke it down, rushed with it into the water, placing boards within the reach of all that it was possible to approach, and was the means of saving fifteen persons. He rescued so far as man could by his own unaided exertions. What did the engineer do? He was in the water likewise; but, for a part of the time, he was endeavouring to scuttle the vessel, thinking that by sinking her the fire could be put out, or the flames quenched, or that the vessel might be made to touch the bottom, and the lives of the passengers be thus to some extent rescued. Captain Tallman had on that day been confined to his berth from an attack of the cholera morbus, and unable to be on deck, except at intervals, for the purpose of breathing fresh air. Though he was taking calomel, a kind of medicine which rendered it exceedingly dangerous for him to go into the water, yet he sprang in, got hold of a boat, made two voyages in it, and was the means of taking to land some nine or ten ladies. No efforts made to save the passengers! Why, their efforts were superhuman. They did all that men possibly could; and when Capt. Tallman reached the shore, he had to be carried on board the Armenia, almost insensible, and was obliged to be immediately put to bed. What as to the pilot? He was in the water, and I could relate to you several touching incidents of his acts, when his kindly nature was aroused. Mr. Jessup was up to his neck in the water, doing all he could, though he was unable to swim. Mr. Elmendorf, too, was making exertions. There was not an officer on board that boat, whether engineer, assistant engineer, pilot, or assistant pilot, captain, or Mr. Collyer, that did not make more than human exertions in order to save the lives of those passengers. Why did not the prosecution ask Mr. Minturn whether anything was done to save the lives of the passengers? They did not; and, if they had, it would have let us understand what they were endeavouring to set up, and we could have elicited that on that day Mr. Collyer made most superhuman exertions.

"But it is said that the vessel was not seaworthy. On this subject I will make a few remarks. We will introduce evidence to show that the vessel was built by one of the most talented shipbuilders in the United States, Mr. Collyer; that she was built with a view to rapidity of motion in the water, and also with a view to safety. We will introduce evidence to show that the witness Edwards, who said he saw wood around the smoke chimney charred, must have lied, because there was no woodwork touching it. On the contrary, there was such an opening that there was at least a foot of space between the chimney and the wood, and, besides that, there was a protection of canvas on each side. I will show, too, that the vessel was built in every respect with an eye to security, and especially to safety from fire. We will show that she had twenty-four buckets for water on her hurricane deck, and two boats, capable of containing fifty passengers, and four chain buckets on her forward deck, that she had a steam cock to let off the steam, for the purpose of extinguishing any flame, steam being the best extinguisher known; that we had one of the most experienced masters on the river, who, however, on that day was unfortunately sick, and confined to his berth; that we had one of the best pilots on the river, one, also, of the best engineers,—the man whom Cornelius Vanderbilt would not go to sea without,—and one of the most scientific and careful pilots in the craft; that we also had a good second pilot, and a good clerk, who was selling tickets, and is now claimed by the prosecution to have set the vessel on fire. We shall prove that it was a steamboat of the most improved model, and we will show, on the part of the officers of the vessel, the best possible character for care, skill, and caution.

"Now, in conclusion, let me beg of you not to listen to the voice of prejudice. For fifteen months have these men been pursued with public odium, their characters maligned in every possible way, standing under this indictment; in another county actually charged with murder; fortunately, however, able to quash that; then charged with manslaughter, actually, under that indictment, in another county, pressed vigorously, too, by the prosecution for fifteen months. Nor were the public, notwithstanding, satisfied with that. During the whole period, the officers of the steamboat and the owners were pursued with public odium. The matter was spoken of as the steamboat so and so, commanded by Captain Tallman, and piloted by Edward Hubbard. During the entire period, they suffered intensely and agonizingly from the attacks upon their character, many having wives and children, most of them having those who were near and dear to them depending on them for their subsistence, and suffering the most intense anxiety for the result of this prosecution.

"I beg of you, gentlemen, in conclusion, that you will not listen to the voice of prejudice, but that you will calmly and dispassionately consider the testimony submitted to you. When we get through, we will scotch the snake; we will put an end to the malignity of the prosecution."

Evidence at great length was introduced by the defence to prove the facts contained in their opening.

The case was summed up by Mr. Jordan, for Collyer, and by Mr. Wheaton, for Germaine. Mr. McMahon, after their summing up, declined to speak. Mr. Wheaton then commenced summing up for the defence. As it had been remarked by the counsel who opened the case, it was one undoubtedly of very great importance in its results, both to the public, who feel a deep interest in it, as well as the defendants themselves. Most certainly it was so to the latter, for on this occasion the jury had before them men who had not heretofore been charged with crime; men who had, up to the time of the destruction of this boat,—he might say up to the present time,—held as high a position in society, and had had the confidence of the public perhaps as much as any of their fellow citizens that could be selected from this city. They were men accomplished in the employments in which they were individually engaged, and their employments were such as the public had the deepest interest in having responsible or skilful men employed to perform. They were arraigned upon a high charge, with being the criminal authors of the most extraordinary destruction of human life that has occurred for some time. If the crime which has been alleged against them shall have been proved, it will expose them to one of the highest punishments known to our laws; they being liable to be consigned to the state prison for a period even of ten years, their characters, of course, too, to be destroyed in the estimation of the public, and themselves to be cut off from society, and even be deprived of their liberty. The jury saw, therefore, that the case was of the utmost importance, but still they came into court, and presented their defence with the utmost assurance, and the utmost confidence that, after a fair examination of the evidence that had been produced on the part of the defendants, the jury would be satisfied, not only that they were not guilty of the crime which had been charged against them, but that there was not the semblance even of a crime made out against them. There was no doubt this was a case in which the public had felt a deep interest, arising, as it did, out of an almost unparalleled destruction of human life; and a feeling had got abroad that the whole case should be thoroughly investigated, and, beyond a question, it was peculiarly proper that a thorough search should be made, to ascertain, if possible, whether any one was the criminal cause of the destruction of human life in question. But they must act against individuals only upon evidence, and he did say that, if there had been no more evidence before the grand jury, on which to ground their presentment against the accused, he was amazed how it was possible that they could have come to the conclusion of there being prima facie evidence against the defendants. But they all knew how investigation before coroners' juries was conducted; that only one side of the case was presented for consideration, and that the defendants had no opportunity of cross-examining the witnesses, or of discussing the testimony, as to whether it was sufficient to ground an indictment upon it, or even presented a case that was proper for investigation.

He would next call the attention of the jury to the statute upon which the indictment was framed; see what it was the defendants were charged with, what testimony would be required for conviction, and then look at the evidence in the present case, to see whether really there was a single fact on which the prosecution could rely for the purpose of obtaining a verdict. This indictment was founded on the 12th section of the act of congress, entitled "An act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam"; and he called their attention particularly to the wording of the section. "And every person employed on such steamboat, propelled wholly or in part by steam, by which misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, shall be sentenced to confinement with hard labour, for a period of not more than ten years." The first thing to be found upon this was whether the persons charged with the offence

were employed on board such a boat, and had some distinct and particular business on it to perform. Then, what misconduct, negligence, or inattention to their respective duties had they been guilty of. Then, you must find a particular act, in each instance, against each of the defendants charged. In the case of an indictment arising out of a boiler explosion, Judge Betts laid down that, by the misconduct, negligence, or inattention in question, was undoubtedly meant the omission or commission of any act, the necessary or most probable result of which was the loss of human life; and, no matter what amount of misconduct the parties were guilty of, it must be shown, clearly and distinctly, that the misconduct led to the destruction of human life in question. Let them now apply that to the present case. The jury had heard about the inspector's certificate, but the inspector had not power to compel obedience. He could only give a recommendation as to the quantity of steam, and the parties might follow it or not, just as they chose. Great stress had been laid by the counsel for the prosecution upon the fact, which they strove to establish, that the limit was thirty pounds, but there had not been a particle of proof that at any time during the whole distance between Albany and Yonkers, she had carried an ounce of steam beyond thirty pounds; but, moreover, the weight of evidence was most decidedly in favour of the defendants' position, that the amount of steam fixed was thirty-five pounds. There was to this point the testimony of one of the firm of Radford & Co., and several other witnesses, to that effect. Even from one of their witnesses' testimony, it was as likely that it was thirty-five pounds, as thirty pounds.

Let them take the different officers, and see what they had been guilty of. What misconduct, for instance, had been proved against the engineer? Had he not managed, in the most skillful manner, so far as his part was concerned, up to the moment that the boat struck the land? He challenged the counsel for the prosecution, when he stood up, to point out any act of his which was criminal,—any omission to perform his special duty. If he could not show this to the jury in letters of living fire; if he could not show it to them so plain that the wayfaring man, though a fool, could see it; if he could not point it out to them so plainly that the human eye could not be deceived,—then, appealing to the true spirit of our law, that a man is not to be presumed to be guilty until his criminality is clearly and satisfactorily established, he should ask them with confidence for their verdict on the part of the defendants. Then, what had been proved with respect to the pilot? The prosecution had, indeed, only attempted to urge one fact against him, and that was that, crossing over to his landing place at Kingston, he had run his vessel in contact with the other, and that this was a culpable act on his part; he having at the time the control of the helm. Well, even supposing the jury had found that this had been a wrong act, though undoubtedly his vessel had been chased by the Armenia, either in the endeavour to make the landing first, or to get into the suction of the Henry Clay, this act could not be said to have any connection with the burning of the vessel. It was eighty-five miles from the place where the fire had been first discovered, and the contact had been appropriately described by one of the witnesses as a blow, and then separate. The Clay had not been injured at all; not even had her paint been rubbed. All the time of the accident, much excitement had prevailed, and every slander that human ingenuity could suggest had been thrown out against the accused. Indeed, to such an extent did the excitement go, in relation to the matter, that, looking back at it now, and considering it coolly, they could only regard it with astonishment. The catastrophe was undoubtedly an awful one, and the public, in their indignation, did not stop to examine whether this person or that person was guilty, but with one general voice exclaimed against all the officers: "They are guilty; punish them." A victim was demanded, and the voice was, "Let us pay back life with life;" but the laws were not now so vindicated. This had gone out with paganism. The time had been when, if the wind blew unpropitiously, the oracle was consulted, and the answer was that the storm should be appeased by the sacrifice of human life; but that time has passed. Punish the guilty by all means, but let them take care that it was the guilty they punished.

The defendants were charged with bearing on the waters a precious burden of men, women, and children; but let them punish the innocent, and what would the navigator say? That it made no difference, let him be as careful as he could, when the public indignation was raised, and a victim called for, it took the innocent, as well as the guilty. It was a happy thing in the administration of our laws, whenever there was a great deal of excitement prevailing against an individual charged with a crime, to put it off until the public mind had settled down under the excitement. In the present case they had waited until the excitement was in some measure subdued, and the consequence was that, instead of having the court crowded with spectators, there was only a small gathering, for the purpose of gratifying their curiosity, rather than from revenge He would now read from Starkie (page 478) a distinction in criminal cases, as contradistinguished from civil ones: "The distinction between mere proof and mere preponderance of evidence is very important. In all criminal cases it is essential to a verdict of condemnation that the guilt of the accused should be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient, unless it generates full belief of the fact, to the exclusion of every reasonable doubt." It was laid down in the 507th page that the conclusion to

be drawn should be fully established; that if the basis was unsound, the superstructure could not be sound; that the party upon whom the burden of proof rested was bound to prove every single circumstance which was essential to the conclusion, in the same manner, and to the same extent, as if the whole issue rested on the proof of such individual and single circumstance.

An attempt had been made in this case to prove that there had been racing, and inferences were sought to be drawn from this; but, before this could be done, they must first be convinced of the existence of the fact that there was racing. But not only was there no evidence as to this, but every fact and circumstance went to show that not even was there any attempt at it; that, even if the racing had been proved, it was not shown that the fire in question had resulted from it.

The evidence of Mr. Belknap went to show that the furnaces were surrounded with water, and that, consequently, it was utterly impossible to raise the heat to such an extent as to set fire to the woodwork by radiation.

(Counsel then proceeded to review the evidence produced for the defence, and concluded by saying): "With respect to Mr. Ridder, I shall say nothing, in consequence of the fact of their having disparaged his testimony, by showing that he told a very different story at the indignation meeting. From the appearance of the man, and the circumstances that transpired during the examination, I apprehend that he was a little desirous of making a speech there which would satisfy his hearers, and, in all human probability, he said things then that he was unwilling to corroborate under oath. He was making a speech to an excited meeting, that would not listen to any vindication of the officers, and I apprehend that he told stories then which he was not afterwards willing to corroborate under oath. I will therefore pass over his testimony.

"With respect to that of Mr. Van Buren, which there can be no reason to disbelieve, instead of there having been anything criminal on the part of the pilot of the Henry Clay, in what he did, it would appear that he did nothing more than what was right for a vessel under such circumstances to do, in order to obviate what the Armenia was endeavouring to accomplish by dragging herself along in the Henry Clay's suction, in trying to make the landing at Kingston before her.

"I appeal to you, in conclusion, whatever else may happen, whatever may be the strifes or disputes, only keep sacred the altar of justice. Let the sword be wielded only by the hands of a pure and honest jury, and then when it strikes, the public voice will say 'Amen,' and when it acquits 'Amen.' It reverberates through the halls of justice, and will reach the utmost corners of our Union; and, that it may continue to be venerated, I call upon you on this occasion, if you are not satisfied of the guilt of these men, to say so promptly. There is a great deal in promptness. Let not the public think that you have doubted, because of a long continuance in deliberation. The facts are few, though so much time has been spent in this voluminous evidence. When you come to winnow out the wheat from the chaff, how much is there of the wheat left? How much out of the whole mass of evidence is there that bears upon any of the questions upon which you are to satisfy yourselves, before you pass your verdict upon the case which is now before you? Has there been a culpable omission on the part of either of these defendants? If there has, can we say, clearly and distinctly, that that act which we have marked down as culpable was the cause of the destruction of this vessel, and, consequently, the cause of the destruction of human life? Gentlemen, ponder upon these things, if you have doubt. If you have no doubt, let me ask you, in favour of these men, whom you would be proud to honour, and whom the very kindness of your hearts would prompt you to favour, say to them promptly, and in that pure, energetic language, consisting of these words: 'In our opinion, you are not guilty of the charge brought against you.'"

Mr. Jordan, counsel for Mr. Collyer, then proceeded to address the jury on behalf of his client. "If," said he, "I had the power, gentlemen of the jury, of taking the vote of the jury, whether they would hear any more on the part of the defence, I should feel very well satisfied, in my own mind, that any remarks which I am about to make would be excluded. It appears to me that such is the nature of the case, and such the demonstrations of innocence of all the parties concerned in this indictment, that it would be unnecessary to spend time in any further discussion. I did not expect, until recently, for reasons personal to myself, and therefore not necessary to mention, to take part in this discussion; but, feeling a little more like a man to-day than I have for the last three or four days, I shall endeavour to show you, beyond all doubt, that my client, Mr. Collyer, the only person with whose defence I am particularly charged, is entirely beyond the scope and pale of this indictment, and that to punish him, under the act of congress, is entirely out of the question; and, if I undertake to submit my views upon the general subject, which has been ably and eloquently discussed, they will be very general indeed. My object is, more particularly, to perform a dissecting process upon some of the testimony. I intend to show that all the witnesses who have sworn to facts relative to Collyer have so exhibited themselves before you as to entitle them to no credit or consideration; not that I intend to charge them with untruthfulness, but that they were so excited that they were unable to discriminate as to the facts which they swore to. It is one of the noblest efforts of the human mind to endeavour to raise it-

self above prejudice and error, and to arrive at truth; because truth is always the foundation of justice, and falsehood and fiction always the basis of every error. Courts of justice are instituted for the purpose of arriving at the truth. They were framed for that purpose. Facts are frequently coloured by men's feelings and prejudices, but when we come into a court of justice, where the balance is held equal and even, and where the judge sits with that equipoise which is necessary to the calm investigation of truth, it is there alone that we can arrive at the truth of the subject in controversy. It is that which distinguishes courts of justice from mobs. It is that which distinguishes courts of justice from those indignation meetings we have heard of; not that I feel disposed to cast any blame upon those persons who assembled at the Astor House for the purpose of passing resolutions upon this subject, because I know, under the impulse of their feelings, it was the only vent their human nature had to let off, so that, under the pressure and agony of their feelings, something might go forth to the community; and, though it was rather of a vindictive character, and the circumstances under which they were assembled unfavourable to the investigation of truth, yet it was a relief to them, which I have no disposition to find fault with.

"I shall proceed, first, to consider whether Mr. Collyer is implicated in the indictment, admitting that all the rest are to blame; and, secondly, I shall proceed to make a few general observations, for the purpose of gleaning a few facts. I will demonstrate to you that Collyer is not implicated; and, further, notwithstanding the efforts of the able prosecutor, which will be continued up to the death, I will show that all these defendants in this case are equally innocent with Mr. Collyer, who had nothing to do with the matter, and is not implicated in this transaction at all. You will recollect that this is an indictment under the statute of an act of congress, but it is not an indictment at common law, for no such an indictment at common law would lie. It is therefore under the act of congress alone that these parties can be indicted and punished, and they must be brought within the terms of that act of congress, one and all of them, in order to find a verdict against them. That act of congress, being a penal statute, must be strictly construed, and they must be strictly brought within it before they can be punished according to the penalties inflicted by the twelfth section. I will once more refer to the twelfth section of the act of congress, not generally, but for a particular purpose, which I have now in view: 'Every captain, engineer, pilot, or other person employed,' (it is the word 'employed' which I wish to call your attention to) 'and who shall, by any misconduct, negligence, or inattention to his or their respective duties, destroy the life of any person on board, shall be guilty of manslaughter.' Now, the first question is, was Mr. Collyer employed on board this vessel? I beg to call your attention strictly to the section, and to impress upon you that no man can be convicted unless he comes within the meaning of the word 'employ,' and I shall ask his honour—which, I think, will be his obvious duty—to charge the jury that to convict Mr. Collyer, or any other person here, it must appear that he was employed on board the vessel at the time of the happening of this accident. Mr. Collyer was one of the owners; but the act of congress has nothing to do with owners of a vessel, and it has purposely omitted them. It would be unjust and improper to make the owners of a vessel responsible, in a criminal prosecution, for the negligence, misconduct, or inattention of those engaged in the navigation of the vessel. But if the owner goes on board, and takes charge of the vessel,—if any third person goes on board and takes charge,—if any man should substitute himself in the place of the captain, and, in case of illness, or from some other cause, assume the command of the vessel, he would, I am willing to admit, be within the true interpretation of the act of congress. The question, then, is, was Mr. Collyer in that situation? Mr. Collyer was a shipbuilder in the city of New York, carrying on such business here, and he constructed this boat as he had many others. He was the owner of five-eighths of her, and I shall show that he had performed his duty as owner by providing one of the best vessels that was ever built in this port, or that ever ran upon the Hudson river, and, so far as he was concerned, together with his co-owners, he provided one of the best set of men who were ever employed upon this river; all young, active, intelligent, vigilant, men. It has been satisfactorily proved that this vessel was fully equipped with boats and buckets, and that the hull of the boat was one of the most substantial kind; and one of the witnesses, a pilot, tells you that her running up on to the beach in the manner she did, and remaining unbroken, was an evidence of the substantial qualities of the frame of that vessel."

The learned counsel then proceeded at great length to dissect the evidence of Minturn, Gilson, Gourley, Connor, Hubbard, and Shelmore. He contended that, even supposing their testimony to be worthy of credence, Mr. Collyer did not lie under the imputation sought to be sustained by the prosecution, of having in any manner engaged in the control or management of the Henry Clay on the day of the calamity, and that, therefore, the twelfth section of the act of congress did not, in the slightest degree, apply to his case. He commented with particular severity on the contradictions in Mr. Gilson's evidence. The facts which Gilson attributed to have taken place in regard to

Mr. Collyer, at the time of the collision, were all facts which took place with regard to Mr. Ridder, and that this appeared plain and conclusive, there could be no doubt; for, when he (Mr. Jordan) pointed to Mr. Ridder, and asked Gilson if that gentleman was Mr. Collyer, Gilson said it was he. From this fact alone there could be no doubt but that Gilson did not know what he was talking about. Gilson might be an honest man, but he was a very unfortunate one. He (Gilson) was a man who looked across a gangway ten feet wide, and through an engine twenty feet wide, and saw forty marked on the gauge-rod of the engine, which had no number at all upon it. Gilson was determined to leave an impression upon the mind of the jury that the vessel was carrying forty pounds of steam, and the reason was because the carrying of this forty pounds of steam was a violation of duty, and beyond the amount allowed by the certificate. It was a maxim that a lie would stick to a man as well as the truth, but that fortunately it did not prevail in a court of justice. This was the description of evidence, in infinitesimal doses, by which the prosecution sought to prove that Mr. Collyer was managing the boat on July 28th; but he (Mr. Jordan) would as soon think of fattening an ass on the east wind as endeavour to fix Collyer as controlling the action of the boat on the day of the accident by such desultory and unsatisfactory testimony. At this point of the learned counsel's speech, the court adjourned until ten o'clock the next day.

Mr. Jordan resumed his address to the jury this morning. The counsel for the defense had been aware, from the commencement, that they would have little occasion to make use of Mr. Ridder's testimony, that it was a plain, simple, continuous narrative of the whole journey from Albany to the fatal spot, unembellished, unadorned, uncontradicted, but in fact corroborated by everything in the case. All he said had in fact been proved by other witnesses, so that they had little occasion to make use of his testimony. He (Mr. Jordan) should use it but little, although his learned associate had thought proper to abandon anything like a justification of the conduct and position of Mr. Ridder, and to give him up a prey to the district attorney, to be pounced upon as a lamb is pounced on by a vulture. He (Mr. Jordan) would now say a few words in his defence, not because his clients needed Mr. Ridder's evidence, but because he thought it unjust that any person should be so treated, who, by process of law, had been compelled, whether he willed or not, to come into court and give his evidence. He would show that the assistant editor of the New York Daily Times had not contradicted Mr. Ridder in any essential particular; but, first, he would express his regret that the counsel for the defence had not pertinaciously objected to the questions put by the district attorney, and doubtless, the decision of his honour would have been to rule against it. In answer to the questions of Mr. Hall, Mr. Ridder said: "I cast no blame upon the officers. I said nothing about their firing up to a dangerous extent." Now let them see what it was that the assistant editor of the Times swore it was Mr. Ridder did say. He expressed an opinion as to the cause of the fire, attributing it to an unusual firing. "They made a hotter fire than was usual or necessary." Thus the jury would see that, while the witness said: "I cast no blame upon the officers. I said nothing about their firing up to a dangerous extent," all the assistant editor maintained was that Mr. Ridder "expressed an opinion" that there had been too much fire. He did not maintain that Mr. Ridder distinctly said so and so. Mr. Ridder could no more state the cause of conflagration than any one else could. No one could do more than surmise whether it arose from a match being thrown down there, or a cigar, or whether it was that some fiend in human shape had thrown down camphine, which, running along the heated timber, would account for the flames firing up so suddenly,—no one could do more than surmise,—or whether by the engineer opening the doors of the furnace to damp the fire, instead of pulling the safety-valve. Whether these things were so, Mr. Ridder and they all alike were in the dark, and could only surmise. Besides the assistant editor did not swear that Mr. Ridder said the firing up, if he ever did speak of such a thing, had been done by the order or with the knowledge or consent of the officers. Where then, after all, were the mighty contradictions? Mr. Hall next asked the witness: "Did you say anything about their continuing to race after remonstrance?" His reply was, "I did not." Now mark the words of the assistant editor: "He said that the officers were remonstrated with after racing." Mr. Hall's question, if it had been answered in the affirmative, would have been: "I said there was racing after they had been remonstrated with." The assistant editor only said: "Mr. Ridder said they had been remonstrated with after racing." Neither he, nor any one else, denied that there was racing at one particular point, but it had no connection with the catastrophe which caused the loss of life. The next question of Mr. Hall was, "Did you not say there were no buckets there to extinguish the flames?" The reply was, "No, sir; I did not say exactly that. I said he used all the buckets there were." That answer might certainly imply that there were buckets, and doubtless they were used until it was seen that they were of no use; and, if there had been ten thousand buckets there, they would not have been of any use, for the steamboat went off almost like a charge of gunpowder.

So much for Mr. Ridder,—a man who cer-

tainly had told a plain, consistent, orderly, narrative of the transactions of that lamentable day; so far as he (Mr. Jordan) could discover, without passion or prejudice in heart, he being, to a great extent, one of the sufferers, although he had not lost his daughter. Doubtless, however, he had not considered it just that those men should, without cause, be so universally condemned, particularly when he saw the meeting so gravely passing a resolution, sending forth to the world a statement that they had not been contented with the usual firing up on board, but had burned tar and resin, and pitch, and other combustible material. It was for opposing that resolution, too, that the engineer, who, having been down to the boilers after the catastrophe, and seen the marks of the quenched anthracite coal, knew that there was no other fuel used, was threatened to be thrown out of an upper story window. He (Mr. Jordan) did not know who led that indignation meeting, but he had been informed that it was a particularly precious individual for such occasions, though he would not mention his name; and, doubtless, if a resolution had been proposed which alleged that the officers had got the devil from hell chained down below, vomiting up fire and brimstone for the burning of the steamboat, it would have been passed; and, if it had, it would have been just as reasonable as the infernal one that the murderers—for such they would have been—of the Henry Clay had been firing up with tar and resin, and God knows what. He then proceeded to comment upon the evidence for the prosecution, saying, in the course of his allusions to the different witnesses, that he did not like the cut of Mr. Minturn's jib. That gentleman had attempted to impress upon the jury that a passenger was refused to be landed at Bristol, because of the boat being in such a hurry; whereas, on cross-examination, it turned out that he was nothing more than a drunken loafer, who was making a disturbance on board, and had made no demand at all to be landed until after the boat had passed the place. Dr. Wells he designated as a "do-no-harm do-no-good sort of a man;" and declared that he (Mr. Jordan) could, from personal trial, contradict his statement about the particles of anthracite coal as large as peanuts. He had tried with a newspaper to brush away such pieces, and could easily remove them in that way; "nay, I could do so with a cambric handkerchief." But he could not remove flat pieces of coal, such as might be naturally expected to pass from any smoke-pipe, and which were doubtless the kind that were blown over the decks and the awning of the Clay on the day in question. He held out to the jury, as a guiding polar star in this case, the consideration that they must positively find that the deaths in question were occasioned by the act complained of, though it might not be necessary that the act complained of should have been perpetrated just at the time of death; still the last must be clearly traced to it,—as clearly as ever the effect was traced to the cause. He maintained at some length that this could not be done in the present case, even according to the evidence for the prosecution. He concluded by expressing a hope that the magnanimity of the district attorney's nature would, despite his employment by the government, compel him not to do any injustice, even though he possessed the power, to those men who would stand that day in peril, if it was not that they relied upon the intelligence of the jury.

Mr. McMahon, after the able and eloquent addresses of his associates, declined addressing the jury.

Mr. J. Prescott Hall, for the United States, closed summing up, and said:

"May it please the court, gentlemen of the jury: This is now the fourteenth day that you have lent your attention patiently to the investigation of the facts in this case. I will not abuse that patience by any protracted examination of the testimony, but will endeavour to state, as briefly and clearly as I can, the law which is applicable to the case which is now before the court and the jury, and the evidence which the prosecution has adduced to support it. In endeavouring to discharge my duty, gentlemen, I shall make no effort to go beyond the proper limits, although I shall, on this occasion, discharge it without pain, because I, as a man, think that gross misconduct exhibited itself on the part of the officers of the Henry Clay on the fatal 28th of July, 1852. I will not endeavour, by any effort, to strain the testimony, nor shall I be willing to fall one inch short of it, for I conceive that by my duty to the government, as prosecuting officer, I am required, without fear and without favour, and without regard to the particular individuals who are charged, that I should discharge that duty in the best manner I am capable of. By the constitution of the United States, the commerce of the whole country is placed under the control of congress. The supreme court of the United States have, on many occasions, decided that the word "commerce," as used in the constitution, included navigation also, and that therefore the whole navigation of the United States, as well as the whole commerce of the United States, are under the jurisdiction and supervision of the people's representatives in congress assembled. At the time the constitution went into effect, and for many years thereafter, the mode of propulsion adopted on the rivers of the United States was such that the intervention of the powers of the law was not called for to check any abuses, or to guard people in their rights; but, after the discovery of that mighty and potent engine, which was thereafter to be used on all the navigable waters of this country, and perhaps of the globe, after these potent energies had been brought out, and applied to the propul-

sion of steam vessels, it was discovered by experience that great want of care had been exhibited on so many occasions that the people of the United States were not safe, in the prosecution of their ordinary business upon the water courses of the United States, unless they were in some degree protected from the acts of those who were their transporting agents. And so serious had this whole matter become, that congress, in 1838, passed a law upon this subject, which is significant in its very title. It is entitled 'An act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam.' It proceeds, then, to give a set of rules, which are to govern the conduct of those who are charged with guarding the lives of passengers on board of the vessels which they control, and which rules they have no right to disobey or disregard. And, in order that the utmost vigilance should be exerted, it is provided, after the passing of this act, that no vessel shall be permitted to navigate the waters of the United States, unless they take out a license, under the conditions which are imposed by the statute; that, in the first instance, the district judge should appoint competent persons to inspect the boilers and all hulls of the steam vessels; that the hulls of the steam vessels shall be inspected once in twelve months, and that the boilers shall be inspected once in six months; and to disregard this is visited with the severe penalty of the law. He then referred to that section of the act which made it the duty of the officers of vessels to let off steam at every landing place, or whenever the headway of the vessel should be stopped; and, in support of this, he cited Judge Betts in the case of The Reindeer [supra], to show that it was imperative, and that the captain had no discretion. But congress, not deeming the act stringent enough, passed the following statute: 'Section 12. And be it further enacted, that every captain, engineer, pilot, or other person, employed on board any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his, or their respective duties, the life or lives, of any person, or persons on board said vessel, may be destroyed, shall be deemed guilty of manslaughter; and, upon conviction thereof, before any circuit court in the United States, shall be sentenced to confinement at hard labor, for a period not more than ten years.' If this statute is to be applied to the poor fireman or deckhand, much more is it to be applied, to masters and owners on board the vessel, who take part in the navigation, and to the pilot in the wheelhouse, and the engineer in the engine room. Upon these persons rests the responsibility, and, respectable as they are, intelligent as they are, there is less excuse for their neglect of any duties which the law casts upon them, to have been the cause of this terrible calamity. What, because Mr. Collyer's shipyard is to be shut up, is he to be held irresponsible for such acts?

"The whole theory of this case, rests upon the charge of mismanagement and negligence. I will state the theory that has been adopted by the prosecution in this matter. We suppose that this terrible accident occurred in consequence of the misconduct of those having charge of this vessel on the 28th of July.

"It is in evidence here that the steamboat Reindeer, which used to be the Racehorse, upon the North river, with the Henry Clay, had become disabled, and it was necessary to have some boat take her place. The Armenia, a boat of about equal speed with the Henry Clay, was selected for that purpose. She was to sail on the 27th of July, bound from New York to Albany; but, with a very cunning regard to their own interests, the owners of the Henry Clay had made a secret contract with those who were to navigate the Armenia that the Armenia, was to lie behind the Henry Clay, and that the Henry Clay was to be permitted to go to all the docks ahead of the Armenia, take in the passengers that first offered themselves, carry them to Albany, and deliver them there, and that on the return down the same course of conduct should be pursued. It is in evidence that this arrangement became displeasing to the charterers of the vessel. They therefore took Capt. Smith from his command, and gave the vessel in charge of Capt. Polhemus, and placed another individual on board to direct him in her management. After the vessel had departed from Albany, it was supposed, on the part of the officers of the Henry Clay, that this same arrangement was to be persisted in, and there was no reason to suppose that this arrangement would not be kept up until after the Henry Clay came to Hudson. When she came to Hudson, it was then discovered that the Armenia, in apparent violation of the arrangement which had been made between these vessels, instead of following the Henry Clay to Hudson, had gone down the west passage, avoiding the landing at Hudson, and made directly for Catskill. The instant the Henry Clay discovered this, it became the subject of conversation between the passengers, and it was so admitted that, when Mr. Collyer was asked whether the Armenia would pass the Henry Clay, the answer given by Collyer was that he thought she would not."

The learned counsel here entered upon a critical examination of the testimony introduced, and contended that the prosecution had clearly proved that the vessels were engaged in a fearful contest of speed, the results of which were the destruction of the Henry Clay, and the fearful loss of life. Such being the case, he called upon the jury to pronounce a verdict of guilty against the defendants, particularly Collyer and Tallman, who were in a position of life which

should have prevented them from doing that which they knew was contrary to law. The question which the jury had to determine was one of the greatest importance to the community, who were looking with intense anxiety to the result of the present trial. Mr. Hall wished to ask whether there was any validity in an act of congress, or whether it was null and void. If the former proposition was correct, the defendants must be convicted; if the latter held good, they would be acquitted.

INGERSOLL, District Judge (charging jury). There is a prospect that we shall now bring this protracted trial soon to a close. It has occupied a very considerable portion of your attention, but not, in my judgment, more than was due to the transaction which had to be investigated. I am glad to be able to say, gentlemen, that you have thus far exhibited that patience, and given that attention, which the case requires. It has been intimated, during the progress of the trial, that injustice had been done to these individuals under trial from the fact that they were not enabled to have separate trials, for the reason that, if they had had separate trials, the testimony of those not on trial might have been used in defence of the others who should be tried. In the examination of this question, when the motion was made for separate trials, I gave my reason why separate trials should not be granted, and I will again state, in this place, gentlemen, that, as they have been indicted by the grand jury jointly, if they had been permitted to have had separate trials, the one who should have been tried first could not have called upon the others to testify in his defence. That is the law. It has been so decided, upon solemn argument by the supreme court of the United States, and to that decision we must all bow. I therefore say, gentlemen, that if they had been permitted to have had separate trials, the one who should have been first tried would not, in law, be permitted to call upon the others to testify in his defence. In the year 1838 the congress of the United States, in view of the many startling disasters which had happened upon the waters of the United States to vessels propelled by steam, by which great loss of life had been occasioned, passed a law, the object of which was, as appears by its title, to protect the lives of passengers on board vessels of that description. That law, among other things, provides: "That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel, propelled in whole, or in part by steam, by whose misconduct, negligence, or inattention to his, or their respective duties, the life or lives of any person or persons on board said vessel, may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any circuit court in the United States, shall be sentenced to confinement at hard labour, for a period not more than ten years." The indictment which you have to pass upon is founded upon this violation of this act of congress. It charges that Thomas Collyer, John F. Tallman, John Germaine, Edward Hubbard, James L. Jessup, and James Elmendorf, the parties now on trial, in July, 1852, were employed on board the Henry Clay, a vessel propelled by steam, and navigating the waters of the Southern district of New York; and that, while they were thus employed, the lives of several passengers on board the vessel were destroyed by their misconduct, negligence, and inattention to their respective duties. To the charges set forth in the indictment, the individuals named therein, and against whom the charges were made, have severally pleaded that they were not guilty.

The question, then, at issue, and upon which you, upon your oaths, have to determine, is whether they are guilty, as charged in the indictment; and, to enable you to come to a correct result, it is necessary that your attention should be directed to certain inquiries which are involved in the question at issue. These inquiries are: First. Whether the lives of the persons named in the indictment, or the lives of any of them, have been destroyed? Secondly. Whether they have been destroyed by the misconduct, negligence, or inattention of any one? Thirdly. Whether the individuals against whom the charges in the indictment are made were employed on board the Henry Clay at the time such lives were destroyed. And, fourthly, if they were thus employed, whether such lives were destroyed by his or their misconduct, negligence, or inattention to his, or their respective duties? And in considering the case now to be submitted to you for your determination, it is important that you may come to a just conclusion, to bear constantly in mind certain rules of law, which should govern trials in all cases involving in their consequences a punishment that is infamous; which should govern them in all criminal investigations, and particularly in those investigations which are of an aggravated character. These rules are, that every one accused of crime, whether the offence charged be one of commission or omission, whether it be criminal or culpable neglect, shall be presumed to be innocent until the contrary appears. He should be considered as innocent until his guilt is made to appear manifest by evidence given in court; and, when upon evidence given in court there is in the minds of the jury a reasonable doubt of the guilt of the accused, no matter what the charges may be, he who is accused should have the benefit of that doubt. By the law which governs this court, and which also governs all well-regulated courts, he who is in an indictment charged with crime is not called upon to establish his innocence. That duty is not imposed upon him. His innocence is considered to be established until, by convincing proof brought forward in court, that presumed innocence is destroyed. It is the duty of the government to convince the jury, beyond a reasonable doubt,

of the guilt of him who may be indicted, and not the duty of the accused to convince them of his innocence; and, if the jury are not convinced beyond a reasonable doubt of the guilt, then it is the duty of the jury to acquit. The disaster which gives rise to this prosecution, at the time at which it occurred, deeply excited the feelings of the community, and the public mind, for a considerable period, was in such a state, that, if the trial of those implicated—or, I should rather say, of those supposed to be implicated—had taken place soon after it happened, there would have been some danger, and, I may add, there would have been great danger, that that calm and dispassionate investigation might not have been given to the investigation of the truth which is due to all subjects of inquiry in a judicial tribunal, and particularly to a subject demanding so much impartial investigation as the one now to be submitted to your determination. But that excitement has now passed away, and you, as impartial jurors, sworn to a faithful discharge of your duty, have been selected to pass between the government and the accused, and I have no doubt that the duty which devolves upon you will be faithfully performed.

I have told you what duty devolved upon the government before they could claim a conviction. It is also incumbent upon me to state what is not required of them, and what is no part of their duty, in conducting the prosecution. It is not required of them to prove willful or intentional mismanagement or misconduct on the part of the accused. In a prosecution of this kind, it is not the intent which constitutes the essence of the offense, but it is an improper act, although unaccompanied with any evil intent or negligence, in the performance of a proper act, or inattention to any duty imposed upon any captain, engineer, pilot, or other person employed on board any steamboat or vessel, propelled in whole or in part by steam, when by such improper act, or negligence in the performance of a proper act, or inattention to any duty imposed upon such captain, engineer, pilot, or other person, the life of any person on board such vessel is destroyed. But there must be some improper act inconsistent with the faithful performance of duty, or negligence in the performance of a proper act, or inattention to some duty imposed upon such person, and the death of some person on board a vessel in consequence thereof, before there can be a conviction. There must be not only such improper act, or negligence, or inattention, but there must also be a death of some person on board, as a consequence of such improper act, negligence, or inattention; and, if these are proved, it is unnecessary to inquire whether or not the accused had any wrong intention. But, although such improper acts and negligence, inattention, and death are proved, yet, if such death was not in consequence of such improper acts, or negligence, or inattention, there can be no conviction. To make myself understood, gentlemen, the law of congress makes it necessary, or rather makes it the duty of every captain, at every landing place, to blow off steam. If he does not blow off steam, that is misconduct or negligence, or inattention to his duty. But if, subsequently to that time, a death occurs on board of a boat, and it is not attributable to that cause, although there may have been misconduct, negligence, or inattention, there can be no conviction, for the death is not connected with the act complained of, and which is said to be misconduct or negligence. And if there were death, and such a death were in consequence of some misconduct, negligence, or inattention by some one employed on the vessel, if these defendants are not chargeable with such misconduct, negligence, or inattention, and if there is not proved to your satisfaction that they have been guilty in this respect, there can be no conviction. In other words, if there has been a death, and such death has been occasioned by the misconduct or negligence of some other person other than those, if those persons have not been guilty of negligence or such misconduct or negligence as caused that death, or contributed to it, then they cannot be convicted.

Those who conduct this prosecution do not claim that these defendants, or either of them, intended the death of any one on board the vessel. There is no necessity that they should. They are not accused of any willful design to take the life of any one. The indictment is not pressed upon that ground, but, as I have before intimated, it is pressed on the ground that the lives which have been lost were lost by the misconduct, negligence, or inattention of the defendants. In an action in favour of any passenger on board the Henry Clay, at the time of the disaster, against the owners or captain of the boat, for any injury to his person, or to his property, the mere fact of such injury, caused by the burning of the boat, would be sufficient, if there was nothing else in the case, for the jury to say, and they would be bound to say, that the boat was destroyed by negligence, so as to make the party defendant liable for the damage claimed in consequence of such burning. In such a case, from the fact of burning, negligence and misconduct are presumed, and the defendants would be liable for the negligence, unless they proved affirmatively, that the fire was not caused by negligence or misconduct; for from this fact the law takes it for granted that the defendants are guilty, and, to prevent a verdict against them, they must prove their innocence. This, gentlemen, is the rule in a civil case, where a party brings a suit for the recovery of damages; but this is not the rule in a criminal case, such as you are now about to determine. In a criminal case there is no such presumption against the defendants which they must remove, but all the legal presumptions are in their favour, until the contrary is proved; and the death claimed to be in

consequence of any misconduct or negligence must be proved to be, before a conviction be had, the direct consequence of the mismanagement and negligence complained of, and if it is not the direct consequence of the misconduct or negligence complained of, a conviction cannot be had. As in the case cited by the counsel from the books, where an individual places a loaded gun in the corner of the room and another person not knowing that it was loaded, takes it up and innocently snaps it, by which it is discharged, and causes the death of some one, there would be a death, and there would be negligence on the part of him who placed the loaded gun in the corner of the room. If there had not been that negligence, there would not have been a loss of life, but that negligence would not be the immediate cause of the death. The negligence did not directly produce the death. It could not produce it without the act of some other person, and, as the death was not intended by the person who was guilty of the negligence in so placing the loaded gun, and as the death was not the immediate consequence of such negligence, and would not have taken place but for the act of another person, the party guilty of such negligence would not be responsible for that death. But if the negligence or improper act complained of be the sole cause of the death, if it cause or produce the burning of the vessel, and such burning of the vessel cause the loss of life, then such loss of life is the direct consequence of such negligence or improper conduct, and the party guilty of the same is liable to the punishment imposed by the act of congress, upon which this prosecution is founded.

An error of judgment merely, gentlemen, is, however, not sufficient to fix such misconduct or negligence upon the person against whom such error of judgment is proved. The law of congress did not intend to punish a mere error in judgment. What was meant by misconduct, negligence, and inattention, in the law of congress, upon which this prosecution is founded, is well expressed by the learned judge, in his charge to the jury, in the case of U. S. v. Farnham [Case No. 15,071]. I, in substance, use his language. "By misconduct," he says, "negligence, or inattention in the management of steamboats, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it is slight or serious, if the proof satisfy you that the setting fire to the boat was the necessary or most probable cause of it." Bearing these rules of law in mind, you will turn your attention to the issue of the question which must be determined by you, in order that a correct decision may be had of the issue which has been framed between the government and the parties now on trial.

The first question is, were the lives of any persons on board the Henry Clay destroyed by the disaster which happened to her on a trip from Albany to New York in 1852? It is admitted, and the proof is full, that there were a number of those who were passengers on board the boat perished in consequence of the sad disaster, the details of which have been repeated during the progress of the trial. Some were destroyed by the fire, and some, attempting to escape from this devouring element, perished in the water.

The next question is, were these defendants persons employed on board the boat, having duties to perform connected with her management and navigation? For, whatever negligence or mismanagement there may have been, and however much the death of the persons destroyed may be connected with any negligence or misconduct, which may be claimed to be chargeable to the defendants, or to any one else, these defendants are not responsible for such misconduct or negligence, unless they were persons employed on board the boat, having duties to perform connected with the management and navigation of the boat. It is admitted that John F. Tallman was the captain of the boat. The captain has generally the command of the boat. All on board performing duties are under the authority of the captain, whoever he may be, and they are subject to his orders. It is admitted that James L. Jessup was the captain's clerk, and, among his duty or duties, was the collecting of fare and giving tickets, and of acting as the assistant to the captain, under him. John Germaine was the engineer of the boat. His duty was confined to attending to the engine, regulating and directing it, and having control of the fireman. Edward Hubbard was the pilot of the boat, and his duty was to direct the course of the boat. James Elmendorf was the assistant pilot, and his duty was to assist the pilot, to act under him, and in his absence to take his place. But it is claimed that Mr. Collyer, a part owner of the boat, and on board of her at the time of the disaster, was not a person on board of her having duties to perform connected with her management and navigation, and, if he was not, he cannot, under any circumstances, be liable to this prosecution. It is claimed, on the part of the government, that he was such person, who at the time of the disaster was on board, having such duties to perform, and that he was, for the time being, the captain of the boat. It is unnecessary, by the law upon which this prosecution is founded, to make a person come within its meaning, that he should be employed under pay to perform any particular duty; but, if any person acts as captain for the voyage, or for any particular time is engaged or acting as captain, or for any cause takes the place of the captain, and for the time being acts as such, he is, within the meaning of the law, the captain of the boat, upon whom is imposed the duties of captain.

The question, then, is, did Mr. Collyer, on the trip from Albany, on the 28th of July, 1852, act for the time being as captain of the boat? Did he take the place of the regular captain? If he did, he was employed, within the meaning of the law, as captain on board the boat. Proof that certain things were done upon his advice, or upon his suggestion merely, would not be sufficient to establish the fact that he was for the time being acting as captain. Nor is it sufficient that he should have passed an opinion, whether asked or unasked, as to the safety or risk of a particular movement of the boat, or of the danger of the mode by which the boat was managed. He must, at least, assume to exercise the control and the authority of the captain to take the command, and no opinion which he may pass, or suggestion that he may make, unless he has a duty to perform on board the boat, will make him an officer, or a person on board of the boat having duties to perform, within the meaning of this act of congress. The government say that they have proved, upon the trip in question, that Collyer was captain of the boat, and they rely upon certain witnesses whom they have called. The principal witnesses are Minturn, Gilson, Gourley, Connor, Hubbard, and a witness from Philadelphia, whose name I do not remember. Most of these witnesses do not speak of any order which Collyer gave. Mr. Minturn speaks of an opinion which he (Collyer) gave as to the danger of the boat; and others speak of suggestions which he may have made as to the bell, and others speak of his being on board the boat, displaying great activity. This, gentlemen, will not amount to much to prove that he was captain; and, according to my recollection, there was only one witness, and that was, I think, the witness from Philadelphia—I may be mistaken, and, if I am, bear it in mind, (addressing the counsel)—who says (turning to the jury) that Mr. Collyer on that occasion admitted himself to be captain, and it is claimed on the part of the defence, that this individual is not to be credited. But if, without particularly pointing out the testimony which is relied on upon the one side or the other, you should be of opinion that he was, for the time being, captain of the boat, having control of the same, and having command of the same, he would, if the boat was destroyed by negligence, and those lives were lost, be responsible under this act of congress.

The next question, and the great question in this case, is, was there misconduct, or negligence, or inattention to duty, on the part of those who had the management of the boat? Were the officers justly chargeable with misconduct, negligence, or inattention to their duties as such officers, by which the disaster took place, and in consequence of which the numerous lives were lost, which were destroyed on that occasion? To justify a conviction, a neglect of the duty imposed upon the defendants and which it is incumbent upon them to perform, or some misconduct in the performance of that duty, must be proved, by which, as a consequence, this disaster took place. . It must be proved that they have done that which they ought not to have done, or done improperly, and in a negligent manner, that which they ought to have done in a proper and careful manner, or that they neglected to do that which they ought to have done, by which the disaster occurred, and which disaster would not have occurred if it had not been for such misconduct or negligence of duty. And if the fire occurred by the neglect of a particular person on board the boat, in the performance of his particular duties, and not by the neglect of duty or misconduct of others, he only by whose misconduct or neglect of duties the disaster occurred is responsible for the consequences. The government claim that there was negligence of duty and misconduct upon the part of each of the defendants, by which the disaster took place, and, as a consequence, the loss of life that took place. They claim this misconduct and negligence in two particulars: First, in so conducting, and in so neglecting to conduct, before the fire, that the fire on board the Henry Clay took place as a consequence thereof. They claim, in the second place, that there was negligence and misconduct in these defendants, in their conducting after the fire took place, in running the boat on shore, and in neglecting to attend to the safety of the passengers after the boat was turned to the shore, and after she had already reached the shore, and also by the order that was given to go aft, and that by such latter misconduct and negligence the loss of life took place.

By the testimony of Mr. Belknap, a most intelligent witness,—as intelligent as any witness that I have ever seen upon the stand in a court,—it appears that the Henry Clay was one of the best boats recently built in the city of New York. By his testimony, it appears that her hull was built in the most substantial manner; that she was so constructed that there was as little danger from fire as there would be on any boat navigating the North river; that she had one of the best engines and boilers, and, as, admitted by the government counsel, she was officered by men whose character and whose skill stood fair in the community and deservedly high. She had a skillful and prudent captain, it is admitted; she had a skillful and competent engineer; an experienced and competent pilot and assistant pilot. She was well officered and manned, as it appears, by four firemen, and there is no claim but that that number was her full complement. On her trip from Albany she took fire, as has been stated, near a place thirteen or fourteen miles from the city of New York, and the question, gentlemen, is whether that fire was caused by the negligence of these individuals now on trial, or the negligence of any of them. If it was caused by the negligence of

one, and him only, he alone is responsible. If it was caused by the negligence of the whole of them, they all are responsible. If it was caused in a manner that is not accounted for, unless it is proved to your satisfaction that it was caused by the misconduct or negligence of these defendants, then it would become your duty to acquit. What is the theory on the part of the government? The theory is that from Hudson, on that day, the vessel was put under an excessive rate of speed,—in other words, that she was engaged in a race with the Armenia,—and, to produce that excessive rate of speed, an excessive quantity of fuel was applied to the furnaces; and that in consequence of that excessive quantity of fuel thus applied, and the manner that it was applied, by the negligence of these defendants, as a consequence of that, this boat took fire. Now, gentlemen, when they arrived at Kingston, it is evident that there was a great alarm on board this boat in consequence of that collision. But can you trace that collision as a cause for the burning of the boat eighty-three miles below? If you can not say that anything that took place was the cause of the burning of the boat eighty-three miles below, then, although you should be of the opinion that there was misconduct or negligence, these defendants would not be responsible, unless you can say that the burning of the boat was in consequence thereof.

But the government go further, and if their theory is right, then it would undoubtedly follow that the burning was attributable to the causes assigned by them. The government claims, gentlemen, that at Hudson the racing commenced; that this intense fire was then applied; that it was kept up down to Kingston; and that, after the boat left Kingston, it was continued, in order to keep up the race; and that it was so continued up to the time it was discovered that the boat was on fire, and then it had arrived at such a heat that the fire was communicated from the furnaces in some way to the boat, by the misconduct or negligence of these men. They claim there was a race. If there was no race, then the theory of the government fails, and the question for you to determine is, was there a race at the time that the fire was discovered, or for any considerable portion of the time previous thereto? If there was a race six or eight hours before, and if you cannot connect the fire with that race six or eight hours before, then you cannot say that these defendants are guilty under this act of congress. It is not claimed, on the part of the government, that there was any combination beforehand to have this race. Indeed, it is affirmed that the understanding between the boats was, at the time they went up, that the Clay should take the lead, and that the Armenia should follow, and that no one had any idea of race. If this is the true theory, I do not see what reliance can be placed upon the testimony of one witness examined here,—I mean the fireman who left the boat. He purposes showing that it was intended to be a race in coming from Albany to New York, and he testified that Capt. Tallman, as he went up from New York to Albany, said, when the Armenia came out of the dock, that "he would beat her going up and coming down." There must be some mistake on this subject. If there was an understanding that there should be no race in going up at that time, and no race in coming down, and if the theory of the government is that the race selected is from Hudson, what that witness said as to the fear he had in going up, and as to what he said to Mr. Tallman when the boat was leaving the dock at Albany, would have little weight; because, from the theory of the government, at that time the race was not contemplated.

Was this race continued, and the fire kept up, so that it was in an improper manner communicated to the boat? We are not able to ascertain exactly how much steam was carried on this occasion down to New York. One witness said he thought he saw forty pounds marked up, one said it was seventeen or twenty pounds; and, to my mind, it was not very satisfactorily accounted for what it was. If Mr. Belknap, the builder of this boiler, is correct in his statement that the vessel could not carry more than thirty-one pounds of steam without the steam blowing off, then it follows she could not have had more than that, unless the government make out that the safety-vale was tied down, so that the steam would not blow off. What is the proof upon the subject that the Clay carried an excess of steam? The fact is well established, as I understand it, that her ordinary time of arrival was at three o'clock, or soon after. This accident happened thirteen, fourteen, or fifteen miles above there, a little after three o'clock. Then, if three o'clock was the ordinary time of her arrival in New York, at her ordinary speed, there could not have been very extraordinary speed in driving her down as far as Yonkers at the time she ordinarily arrived in New York. What is the evidence upon the subject of this negligence? for there may be negligence, even without an extraordinary rate of speed. The fire was discovered in a certain part of the boat that has been pointed out She had a short time before been inspected. In June previous, the hull inspector declared her to be complete, so far as the hull was concerned,—a complete and safe boat for the navigation of the Hudson. The inspector also declared her boilers complete and sufficient for the thirty pounds of steam which Mr. Curtis says he allowed her to take. She was then declared by these men as a competent boat. How did this fire originate? You have only the testimony of one of the firemen, but the other is all surmise. He tells you how it was. You may believe other witnesses rather than the fireman, but you have got to establish the fact that it was in consequence of the misconduct of these defendants, before you can convict them. It

was discovered at a particular point. Efforts were made to put it out, but these efforts were unavailing, and the result was such as has been testified to. I will not occupy more time on the subject whether the negligence was proved or not; it is emphatically a question for your determination. If there was no negligence or misconduct, then, of course, these defendants cannot be guilty of misconduct or negligence. If there was negligence or misconduct by others, and in consequence of that the fire was communicated to the boat, these defendants would not be responsible for that negligence. For instance, to make myself understood, here is a pilot whose duty is to direct the course of the boat. He is a faithful man. He is intrusted with the boat, to direct her in her course; but for some reason or other, he willfully drives her upon a rock, and lives are lost. That would be misconduct in him, but it would not be misconduct in the captain, for the captain has done all that a prudent man could do to employ a competent pilot, with a good reputation. So it is in case of a fireman. If a captain has employed competent and faithful firemen, and if they, by their negligence, cause a fire, then, in my judgment, the other officers would not be responsible for it, because the captain has done everything a prudent man can do. He has appointed faithful and reliable men, and, if those men abuse their trust without any fault on his part, the captain, in my judgment, would not be liable under this law. He and every one is responsible for his own negligence. But in the case I put of a pilot who was employed as a faithful man, if he abuses the trust confined in him, the captain would not be liable for that abuse, but the pilot himself alone.

Was there any further negligence in running this boat ashore, and in so conducting matters after the boat had struck the shore, that the lives of these passengers were lost? The proof is abundant that this boat was run ashore in the best possible manner. All the witnesses agree upon that subject. All the nautical men,—landsmen would not understand it as well,—all the nautical men brought on the part of the government, say that the vessel was run on shore in the best possible manner. Were these defendants then guilty of negligence or misconduct after the Clay got on shore? There was an order given to go aft, and it has been explained to you by the defendants why such was a reasonable order. She struck the shore, and it seems that those who had presence of mind about them, who were aft at the time she struck the shore, escaped; and I was never more struck in my life with the necessity of presence of mind than I was when some of these witnesses were testifying, particularly Dr. Wells, who says he was aft in obedience to the order, and that he remained aft until she struck the shore, and the females whom he had under his charge had passed forward, and escaped to the bow, and he then passed on. Mr. De Peyster did the same, and probably others. But others were panic-stricken, and most people are so on an occasion when they are every moment in danger of perishing either by the water or flames.

Then, gentlemen, it appears that these defendants, when the vessel struck the shore, were in the water, endeavouring to save lives. Were these officers guilty of any misconduct or negligence in not saving more lives? Upon this subject, I will say, as I said in opening my charge, that an error of judgment merely would not make then culpable. The evidence is abundant that they exerted themselves to save those who were in the water. What men generally would have done, under such circumstances, we do not know. Whether they directed their attention to save this class or that class, we are not certain. If you think that in what they did there existed an error of judgment, then, gentlemen, you cannot convict them. If, however, they were guilty of misconduct or negligence, or inattention to their duties, such as I have described it to you to be, then, gentlemen, you will be authorized to convict.

With these remarks you will take the case under your consideration, and return such verdict as you, in your proper judgment, may think proper.

One thing I have omitted to notice: It is admitted, on the part of the prosecution, that these defendants were perfectly skillful in their several professions, and their private character was good. This circumstance, although it will not overcome evidence when it is positive, yet, in balancing the case, it will go a great way to turn the balance in favour of the accused. The case rests with you, gentlemen.

The learned judge concluded his charge at ten minutes past three o'clock, after which the jury retired to consult. At twenty-eight minutes to four the jury returned, when their names were called over by the clerk of the court:

The Clerk. Have you agreed upon your verdict, gentlemen?

The Foreman. Yes.

The Clerk. How do you find?

The Foreman. Not guilty.

Case No. 14,839.

UNITED STATES v. COLT.

[Pet. C. C. 145.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

ACTION OF DEBT—AMOUNT CLAIMED—STATUTE—AMOUNT RECOVERED—EMBARGO BOND.

1. Debt on an embargo bond. The declaration demanded 20,000 dollars, and recited the statute which authorises the United States, to demand a sum, not exceeding 20,000 dollars, and

[1] [Reported by Richard Peters, Jr., Esq.]

not less than 1,000 dollars; which it averred that the defendant owed and detained. The jury found a verdict for 4,000 dollars. Upon a motion to arrest the judgment, this declaration was *held* to be good.

2. A declaration in debt, claiming no precise sum to be due, is without precedent; but the demand of one sum in the declaration, does not prevent the recovery of a smaller sum, diminished by extrinsic circumstances.

[Cited in Washington v. Eaton, Case No. 17,228; Dillingham v. Skein, Id. 3,912a; Re Rosey, Id. 12,066; Stockwell v. U. S., 13 Wall. (80 U. S.) 543.]

[Cited in brief in Lea v. Hopkins, 7 Pa. St. 494. Cited in Western Union Tel. Co. v. Scircle, 103 Ind. 229, 2 N. E. 605.]

This was an action of debt, brought upon an embargo bond, in the district court, to June, 1811; and the declaration demanded twenty thousand dollars, which the defendant was alleged to owe and detain. It then recited the embargo law, laying the breach, by the defendant; "whereby the United States are entitled to demand a sum, not exceeding twenty thousand dollars, and not less than one thousand dollars, viz. twenty thousand dollars;" which it averred to be due to the plaintiffs and detained from them by the defendant. Upon nil debet pleaded, the jury found a verdict for four thousand dollars. [Case unreported.] The defendant took out a writ of error, returnable at April sessions 1812, of the circuit court; and the case now came on for decision.

WASHINGTON, Circuit Justice. The question in this case is, whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain is, that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said, that the very sum demanded, must be proved; and on a demand for thirty pounds, you can no more recover twenty pounds, than you can a horse, on a demand for a cow. Blackstone says (3 Bl. Comm. 154) that debt, in its legal acceptation, is a sum of money due, by certain and express agreement; where the quantity is fixed and does not depend on any subsequent valuation to settle it; and for nonpayment, the proper remedy is the action of debt, to recover the specific sum due. So if I verbally agree to pay a certain price for certain goods, and fail in the performance, this action lies; for this is a determinate contract. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, if the proof varies from the claim, cannot be looked upon, as the same contract of which performance is demanded. If I sue for thirty pounds, I am not at liberty to prove a debt of twenty pounds, and recover a verdict thereon; for I fail in the proof of that contract, which my action has alleged to be specific and determinate. But indebitatus assumpsit is not brought to compel a specific performance of the contract; but is to recover damages for its non-performance; and the damages being indeterminate, will adapt themselves to the truth of the case, as it may be proved; for if any debt be proved, it is sufficient.

The doctrine laid down by this writer, appears to be much too general and unqualified; although to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But, it is not essential, that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated; to recover back money which a bailiff has paid more than he had received; and in a variety of other cases, where the law, by implication, raises a contract to pay. 3 Com. Dig. 365. The sum may not be fixed by the contract, but may depend upon something extrinsic, which may be averred; as a promise to pay so much money as plaintiff shall expend in repairing a ship, may be sued in this form of action; the plaintiff averring that he did expend a certain sum. 2 Bac. 20. So, on promise by defendant, to pay his proportion of the expenses of defending a suit, in which defendant was interested, with an averment that plaintiff had expended so much, and that defendant's proportion amounted to so much. 3 Lev. 429. So an action of debt may be brought for goods sold to defendant, for so much as they were worth. 2 Com. Dig. 365. So debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon. 6 Term R. 63.

3 Wood. 95, states, that debt will lie for an indeterminate demand, which may readily be reduced to a certainty. In Emery v. Fell, 2 Term R. 28., in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labour, money laid out and expended, and money had and received; the court, on a special demurrer, sustained the action, although it was objected that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. But the court took no notice of the first objection, and avoided the second, by implying a contract of sale, from the words which stated a sale. These cases prove, that debt may be maintained upon an implied, as well as upon an express contract; although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield, in the case of Walker v.

Witter, 1 Doug. 6, is conclusive upon this point. He lays it down, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say, that whenever indebitatus assumpsit is maintainable, debt is also. In this case two points were also made by the defendant's counsel; first, that on the plea of nil debet, the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and secondly, that on the plea of nul tiel record, judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The court were in favour of the defendant, on the second point, and against him in the first; by deciding, that debt could be maintained on a foreign judgment, because, indebitatus assumpsit might; and that the uncertainty of the debt demanded in the declaration, was no objection to the bringing of an action of debt. The decision therefore given upon that point, was upon the very point, on which the cause turned. But, independent of the opinion given in this case, is it not true, to use the words of Buller, "that all the old cases show, that whenever indebitatus assumpsit is maintainable, debt also lies." The subject is very satisfactorily explained by Lord Loughborough, in the case of Rudder v. Price, (1 H. Bl. 550,) which was an action of debt, brought on a promissory note payable by instalments, before the last day of payment was past; in which the court, yielding to the weight of authority, rather than to the reason which governed it, decided; that the action could not be supported, because the contract being entire, would admit of but one action, which could not be brought until the last payment had become due, although indebitatus assumpsit might have been brought. But his lordship was led to inquire into the ancient forms of action on contracts; and he states, that in ancient times, debt was the common action for goods sold, and for work and labour done. Where assumpsit was brought, it was not a general indebitatus assumpsit; for it was not brought merely on a promise, but a special damage for a nonfeasance, by which a special action arose to the plaintiff. The action of assumpsit, to recover general damages for the non-performance of a contract, was first introduced by Slade's Case, which course was afterwards followed. In the case of Walker v. Witter, Buller also stated, that till Slade's Case, Trin. Term, 44 Eliz., 4 Coke, 92b. a notion prevailed, that on a simple contract for a certain sum, the action must be debt; but it was held in that case, that the plaintiff might bring assumpsit, or debt at his election.

Thus it appears, that in all cases of contracts, unless a special damage was stated, the primitive action was debt; and that the action of indebitatus assumpsit succeeded, principally, I presume, to avoid the wager of law; which in Slade's Case, was one of the main arguments, urged by the defendant's counsel, against allowing the introduction of the action of assumpsit; as it thereby deprived the defendant of his privilege of waging his law. Buller seems therefore to have been well warranted in the case of Walker v. Witter, in saying; that all the old cases show, that where indebitatus assumpsit will lie, debt will lie. The same doctrine is supported by the case of Emery v. Fell, 2 Term R. 30, which was an action of debt, in which all the counts of indebitatus assumpsit are stated; where the objection to the doctrine was made and overruled. So in the case of Herries v. Jamieson, 5 Term R. 557, Ashurst refers with approbation, to the opinion delivered in the case of Walker v. Witter. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of Walker v. Witter; as appears by the case of Rands v. Peck, Cro. Jac. 618; and in Draper v. Rastal, Id. 88, the same action was brought, though in different ways, for current money, being the value of the foreign.

Com. Dig. tit. "Debt," p. 366., where he enumerates the cases in which debt will not lie, states no exception to the rule that where indebitatus assumpsit will lie, debt will lie, but one for the interest of money due upon a loan. But the reason of that, is explained by Lord Loughborough in the case of Rudder v. Price; who states, that until the case of Cooke v. Whorwood, 2 Saund. 337, upon a covenant to pay a stipulated sum by instalments, if the plaintiff brought assumpsit, after the first failure, he was entitled to recover the whole sum in damages; because he could not in that form of action, any more than in the action of debt, support two actions on an entire contract. Until that decision, the only difference between debt and assumpsit in such a case, was, that the former could not be brought, until after the last instalment was due; and, in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

I proceed with the doctrine of Judge Blackstone before stated. After stating what constitutes debt, he observes, "that the remedy is an action of debt, to recover the special sum due." It is observable, that he does not say, that the plaintiff is to recover the sum demanded, by his declaration; and no person will deny, but that he is to recover the special sum due. After stating what constitutes a debt, and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery; and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds "the action of assumpsit is most commonly brought; because in that, it is sufficient if the plaintiff

prove any debt to be due, to enable him to recover the sum, so proved, in damages." If this writer merely means to say, that where a special contract is laid in the declaration, it must be proved as laid; the doctrine will not be controverted. If debt be brought on a written agreement, the contract produced in evidence, must correspond, in all respects, with that stated in the declaration; and any variance will be fatal to the plaintiff's recovery. Such too is the law in all special actions in the case; but if Judge Blackstone meant to say, that in every case, where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing; he is opposed by every decision, ancient and modern. The old cases before mentioned, in which debt was brought and sustained, are all cases, where it is impossible to suppose that the sum stated in the declaration, was or could in every instance be proved; any more, than it is, or can be proved, in actions of indebitatus assumpsit. They are in fact, actions substantially like to actions of indebitatus assumpsit in the form of action for debt. The action of debt for foreign money, is and can be for no determinate sum; because the value must be found by the jury, either upon the trial of the issue, or upon a writ of inquiry, where there is judgment by default. Rand. Peake. The case of Sanders v. Mark [3 Lev. 429], is debt for an uncertain sum, in which the debt claimed, was for fifteen pounds eighteen shillings and six pence, and the defendant's proportion of the whole sum, was averred to be fifteen pounds eighteen shillings and eight pence; yet the action was supported. This is plainly a case, where the sum due could not be certainly averred; because the yearly value of the defendant's property might not be known to the plaintiff, and could only be ascertained, with certainty, by the jury. In the case of Walker v. Witter, Lord Mansfield is express upon this point. He says, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time of bringing the action; and he adds, that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of Rudder v. Price, Lord Loughborough, who has shed more light upon this subject than any other judge, says "that long before Slade's Case, the demand in an action of debt must have been for a thing certain in its nature; yet, it was by no means necessary, that the amount should be set out so precisely, that less could not be recovered." In short, if before Slade's Case, debt was the common action for goods sold, and work done; it is more obvious, that it was not thought necessary to state the amount due, with such precision, as that less could not be recovered; for in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained, though not ascertained, or perhaps capable of being so, when the action was brought. Whence the opinion arose, that in an action of debt on a simple contract, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to Slade's Case; and it is clear, that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough in the above case, denominates it an erroneous opinion, and says, that it has been some time since corrected.

In the case of M'Quillin v. Cox [1 H. Bl. 249], the sum demanded was five thousand pounds; which was fifty more than appeared to be due by the different sums. The objection was made on a special demurrer, that the declaration demanded more than appeared by the plaintiff's own showing to be due. The court did not notice the alleged variance between the writ and declaration, or the misrecital of the writ; but overruled the demurrer, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ. From this last expression it might be supposed, that the court meant to distinguish between the sum demanded by the writ, and that demanded by the declaration; but this could not have been the case, because the sum demanded by the writ, and that demanded by the declaration was the same; viz. five thousand pounds. There was, in fact, no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ; and the objection stated in the special demurrer, was made to the variance, between the sum demanded by the declaration, and the sum alleged to be due.

The distinction taken in the case of Ingledew v. Cripps, 2 Ld. Raym. 815, Salk. 659, runs through all the above cases, and appears to be perfectly rational, viz. that where debt is brought on a covenant, to pay a sum certain, any variance of the sum in the deed will vitiate. But, where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a remittitur for the balance. This shows, that debt may be brought for more than is due, and that the jury may give less; or if they give more than is due, the error may be corrected by a remitter.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract, where the sum demanded is uncertain, it would seem to follow, that it would lie for a penalty given by statute, which is uncertain, and de-

pendent upon the amount to be assessed by a jury. For, when they have assessed it, the sum so fixed becomes the amount of the penalty given. This however stands upon stronger ground than mere analogy. The point is expressly decided in the case of Pemberton v. Shelton, Cro. Jac. 498. That was an action of debt brought upon the first section of the statute 2 Edw. VI. c. 13, which gives the treble value of the tithes due, for not setting them out. The declaration claimed thirty-three pounds, as the treble value; and in setting forth the value of the tithes, the whole amount appeared to be more than one third of the sum demanded; so that the plaintiff claimed less than the penalty given by the statute. Upon nil debet pleaded, the jury found for the plaintiff twenty pounds, and a motion was made in arrest of judgment, for the reason above mentioned. The court overruled the motion, upon the ground afterwards laid down in the case of Ingledew v. Cripps. They held, that there was a difference when the action of debt is grounded on a specialty, or contract, which is a sum uncertain; or upon a statute, which gives a certain sum for the penalty; and where it is grounded on a demand, when the sum is uncertain, being such as shall be given by the jury. In the former, it was agreed, that the plaintiff cannot demand less than the sum agreed to be paid or given by the statute; but in the latter, it is said, that if the declaration varies from the real sum, it is not material; for he shall not recover according to his demand in the declaration, but according to the verdict and judgment, which may be given for the plaintiff. It cannot be said, that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought upon the common law principle, that where a statute gives a penalty, debt may be brought to recover it. In this case the statute gives the action of debt, and I cannot perceive in what other form, than this one which has been adopted, the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet, judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying, that the demand of one sum, does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances. Rule discharged.

Case No. 14,840.

UNITED STATES v. COLUMBIAN INS. CO.

[2 Cranch, C. C. 266.] [1]

Circuit Court, District of Columbia. Nov. Term, 1821.

CORPORATIONS—ELECTION OF OFFICERS—SUPERSEDEAS—MANDAMUS.

1. The Columbian Insurance Company of Alexandria cannot, by a trustee, vote in an election of directors of the company, upon stock of the same company, purchased by the company, and held for their use in the name of the trustee.

2. A writ of error to the judgment of the circuit court of the District of Columbia, awarding a peremptory mandamus, is a supersedeas, and if the peremptory mandamus be issued after the filing of the writ of error, and within ten days after the rendition of the judgment, it will be quashed

On the 12th of December, 1821, John Wheelwright and five others, filed their petition, supported by the affidavit of Wheelwright, praying for a rule on the judges of the election of directors of the Columbian Insurance Company of Alexandria, to show cause why a mandamus should not issue commanding the said judges of election to return the petitioners as duly elected directors of the said company, and also for a rule upon the said company to admit the petitioners as directors. The petitioners state that they are, and have been for twelve months and upwards stockholders of that company. That on the 31st of July, 1821, the then board of directors passed an order that 1233 shares of the stock of that company, the property of one Edward Lloyd, should be purchased; and that the sum of $8,500 should be borrowed, upon stock owned by the said company in the Bank of the United States, to assist in the payment for the same; all which was done and the shares were transferred by Lloyd to Joseph Mandeville in trust for the Columbian Insurance Company. That the annual election of directors took place on the 5th of November, 1821. That there were two lists of directors voted for, one of which included the petitioners, and that the directors named on that list were duly elected, if the said Joseph Mandeville had no right to vote upon the 1233 shares there standing in his name, as the trustee of the company. That his right so to vote was denied by the petitioners at the election, and a written notice of the objection was delivered to the judges of the election in due time, and before the election was closed; but they received the vote which gave the preponderance to the opposing ticket. A rule was granted, according to the prayer of the petitioners, to show cause, &c., on Saturday, the 15th of December, 1821; which rule, upon hearing, was made absolute, and writs of mandamus nisi, were issued returnable on the 22d of

[1] [Reported by Hon. William Cranch, Chief Judge.]

December. The Columbian Insurance Company returned the writ on that day, and for return said, "That the said John Wheelwright ought not to be admitted as a director of the said company, because they say that at the election of directors in the said writ mentioned, the said John Wheelwright was not duly elected a director of the said company, and that at the said election, the said Joseph Mandeville, whom they are required to remove, was duly elected a director of the said company." This return being traversed by the United States, and issue thereupon joined, the jury found a special verdict, in which they set forth the act of congress of February 16, 1818 (6 Stat. 198), incorporating the Columbian Insurance Company of Alexandria, and the original articles of association, under which the company transacted its business before its incorporation. They also found that at a meeting of the board of directors of the said company on the 31st of July, 1821, they made an order that 1233 shares of the stock of the company, the property of one Edward Lloyd, should be purchased for the use of the company, at 80 per cent.; and that the president of the company should be authorized to obtain a discount at the office of discount and deposit at Washington, for the use of the company, of $8,500, upon the pledge of eighty-five shares of the stock of the Bank of the United States, the property of the company. That the said shares were purchased according to the order of the board, and were on the 1st of August, 1821, transferred by the said Lloyd to Joseph Mandeville, "as trustee of the Columbian Insurance Company of Alexandria." That an election of directors was holden on the 1st Monday in November, 1821, by the commissioners duly appointed by the board of directors on the 1st day of November in the same year. That Mandeville voted upon the 1233 shares of stock so held by him in trust, with the knowledge and consent of the commissioners of election who were apprised of the circumstances, and were of opinion that he had a right so to vote, and received his vote accordingly. That Wheelwright was not present when the vote was given in, but afterwards came in, while the election was going on, and before the votes were taken out of the ballot-box to be counted, and delivered to the commissioners the following written notice: "I object to the vote of Joseph Mandeville, as trustee for the Columbian Insurance Company on 1233 shares of stock bought by the company of Joseph Mandeville, as trustee for the Columbian Insurance Company. John Wheelwright." That the said shares were contracted to be sold by the said Lloyd to the said Mandeville, on the 8th of June, 1821, with a view that the company should afterwards become the purchaser thereof. That the said Mandeville gave his note, indorsed by Newton Keene and James Sanderson, to the said Lloyd, for $9,864, payable in 60 days from the 8th of June, for the said stock. That the said shares had been duly and regularly subscribed and paid by one or more original subscribers to the said company, and had been duly and regularly assigned to the said Lloyd, before the purchase and transfer from him to the said Mandeville, and as such, were entitled in the hands of the said Lloyd, at the time of such purchase and transfer, to all the advantages, profits, and privileges of shares regularly forming component parts of the capital stock of the said company. That on the 5th of November, 1821, before the election was opened, at a meeting of the board of directors, duly convened, it was by the board resolved that the said Joseph Mandeville as such trustee, should be instructed, and he was by such resolution instructed, to vote upon the said stock as such trustee, at the said election, for certain persons in the said resolution named as such directors; and that he voted accordingly. That the said John Wheelwright, although then a director, was not present when the ballot was taken to instruct the said Mandeville to vote as aforesaid.

The jury conclude by finding that if the said Mandeville had not a right in law to vote upon the 1233 shares, then the said John Wheelwright, and the others on the same ticket were duly elected directors of the said company; but if he had a right to vote on those shares, the said Joseph Mandeville, and the others on the same ticket, were duly elected. This special verdict was rendered on the 1st of January, 1822, and on the 3d, the court rendered judgment upon the verdict in favor of the petitioners, that a peremptory mandamus should be issued.

Upon this judgment the petitioners, respectively, sued out their several writs of peremptory mandamus, on the 10th of January, 1822, before the expiration of the ten days allowed by the 23d section of the judiciary act of 1789 (1 Stat. 73) for filing a writ of error, which writs of mandamus were in the following form:—

"(L. S.) District of Columbia, to wit. The United States of America. To the Columbian Insurance Company of Alexandria, greeting: Whereas at a late election of directors of the Columbian Insurance Company of Alexandria, on the 5th day of November last, pursuant to the act of congress, in such case provided, John Wheelwright was duly elected by the stockholders, or proprietors of the said corporation, and by a plurality of votes actually given, a director of the Columbian Insurance Company of Alexandria; you, nevertheless, the said Columbian Insurance Company of Alexandria, lightly regarding the premises, have wrongfully, injuriously, and unlawfully, and without reasonable cause, refused to admit the said John Wheelwright, as a director of the said Columbian Insurance Company of Alexandria, to the no small damage and grievance of the said John Wheelwright, as by his complaint we have

understood. We, therefore, being willing that due and speedy justice be done in this behalf, as is reasonable, command you that immediately after the receipt of this, you admit the said John Wheelwright as duly elected a director of the said Columbian Insurance Company of Alexandria, at the time and place of election aforesaid; and that you remove Joseph Mandeville, who is alleged to have been unduly and wrongfully admitted as aforesaid; with all liberties, privileges, and pre-eminences to that office belonging or appertaining; and that you make return of this writ to our United States circuit court of the District of Columbia, for the county of Alexandria, immediately on the receipt thereof. Witness the Honorable William Cranch, Chief Judge of our said Court, this 10th of January, 1822. Edmund J. Lee, C. C."

These writs were, on the 11th of January, served on the company, who refused to obey them; and on the 15th of January, the petitioners obtained a rule upon the persons returned as directors of the company, to show cause why an attachment should not issue against them for not obeying the peremptory mandamus. This company, at the same time obtained a rule upon the petitioners, to show cause why the writs of peremptory mandamus which had been issued, should not be quashed. Before the expiration of the ten days after the judgment of the court upon the special verdict, the company took out, and served upon the adverse party, a writ of error, with the requisite security to operate as a supersedeas, if a writ of error will lie in the case; notwithstanding which.

Mr. Fendall, for the relators, now moved the court, the ten days not having yet expired, to order the clerk to issue a writ of peremptory mandamus, upon the judgment which the court had rendered upon the verdict. He contended that no writ of error would lie in a case of mandamus, and if it would, it would not be a supersedeas, and therefore the relators need not wait the expiration of the ten days, before they took out their peremptory writs of mandamus. And he cited 4 Bac. Abr. 522, 543; St. 9 Anne, c. 20, § 2; Case of Dean and Chapter of Trinity Chapel, Dublin, 8 Mod. 27, 1 P. Wms. 348; 2 Brown, Parl. Cas. 554; 3 Brown, Parl. Cas. 178; and the Virginia act of assembly of Jan. 22, 1799. p. 392, c. 253, which gives a right to traverse the return of a mandamus in all cases, and the right to recover damages and costs in the same manner as in an action upon the case, and if judgment shall be given for the complainant either on verdict, or demurrer, or nil dicit, or for want of replication or other pleading, he shall recover his damages and costs, and shall have execution therefor, and a peremptory writ of mandamus shall be granted without delay, as if such return had been adjudged insufficient. This act seems to be but a new edition of the English statute of 9 Anne, c. 20, § 2, as it had been construed and practised upon in the English courts. It says nothing of a writ of error.

Mr. Swann, on the same side, contended, that if a writ of error will lie in a case where there was a traverse, yet it would be only to the judgment on the verdict, and would be no supersedeas to the peremptory writ of mandamus. Case of Dean and Chapter of Dublin v. Dowgatt, 1 P. Wms. 348. The act of Virginia says that the peremptory mandamus shall issue without delay.

Mr. Taylor and Mr. Jones, contra.

The cases cited are only applicable to cases of mandamus, at common law, where the return was conclusive, and could not be traversed; and where the only remedy for a false return was by a special action upon the case. But, in the Dublin Case it is expressly stated by the court that if the return had been traversed, a writ of error would lie. In the present case, a writ of error has been actually issued. The act of congress gives a writ of error upon every final judgment, where the matter in dispute is of a certain value. An award of a peremptory writ of mandamus is a final judgment; nothing remains to be done but to execute the judgment. A peremptory mandamus cannot be issued after a writ of error filed. There cannot be a writ of error to part of a judgment. It issues for the whole or for nothing.

THE COURT said that the judgment of the court was for a peremptory mandamus. We have no jurisdiction to decide whether the defendants have a right to a writ of error. That question can be decided by the supreme court only. A writ of error has been issued; if we give any opinion upon the defendant's right to issue it, it will be extrajudicial. No opinion was given.

The petitioners then, respectively, sued out their several peremptory writs of mandamus, on the 10th of January, 1822, the ten days not having yet expired; and on the 11th, served them on the company, who refused to obey the writs; and on the 15th, the petitioners obtained a rule upon the persons returned as elected directors of the company, to show cause immediately why an attachment should not issue against them for disobeying the writ; and the company, at the same time, obtained a rule upon the petitioners to show cause immediately why the writs of peremptory mandamus should not be quashed.

Mr. Jones, for the defendants, in showing cause, contended, that the writ of error is a supersedeas to the judgment of this court. The right to the writ of error is as perfect as the right to have the judgment of the court below. There is a difference between England and this country as to prerogative. In England the writ of mandamus is a prerogative writ. He admits, that in England, no writ of error will lie to a peremptory writ of mandamus, at common law. But, in this country, it is a judicial writ, given expressly by the statute of Virginia. It is a civil, not a criminal process. The Dublin Case, 8 Mod.

27; 2 Brown, Parl. Cas. 554; 3 Brown, Parl. Cas. 178; 1 Strange, 536. The judicial authority in this country is not derived from the executive authority, as in England, but is carefully separated from it. By the 8th section of the act of congress of Feb. 27, 1801 (2 Stat. 103), "any final judgment, order, or decree," in this court, "where the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed in the supreme court of the United States, by writ of error or appeal." An order for a peremptory mandamus is as much a final order as an order for execution upon a scire facias to revive a judgment. So, upon habeas corpus, an order, remanding the prisoner, is a final order, upon which the supreme court may exercise its appellate jurisdiction, as in the cases Ex parte Burford, 3 Cranch [7 U. S.] 447, and Ex parte Bollman, 4 Cranch [8 U. S.] 75; and in the case of Marbury v. Madison, 1 Cranch [5 U. S. 137] the supreme court said they had only appellate jurisdiction in cases of mandamus. In England, in a case circumstanced as this is, a writ of error will lie. It is not merely a judgment between the king and a subject. A case under the statute of Anne is a civil cause for the trial of private rights. At common law, the return was conclusive; and the only remedy for a false return was a special action upon the case. In that action damages and costs were recovered; and upon that judgment for damages and costs, a writ of error would lie both to the judgment for damages, and to the award of a peremptory mandamus.

In answer to the objection that the tenure of office, being only for a year, would expire before a judgment could be had upon the writ of error, it was observed that the supreme court would sit the next month, and would, no doubt, take up the cause out of its turn, upon being informed of the circumstances. The statute of Anne and the statute of Virginia have changed the whole ground of the action by mandamus. It is now a civil action to try a private right. It would be absurd to say that the judgment for damages and costs should be reversed, and yet the order for a peremptory mandamus should be executed. A writ of error in an action upon the case for a false return, is a supersedeas to a peremptory mandamus. Ruding v. Newel, 2 Strange, 983. In the Dublin Case there was no traverse. The peremptory mandamus was issued upon the return being adjudged insufficient by the court; and in that case it is admitted, that where an issue has been tried, a writ of error will lie.

Mr. Swann, contra.

The object is to evade the decision of this court until the year shall expire. A writ of error is a statutory right. If not given, in this case, by statute, it does not lie. In cases respecting mills, roads, probate of wills, &c., the appeal is given by statute only. The Virginia statute respecting mandamus does not give an appeal or writ of error. The preamble of that statute (Jan. 22, 1799, p. 392,) complains of the delay which attended the old proceedings on writs of mandamus; and if a writ of error will lie, the object of the statute will be defeated. To prevent this delay, the statute expressly directs, that if a verdict shall be found for the person suing out the writ, "a peremptory writ of mandamus shall be granted without delay," "as it might have been if the return had been adjudged insufficient." The case of Ruding v. Newel is reported very shortly by Strange, who only says it was held to be a supersedeas, but does not say by whom. But, in the Dublin Case, as reported in 1 P. Wms. 351, Parker, C. J., said "that a mandamus, since the late statute (9 Anne, c. 20), was in the nature of an action, special replications and pleadings therein being admitted, and costs given to either side that prevailed; and that a case had happened in the king's bench, where judgment was given upon special pleadings, upon the late statute, for the mandamus, and the defendant brought error, and it was admitted error lay; yet this was held to be no supersedeas to the peremptory mandamus; for that such a construction would quite defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the mandamus." "And King, C. J., took notice that the words of the statute were that in case judgment were given for the mandamus, a peremptory mandamus should be granted without delay." In the present case, no damages are given. The only judgment of this court is for costs, and that a peremptory mandamus should issue.

Mr. Jones, in reply.

It is contended that the judgment is divided, and that a writ of error to one part is not a supersedeas to the other. But if that could be the case, the writ of error itself and the judgment of the supreme court thereon, in case of reversal, would be wholly defeated. This court would take from that court the power of doing justice. The statute of Virginia only means that such a writ shall issue after verdict in favor of the mandamus, as the court would have issued if it had adjudged the return insufficient, without the intervention of a jury. The Dublin Case was not a case under the statute of Anne. It was a mandamus at common law; and the court in Ireland had adjudged the return insufficient, in law, and had issued a peremptory mandamus. What is said by Parker, C. J., is only obiter dictum.

The act of congress of Feb. 27, 1801 (2 Stat. 103), gives the supreme court of the United States appellate jurisdiction of every final order of this court, where the matter in controversy is of a certain value; and if that value does not appear upon the record, that court will ascertain it by affidavits. That jurisdiction is given by an authority paramount to the state laws, and in the cases of Wilson v. Mason, 1 Cranch [5 U. S.] 91, and Young v.

Bank of Alexandria, 4 Cranch [8 U. S.] 395, the supreme court of the United States decided, that, even if the state law declared that no appeal or writ of error should lie from the judgment of the inferior tribunal, it would not deprive the supreme court of the jurisdiction given to it by the constitution and laws of the United States. A writ of error removes the whole record, and is a supersedeas if taken in proper time, which, in England, is four days; and, by the act of congress, ten days.

THE COURT (THRUSTON, Circuit Judge, contra), was of opinion that the writ of error is a supersedeas to the writ of peremptory mandamus, and refused to award an attachment, and quash the peremptory writs of mandamus which had been issued before the expiration of the ten days.

See 7 Wheat. [20 U. S.] 534. The supreme court determined that a writ of error would lie to reverse the judgment of this court awarding a peremptory mandamus, and directed Mr. Jones to produce affidavits as to the value of the matter in controversy. But it not appearing that it amounted to $1000, the sum required to give appellate jurisdiction to the supreme court from the final judgments or decrees of this court, the supreme court decided that a writ of error could not regularly issue in this case, and ordered the writ of error to be quashed.

At May term, 1822, of the circuit court, a mandate from the supreme court was produced, showing that the writ of error was dismissed: whereupon the circuit court granted a peremptory mandamus to admit the petitioners, Wheelwright and others, to their seats as directors, &c.

Case No. 14,841.

UNITED STATES v. COLUMBUS.

[5 Cranch, C. C. 304.] [1]

Circuit Court, District of Columbia. March Term, 1837.

KEEPING DISORDERLY HOUSE—INDICTMENT—EVIDENCE—TRIAL—INSTRUCTIONS.

1. An indictment, charging that the defendant kept "a certain unlawful, disorderly, and ill-governed house," "as a common tavern," "without license," "and kept a common tippling house," and therein openly sold spirituous liquors to all persons calling for the same, and allowed the same to be drunk in and about the house at all times both at day and night and on Sundays and permitted certain idle and ill-disposed persons to assemble and continue drinking and tippling, to the common nuisance, &c., is a good indictment, at common law, for keeping a disorderly house.

[Cited in Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 824.]

2. And evidence, that the defendant kept an open house for selling spirituous liquors, and that such liquors were sold to other persons than boarders and lodgers, and that the house was kept open, and such liquors there sold, on Sundays and at late hours of the night, that persons intoxicated were seen in and coming out of the house drunk and disorderly, is sufficient to support the indictment.

3. The court will not permit counsel to argue to the jury against an instruction given in the cause.

[Cited in Stettinius v. U. S., Case No. 13,387.]

The indictment [against Charles Columbus] was in these words: "District of Columbia, Washington county, to wit: The jurors of the United States for the county aforesaid upon their oath present, that Charles Columbus, late of the county aforesaid, yeoman, on the fifteenth day of December, in the year of our Lord eighteen hundred and thirty-six, at Washington county aforesaid, and on other days and times between that day and the day of taking this inquisition, with force and arms, kept a certain unlawful, disorderly, and ill-governed house in the city of Washington in the said county, as a common tavern, without any lawful authority or license therefor, did take upon himself to keep and maintain: and the said house did then and there, at the days and times aforesaid, keep as a common tippling-house; and did therein openly sell spirituous liquors to all persons calling for the same, and allow the same to be drunk by such persons, in and about his said house at all times, both at day and at night, and on all days, both Sundays and other days; and did permit certain idle and ill-disposed persons, to the jurors aforesaid unknown, to assemble together in his said house, and then and there continue drinking and tippling, to the common nuisance of the good people of the United States, to the evil example of all others, the corruption of the public morals, and against the peace and government of the United States. F. S. Key, United States Attorney, D. C."

To this indictment the defendant demurred, first, because it does not aver that the defendant kept a common disorderly house; and, second, because it charges the keeping a tavern without license, but does not aver that he kept a common tavern. All the precedents, the defendant's counsel said, use the word "common;" a single instance of disorder is not sufficient. Reg. v. Pierson, 2 Ld. Raym. 1197; 3 Chit. Cr. Law, 678; 1 Russ. Cr. 300.

Mr. Key, U. S. Atty., contra, contended that it was sufficiently averred to be a common disorderly house. The indictment charges that the defendant undertook to keep a disorderly house as a common tavern without authority therefor, and did keep the same as a common tippling-house, and therein sold spirituous liquors to all persons calling for the same, to be drunk in and about the house at all times, day and night, Sundays and other days; and permitted idle and ill-disposed persons there to assemble and continue drinking and tippling to the common nuisance, &c. The offence charged is the keeping of a common disorderly tippling-house.

THE COURT (CRANCH, Chief Judge,

[1] [Reported by Hon. William Cranch, Chief Judge.]

doubting) overruled the demurrer; being of opinion that it sufficiently appears in the indictment, that the offence charged is the keeping of a common disorderly house.

Upon the trial, Mr. Key prayed the court to instruct the jury, that if they believe, from the evidence, that the defendant kept an open house in the city of Washington for selling spirituous liquors, and that such liquors were sold and drunk in the said house to other persons than boarders and lodgers; and that the said house was kept open on Sundays, and such liquors there sold and drunk by such persons on Sundays, and also at late hours of the nights both of Sundays and other days; and that persons intoxicated were seen in said house and coming out of said house at late hours of the night, drunk and disorderly, such evidence is sufficient to support the indictment.

Which instruction THE COURT gave, having yesterday, in the absence of CRANCH, Chief Judge, given a similar instruction in the case of U. S. v. Bede, published in the National Intelligencer of the 23d of June, 1837.[1]

W. L. Brent, for defendant, being about to argue to the jury against the instruction just given, was stopped by the Chief Judge, and informed that the court could not permit him to argue the point of law to the jury against the instruction which the court had given to them.

Mr. Brent contended, that as he had not asked the opinion of the court upon that point, he was not precluded from arguing it to the jury. That in criminal cases the jury are judges of the law as well as of the fact, and, therefore, the law ought to be argued to them.

CRANCH, Chief Judge, observed, that this court had always refused to permit counsel to argue the question of law after it had been decided by the court, in the cause. That the jury has a right to find a general verdict, which includes the question of law as well as of fact; but the jury has no right to decide the question of law, disconnected from the fact. That this point had been decided early in the existence of this court, upon full argument; and that such had been the uniform decision and practice of the court from its commencement, more than thirty years ago.

Mr. Brent then prayed the court to instruct the jury, that notwithstanding they might be of opinion, from the evidence, that the tavern of the defendant was kept open on Sunday, the selling of liquor (in a legal point of view) upon Sunday, is no more an offence for which the defendant could be indicted than the selling upon any other day, according to the laws and constitution of Maryland as in force in this part of the District of Columbia.

Which instruction THE COURT (THRUSTON, Circuit Judge, absent) refused to give.

Verdict, guilty

[1] In the case of the U. S. v. Bede [Case No. 14,558] the indictment was in the same form as that of U. S. v. Columbus. The following is the instruction moved by Mr. Key, and given by the court in the absence of Cranch, C. J.: "That if the jury believe from the evidence that the traverser kept a public and open shop in this city in which he sold liquors to persons not lodgers or boarders in his house, at times to persons who were drunk, at times to persons who came in drunk, and drank there, and went out drunk; sometimes to persons who came out and went away from his house in a noisy manner and sky-larking in the streets; that his shop was generally kept open on Sundays, and that persons, not lodgers or boarders, bought and drank spirituous liquors in the shop, on Sundays; and that he had no accommodations for travellers or boarders, neither beds nor stables for such accommodation; and that he had no license for keeping a public house from the corporation; then the charge of the indictment is sustained."

Case No. 14,842.

UNITED STATES v. COMMANDANT OF FORT DELAWARE.

[1 Am. Law Rev. 576.]

District Court, D. Delaware. Nov. 17, 1866.

MARTIAL LAW—MILITARY COMMISSIONS—POWER TO TRY AND SENTENCE—HABEAS CORPUS.

Four men, three being citizens of South Carolina and one of Georgia, were tried by a military commission convened at Charleston, by orders from the headquarters of the department of South Carolina, dated Dec. 26, 1865, on charges and specifications alleging, in substance, that, being actuated by hostility to the United States, and with intent to oppose the military forces of the United States, on Oct. 8, 1865, at Brown's Ferry, S. C., whilst martial law was in force by authority of the president, did voluntarily associate with an armed band, and, acting therewith, with unlawful force, did attack and kill a military guard. The prisoners were found guilty, and sentenced to be hung; the president commuted the sentence, July 26, 1866, to imprisonment for life at the Dry Tortugas, whither they were sent; and they were removed thence, on the following 6th of August, to Fort Delaware, in Delaware. A writ of habeas corpus was issued for them, directed to the commandant of the fort, who brought them into court, and made return of the facts substantially as above.

HALL, District Judge. The competency of the military commission to arraign, try, and sentence the prisoners upon the charges and specifications against them, is the single point for consideration. If the commission had jurisdiction, the proceedings are conclusive; if it had not, they are void. To sustain the proceedings of the commission, the case of Rex v. Suddis, 1 East, 306, has been cited for the admission of Mr. Erskine, that, in the absence of all civil judicature, the military may try offenders, assuming that the condition of South Carolina afforded ground to presume the absence of all civil judicature to try offenders. But public documents of which the court must take notice

do not permit this presumption. The Rebellion had ceased, and the authority of the United States was acknowledged in that state; so that, the 30th June, 1865, the president issued his proclamation appointing a provisional governor, with authority to exercise all the powers to enable the loyal people of that state to restore it to its constitutional relation to the United States, directing that the district judge of the district in which South Carolina is included proceed to hold courts within said state, according to the provisions of the acts of congress, and that the attorney general instruct the proper officers to libel, and bring to judgment and sale, property subject to confiscation, and enforce the administration of justice, within the said state, in all matters within the cognizance and jurisdiction of the federal courts, &c. Under this provisional governor, the institutions of the state were in operation; the people of the state elected a governor, who entered upon his duties Nov. 29, 1865; and the provisional governor, having fulfilled his office, was relieved Dec. 22, 1865; so that, before the issuing of this commission, Dec. 26, 1865, the state was, in fact, in the exercise of its civil functions. Besides, if the commission had been issued because of the absence of civil judicature to take cognizance of the crimes, it would, indeed it must have been, so suggested in some part of the proceedings; there being no such suggestion evinces there was no such ground for this commission; nor would a temporary abeyance of civil judicature give jurisdiction to a military commission to try and sentence, however the military might be justified in arresting and detaining for the proper tribunal. The place to which Mr. Erskine's remark in 1 East, 306, applied was Gibraltar, a distant fortress, purely military; the subject, a soldier; the decision has no application. Transactions in our army in Mexico have been referred to. Mexico was a foreign country, conquered, its language and institutions unknown; South Carolina, a state of the Union rescued from rebellion, its laws and institutions restored. Acts Cong. 1863, c. 75, § 21 [12 Stat. 735], and 1864, Acts Cong. c. 215 [13 Stat. 356], have been relied upon for giving jurisdiction. The purpose of these acts is apparent on their face,—to enlarge the powers of the commanding general for executing, pardoning, or mitigating sentences of military commissions or courts martial, not to enlarge their jurisdiction. The commission derives no authority from these acts; congress intended no such thing. The ground on which this commission proceeded appears in the charges and specifications. It is, that the crimes were committed against a guard of the forces of the United States, composed of duly enlisted soldiers, on duty. The assumption is, that in cases of alleged offences by citizens against a guard of the army of the United States, detailed and on duty, and against enlisted soldiers on duty as such guard, it is competent to issue a military commission to arraign, try, and punish the offenders; the gist of the assumption being, that, of alleged offences by citizens against soldiers, soldiers should be the judges. Is this position in accordance with sound reason, or the fundamental principle of our laws? In so small a body, comparatively, as the army, so associated, with so much in common, so sensitive, there must be an esprit de corps that will not allow us to expect impartial justice from them in collision with citizens, while the broad ground of citizenship is not liable to this objection. This aspect of the case exhibits nothing favoring trial by military commission of alleged offences by citizens against soldiers: on the contrary, all sound principles are opposed to subjecting the accused to the disadvantages of such a trial.

Case No. 14,843.

UNITED STATES v. CONANT.

[Cited in U. S. v. Bettilini, Case No. 14,587. Nowhere reported, opinion not now accessible.]

Case No. 14,844.

UNITED STATES v. CONANT.

[9 Reporter, 36;[1] 9 Cent. Law J. 129; 2 Nat. Bank. Cas. (Browne) 148.]

Circuit Court, D. Massachusetts. May Term, 1879.

EMBEZZLEMENT—WHAT CONSTITUTES—INDICTMENT—MATTERS OF FORM—DESCRIPTION OF CRIME.

1. The word "embezzle," in Rev. St. U. S., is used to describe a crime which a person has an opportunity to commit by reason of some office or employment, and which is some breach of confidence or trust.

2. Rev. St § 1025, provides: "No indictment . . . . shall be deemed insufficient . . . . in matter of form only." *Held*, that anything that form a part of the description of the crime is not a matter of form.

Indictment under Rev. St. § 5209, relative to embezzlement by national bank officers, clerks, etc. On motion to quash an indictment.

LOWELL, District Judge. [2] [These indictments are drawn under section 5209 of the Revised Statutes: "Every president, director, cashier, teller, clerk or agent of any association" (that is, national banking associations, which are mentioned in this chapter), "who embezzles, abstracts, or willfully misapplies any of the moneys, funds or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or

[1] [Reprinted by permission.]

[2] [From 2 Nat. Bank. Cas. (Browne) 148.]

puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and any person who, with like intent, aids or abets any officer, clerk or agent, in any violation of this section, shall be deemed guilty of a misdemeanor."

[The principal points that have been taken appear to be objections to the mode in which the indictments charge this crime. That may be subdivided, and there are two principal objections: One is that the facts to show an embezzlement, as distinct from some other crime—for instance, larceny—are not sufficiently set out in the indictment, and has been very fully and ably argued from what may be called the foundation. The leading idea of the argument is that the word "embezzle," by its own force, describes something which was known to the common law, and now by statute, like the words "murder" and "steal;" and that the sense in which the word "embezzle" is already well known in our laws must give the interpretation to the word in this statute. That is a very important point, and I have given it such attention and consideration as I might. I have come to the conclusion that there was no common-law definition of embezzlement when our constitution was formed. There was a very ancient statute, which was in force in some of the states and not in others—that of Henry VIII.—at least it has been decided not to be in others, though I should have supposed it was in all; but I must take the decisions, of course. But if there was any such statute, which by reason of having been passed as early as Henry VIII. was in force here, it does not define the word "embezzlement" in this statute.] [2]

There was no common law definition of the word "embezzlement," there never has been, and there is not now. Some elements of the crime are probably common to the statutes, and also to the familiar meaning of the word; that is to say, the word appears to mean, whenever used to distinguish a crime which a person has the opportunity to commit, by reason of some office or employment, which may include, in its signification, some breach of confidence or trust, some misuse of an opportunity of that sort. That is about all, I think, that can be found of a general nature in the meaning of the word. I do think, however, that there is one mode of comparison,—one source of comparison,—and that is by the various statutes which make up the body of the Revised Statutes, all passed on a certain day of 1874, and all forming one body of law. Examining the word "embezzle," as used in these various statutes, which are all contained in this very large volume now, I think it will be found that the only general idea which runs through the whole use of the word "embezzle" generally, is the one that I have stated.

[2] [The crew of any merchant vessel may commit the crime of embezzlement in regard to the cargo or stores of the vessel. That cargo and those stores are not in their possession, and not intrusted to them in any technical sense. They are not in law in the possession of a seaman. He has an opportunity, being a member of the crew, to steal them. Undoubtedly it would be larceny at common law, but it would be embezzlement by the statute, if he took them fraudulently to convert to his own or some improper use. Any person who receives public money from any agent of the United States—some agents being designated by a particular name, and also a general word being used—without authority, not being a duly authorized depositary, commits the crime of embezzlement in receiving that money. He becomes a sort of agent, and cannot say he was not an agent, and is guilty of embezzlement, for the statute says: "Every banker, broker or other person not an authorized depositary of public moneys, who knowingly receives from any disbursing officer, * * * any public money on deposit, or by way of loan, * * * is guilty of an act of embezzlement." There are many other statutes. The word, as used in the post-office laws, applies only to agents, clerks, etc, of the United States. But if I remember rightly—I have not looked at all the statutes, but I have a very strong impression, for I have tried a good many of the cases—it does not depend upon the letter being intrusted to the particular officer or clerk or agent, under the circumstances which would constitute embezzlement under many of the statutes. Any officer of the mint or assay office may embezzle coins, medals or moneys in his charge, or of which he assumes charge, or any other moneys, medals or coins in his office.

[It is very apparent, I think, from an examination of these various statutes, which were re-enacted on the same day, and which before that time formed a body of law enacted at various times, that the word is not used generally in the statutes. I do not know that it is at all in the United States in so sharp and technical a sense as it has been construed to be under some statutes, and of course the definition of the crime must be followed by the courts. There is no definition of it here or in any of the statutes of the United States, but the word is used in such a way as to show the meaning which I have mentioned, and therefore I think, though I do not find it

[2] [From 2 Nat. Bank. Cas. (Browne) 148.]

[2] [From 2 Nat. Bank. Cas. (Browne) 148.]

necessary to decide, that it will not be found, when the point comes to be decided, that in those cases those rules that have been laid down in some courts—and the courts have differed as the statutes have—those sharp lines would be found to be drawn about the word "embezzle" in the statutes of the United States. But I do think—and this is a point of law, not pleading—I do think that the intent here governs the whole fraud. It is not a perfectly clear point. In the only case that is cited on either side, the pleader averred that the acts had been done with intent, as I gather from the report. There are several counts. In one, for instance, an embezzlement with intent was charged. In the next, abstracting with intent. In the next, willful misapplying with intent. It was conceded, therefore, in that case by the prosecuting attorney representing the government, that the intent governed the whole cause. The court carefully say that they do not decide that point, evidently seeing ambiguity and doubt which had not been argued to them, and therefore, perhaps, having quite as much weight as if it had been argued, as showing how a person reading the statute would say there was a doubt on this point. But when taken with the original statute, in which there are no semi-colons, and if it is taken with the remainder of the section—"Every person who with like intent aids or abets any officer, clerk or agent in any violation of this section"—I think the better opinion is—and of course we must decide the doubtful points as well as the clear ones—that that governs the whole section. There are reasons for it, also, as was said by the counsel in argument.] [2]

A person may wilfully misapply money without doing any wrong in fact, and without intent of any. For instance, he may pay Mr. "A." instead of Mr. "B.," both being honest creditors. It is a misapplication, and it might injure or not the employer. "Abstracts;" that is rather a tender word. That might possibly be held to be committed without wilful intent, and even without actual injury. That is a matter that is a good deal discussed in the case of U. S. v. Taintor [Case No. 16,428], assuming that the intent is necessary. The meaning and importance of the intent is a good deal discussed on the supposition that it is a part of the statute. The word "embezzlement" of itself would hardly seem to require any such qualification, because I think that would carry in any sense,—I mean in any sense in which it could be used,—would carry with it some intent. But when we look back to one of the statutes I have cited, it will be seen that the mere receiving of public money is embezzlement. There is embezzlement without intent, and without injury, in fact. So that as to the meaning of the word "embezzle"—taking, as I do take, the meaning of that word from the statutes of the United States themselves, it might be necessary (in the opinion of congress, I mean, for I have nothing to do with that) to say that that crime could not be committed without the positive intent to "injure," or "deceive," or "defraud," for all three words are used, and at any rate, as to the two words "abstract" and "misapply," there is an obvious reason for it.

[2] [I think I can see why the semi-colons were put in, and that is to meet another argument made that the words "such authority" govern the whole sentence. It is very clear they do not. This section is carefully parted off by the semi-colons, and by the sense also. "Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association;" "or who, without authority from the directors, issues or puts in circulation any of the notes of the association;" and that must be done with intent to defraud, or injure or deceive; and then, repeating the words "without such authority," and it is repeated because they meant to repeat it. "Or who without such authority issues, or puts forth any certificate of deposit, draws any order or bill of exchange, mortgage, judgment or decree." Now, in the next clause of the sentence they omit the words "without authority," so that it is perfectly clear, I think, from the statute, that whenever they meant to say "without authority," they do say so, and when they do not say so they do not mean so to do. They put these words in twice, and leave them out of all the others, and they part off the sentence carefully with semi-colons so as to show to what portions of it these words are intended to refer, and that is the reason why the semi-colons were put in. I have consulted Judge NELSON about it, and he agrees with me. That being so, I think that the only counts which are sufficient, are those for making false entries.] [2]

To be sure the statute says (section 1025): "No indictment * * * shall be deemed insufficient * * * in matter of form only." That "only" is important. It must be a "matter of form," and in construing that in this circuit we have been very liberal. I have no sympathy with the extreme technicality of the ancient criminal law,—do not like it, and do not believe in it. At the same time, I have to administer it as I find it, and anything which forms a part of the description of the crime does not seem to me to be a matter of form. In this particular case it might turn out to be a matter of very little importance. Undoubtedly, the intent might often be presumed from the fact; but when congress sees fit to make the intent part of crime, I do not think the courts have any right to say it is a mere matter of form. So far as "misapplying" and "abstracting" are concerned, that is a very important part of the sub-

[2] [From 2 Nat. Bank. Cas. (Browne) 148.]

[2] [From 2 Nat. Bank. Cas. (Browne) 148.]

stance. I do not think that this statute means that we should find out what is an important point of the substance, but only an important point of form. I do not mean to say that the matter of substance may not be very loosely stated, and if the substance of the offense is loosely stated—badly stated—imperfectly and ungrammatically stated, still, if the meaning is clear, that is a matter of form; but it is not a matter of form to state the substance of the crime.

Indictment quashed.

Case No. 14,845.

UNITED STATES v. CONKLIN.

[17 Int. Rev. Rec. 76.]

Circuit Court, S. D. Ohio. 1873.

CLAIM AGENT—INDICTMENT FOR RETAINING ILLEGAL FEES.

The defendant [Jerome B. Conklin] was indicted under the seventh and eighth sections of the act of congress, approved July 8, 1870, for retaining a greater compensation for his services as claim agent than was allowed by law. He had obtained a father's pension for an old man named Porter, amounting with the back pay to some six hundred and sixty dollars; from this amount he retained $330, or one half. The indictment was found in October, 1872. On the 26th of October the defendant was arraigned, and entered a plea of not guilty. By permission of the court the plea of "not guilty" was withdrawn, in order that the defendant might file a motion to quash the indictment. The motion to quash was heard and overruled, and by consent of both parties the case set down for trial. The defendant was found guilty upon three counts of the indictment, and he now files several motions, the most important of which is one to amend the record by striking out the entry, showing that the defendant had re-entered the plea of not guilty.

Henry Hooper, and Channing Richards, Asst. U. S. Attys.

L. H. Bond, for defendant.

SWING, District Judge, held: The record in this case shows that the defendant had been arraigned, and had entered a plea of not guilty. Subsequently the plea was withdrawn by leave of the court, and he filed a motion to quash the indictment, which was heard and overruled. The record shows that on the 19th of December, 1872, the plea of not guilty was re-entered, a jury sworn to try the issue, and the cause submitted to the jury, who found the defendant guilty.

He now files a motion to amend the record by striking out the entry of the plea of not guilty, as he never entered it himself; and, consequently that the jury had no issue to try, and that the verdict cannot stand. The facts outside of the record are: That on the day of the trial the clerk, sua sponte, or by direction of the assistant United States attorney, re-entered the plea and made up the issue. When the case was called, the assistant attorney for the government opened the case to the jury, and the defendant's counsel opened the defence and stated emphatically that his client was not guilty. The defendant had challenged jurors and otherwise exercised his rights in the proceeding. The second day of the trial the clerk read in open court the record as it now stands, of the plea and the issue; and the defendant and his counsel were present and took no exception to its truth, but called witnesses, asked for certain charges, and submitted the case to the decision of the jury. Under these circumstances ought the court to permit the defendant to have the record amended in order that he may get a new trial or have the judgment arrested?

No case precisely similar to this can I find in any of the books. The nearest to it is the case of Fernandez v. State, 7 Ala. 511; but even there a statute permitted the court to enter the plea. In People v. Frost, 5 Parker, Cr. R. 52, the court held that the conduct of the defendant in demanding a trial, challenging jurors, etc., amounted to a plea of not guilty, but as that was by virtue of the statute, the case has no application here. The cases are unanimous that, if the record does not show an arraignment and plea, an issue for the jury to try on the verdict cannot stand. It must be set aside. And the court cannot supply the plea after verdict. See Sartorious v. State, 24 Misc. 609; Douglass v. State, 3 Wis. 820.

The record in the case at bar is perfect, and, consequently, these cases do not apply. Can the defendant waive the right of entering the plea himself? The old authorities say he cannot waive any of his rights, but that was at a time when the defendant, as a matter of right, could neither have counsel or witnesses. Our criminal jurisprudence secured to the defendant every privilege in favor of life and liberty. The reason for the old rule is gone. It has been settled that both in civil and criminal cases he may waive certain rights, such as the challenge of jurors. See 1 Bish. Cr. Proc. 425; Parks v. State, 4 Ohio St. 234.

We cannot lose sight of the facts that he was once arraigned and pleaded not guilty; that for his benefit he was allowed to withdraw this plea. The case was set down for trial upon a consent day; he appears in person, challenges the jury, is defended by counsel, calls witnesses to maintain his defence, and, telling the jury he is not guilty, submits to their decision. There is also another important fact in the case, viz. that on the second day of the trial he heard the record read in open court as it now stands, he made no objection to it but went on with his defence. Under these circumstances it seems to me that he waived his right to enter the plea or to have the record altered. He was silent when he ought to have spoken; and he must

now be silent when he would like to speak. It is admitted that he has had an impartial and fair trial, and that he has suffered no injury by the entry in question.

The motion to amend the record must, accordingly, be overruled.

THE COURT also overruled the motion for a new trial and a motion in arrest of judgment.

Upon a motion of the assistant United States attorney, the defendant was sentenced to pay a fine of $250 and costs of prosecution.

Case No. 14,846.

UNITED STATES v. CONNER.

[1 Cranch, C. C. 102.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

GAMING—OWNER OF TABLE—WHO MAY BE INDICTED.

1. Upon an indictment for keeping a gaming-table in a booth upon a race-field, contrary to the act of Maryland, it is not necessary to prove that the traverser was the owner.

2. He is equally guilty, whether he acted as principal, or agent, or servant of the owner.

Indictment for keeping a gaming-table, to game with dice, at a booth, on the race-field, contrary to an act of assembly of Maryland.

THE COURT instructed the jury that it was not necessary for the United States to prove that the traverser was the owner of the table, if he played at it as owner, and appeared to be the person who set it up. And that it was of no importance whether the traverser acted as principal or as agent or servant for the owner of the table. In each case he was equally guilty.

Quære. See U. S. v. Voss [Case No. 16,628], and the cases there referred to.

Case No. 14,847.

UNITED STATES v. CONNER.

[3 McLean, 573.] [2]

Circuit Court, D. Michigan. June Term, 1845.

PERJURY—FALSE BANKRUPT SCHEDULE—CRIMINAL INTENT—NEW TRIAL.

1. A bankrupt having submitted the facts in regard to his property fairly to the advice of his counsel, and in acting under the advice thus given withholds certain items from his schedule, is not guilty of perjury.

[Cited in Re Rainsford, Case No. 11,537. Distinguished in U. S. v. Learned, Id. 15,580.]

[Cited in Barnett v. State (Ala.) 7 South. 416; Lambert v. People, 76 N. Y. 226.]

2. The fraudulent intent is wanting, which is an essential ingredient of the crime.

[Cited in U. S. v. Learned, Case No. 15,580.]

3. A criminal intent is necessary to constitute this offence.

[Distinguished in Halsted v. State, 41 N. J. Law, 596.]

4. The circuit courts of the United States may, on cause shown, grant new trials in criminal cases.

[Cited in Ex parte Bradley, 48 Ind. 553; Joy v. State, 14 Ind. 153.]

[This was an indictment against Henry W. Conner for perjury.]

Mr. Bates, U. S. Dist. Atty.

OPINION OF THE COURT. The defendant was indicted for perjury under the bankrupt law, and was found guilty by the jury at the last term, the presiding judge being absent. The indictment contained but one count, charging the defendant with having furnished a false inventory of his property, in not including his interest in a house and lot, his interest in a grocery store, and in certain choses in action. The verdict was general, and a motion being made at the last term for a new trial, it was continued to the present term.

This motion is opposed on the ground that the circuit courts of the United States have no power to grant new trials, in any case of felony; that the common law must be their guide, and that, at common law, no new trial in a criminal case can be granted, except in cases of misdemeanor. This question was considered and decided in U. S. v. Keen [Case No. 15,510], and it will not be again examined. There can be no doubt that the court may, on cause shown, grant a new trial in any criminal case. The principal ground relied on for a new trial is, the charge to the jury on the fact proved, that the schedule being made out on the advice of a lawyer, a full statement of the facts being submitted to him, did not exempt the defendant, if any property was withheld from his schedule, from the charge of perjury.

The maxim is admitted, that ignorance of the law constitutes no excuse for the commission of a crime. But the intention with which the act is done must give a character to the act. A man may innocently commit homicide. If, in doing a lawful act, he should unintentionally kill a fellow creature, he is in no sense guilty of a crime. A bankrupt is bound to exhibit a true schedule of all his property, and if he fail to do this, wilfully and fraudulently, he is guilty of perjury. But if he, being unacquainted with the requirements of the law, shall be advised by his counsel, after the facts have been fully stated to him, that certain items of property are not required to be stated on his schedule, and he omits them, he is not guilty of perjury. He acts fairly in submitting the facts to his counsel, and, by acting under his advice, he shows a desire to conform to the law.

To constitute perjury under the law, the false schedule must have been made corruptly, by the bankrupt, and with the intent to defraud his creditors. The falsity of the schedule be-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John McLean, Circuit Justice.]

ing established, the mitigating circumstances must be shown by the defendant; and if no excuse be proved, the fraudulent intent will be inferred from the act, it being, prima facie, in violation of the law.

A new trial being granted, a nolle prosequi was entered.

Case No. 14,848.

UNITED STATES v. CONVERSE.

[21 Law Rep. 593.]

Circuit Court, D. Massachusetts. 1858.[1]

OFFICERS—EXTRA COMPENSATION—COLLECTORS OF CUSTOMS—DISBURSEMENTS.

1. The act of August 23, 1842, § 2 (5 Stat. 580), provides that no officer whose salary is fixed shall receive any additional compensation, "unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation." The act of March 3, 1849 (9 Stat. 367), makes an appropriation for superintendents' commissions on disbursements for light-house purposes, and repealed the following proviso in a previous act of the same year: "Provided that no part of the sum hereby appropriated shall be paid to any person who receives a salary as an officer of the customs, and from and after the first day of July, 1849, the said disbursements shall be made by the collectors of the customs without compensation." *Held*, that the repeal of this proviso neither repeals the second section of the act of 1842, nor satisfies its requirements by an explicit appropriation to pay an extra compensation for an extra service. The effect of such repeal is merely to restore the power of appointing others than collectors to make the disbursements, and, if collectors shall be appointed, leaves their rights to commissions to depend on the law as elsewhere found.

2. For disbursements made not as superintendent for a certain district, but under special orders from the secretary of the treasury for the whole lighthouse service, the act of 1849 makes no provision

3. If the repeal of the proviso enabled collectors to participate in said commissions, the act of 1822, § 18 (3 Stat. 696), limits their extra compensation to $400 a year.

4. The acts of September 30, 1850 (9 Stat. 533), March 3, 1851 (9 Stat. 608), and August 1, 1852 (10 Stat. 86), deprive every collector whose compensation exceeds $2,500 of all participation in these commissions, though they are required to render the service of superintendents of lights, or disbursing agents, in procuring supplies for them.

[This was an action at law by the United States against James C. Converse, administrator of Philip Greely, Jr., deceased.]

Mr. Hallet, U. S. Dist. Atty.

Mr. Choate and C. T. Russell, contra.

CURTIS, Circuit Justice. This is an action for money had and received to the use of the United States, by Philip Greely, Junior, the defendant's intestate, while collector of the customs for the port of Boston and Charlestown. A number of items were in question when the case was opened, but in the progress of the trial, all were disposed of to the satisfaction of both parties, save a charge made by the intestate, of $17,968.92, as commissions on disbursements made by him under the orders of the secretary of the treasury, in the purchase of oil and other materials for lighthouses. The question is whether the collector was entitled, by law, to make this charge against the United States for that service. Mr. Greely held the office of collector from May 1, 1849, to May 1, 1853.

By the act of March 3, 1841, § 5 (5 Stat. 432), it was enacted, that "no collector shall, on any pretence whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than six thousand dollars per year, including all commissions for duties, and all fees for storage, or fees or emoluments, or any other commissions, or salaries which are now allowed by law." The act of August, 23, 1842, § 2 (5 Stat. 510), is as follows: "That no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation."

It being admitted that Mr. Greely was an officer, whose salary, pay or emoluments was or were fixed by the law, and that he had received its full amount of six thousand dollars, independent of the charge in question, it is incumbent on the defendant to show, not only that the service was authorized by law, but also that the appropriation for that service explicitly sets forth that it is for such additional pay, extra allowance, or compensation. It is not enough to find an act of congress authorizing a service and making an appropriation to pay for it. This would be sufficient, provided the person rendering the service were not an officer or other person entitled to a fixed compensation. If he be, and he claims an extra compensation for an extra service, he must produce an appropriation which explicitly sets forth that it is made for such additional compensation; that is, he must show not only that congress contemplated and provided for a service and payment therefor, but that they contemplated and explicitly provided that if it should be rendered by one already entitled to a fixed compensation he should nevertheless receive, in addition thereto, the compensation provided for such service. And the addition of such compensation to a fixed compensation is not to be inferred from any equitable considerations, but must be found explicitly declared in the law itself. Such in my judgment is the fair interpretation of the language of this act, and the history of the legislation of congress upon this subject of the extra compensation of officers, makes this interpretation, if possible, still more plain and necessary.

[1] [Reversed in 21 How. (62 U. S.) 463.]

The defendant relies on the following clause in the appropriation act of March 3, 1849 (9 Stat. 367): "For superintendents' commissions, at two and one-half per cent. on the four hundred and sixty-six thousand nine hundred and thirty dollars and eight cents, appropriated above for light-house purposes, eleven thousand six hundred and seventy-three dollars and twenty-five cents. And the proviso contained in the act making appropriation for the civil and diplomatic expenses of the government, for the year ending the thirtieth day of June, 1849, and for other purposes, approved, &c., which proviso is in the following words: 'Provided, that no part of the sum hereby appropriated shall be paid to any person who receives a salary as an officer of the customs, and from and after the first day of July, 1849, the said disbursement shall be made by the collectors of the customs without compensation, is hereby repealed.'" The argument of the defendant's counsel is, that the express repeal of this proviso is equivalent to an explicit declaration that parts of the sum appropriated by this act might be paid to persons who received salaries as officers of the customs, and that it was not to be disbursed by collectors without compensation. But, certainly, this appropriation does not "explicitly set forth that it is for additional pay, extra allowance or compensation." If this appears at all, it is only inferentially, and the inquiry is whether it be a necessary inference that some part of this sum was appropriated as additional pay, or extra compensation to collectors who should perform the service of superintendents of lights. Now, the proviso which was repealed, consisted of two parts. The first related exclusively to commissions in the disbursement of the appropriation for light-house expenses made for the fiscal year ending on the thirtieth day of June, 1849; and it prohibited the payment of any commissions out of the sum thus appropriated, to any officer of the customs who received a salary. The second part of the proviso positively required the service of making disbursements as superintendents of lights to be performed by collectors of customs, after July 1, 1849, without compensation. It left no discretion with the secretary of the treasury to appoint any other person to discharge this duty. The repeal of the proviso left the right of officers of the customs to participate in the commissions for disbursing the appropriation made for the year ending June 31, 1849, to stand upon the law as elsewhere found; and restored to the secretary of the treasury the power to appoint persons other than collectors to make the disbursements, and if collectors should be appointed it left their right to commissions to depend on the law as elsewhere found. It must be admitted that this repeal might, under some circumstances, indicate an intention to have collectors participate in these commissions. If they have been for the first time deprived of them by the proviso, its repeal would quite clearly show that their former title was restored. But the contrary is true. Independent of the proviso they had no title to this or any other extra compensation, and by force of the act of August 2, 1842, could have none, unless explicitly granted by the act making the appropriation; so that unless I can say that the repeal of the proviso either repeals the second section of the act of 1842, or satisfies its requirements by an explicit appropriation to pay an extra compensation for an extra service, the defendant has no title to the commission. That the second section of the act of 1842 is not repealed by implication, by the repeal of the proviso, is clear. There is no repugnance between this repeal and the act of 1842. The reasons for repealing the entire proviso may have been that the act of 1842 was broad enough to cover the cases of extra compensation contemplated by the proviso, and so it was not necessary, in so far as its object was to provide for those cases; and in so far as it required the service to be performed by collectors only, that it was inexpedient. But to amount to a compliance with the second section of the act of 1842, it should have superadded to the repeal of the proviso, an explicit declaration that the appropriation was intended as extra compensation to those officers having fixed salaries, who might be selected to render the service.

There are two other views of this subject, either of which would, in my judgment, be sufficient to show that there is no lawful claim to these commissions. The first is, that although Mr. Greely was superintendent of lights within a certain district, extending round the Massachusetts Bay, yet these commissions are charged on disbursements made by him in the purchase, under the orders of the secretary of the treasury, of oil and some other materials for the whole light-house service of the United States. Now the appropriation made is for "superintendents' commissions." If he did not render this service as superintendent, but aside from that employment, acted under the orders of the secretary of the treasury in making large purchases for this service, no appropriation is made for paying him. It was, no doubt, an onerous and responsible duty, imposed upon him because he happened to be at a place favorable for making these purchases, and this may constitute a claim on the equitable consideration of congress, especially if the imposition of this onerous duty on him, instead of distributing it among all, or most of the superintendents of lights, was advantageous to the government. But this is for the consideration of congress. It does not enable me to say an appropriation to pay commissions by way of extra compensation, was actually made. Besides, if the repeal of the proviso in the act of 1848 were held to amount to an explicit declaration that collectors might participate in the commissions of superintendents, by way of extra compensation, the inquiry would still remain, To what extent may they receive such extra compensation? and this seems to me to be answered by

the act of May 7, 1822, § 18 (3 Stat. 696): "That no collector, surveyor, or naval officer, shall ever receive more than four hundred dollars annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any other office or capacity." In the case of Hoyt v. U. S., 10 How. [51 U. S.] 141, the supreme court considered this section in force, and applied it to the case of a collector who held office from March, 1838, to March, 1841, and I am not aware of its having been since repealed. It was admitted that aside from the charge now in question, Mr. Greely had received extra compensation to the extent of four hundred dollars annually, for services performed for the United States in a capacity other than that of collector. It follows that, for services performed in making these contracts and disbursements, which were not within his duties as collector, he can make no further charge.

What has thus far been said, relates exclusively to the defendant's claims under the act of 1849. The subsequent acts are so much more unfavorable to these claims that I do not deem it necessary to enter into a particular discussion of them. They are the acts of September 30, 1850 (9 Stat. 533), March 3, 1851 (9 Stat. 608), and August 31, 1852 (10 Stat. 86). I have examined these acts, and am satisfied each of them deprives every collector whose compensation exceeds twenty-five hundred dollars, of all participation in these commissions, though they are required to render the service of superintendents of lights or disbursing agents in procuring supplies for them.

The verdict must therefore be taken for the plaintiffs, disallowing in the account the credit claimed for these commissions.

[Reversed by the supreme court, where the cause was taken by writ of error. 21 How. (62 U. S.) 463.]

Case No. 14,849.

UNITED STATES v. CONWAY.

[Hempst. 313.] [1]

District Court, D. Arkansas. July, 1843.

EXECUTION—SALE OF PROPERTY UNDER—CONTRACTS—OBLIGATION—REMEDY—CONSTITUTIONAL LAW.

1. The "Act to regulate the sale of property on execution," approved 23d December, 1840, commonly called the "Valuation Law," is constitutional, according to the doctrine in Bronson v. Kinzie, 1 How. [42 U. S.] 311, and its provisions must be followed in executing the final process of the court.

[Cited in Moore v. Fowler, Case No. 9,761.]

2. The obligation of a contract and the remedy to enforce it are distinct things, and whatever belongs to the remedy may be altered according to the will of the state, as to both past and future contracts, provided the alteration does not impair the obligation of the contract.

3. The obligation of a contract may be destroyed by denying a remedy altogether, or impaired by burdening the proceedings with new restrictions and conditions so as to make the remedy hardly worth pursuing; but a law which reserves property from sale one year, if two thirds of the appraised value shall not be offered, is not of that character.

4. A writ of venditioni exponas issued before the expiration of the year is irregular, and will be quashed on motion, and a supersedeas thereto ordered.

[Suit by the United States against James S. Conway.]

Motion to quash a venditioni exponas.

A. Fowler, Dist. Atty, for plaintiff.

Chester Ashley, for defendant.

JOHNSON, District Judge. This is a motion made by the defendant, Conway, to have stayed, set aside, and quashed an execution issued in this case against him, on the 9th day of June, 1843, now in the hands of Thomas W. Newton, the late marshal of this district, on the ground that the same has been irregularly and illegally issued. The only question I deem it material to determine is, whether the execution law of this state, entitled "An act to regulate the sale of property on execution," approved 23d December, 1840 (Acts Ark. 1840, p. 58), providing for the valuation of property taken on execution, and that it shall not be sold unless it brings two thirds of its appraised value, be a valid and constitutional law. If it be a valid law, having been adopted under acts of congress as the law of this court (4 Story's Laws, 2121; 8 Laws [Bior. & D.] 62 [4 Stat. 278]; 10 Laws [Bior. & D.] 244 [5 Stat. 499]; 17th rule of 6th Oct. 1842; Wayman v. Southard, 10 Wheat. [23 U. S.] 20; Bank of U. S. v. Halstead, Id. 51,) it follows that the venditioni exponas has irregularly and erroneously issued, one year not having elapsed since the property was offered for sale under the first execution.

I have looked into the opinion of the supreme court of the United States, in the case of Bronson v. Kinzie, 1 How. [42 U. S.] 311, and from an attentive and deliberate examination of the doctrine there settled, I can perceive nothing which can justly authorize the inference that that court would declare our state valuation law inoperative and void, as being in conflict with the constitution of the United States. The distinction between the obligation of a contract, and the remedy to enforce it, is clearly stated by the chief justice who delivered the opinion. In their nature they are different and distinct things. The obligation of a contract arises at the time the contract is made, and continues until it be performed or discharged. The remedy to enforce the obligation of the contract does not arise until there is a failure to perform the obligation. They are, then, not identical, but

[1] [Reported by Samuel H. Hempstead, Esq.]

different and distinct things. The constitution prohibits laws impairing the obligation of contracts, and is silent with regard to laws relating to the remedies by which contracts are to be enforced.

In the opinion referred to, the chief justice states the doctrine in the following terms: "If the laws of the state, passed afterwards, had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts, in relation to past contracts as well as future. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself In either case it is prohibited by the constitution." The chief justice further says: "It is difficult perhaps to draw a line that would be applicable in all cases, between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered them with conditions that rendered it useless or impracticable to pursue it."

Now, the question here presented is, does the valuation law of this state come within the rule here laid down by the supreme court of the United States? Does it, in the language of the court, so seriously impair and burden the proceedings with new conditions and restrictions, as to make the remedy hardly worth pursuing? I think not. The valuation law, in the event that the property will not bring two thirds of its appraised value, postpones the collection of the debt for twelve months. This can scarcely be said to make the remedy hardly worth pursuing.

My opinion is, that the valuation law is a valid and constitutional law, and its provisions are to be followed in executing the final process of this court. The venditioni exponas must, therefore, be quashed, and the clerk, on the application of the defendant, is directed to issue a supersedeas thereto. Ordered accordingly.

Case No. 14,850.

UNITED STATES v. CONYNGHAM et al.

[Wall. C. C. 178; 4 Dall. 358.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1801.

EXECUTION—ALLOWING DEBTOR TO RETAIN PROPERTY LEVIED ON—SUBSEQUENT EXECUTION.

Where a creditor having levied on the personal property of his debtor, instead of selling the property as soon as it can reasonably be done, allows the debtor to retain possession of it for an unreasonable length of time, such execution is fraudulent as respects a subsequent one, and the property may be levied on and sold under such subsequent one.

[Cited in The Roslyn, Case No. 12,068.]

This was a question addressed to the court, respecting the priority of two executions, interfering with each other. A case was stated, which was shortly this. John Travis and others having obtained judgment in the supreme court of Pennsylvania, against F. and I. West, laid a fi. fa. on their household goods, and about twenty-eight days afterwards, assigned the judgment bona fide, and for a valuable consideration, to the defendants in this cause. The sheriff, by the consent and approbation of Travis and Conyngham, allowed the goods to remain about thirteen months in the possession of the Wests, when they were levied on by the marshal of this court, by virtue of an execution, at the suit of the United States. The question for the decision of the court was, whether the goods of the Wests, thus circumstanced, were liable to the suit of the United States.

Rawle & Dallas, for the United States, contended, that the defendants having omitted to proceed with their execution till after the levy, and leaving the goods in the possession of the Wests, for so long a time, had lost their lien, and the property had become liable to the execution of the United States. From Twyne's Case [3 Coke, 80], to the present day, a party's being allowed to remain in possession of goods, after title passed to another, has been considered a badge of fraud, and the goods have been held subject to a subsequent execution. The principle of the decision, and policy of the law, applies equally to the case of property seized in execution, and left in possession of the former owner. In both cases indicia of ownership, are separated from the reality of it, and both alike mislead the public and encourage fraud. The cases from the books, put both cases on the same ground. See 1 Ves. Sr. 245; 1 Wils. 44. Rice v. Serjeant, 7 Mod. 37, in point. 10 Vin. Abr. 561, pl. 18; Peake, 65; 1 Salk. 320; Carth. 420; 3 Ves. 38; 1 Ld. Raym. 251; Cowp. 434; Prec. Ch. 285.

The defendant's counsel, Levy & Lewis, denied that the law was settled in England so broadly as the plaintiff's counsel insisted,

[1] [Reported by John B. Wallace. 4 Dall. 358, contains only a partial report.]

for in the cases cited of interfering executions, the first execution creditor, after delivering his writ to the sheriff, had forbidden him to proceed, or had by some act or direction prevented him; while in the present case, the defendants had been merely quiescent; the sheriff, to be sure, acted with their approbation and permission, but not by their direction. But farther; all the authorities concur, that leaving the goods in the owner's possession, is but evidence of fraud; it is not a fraud in itself. No actual fraud is alleged. But admitting that the law is in England as it is stated, it is not so in Pennsylvania. A series of cases, and the ancient, general usage of the state, has settled it differently: and with us, a creditor may take goods in execution under a fi. fa. and without proceeding to sale, leave them in possession of the debtor, without losing his lien, provided it be done through indulgence, and not with any actual fraudulent intent. Levy v. Wallis [4 Dall. (4 U. S.) 167], in the supreme court in 1799, was the case of a testatum fi. fa. to Lycoming county, to March, 1799. The sheriff, by virtue of it, "levied upon twelve horses." Upon the return of the fi. fa., Ingersoll, on behalf of A. B. of Lycoming, objected to it, that these same horses had been levied on, twenty or twenty-two months before, under a fi. fa. by his client. Wallis had been allowed to remain in possession the whole time, and had actually sold two of the horses levied on under the first fi. fa. The question was made, whether the first execution creditor had lost his lien. The court was full, and considered the point so settled, that they would not allow an argument. The chief justice said, that it had been the practice ever since he had been at the bar, that an execution creditor leaving the goods in the debtor's possession from motives of humanity, or as an indulgence, and not for an actual fraud, should not be postponed to a subsequent execution. Steinhauer v. Witman [1 Serg. & R. 438,] in the supreme court in 1798, was this. A fi. fa. in the suit of Swift v. Witman [unreported], had been levied on the defendant's goods; but they were allowed to remain in his possession. Afterwards came Steinhauer's fi. fa., and upon the question of priority, the chief justice expressed his displeasure that the point should be raised. Yeates, J., said that the rule in England was, that an execution creditor by allowing the goods to remain in the debtor's possession, lost his lien as against a subsequent execution: yet that such a rule would not do here, that ours was a young country, where money was not easily to be raised on a sudden; and that it would be productive of great inhumanity and distress, to oblige a creditor to sell his debtor's goods immediately; thereby creating a rush of the creditors, and breaking him up, when by a little indulgence, which the creditor might wish to give him, he would be able to discharge the debt. He said that "there was a distinction between an execution creditor leaving goods in the debtor's possession, and a purchase under a bill of sale; the former may, and generally does do it, from motives of humanity; the latter must have a fraudulent motive." These cases do not so much settle the law, as prove that it has been long settled and acted under. It has become the common law of Pennsylvania, and by the laws of the United States—1 Story's Laws, 114 [1 Stat. 142]—this court will observe it. It will be adhered to in the state courts, and infinité inconvenience will be produced if discordant decisions should take place in the different courts.

In reply, it was said that the rule was not so firmly established in Pennsylvania, nor to the extent supposed by the defendant's counsel. Collins v. Earle [unreported] was opposed to it; this case was in the common pleas, in 1791, before President Biddle. Collins levied fi. fa. on Earle's property, but entered an order on the sheriff's docket, that he was not to sell unless another execution came. Johns afterwards levied another execution on the same goods, and they were sold, and the money brought into court. Judge Biddle heard the question argued at large, and then expressed his clear opinion, that the first execution was to be deemed fraudulent in law; and Johns accordingly took the money. Page v. Cook [unreported] was a similar case of interfering executions. It arose before Judge Coxe, and his decision was similar to Judge Biddle's. He said that Rice v. Serjeant, 7 Mod. 37, settled the question in England, and that the law must be the same in Pennsylvania. The counsel of the United States had notes of the cases which they said could be entirely relied on for authenticity and accuracy.

THE COURT remarked that this was an important case, and declined giving an opinion till the following term, when they did so as follows:

[Before TILGHMAN, Chief Judge, and GRIFFITH, Circuit Judge.]

TILGHMAN, Chief Judge. I think it may be taken for granted, that by the principles of the common law (Twyne's Case, 3 Coke, 80b); and by the stat. of 13 Eliz. c. 5, adopted in this state, and practised under, before and since the Revolution, the conduct of the defendants would be considered as attended with those circumstances, which induce a legal presumption of fraud. When I use the word fraud, it is understood that no actual misconduct or immorality is ascribed to Messrs. Conygham, &c., who are gentlemen of fair character, and have acted in this business, in all probability, solely from principles of friendship and humanity. This construction of the common law, and of the stat. 5 Eliz. was not disputed by Mr. Levy, who argued for the defendants, nor has it been questioned by the supreme court of Pennsylvania, whose opinion I very much respect.

That opinion, cited and relied on by the defendant's counsel, is the only circumstance which raised the least doubt in my mind. It is contended, that we are bound by the decision of the supreme court of Pennsylvania, by the 34th section of the act to establish the judicial courts of the United States on the laws of the several states, except where the constitution, treaties, or statutes of the United States provide otherwise. I will not now deliver any opinion, whether the laws of the several states here spoken of, are to be understood to be the acts of the several state assemblies as expounded by their judicial decisions, and not the decisions of the state courts on principles of common law. At all events, it will not be contended that we are bound by the opinions of the state courts on common law points, unless their decisions have been ancient, universal and without variation—so as truly to constitute the law of the land. We have kept this cause under advisement since January last, in order to make inquiry into the decisions of the Pennsylvania state courts. I have inquired, and from the best information I have been able to procure, the point has never been decided in the high court of errors and appeals; nor is it understood as established, in the extent contended for by the defendants' counsel, in the several county courts of Pennsylvania. I am warranted in saying this, by the opinion of the late Judge Biddle, and of the present Judge Coxe, both of the most respectable legal abilities. Indeed, the supreme court themselves, struck with the pernicious consequences, which might result from a general principle, that a plaintiff might suffer goods seized by a fi. fa. to remain in the hands of the defendant as long as he pleased, did in the case of Chancellor v. Phillips, 4 Dall. [4 U. S.] 213, decide, that a bona fide purchase without notice, of a parcel of bricks thus left in the hands of the defendant, should hold them against the plaintiff. This decision appears to me to have shaken the principle contended for by the defendants. It is contended that this principle still continues in force, with respect to household goods; but for what reason are household goods to be distinguished from other things? Are they not equally valuable? Do they not equally hold out to the world, an idea of false credit? Do they not encourage the entering up fraudulent judgments, for the purpose of being protected by a fi. fa. laid on them. It is said that there is no false credit, because it appears from the records of the court, that the goods have been taken in execution. True, it does appear so; but when the goods have remained a long time in the hands of the defendant, without sale, the fair and reasonable presumption is, that the execution has been satisfied, and there is no obligation on either party, to make this satisfaction matter of record, supposing it to have taken place. If the principle contended for prevails, in what situation are we? An execution for a small sum, may protect property to a large amount. If the goods remain, in point of law, in custody of the sheriff of the county of Philadelphia, the marshal of the United States cannot touch them by virtue of process from this court, and thus they may be protected at the pleasure of the plaintiff in the state court. But if it is granted that the goods are not in the custody of the sheriff, I think the point, on the part of the defendant, is abandoned. On the whole, I am of opinion that by the principles of the common law, and the stat. of 5 Eliz., which in fact, was no more than an affirmance of the common law, the property in question was liable to the execution of the United States. And I am also of opinion, that the defendant has not shown such an uniform, consistent, universal train of decisions, in the courts of Pennsylvania, as will warrant this court in departing from the principles of the common law.

GRIFFITH, Circuit Judge. Upon principles of the common law, nothing is more settled, than that a possession of chattels is prima facie evidence of property in the possessor; yet mere possession does not always subject the real owner, who is out of possession, to be deprived of his right by the disposition of the possessor, or the process of law: goods hired, or loaned, or in possession of another by the pledge or mortgage of the owner, or which have come to one as trustee, or by finding, or fraud, or tort—are protected during the continuance of the loan or hiring, the pledge or mortgage, the trust, fraud, or tort against third persons who purchase or take them in execution, or found any claim against the real owner, on the ground of such possession; but in all these cases, it will be perceived, that the possession of the goods in the other is consistent with the ownership of him out of possession; there is nothing which can raise a presumption, when the truth is made known, that the real property is not in him who claims it: but if the real owner permits the goods to remain after the period of the hiring or loan is expired, or the pledge after it is redeemed, or with the trustee, after the trust expired, or with the finder or spoliator after discovery, and neglects an unreasonable time to assert and reclaim his property, third persons, who bona fide purchase, or by process of law seize on such goods, will hold it against the real owner. This is allowed on the broad principles of public policy. What innumerable evils would follow, were it allowed for one man to appear the owner of property transferable by delivery—act as such—receive credit, and draw into confidence the world under such appearances, and when called upon to make good his engagements, to tell those who trusted him that he was all along a pauper, and that what he appeared to be was a mere disguise, a snare laid for the ruin of unsuspecting creditors. To avoid the mischiefs resulting from such contrivances, policy dictates, and the law says, that let a man's in-

tentions be what they may, and be ever so good and meritorious, yet he shall not be allowed to assist another in holding out appearances of property, to the injury of third persons; the only difficulty lies in settling what shall be an unlawful or fraudulent departing with possession by the true owner, so as to give him who comes in under the person in possession a superior or better right. I have before stated, that it is lawful to lend or to hire, and that if property is pledged or mortgaged, the pawnee or mortgagee may hold it securely; and so in the other cases, with this limitation, that if left by the owner in possession of another an unreasonable length of time after his right to reclaim or demand it accrues; and third persons, acting upon a supposition of property in the possessor, purchase or take it in execution, their right shall be preferred. What is a reasonable time, and what circumstances would in such cases give the character of legal fraud to the possession, are questions of law, to be determined as they arise, by a careful application of it to the particular case. There are certain cases perfectly settled, as coming within the description of constructive fraud: for instance, if A. sells goods absolutely to B., and yet B. permits the vendor to remain in possession and use the goods as before, though such sale was bona fide, and a valuable consideration as for money, or the payment of a debt; and afterwards A. sells the goods, or they are taken in execution, such sale or execution will be good against B.; for it is wholly inconsistent with the nature of the transaction, that after an absolute sale from A. to B., that A. should keep the goods, and use them as his own (3 Coke, 80; 2 Bulst. 218; 2 Term R. 585; Id. 594; Id. 587; 3 Esp. 54); the law therefore avoids such sales as fraudulent, preferring the title of him who makes a real purchase or lawful seizure, and takes possession, to his, who, though his purchase was honest, yet did not carry it into effect, but permitted the vendor to hold out the property as his own, and thereby deceive mankind into a belief that they were trusting to something real. The cases decided on this principle are innumerable; nor is it enough that the parties to such a transaction effect a nominal transfer, or color the sale by appearances of acting upon and executing the bargain and sale agreeably to the terms, if in truth and fact no real possession is taken, and no fair and reasonable execution of the sale, or transfer, of whatever nature, or for whatever purposes it may pretend to answer, is designed or effected. It may seem harsh to say, that a bona fide sale shall be deemed fraudulent. In general, where sales are made, and the vendor continues in possession, they are not bona fide, but fraudulent, in fact; that is, designed to cover the property; but the law is the same, where there is a valuable consideration and a good intent, if thereby third persons, as purchasers and creditors, are, or are liable to be drawn in and deceived; this is constructive or legal fraud —not inferred from the intent of the parties, but from the nature and consequences of the act. This principle of the common law, (for the statutes against fraudulent conveyances are merely in affirmance of it,) has been applied to the case of executions and seizures under them. There are cases establishing this position, that if one creditor obtains a judgment and issues execution, and takes the goods of his debtor on the fi. fa., and there voluntarily rests, if another takes out an execution and seizes the same goods, and proceeds to sell them, he shall be preferred who last seized and sold. This is so held upon the most obvious reasons of justice and policy—it is held to be fraudulent in law. A creditor who sues and gets judgment and issues execution against his debtor, acts wholly inconsistently with all his legal rights and his prior conduct, if, after seizing the goods, he suspends, or assents to the suspension of an actual sale for the satisfaction of his debt; his conduct is equally hostile to the debtor, if he takes the goods and keeps them locked up, and to other creditors, if he permits them to remain with the owner, to be used as before; it is plain, that his only object in levying his execution was to gain a preference, without in fact proceeding to execution. This the law will not permit, for many obvious reasons. In the first place, if a creditor may issue his execution, and then hold a preference, without proceeding to a sale, he may thereby completely fetter the property, of whatever amount: he may equally ruin the debtor, and prevent other creditors from obtaining their just rights; for while goods are held under one execution, and while that has a lawful preference, no other execution seizing the same goods can be executed. 4 Term R. 640. Again, if the creditor may, by a mere delivery of his execution first, and seizure, without going further, gain a preference over all subsequent process, this would in effect be giving to the first judgment a priority in case of goods; for where is the difference, whether a second creditor is defeated and delayed by a first execution not executed, or by a judgment on which no execution has been issued. The statute has declared, that in the case of chattels, the first execution shall have priority; but if that execution is not pursued, it is a plain fraud on the act, and ought to have no other preference than the judgment itself: and lastly, if the goods are only seized and left in possession of the debtor, this gives rise to all those consequences, to a certain extent, for which sales are avoided by innocent purchasers and creditors, where the vendee has left the property with the vendor: he uses them as his own—he gains credit, is trusted on that account; and perhaps the prospect of the fund, which apparently belongs to him, may induce the creditor to forego other means of obtaining satisfaction. In short, there seems the utmost wisdom and equity in the common law, which uniformly holds that a second fi. fa. shall be preferred to a first not carried into execution;

but here, as in every other case depending on the common law, great care must be observed to apply it correctly: that whilst the principle is recognised, we are certain the case comes under it. The question is, what is such a delay of execution, or what such a possession of the property by the defendant, as will constitute it fraudulent and void against a later fi. fa? Where the plaintiff manifests a desire to pursue his execution, or where, in other words, the delay, or the allowing the defendant to hold possession of the goods, results from the officer alone, I should be sorry to lay it down, that a later fi. fa., coming to another officer, should for that reason, be preferred; where the executions are in the hands of the same officer, no dispute on this subject—that is of laches in the officer—can often occur, for he will be equally delinquent in regard to all. There may possibly be also other circumstances intervening, which would form a reasonable ground upon which to hold a preference once gained, though some delay on the part of the plaintiff, or the defendant has been left some time in possession: these will be judged of as they arise, making all allowances for the peculiar circumstances of the parties, the state of society, the usages of the country, and the obstructions of a legal kind, retarding or entangling the parties in their pursuit of justice. But there must be no designed or intentional delay of execution: but where an execution is taken out, and the party who issues it either directs it not to be executed till a certain time, or until further orders, or assents to, or approves of the property continuing in the possession of the debtor as before, beyond the time reasonably required for the sale of it; if another execution comes to the same officer, or to another during the orders for suspension, or after the goods have continued more than a reasonable time in the possession of the defendant, with the plaintiff's approbation, I make no hesitation to say, the law is and ought to be, that the second execution gains the preference, and either the same officer or another may go on to execute it and pay the moneys to the second creditor; and so a third may come in and gain the preference over the second. But what is a reasonable time for making execution? This will often vary with circumstances—a week or ten days—or so much as would enable the officer to give sufficient notice of the sale after the seizure, would be allowed; but in general this is the affair of the officer, and though he should give more than was necessary, yet if not with the assent of the plaintiff, a subsequent execution coming in would not prejudice the first creditor's execution: it is where the execution of the writ is procrastinated by the connivance or privity of the party, and in the interim another execution comes, that he loses his preference. Taking these principles for a guide, what doubt can remain in this case? Here the plaintiffs took out a fi. fa., which was levied under their own eyes—the property could have been sold in twenty-four hours; they not only assent but approve of the delay of execution and permit the party to keep the possession as before, for a whole year, and for aught that appears, would never have executed it. In the mean time, the United States issue execution, and seize on these goods in the possession of the defendants. It is clear that this delay was not from the sole act of the officer; no steps were taken to compel the execution; on the contrary, it is expressly stated, that they approved of his suspending execution, and leaving the property, with the defendants in the first action. This then, was an execution, fraudulent in law as against the second. The party who sued it out did not enforce it; it was merely nominal; it did not operate, nor was intended to operate according to its purport: the judgment remained unexecuted, and as much so as if no fi. fa. had issued, and as against the second fi. fa. should have no preference. We have been pressed with the decisions of the state courts. I feel the utmost deference for their great equity and correct principles; but I am not satisfied that the question has been so fully settled as has been represented: no printed case is produced. Some accounts are given of an unsatisfactory kind of opinions, and a general understanding on this head; but I cannot collect from any decision in the supreme court of this state, that it has been solemnly settled as law, that a first creditor may sue out an execution—seize the goods—leave them in possession of the debtor, and consent to and approve of their remaining there an indefinite time. It is to this extent, the law has been stated as understood in Pennsylvania. But that cannot be so; for it goes to establish this monstrous proposition, that the first execution creditor may seize the whole property, and under cover of it hold it for any length of time, locked up against the claims of all others. According to this doctrine, an execution for $1,000 may hold property worth $10,000 for an indefinite time. It is well known, that the sheriff always seizes the whole, and makes an inventory, affixing a small value upon the goods levied on; so that the debtor cannot dispose of any of them, nor can any other creditor satisfy his execution, whilst the first levy subsists. In order, however, to get over this difficulty and its consequences, it was suggested, that in Pennsylvania there was a practice understood to be law, that when a second or later fi. fa. came into the hands of another officer, he might seize the same goods taken on the prior execution or executions, make an inventory, and return them, subject to the prior levy. If he could go no further, it is obvious the difficulty is not removed; for the first creditor may not be hastened by this; but the practise was represented as authorising the officer who levied "subject to the prior execution, to take the goods into his own possession, and to sell them on the second or later writ; and after paying over the moneys due on the first executions, to retain the residue on that under which the goods were sold." This has

been denied to be the law of Pennsylvania. Certainly there is no statute which authorizes it; and I make no doubt, if such instances have occurred, they were the result of accommodation, or acquiesced in from mistake of the law—a mere inadvertency; for nothing is clearer to my apprehension, that while the first seizure is in full legal force, that is, as long as the first execution remains upon it, and the property is in the supposed or actual custody of the first officer—any seizure or sale of it by a second officer would be tortious and void. Trover would lie against him, or against a purchaser with notice. It is said by Buller, J., in 4 Term R. 640, that it had been resolved by Holt, C. J., "that goods being once seized and in custody of the law, they could not be seized again by the same or any other sheriff." He cites Holt, 634; 1 Show. 174. The law supposes—so is the command of the writ, and so, if the officer does his duty, is the fact,—that all the goods seized are taken into his immediate and actual custody for sale: he returns them, if not sold "in his hands pro defectu emptorum." They are therefore not liable to any other process so as to be sold by such subsequent process, before the first is executed. The law is, that the officer who seizes must sell, and a venditioni goes to him for that purpose, though there is a method by distringas of compelling a sheriff out of office to assign the goods over to the sheriff in office; but this is for the benefit of the creditor, who has a lien by the seizure.

I admit, that by the delivery of the second fi. fa. the surplus goods are bound to answer that debt, and so all subsequent executions in order of delivery: and after the first is executed, if any goods remain, they, as the debtor's property, may be seized and sold to satisfy the subsequent creditor. But after the first seizure, no other can be made on the same goods, until the first execution is satisfied, or otherwise becomes void by the laches of the party; and then the writ, which was delivered after, may be executed upon the same goods by seizure and sale, if they remain in the actual possession or power of the party. The only question in this case is, whether the first levy or seizure really exists in law, or stands in the way of the second writ, issued by the United States. I am of opinion, from the facts stated in this case, that it does not. The plaintiff assented to and approved of the execution remaining unexecuted, and the goods, with his assent and approbation, were left in the possession of the debtor, as before; and that, too, for many months, without any apparent difficulty, or any necessity for the delay. I am of opinion, that any suspension of the execution, by the voluntary interference, or even voluntary delay of the creditor is a waiver of his priority: he loses the benefit which the law confers on the writ first delivered; and if a second fi. fa. comes in during this suspension, and finds the property in the hands of the debtor, that second writ obtains the preference, and is in law the writ first delivered; inasmuch as the other became fraudulent and void, being merely colorable so far as respected an actual execution.

In the case of Bradley v. Wyndham (Anno, 1743) 1 Wils. 44, the plaintiff got out an execution and a warrant to a bailiff to execute it, who on the 14th of May, did make a seizure, but it appearing that the plaintiff's attorney told him to use defendant kindly, and not to take any of his household goods, in consequence of which the bailiff made a mere nominal seizure, leaving defendant in full possession. On these facts a second fi. fa. which came out six days later, and on which the goods were seized and sold, was supported, the jury holding the first fraudulent, and the court refused to set aside the verdict. In that case the debt was bona fide, and the judgment and execution also; but the plaintiff lost his preference by delaying the execution, and leaving the goods in possession of the debtor. In West v. Skip (Anno, 1749) 1 Ves. Sr. 245, 246, Lord Hardwicke held that an elegit lost its preference, as against the assignees of a bankrupt, the plaintiff having left the goods in the possession of the debtor; his words are, "for the sisters on the elegit do not take possession of the goods, but leave them absolutely with the Harwoods, the question therefore arises, whether by this clause (21 Jac. I., 19,) they are not excluded, being either a plain consent, or great laches:" he then adds, "and it holds more strongly against a creditor by execution than any other, for if a creditor by fi. fa. seizes the goods of the debtor, and suffers them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution, it has been determined often, that it is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable." In Smallcomb v. Buckingham, 1 Salk. 320, and in several other books, all the reports agree in the court's laying down this position: If two executions come to a sheriff on same day, he should execute the one first delivered; yet if he execute the second, the sales will be good, and the second creditor will be entitled to the money—but the first creditor may have his action against the sheriff; yet, say the court, this action may be defeated, if the sheriff can show that there were laches, or designed delay on the part of the first execution creditor. In Rice v. Serjeant (1703) 7 Mod. 37, 38, which case has never been denied, the law is put in so many words: "A man has a judgment for a just debt against A. and takes out a fi. fa., and gets the sheriff to seize the goods, but would not let him proceed further: B. who has also a judgment for a just debt against A., takes out a fi. fa. against him, and the question whether he could seize on the same goods, and Per Cur. he may, for the former was a fraudulent execution, and the sheriff might very well return nulla bona on the first execution." The case here puts it, that

the first plaintiff would not let the sheriff proceed further: that can only be understood to mean that he voluntarily suspended or stayed proceedings, for it would have been out of the power of the plaintiff to have prevented the sheriff from selling if he had chosen so to do.

There can be no question that the common law is such as is laid down in these cases. In Pennsylvania, no doubt, some relaxation has been indulged, but I believe the law has not been altered, no solemn decision on the very point brought forward in this case has been given. In Chancellor v. Phillips [supra], cited from a note at the bar, it was decided in the supreme court, that leaving the goods with the debtor, was fraudulent as against bona fide purchasers from the debtor, and that such purchasers should be protected against the execution creditor and sheriff. This was going nearly the length of my opinion in this cause. If the creditor by execution, loses his lien by delay, and suffering the property to remain with the debtor, as against a subsequent purchaser from the debtor, I see not why he may retain it under the same circumstances against a bona fide seizure on a second execution; a purchaser of the debtor has equal means of notice of the lien, as the second execution creditor; for the judgment and execution being of record, are as much accessible to the one as the other: and though the subsequent purchaser pays money, it may be that the second execution creditor's debt arose in consequence of trusting to the apparent property of the debtor, and his apparent ability to proceed in business: and though it should happen that the debt of the last execution creditor had arisen before that of the first, still he might have suffered it to rest, or found other means of satisfaction, after the execution of the first creditor was levied, from perceiving the property to remain with the debtor, and therefore supposing either that no seizure existed, or that the debt was satisfied.

In the same case of Chancellor v. Phillips, Mr. Ch. Justice Shippen, is reported to have said, that the usage in favour of the debtor's possession after a fi. fa. had been principally restricted to furniture, from motives of humanity. This was evidently frittering down the usage to a mere nothing;—nor do I perceive the reason of this exception in favour of furniture. But how long may this permission continue? Certainly there must be some limit. In short, I believe the state courts will endeavour to get rid of this inconvenient and irregular usage, as fast as possible. I am sure that the ancient common law is the best, and safest, and plainest rule for us all. It is better for creditor and debtor, for the officer and the public, that judgments and executions should be executed, and that if one creditor delays, the next may come in and be paid.

Upon the whole, I feel satisfied, that while we lay down the rule in this case, we are pronouncing a judgment conformable to law, and which may in its consequences tend much to promote repose and security.

Case No. 14,851.

UNITED STATES v. COOK.

[2 Mason, 22.] [1]

Circuit Court, D. Massachusetts. May Term, 1819.

APPEAL—RECORD—ISSUES OF FACT—NUL TIEL RECORD.

1. Where the issue in the district court is nul tiel record, and the court below adjudge, that the plaintiff has not produced the record, there can be no reversal of that judgment, unless the record, if any is produced, is contained in the record brought up on the writ of error to the circuit court.

2. The issue of nul tiel record is an issue of fact, and as such, no writ of error lies from the judgment of the district court, on that fact, to the circuit court, under the judiciary act of September 24, 1789, c. 20, § 22 [1 Stat. 84].

Error from the judgment of the district court of the United States for the district of Massachusetts. This was an action of debt on bond at common law, commenced before the said district court at the September term, 1817. The bond bore date on the 21st of February, 1815, and was given by the defendants as claimants of a certain brigantine called the Voader, for the agreed value of the same, she being then under a libel at the aforesaid district court, as subject to forfeiture, for the causes set forth in said libel, and the bond was given on the delivery of the vessel to the claimants, upon their petition, in pursuance of the provisions contained in the eighty-ninth section of the act of March 2, 1799 [1 Stat. 627], for "regulating the collection of duties on imports and tonnage." The defendants filed their plea, in bar, setting forth, among other things, as grounds of objection against the demand of the United States, the following facts and circumstances relative to the proceedings under the libel against the Voader. That while said libel was pending, it was agreed between the seizing officer and claimants, that the vessel should be estimated at the value of $1,600; and that a bond should be given for this sum under the before-mentioned section of the act of congress, with condition to abide the final decision of the court upon the libel aforesaid, etc., in common form; said bond being lodged with the proper officer of said court, in the nature of a stipulation, in pursuance of the provisions of the statute herein before referred to. That said libel or information was continued in said court from term to term, until the term thereof holden at Boston on the 12th September, 1815, whence it was no further continued, nor further proceed-

[1] [Reported by William P. Mason, Esq.]

ings had thereon in said court; that afterwards, to wit, at a term of said court, holden in June, 1816, the United States by their attorney, moved the said court in writing, for judgment on said bond, for the aforesaid agreed value of said vessel, and for costs. Whereupon the claimants, in answering said motion and shewing cause, why the same should not be granted, did set forth in substance as follows, viz.: That after the exhibition of said libel or information and claim, and after giving the bond aforesaid, they preferred to the district judge their petition for a summary hearing of the case, to the end that the forfeiture alleged might be remitted by the secretary of the treasury, in pursuance of the statute in such case provided; that a statement of the facts was accordingly afterwards transmitted by the district judge in due form to the secretary of the treasury. And that, on the 11th September, 1815, the said secretary did decide to remit said forfeiture in pursuance of the authority vested in him in such cases, on certain conditions, which were duly complied with by the claimants. That the remittitur was returned in due form, and filed in said district court, and that thereupon the said remission was, by order of said court, entered on the record, and that the said libel was thereafter no further continued in court, nor any further proceedings had thereon. All which the said claimants declared by their said plea or answer, that they were ready to verify, and prayed judgment of the motion of said attorney of the United States, etc.

The replication of the United States attorney to the foregoing plea, was, in substance, as follows, viz.: That before the presentment of the aforesaid petition for a remission of the forfeiture, or any decision thereupon, to wit, at the term of said district court, holden in March, 1815, a final judgment and decree of said court was duly rendered against said vessel and appurtenances as having been forfeited for the causes alleged in the libel, as would appear by the record thereof, and that the same decree was then in full force, etc. Wherefore the said attorney prayed for judgment on the bond, etc., with profert of the record.

The rejoinder of the claimants was, in substance, that before and until the remittitur of the secretary of the treasury was produced and exhibited in said court, and before and until it was entered on the record thereof, the said information or libel, and the claim of the defendants consequent thereon, were continued in said court from term to term, and at the time of said exhibition, and of the said entry were pending in said court; the rejoinder, concluding with a traverse of the fact, of there being any such record of a final judgment or decree, as that set forth in the replication.

Upon this plea of nul tiel record, the issue was joined by the United States attorney, in common form; and thereupon the said motion and proceedings were continued to the then next December term of said district court; when and where the said court did render an order or decree in the cause, in the following words, viz.: "After a full hearing of the cause upon the allegation and proofs, and the arguments of counsel, and due consideration thereof, it is ordered and decreed, that the said motion of the district attorney, for judgment on the bond for the agreed value of the said brigantine Voader be overruled." That thereupon the attorney of the United States claimed and entered an appeal from said judgment or decree to the circuit court then next to be holden in said district; at which said last mentioned court, and by the consideration of the same, the said appeal was dismissed as irregular and void, for want of lawful authority in said court to sustain the same. All which facts and circumstances were fully set forth in the defendants' first plea, to the action on the bond, at the district court, concluding with the usual averments as to identity of party, etc.

To this first plea of the defendants, there was a general demurrer on the part of the United States, and joinder by defendants.

2. The second plea in bar of defendants in this action on the bond, at the district court, was this, in substance, viz.: That before the making of the "writing obligatory, set forth in the writ, the said brigantine Voader had become forfeited to the United States, as set forth in the libel referred to in the first plea, and mentioned in the condition of the bond;" and that always from the time of executing said writing obligatory, the said Nathan Cook did "abide by the decision of the proper court of the United States, touching the said seizure." And after the executing the said writing obligatory, to wit, on the 11th September, 1815, the forfeiture of said brigantine was, upon the petition of the claimants, duly remitted by the secretary of the treasury, in conformity with the statute, etc., upon the payment of costs, etc.; which were duly paid to clerk, etc. Concluding with the parati sunt verificare, in the usual form.

The replication of the United States attorney to this second plea of defendants, was substantially this, viz.: That the said Nathan Cook did not abide by the decision of the proper court of the United States touching the said seizure; but that long before the said 11th September, 1815, when the said forfeiture mentioned in the plea is alleged to have been remitted by the secretary of the treasury, to wit, at a term of said district court, holden in March, 1815, a final judgment and decree of said court, upon said libel, was duly rendered against the said vessel and appurtenances; that the same had become forfeited, prout patet per recordum; and that the said judgment, or

decree, was then remaining in full force, etc.

The defendants' rejoinder to this replication, was, "that before, and until the forfeiture of said vessel was remitted by the secretary, and until it was entered on the record of the said court that said forfeiture had been remitted as aforesaid," the said libel, and the claim of said Nathan consequent thereupon, were continued in said court from term to term, and at the time of the said remission, and entry thereof, were pending in said court; concluding with a denial of there being any such record of final judgment or decree, as that referred to in the replication; and with a verification in common form.

Surrejoinder of the United States, affirming the existence of such a record, with profert thereof, in common form; and upon this the defendants joined issue.

Upon these pleadings, the judgment of the district court was rendered in the following terms, to wit:

"And now all, and singular, the premises being seen, and by the court here fully understood, for that it seems to said court, that the plea aforesaid of the said defendants, by them first above pleaded in bar, is good and sufficient in law to bar, and preclude the said United States from having and maintaining their said action against them the said defendants; and for that the said United States have failed to produce the said record of a final judgment or decree, by them above in pleading alleged; therefore it is considered, that the said United States take nothing by their said writ," etc. [Case unreported.]

Mr. Blake, for the United States.

Gallison & Prescott, for defendants.

STORY, Circuit Justice. The only error now assigned at the bar is, that on the issue of nul tiel record the court below ought to have rendered a judgment, that the plaintiffs had perfected the record. There are two objections to this court's entertaining any question on this subject, which are equally fatal to the plaintiffs. In the first place, the judgment of the court below is that the plaintiffs failed to produce the record; and as no record was there produced, and none is contained in the transcript before this court, it is impossible for me to perceive that there was any error in the judgment in this point. If there had been a record produced, which the district court judicially held not to be the record pleaded, the error if any, in its judgment, could not be made apparent here, but by showing it on the record, in a bill of exceptions, or in some other regular manner. In the next place, the issue of nul tiel record was an issue of fact, although it was triable by the court; and the judicial act of 1789 (chapter 20, § 22), declares, that there shall be no reversal upon a writ of error upon the judgment of the district court for any error of fact. Upon both grounds, therefore, the judgment must be affirmed.

Case No. 14,852.

UNITED STATES v. COOK et al.

[1 Spr. 213.] [1]

District Court, D. Massachusetts. Oct., 1853.

CUSTOMS DUTIES—WRECKED GOODS—FORFEITURE—SEIZURE—INDICTMENT FOR RESISTING CUSTOMS OFFICERS.

1. If dutiable goods are wrecked, and strewn upon the shore, by force of the winds and waves, they are liable to duties only upon their value, as they lie upon the shore.

2. If worthless in that condition, they are subject to no duty.

3. To justify an officer in making a seizure of goods as forfeited, there must be reasonable ground to believe that some offence has been committed.

4. To subject a person to an indictment, under the statute of 1799, c. 22, § 71 [1 Stat. 678], for carrying away goods, alleged to be under seizure, a seizure must have been lawfully made, and possession taken and continued by the officer; and the accused must have carried the goods away forcibly, knowing them to be under seizure.

This was an indictment, containing four counts, founded on United States statute, March 2d, 1799, c. 22, § 71 (1 Stat. 678). The defendants were charged with "forcibly resisting, preventing, and impeding," custom-house officers and their assistants, in the execution of their duty. The different counts alleged, that Edwin Young, deputy-collector of Scituate, Tilden Hall, deputy-collector of Marshfield, and one William Young, their assistant, were resisted, prevented, and impeded, in the execution of their duty. It appeared from the evidence, that in March, 1853, the ship Forest Queen was wrecked on Scituate beach, with a foreign cargo, composed, among other articles, of rags in bales. The rags were strewn along the beach for miles, and being mixed with wool, and rock-weed, and other substances, and saturated with linseed oil, were of no value in that state. Many tons were picked up by various persons of Scituate, and being separated, with much labor, from foreign substances, and dried in the fields, were put up into bundles, for sale. Messrs. R. & R. Cook, two of the defendants, purchased large quantities of these rags from many persons, it being understood from Mr. W. P. Allen, the then deputy-collector at Scituate, that no duties were to be demanded for them. Shortly after this, Allen was removed from office, and Edwin Young was appointed in his place, who demanded duties on a parcel of rags belonging to the defendants, and on others stored in their loft. This demand was refused, and the rags, shortly afterwards, and in the daytime, were put on

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

board the schooner Taglioni, a packet plying between Scituate and Boston. There they were seen by Young; and Hall testified that Young seized them, but told nobody of the seizure. The rags were afterwards, and in the absence of Hall and Young, taken from the packet; to this, on their return, they made no objection, and in their presence, the rags were put into wagons, and carried away by the defendants. The two deputy-collectors told nobody that the rags were seized, and Young made no objection to their being carried away. Hall testified, that he forbade their putting the rags into the wagons, but his evidence was not supported.

B. F. Hallett, Dist. Atty.

C. G. Davis and Seth Webb, Jr., for defendants.

SPRAGUE, District Judge, in the course of his charge, laid down the law substantially as follows:

To charge the defendants, the government must make out: 1st. That the officers were obstructed in the lawful discharge of their duty. 2d. That this was done by the defendants, forcibly. 3d. That the acts of force were done knowingly and intentionally. In order to justify the United States officers in seizing goods, probable cause must be shown for seizure. They must have reasonable cause to believe that some violation of the revenue acts has taken place. Salvage goods are liable to duty, if of any value. The rags in question were liable to duty, on the beach, if of value, but otherwise, if worthless. The duties, in such case, are to be assessed upon their value as they lay on the beach, and not on the enhanced value, given by subsequent labor. If these rags were worthless on the beach, and Young knew it, and knew that they were not liable to duty, then there was no probable cause of seizure. And further, in order to maintain this indictment, the government must prove an actual seizure of the rags by Young or Hall, and that the defendants knew of this seizure. They must also prove that the officer took the goods into his custody, and continued to hold them, until forcibly ousted by the defendants. If the seizure was abandoned by the officer, the Messrs. Cook had a right to take the rags. Or if the acts of the officer were such as to induce the defendants to believe, either that no seizure had been made, or, if made, that it had been abandoned; and if the defendants did really so believe, and acted in good faith, in removing the goods, then they were not guilty of the offence charged in this indictment. But, on the other hand, if the goods had been rightfully seized, and were in the custody of the officer, and the defendant, knowing these facts, forcibly and wilfully deprived him of the possession, and carried the goods away, then the indictment is maintained.

The jury returned a verdict of not guilty, as to each of the three defendants.

Case No. 14,853.

UNITED STATES v. COOK COUNTY NAT. BANK et al.

[9 Biss. 55; 8 Reporter, 198; 25 Int. Rev. Rec. 266; 2 Nat. Bank. Cas. (Browne,) 128; 11 Chi. Leg. News, 344.] [1]

Circuit Court, N. D. Illinois. June, 1879.[2]

NATIONAL BANKS — INSOLVENCY — PRIORITY OF CLAIMS OF UNITED STATES—NATIONAL BANKING ACT—REPEAL BY IMPLICATION.

1. The United States has a prior lien over other creditors, in the distribution of the assets of an insolvent national bank in charge of a receiver, for the payment of all claims which the government has against such bank.

2. It was not intended that the provisions of the national banking act of 1864 [13 Stat. 99] should, as to banks organized under it, operate as a repeal or modification of the statutes which give the government a priority in the distribution of the estates of its debtors.

3. In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute if it be possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once without the aid of argument, it should be assumed that the legislative department intended both statutes to stand.

4. The government has a priority to secure the payment of postal and money order funds on deposit in a national bank when such bank becomes insolvent.

Demurrer to bill to establish priority.

The facts in this case as set up by the bill were, that the defendant bank was duly organized under the national banking laws, and was also designated as a depositary of money and funds of the United States. It became insolvent and suspended, with liabilities largely exceeding its assets. A receiver [Augustus H. Burley] was appointed and entered upon the discharge of his duties. At the time of its suspension the bank had on deposit a large amount of postal and money order funds, which were designated on the books of the bank as "Postal Funds" and "Money Order Funds" of the United States. These deposits had been made by John McArthur, postmaster at Chicago, under directions from the postmaster general. When the bank suspended, the treasury department held United States bonds to the amount of $100,000, deposited by the bank as security for its circulation. The bank having failed to pay its circulation, these bonds, in pursuance of the statute, were declared forfeited to the United States. A portion of them had, when the bill was filed, been sold, and it was the intention of the department to sell the remainder for the purpose of redeeming the circulating notes, and reimbursing the government for advances made on that account, which would leave a balance exceeding $30,000, or a sum sufficient to pay the debts due the United States on account of postal and

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 198, contains only a partial report.]

[2] [Reversed in 107 U. S. 445, 2 Sup. Ct. 561.]

money order funds deposited, as aforesaid, in the bank, by McArthur. In addition, the treasury department held a sum exceeding $30,000, belonging to the bank and which had been collected upon bills receivable and debts due the bank, in the course of settling up its affairs. A question arose whether the claims of the United States for moneys deposited by Postmaster McArthur were a preferred debt; that is, whether the United States should not distribute the funds and assets in its hands, equally among all the creditors of the bank, including the United States. Thereupon, this bill was filed for the purpose of having an account taken of the amount due the government, and for a decree directing the disposition of the funds belonging to the bank, in the control of the treasury department. On behalf of the bank and its receiver the contention was, that after reimbursing the United States for all sums advanced in redeeming the bank's notes, in excess of the proceeds arising from the sale of United States bonds deposited with the department as security for its circulation, the entire assets of the bank should be distributed pro rata, or equally; among all the creditors of the bank, including the United States.

W. C. Goudy and Mark Bangs, for the United States.

Monroe, Bisbee & Ball, for defendants.

Before HARLAN, Circuit Justice; DRUMMOND, Circuit Judge; and BLODGETT, District Judge.

HARLAN, Circuit Justice (orally). Very early in the history of the government it was provided by statute, that debts due the United States, should be first satisfied in all cases where any revenue officer, or other person, thereafter becoming indebted to the government, by bond or otherwise, should become insolvent, or where the estate of any deceased person, in the hands of executors or administrators, should be insufficient to pay all the debts due from the deceased. The priority thus established was declared to extend not only to cases in which an act of legal bankruptcy should be committed, but to those in which a debtor, not having sufficient property to pay all his debts, should make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, should be attached by process of law. Act March 3, 1797 (1 Stat. 515). That was an act providing more effectually for the settlement of accounts between the United States and receivers of public money, but it was held to include all debtors to the United States, whatever their character and in whatever mode bound. U. S. v. Fisher, 2 Cranch [6 U. S.] 358; Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 102. In the act of March 2, 1799, regulating the collection of duties on imports, a like priority was given to the government as to claims upon bonds given for the payment of duties. 1 Stat. 676; Act 1790 (1 Stat. 169). The policy inaugurated by these statutes seems to have been steadily maintained by the government. Their substantial provisions have been preserved in the authorized revision of the statutes. Rev. St. § 3466 et seq.

It is insisted, however, by the defendants, that a different rule must be observed in the distribution of the assets of an insolvent national bank, in charge of a receiver appointed by the comptroller of the currency. They assume that the national banking act of 1864, the provisions of which are preserved in the Revised Statutes, placed all the creditors of a suspended national bank upon an equal footing, except that for any deficiency, in the proceeds of the sale of United States bonds pledged to secure the circulation of such bank, but for no other purpose, the government is given "a first and paramount lien upon all the assets of such association," and to that extent and no farther, is it entitled, in the distribution of assets, to priority above all other creditors. 13 Stat. 114.

This position, it is earnestly claimed, is sustained by section 50 of the act of 1864 (Rev. St. § 5236), which, among other things, provides: "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction; and as the proceeds of the assets of such association are paid over to him, he shall make further dividends, on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The specific contention is, that these provisions of the national banking act operate as a repeal or modification, pro tanto, of the statutes which give the government a priority in the distribution of the estates of those indebted to it.

We cannot yield our assent to any such construction of the statutes in question. The authorities cited by learned counsel do not justify the conclusion for which they contend. They only announce the general rule, recognized in all the books, "that a subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and, even if a subsequent statute be not repugnant in all its provisions, to a prior one, yet, if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the former act. 'Leges posteriores, priores contrarias abrogant.'" Davies v. Fairburn, 3 How. [44 U. S.] 636; Wood v. U. S., 16 Pet. [41 U. S.] 362; Sedg. St. Law, 124, 125.

But it is equally well settled that repeals, by implication, are not favored by the courts. It must be presumed that the subsequent statute was passed with accurate knowledge upon the part of congress of the language and scope of previous legislation upon the same subject. If there was an intention to repeal or modify the prior statute, the further presumption must be indulged, that direct terms, for that purpose, would have been employed. In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute, if it be possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once, without the aid of ingenious argument, it should be assumed that the legislative department intended both statutes to stand. McCool v. Smith, 1 Black. [66 U. S.] 471; Sedg. St. Law, 127.

In view of these established rules of statutory construction, we are unable to concur in the suggestion that the national banking acts were intended to affect the priority given by previous statutes to the United States in the distribution of the estates of insolvent or deceased persons, or of corporations, indebted to the government. We include corporations because it is the settled construction of the original act of 1797, that corporations are included in the general designation of "persons" in that statute. U. S. v. State Bank, 6 Pet. [31 U. S.] 29. It is admitted by learned counsel that before the passage of the act of 1864, the government had a priority in all the cases specified in the acts of 1797 and 1799, whether the debtors were individuals or corporations. It is also admitted that such priority now exists, except in the cases of national banks for whom receivers have been appointed. But no sound reason has been assigned for a distinction in behalf of the general creditors of national banks, which, counsel concede, is not allowed in behalf of the creditors of other corporations, by whatever authority created, which are indebted to the United States. The words of the statute are broad, that "whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied." The defendant bank is, therefore, embraced by the express language of the statute. The same considerations of public policy which suggested the act of 1797, exist as well now as when the act of 1864 was passed; and there is no such irreconcilable inconsistency between the two acts, or between the several provisions of the Revised Statutes upon the same subject, as requires us to assume that congress intended, by the last statute to surrender the government's priority in any case covered by the prior statute. The two acts may well exist together. The direction in the national banking act, as to a ratable dividend upon all claims against the bank, satisfactorily proven, or adjudicated in a court of competent jurisdiction, should be construed as applicable to all cases of suspended national banks in the hands of receivers, except, and except only, where the United States is a creditor of the bank, and, in such cases, the rule of priority declared in express words, and never directly, or by necessary implication, abrogated by congress, should be enforced. They, the prior and subsequent statutes, may thus be reconciled. We are unwilling, by mere judicial construction, to upset a long established policy of the government in reference to its claims against insolvent debtors, whether individuals or corporations.

Our attention has been called to the case of the National Bank v. Colby, 21 Wall. [88 U. S.] 613, where the supreme court of the United States, referring to the act of 1864, said: "As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank." That case, it is clear, does not touch the precise point under consideration. It did not involve any question of priority as between the United States and the general creditors of the bank. The contest in that case was between the receiver, representing the general creditors, and a particular creditor, who had sought through adverse proceedings by attachment in a state court, to obtain a preference or advantage over other creditors. It was in reference to such a contest that the language cited was used.

The court is of opinion that the grounds assigned in support of the demurrer are not well taken—that the application by the United States of the balance on its hands, arising from the sale of bonds held as security for all public moneys deposited in the defendant bank, to the payment, pro tanto, of its claims for postal funds and money order funds, was in accordance with law, and that it may retain, out of any money under its control, belonging to the bank, a sum sufficient to discharge any lawful debt or claim it has against such bank, however it may have originated.

The demurrer is overruled, and unless the defendants present an answer, controverting the allegations of the bill, complainant's counsel may prepare such order as may be consistent with this opinion.

[NOTE. The defendants elected to stand by their demurrer, and from the final decree entered in accordance with the opinion above they took an appeal to the supreme court. The decree was reversed, and the cause remanded, with directions to sustain the demurrer and to dismiss the bill. 107 U. S. 445, 2 Sup. Ct. 561.]

Case No. 14,854.

UNITED STATES v. COOKE et al.

[4 Ben. 376;[1] 13 Int. Rev. Rec. 4.]

District Court, S. D. New York. Dec., 1870.[2]

COUNTERFEIT TREASURY NOTES—ASSISTANT TREASURER — CIRCUMSTANTIAL EVIDENCE — HONEST BELIEF.

1. The defendants, having presented at the sub-treasury of the United States certain seven-thirty notes of the United States, to be retired under the provisions of the act of April 12th, 1866 (14 Stat. 31), and having received the money therefor, it was afterwards claimed by the government that eighteen of them were counterfeits, and an action of assumpsit was brought by the United States against the defendants, to recover the moneys paid for such alleged counterfeits. *Held*, that, in order to entitle the United States to recover, it was necessary for them to prove that the eighteen notes were delivered to the United States by the defendants, that the United States paid their money for them, and that they were not issued by the United States under any act of congress.

2. Under the act of April 12th, 1866, the secretary of the treasury had no authority to retire or redeem any notes that were not in fact issued by the United States.

3. Under the provisions of the act of June 30th, 1864 (13 Stat. 218), the imprint, on the notes, of the signatures of the treasurer of the United States and the register of the treasury, and the statement showing the amount of interest accrued or accruing and the character of the notes, spoken of in the act, are to be taken as evidence of the lawful issue of such notes.

4. A delivery of notes to the assistant treasurer of the United States takes place when the notes are delivered to the proper officer, acting under the authority of the assistant treasurer.

5. As to the application of circumstantial evidence, if the jury should find any one circumstance clearly proved, which was inconsistent with a certain theory, that would be sufficient to destroy the theory entirely.

6. The receipt of the notes as genuine, by the assistant treasurer, would not bind the United States in any manner, if the notes were not in fact genuine.

7. The honest belief of the defendants in the genuineness of the notes would not constitute a defence.

[This was an action of debt by the United States against Jay Cooke, William J. Morehead, H. D. Cooke, H. C. Fahnestock, Edward Dodge, and Pitt Cooke, comprising the firm of Jay Cooke & Co., for money had and received by the defendants to and for the use of the United States, which money was received upon the occasion of their delivery to the plaintiff of certain treasury notes, believed by plaintiff to be valid, whereas they were afterwards discovered to be counterfeit.]

BLATCHFORD, District Judge (charging jury). This case, to which you have given such patient attention for thirteen days, filled, as some parts of it have been, with details not in themselves very interesting, and perhaps rather tedious, is one of the most important cases in which it can be the privilege of any citizen to take part either as judge, prosecuting officer, counsel for the defence, or juror, because it concerns deeply the interests of every man in the community. Every one of us, as a citizen of the United States, has an interest in seeing to it, that this immense mass of debt, which has been created by the government for the protection of our rights, our liberties, and our perpetuity as a nation, shall not be counterfeited, falsely issued, and palmed off upon the community, and even upon the subordinate officers of the government, in redeeming its indebtedness, imposing, in such case, on the government the necessity of resorting to actions, like the present one, for the purpose of recovering what may be its just due. The loss resulting from counterfeit paper of this kind must fall on some one in the community, and almost certainly on some party who is really entirely innocent of any complicity with the spurious issue. So, on the other hand, every citizen dealing, or liable to deal, in spurious articles of this description, is interested that no piece of paper shall be pronounced spurious which is, in reality, genuine. Therefore it is, that this case has been tried with so much care upon the part of the government, with so much patience on the part of the court and jury, and with such assiduous fidelity on the part of the counsel for the defence.

In the remarks which I shall have to make to you, I shall not detain you long. The claim which is made by the government I shall submit to you upon those counts of the declaration, in respect to each one of the eighteen pieces of paper, which are, in substance, to this effect—that, on a certain day named, one thousand dollars, and some additional amount, by way of interest, was obtained by the defendants, Jay Cooke & Co., from the United States, on the occasion of the defendants having delivered to the United States what purported to be a certain obligation of the United States, known as a seven-thirty note, and a coupon attached, for the principal sum of one thousand dollars, and certain interest, to wit, a note bearing seven and thirty one-hundredths per cent. interest per annum, and numbered so and so, of the series of seven-thirty notes issued June 15th, 1865, by the United States, together with an interest coupon, attached to said note, calling for interest to June 15th, 1868, which note, with such coupon attached, was, by the defendants, at the time they delivered it to the officer of the sub-treasury of the United States, professed to be, and by the plaintiffs was, when received by them, supposed to be, a genuine note of the United States, with a genuine coupon attached; and that, by the representations and inducement of the defendants, then and there practiced, the same was received by the United States, and their said officer, as a valid and genuine

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 3,178. Judgment of circuit court reversed by supreme court in 91 U. S. 389.]

note, with the coupon attached, at the subtreasury of the United States; whereas, the note and coupon were, in fact, counterfeit, and neither of them had ever been executed or issued by the United States, their officers or agents, but had been forged and falsely made and uttered, and were no obligation whatever of or upon the United States, and were by them, to wit, by their said officer, received, under the belief created by such representations and inducement, that the said note and the coupon attached were good, and formed a valuable and adequate consideration for the money received by the defendants, which was retained from the plaintiffs after the discovery that the said note and coupon were counterfeit, whereof prompt notice was given to the defendants. Then follow the usual averments to constitute what is called, in the law, an action of assumpsit.

You will perceive that this declaration asserts three things, and those three things must every one of them be proven in favor of the United States, to entitle it to recover in this action; for, if any one of the three shall be found by you in favor of the defendants, the defendants will be entitled to your verdict. Those three things are these: First, that these eighteen pieces of paper, marked C, and called, throughout this trial, the C notes, are the ones alluded to in the declaration, and were delivered to the United States by the defendants; second, that the United States paid their money for them; and, third, that they were not issued by the United States under any act of congress.

The law under which these transactions took place, and of which you have heard so much, in the course of this trial, in connection with the redemption, retiring or withdrawal of the notes called seven-thirty notes, is the act of April 12th, 1866 (14 Stat. 31). The words of that act on this subject are very few. It authorizes the secretary of the treasury to dispose of any description of bonds authorized by the prior act of March 3d, 1865, "either in the United States or elsewhere, to such an amount, in such manner, and at such rates, as he may think advisable, for lawful money of the United States, or for any treasury notes, certificates of indebtedness, or certificates of deposit, or other representatives of value, which have been, or which may be, issued under any act of congress, the proceeds thereof to be used only for retiring treasury notes, or other obligations, issued under any act of congress." This is the simple provision under which the retiring of the seven-thirty notes took place. The authority it conferred upon the secretary of the treasury, and the subordinate officers of the treasury department, was solely to retire treasury notes issued under some act of congress. If they were not issued under some act of congress, they were not within the lawful powers delegated to the secretary of the treasury by the act of 1866. The entire matter is regulated by statute; and, if these notes were in fact not issued under an act of congress, there was no authority on the part of the secretary of the treasury or of any other officer, high or low, not even the president of the United States himself, to retire or redeem them. The law-making power is the omnipotent power, in that respect, under the constitution of the United States; and, congress having declared that the only notes which could be retired were those issued under an act of congress, no other notes could be so retired.

There are two other statutes to which I must refer in this connection. The notes in question here, both those marked K, and alleged to be genuine, and those marked C, and alleged to be counterfeit, purport to be issued under an act of congress passed March 3d, 1865 (13 Stat. 468). All of the notes, thirty-six in number, the eighteen marked K and the eighteen marked C, bear date June 15th, 1865, and belong to what is known, in the parlance of dealers in government securities, as the second issue of seven-thirty notes. This act of March 3d, 1865, which was the authority for the issue of these notes, if they be genuine, contains generally these provisions—that the secretary of the treasury is authorized to borrow so much money, and to issue therefor treasury notes, in such form as he may prescribe, redeemable so and so, to be of such and such denominations, interest to be payable semi-annually, the rate, when not payable in coin, not to exceed seven and three-tenths per centum per annum, and the rate and character of the interest to be expressed on such bonds or treasury notes. Then it provides that he may dispose of any of these obligations, as he may think advisable, for coin or other lawful money of the United States, or for treasury notes or other obligations issued under any act of congress, and may issue treasury notes authorized by the act in payment for any requisitions for materials or supplies for the government. The third section of the act provides, that all the provisions of the act of June 30th, 1864 (which was the act under which the first series of seven-thirty notes was issued), in respect to forms, inscriptions, devices, and the printing, attestation, sealing, signing, and counterfeiting thereof, with such others as are applicable, shall apply to the obligations issued under this act of 1865.

This remits us to the third statute to which I shall refer, and that is the act of June 30th, 1864 (13 Stat. 218), in respect to the forms of the notes and the inscriptions and devices on them. This act of 1864 contains the general provision, that the secretary of the treasury may issue these treasury notes, bearing this rate of interest, seven and three-tenths per cent., and that he may dispose of them upon the best terms he can, for lawful money. Then, at the close of the sixth section, occurs a provision, that the treasury notes authorized by the act to be issued by the secretary of the treasury "shall be in such form as the secretary shall direct, and shall bear the written

or engraved signatures of the treasurer of the United States and the register of the treasury, and shall have printed upon them such statements, showing the amount of accrued or accruing interest, and the character of the notes, as the secretary of the treasury may prescribe; and shall bear, as a further evidence of lawful issue, the imprint of the seal of the treasury department, to be made under the direction of the secretary of the treasury, as before directed." This provision is made applicable, by the act of 1865, to the sealing and signing of the notes of the second series; and it requires, as a further evidence of the lawful issue of the notes—the genuine notes—those in fact issued—that they shall bear the imprint of the seal of the treasury department, to be made under the direction of the secretary of the treasury. The use of the expression, "as a further evidence of lawful issue," necessarily intends that what has been just prescribed in respect to the imprint of the signatures of the treasury and the register, and to the statement showing the amount of interest accrued or accruing and the character of the notes, shall be taken as evidence of lawful issue.

On the point of the notes having printed upon them statements showing the amount of interest accrued or accruing, you will recollect that each note was issued with five coupons. The principal was payable in three years; and, the interest being payable semi-annually, five coupons were attached to each note, representing five instalments of interest, while the sixth instalment was to be payable without a coupon, when the principal should be payable, on the presentation of the note.

As I have said to you, there are three questions here involved—first, the reception of the notes marked C, by the government, from Jay Cooke & Co.; second, the payment therefor, by the government, to Jay Cooke & Co.; and third, whether the notes, if they were received from Jay Cooke & Co., had been previously issued by the government. The first two questions I shall treat as one, they having been so treated by the counsel; and that is, whether the transaction alleged took place in fact between the officers of the sub-treasury here, and Jay Cooke & Co., in respect to these notes marked C. On that subject I have no instructions to give you, except to say that it is a simple question of fact for your determination. You have heard the evidence and the discussions of counsel upon that branch of the case. There is no question of law involved in it. It is for the government to satisfy you, by preponderating evidence, that these C notes were, as is claimed in the declaration, received at the sub-treasury here, by the proper officer there, from some person representing Jay Cooke & Co., and were paid for by the United States to some person representing Jay Cooke & Co., in money or other valuable consideration that was the property of the United States, representing the face of the notes and the accrued interest thereon. It is simply a question of fact, and on that point I charge you, in accordance with the defendants' request, that, in order to entitle the plaintiffs to recover, they must show that the eighteen notes produced on the trial, and marked C 1 to C 18, were the identical notes which were delivered by the defendants to the assistant treasurer of the United States. I charge you, further, that a delivery to the assistant treasurer of the United States takes place, when the notes are delivered to the proper officer acting under the authority of the assistant treasurer.

I am also asked to instruct you, that, in order to entitle the plaintiffs to recover, they must also show that the eighteen notes marked C 1 to C 18, were delivered to the assistant treasurer between the 20th of September and the 9th of October, 1867. The counts in the declaration are to the effect, that the first one of these notes, No. 68,446, was delivered on the 21st of September, and the last one on the 8th of October. Therefore, the dates stated in this request are according to the averments in the declaration, if the notes were ever received at all. There is no evidence on the subject as to when they were received, except as to times between the dates named in the request; but, the government must satisfy you that the declaration is proved, and that the C notes were received between those dates.

I am also requested to charge that, in order to entitle the plaintiffs to recover, they must further prove that the money paid to the defendants for the notes was the money of the United States. That is true.

I shall now pass to the other branch of the case, and that is, whether these C notes were issued by the United States; because, if you find that, in point of fact, these C notes were not issued by the United States, then the plaintiffs are entitled to recover, provided you also find that these C notes are the identical notes delivered to the government by Jay Cooke & Co., and for which the government gave to Jay Cooke & Co. the money alleged in the declaration. As has been remarked by the district attorney, the ultimate question in this case is, not whether the C notes are spurious or genuine, or whether the K notes are spurious or genuine. That is a collateral question, and the whole investigation into the question whether the K notes are genuine, and whether the C notes are spurious, has been gone into as bearing upon the question, whether the C notes were ever issued by the United States.

I shall call your attention to some matters in connection with each branch of the question in regard to the issue of the notes. There is a class of evidence on this subject aside from any comparison between the C notes and the K notes. There is also a class of evidence that arises from a comparison of the C notes with the K notes, in reference to the question whether the two sets of notes were or were not printed from the same

plates; because, it is an argument in the case, urged by the government, and the challenge is accepted by the defence, that, if the C notes are shown to be spurious, and not to have been printed from any plates which the government of the United States used in printing notes which it issued, the presumption arises that the C notes were never issued by the United States.

There are four points of view from which the genuineness or spuriousness of these notes may be considered. The C notes and the K notes are both of them spurious, or the C notes and the K notes are both of them genuine, or the C notes are genuine and the K notes are spurious, or the K notes are genuine and the C notes are spurious. In considering the question, it undoubtedly is of assistance toward arriving at a determination whether one of two things is spurious, to be satisfied first whether the other of the two is genuine. In other words, it will assist you in determining whether or not the C notes are spurious, if you can determine first whether or not the K notes are genuine; because, you may be entirely satisfied that, if the K notes are genuine, the C notes must be spurious. In other words, if you arrive at the conclusion that the K notes are genuine notes, it may follow in your judgment, as a necessary conclusion, that the C notes are spurious. As I have understood the course of the defence, from the evidence and the summing up, the deduction sought to be drawn from the evidence is, that the C notes are genuine notes, and were issued by the United States; but I have not understood the position to be taken by the defendants, that the K notes are spurious notes. It is, however, for you, on the evidence, to pass upon this question.

As I said before, it may be that, if you are satisfied that the K notes are genuine notes, you will conclude that the C notes also cannot be genuine. On this point you will recollect the testimony of Mr. Casilear, when he was first on the stand, and afterwards when the books were produced, showing the commencement of the printing of the second series of notes on the 5th of March, 1865, two days after the passage of the act authorizing their issue. The effect of his testimony, if it is to be believed, is, that these notes of the second series were printed from three plates of four subjects each, plate 1, plate 2, plate 3, each with four subjects, that is, four notes on each plate. For the purpose of illustrating this matter, I have put into a tabular form what is testified to by one of the witnesses in regard to the check letters which he finds on the C notes and the K notes, it being assumed, for the purposes of this table, that the K notes were printed from three plates of four subjects each. The first plate, or plate 1, I throw entirely out of view, because none of the thirty-six notes appear to have been printed on plate 1. Of the K notes, seventeen appear to have been printed from the second plate, and one on the third plate. All of the C notes appear to have been printed from the second plate. The table shows plate 2 with four notes on it, and plate 3 with only one note on it, and that one the first note at the top of the plate. According to the testimony of the witnesses, the system of check letters adopted and used was this: The first note on the plate was lettered A, the second B, the third C, and the fourth D. But, with three plates of four notes each, each plate having these four letters, and these alone, on its four several subjects, it would be impossible to tell, from the face of a note, upon which one of the three plates a note with a given check letter was printed. Therefore, for the purpose of enabling it to be told on which one of the three plates a given note was printed, a small A was engraved underneath each one of the four several letters A, B, C, D, on the first plate; a small B was engraved underneath each one of the four several letters A, B, C, D, on the second plate; and a small C was engraved underneath each one of the four several letters A, B, C, D, on the third plate. Locating the eighteen K notes and the eighteen C notes according to their large and small check letters, by the arrangement which I have just explained, it appears that seven of the K notes have the check letter A with a small B under it, and were, therefore, printed from the first subject on the second plate. Four of the K notes have the check letter B with a small B under it, and were printed from the second subject on the second plate. Three of the K notes have the check letter C with a small B under it, and were printed from the third subject on the second plate. Three of the K notes have the check letter D with a small B under it, and were printed from the fourth subject on the second plate. One of the K notes has the check letter A with a small C under it, and was printed from the first subject on the third plate.

I turn now to the C notes. Every one of them has either the check letter A with a small B under it, or the check letter B with a small B under it, there being eleven with A and a small B, and seven with B and a small B. The same system of interpretation that was applied to the K notes shows, that the eleven C notes which have A and a small B were printed from the first subject on second plate, and that the seven C notes which have B and a small B were printed from the second subject on a second plate. But there is nothing to indicate that the plate from which the C notes were printed had upon it any but the two subjects. There is, however, incontrovertible evidence that the K notes must have been printed from a second plate of four subjects, because there are notes marked K, with the several check letters A, B, C, and D, and a small B under each of them, such small B indicating a second plate, and the four large letters A, B, C, and D indicating that such plate had upon it four subjects.

There is another view of this matter, which, to your minds, may corroborate the testimony

of Mr. Casilear, that, in point of fact, these K notes were printed from plates of four subjects each. You will recollect the testimony as to the notes being numbered consecutively in the treasury department. It is a fact, and is shown by this table, that every one of the K notes which was printed from the first subject on a plate bears an odd number, that is, a number terminating with 1, 3, 5, 7, or 9; that every one of the K notes which was printed from the second subject on the plate bears an even number, that is, a number terminating with 0, 2, or 6; that every one of the K notes which was printed from the third subject on the plate bears an odd number, that is, a number terminating with 5 or 7; and that every one of the K notes which was printed from the fourth subject on the plate bears an even number, that is, a number terminating with 2, 4, or 6. Now, it is quite evident, that, if you have a plate of three subjects only, this uniformity in respect to the notes printed from the first and third subjects on the plate bearing always odd numbers, and those printed from the second subject on the plate bearing always even numbers, could not be preserved, in a system of consecutive numbering; because, you would require for each subject, alternately, even and odd numbers. Thus, beginning with number 1 for the first note printed from the first subject on the plate, the second note printed from that subject would be numbered 4, the third note 7, and so on. The notes printed from the second subject would be numbered 2, 5, 8, and so on; and those printed from the third subject would be numbered 3, 6, 9, and so on. These considerations apply to the question as to whether it is possible that the K notes could have been printed otherwise than from plates of four subjects each.

As to the C notes, every one of them which has the check letter A. and thus purports to be printed from the first subject on a second plate, bears, as do the K notes which have the check letter A, an odd number, that is, a number terminating with 1, 3, 5, 7, or 9; while every one of the C notes which has the check letter B, and thus purports to be printed from the second subject on a second plate, bears, as do the K notes which have the check letter B, an even number, that is, a number terminating with 0, 2, 4, or 6. There is, therefore, this similarity between both sets of notes—every note which has the check letter A bears an odd number, and every note which has the check letted B bears an even number. There are none of the C notes which have a check letter C or a check letter D. This shows that none of them purport to have been printed from the third or the fourth subject on a plate.

I shall allude to but one matter connected with each of the two classes of evidence to which I have referred. I shall first speak of a matter which struck my mind with great force, as the evidence in respect to it was given on the trial, but which has not been alluded to by the counsel in summing up. Mr. Casilear testifies to the fact (and it is readily seen by an inspection of the notes themselves) that, on each one of the four K notes which are printed from the second subject on the second plate, namely, K1, K9, K15, and K18, the loop of the letter p in the word "Spinner"—the engraved signature of the treasurer of the United States, which is required by law to be put on the notes—is brought down in such a manner that the dark line of the loop, as it passes through the border composed of stars, goes through the rays of a star, and divides them into two parts; whereas, on each one of the seven K notes which are printed from the first subject on the second plate, namely, K2, K5, K6, K8, K10, K16, and K17, the loop of the letter p in the word "Spinner" does not cut or divide the rays of a star, but, on the contrary, the whole of such rays are clearly visible within the loop. There is a difference, therefore, in the position of the loop of such letter p, with reference to the rays of the star, between the K notes printed from the first subject on the second plate, and the K notes printed from the second subject on the second plate. Mr. Casilear also states, and it is plainly to be seen, that on every one of the eighteen C notes, whether it has the check letter A or the check letter B, the rays of the star are seen entire inside of the loop of such letter p, and are nowhere cut by the loop. It is for you to say what deductions you will draw from these facts, in respect to the question whether the C notes and the K notes were printed from the same plate or set of plates, irrespective of the question as to which of them are of the genuine issue.

On the class of evidence which is directed to a comparison between the two sets of notes—what is to be seen in making such comparison, and what deductions are to be drawn from what is seen, when the facts are presented in a clear and distinct form and collated—I shall allude to but one point. It is one which was commented upon by the district attorney. It has a bearing on the question, which, as I stated, you may decide to determine before approaching the subject of the issuing of the notes—the question as to whether the K notes are or are not genuine; because, if it is established to your satisfaction that the K notes are genuine, you may, perhaps, be led the more quickly to the solution of the question as to the genuineness of the C notes.

It is testified, and the evidence is not contradicted, that every one of the K notes had appended to it, and forming a part of it, when it was issued by the treasury department, the five coupons to which your attention has been called, and that the coupons on each note were numbered severally 1, 2, 3, 4, 5 (and so numbered that number 1 should be cut off first, and the rest in suc-

cession, and number 5 last), and that each coupon was also numbered with the number of the note. The government has produced here, from the files of the department, the K notes which correspond in numbers with the C notes, and, in every case where any K note has not now attached to it coupons which formed an integral part of it when it was issued, the government has produced from the same files certain coupons which, it claims, make up, with the coupon or coupons now attached to the note, all the five coupons which ever belonged to it. One of the K notes has yet attached to it two coupons, others of the K notes have but one coupon attached, and still others have no coupon attached. Here are the notes and here are the coupons so produced—single coupons corresponding in numbers with the K notes and without duplicates; and it is testified that no duplicate coupons could be found, on searching, in the place where these coupons were found. Every one of the C notes produced has upon it the coupon numbered 5, and no one of the C notes has upon it any other coupon. The loose coupons so produced must be applied to the one or the other of these sets of notes, if they belong to the one or the other. Some loose coupons numbered 5 are produced. In every instance where one is produced, it is found that the K note which corresponds in number with the number on such coupon, has not now attached to it any coupon numbered 5. But no one of such loose coupons numbered 5 can be regarded as belonging to any C note, because every C note has now upon it a coupon numbered 5. Therefore, whatever other conclusion you may come to, it is perfectly clear, if there was to each note one and only one coupon numbered 5, that, as each of the C notes has upon it now a coupon numbered 5, the loose coupons numbered 5 which are now produced must have belonged to some other notes than the C notes. When the government produces certain notes which were issued with coupons, and produces also loose coupons found in its possession, and when, if you apply such loose coupons to the K notes, the C notes are left each with only one coupon and with four other coupons unaccounted for, it is for you to say, as bearing on the question of the genuineness of the C notes, what inference you will draw from any failure to account satisfactorily for the four coupons that are missing from the C notes. These considerations apply to the question of the genuineness of the K notes, as bearing, also, upon the question of the genuineness of the C notes.

In this connection you will recollect the testimony of Mr. Gray, who states, that, on all the K notes which have now appended to them a coupon numbered 5, he finds the positions of the seal and of the figure 5 on such coupon, relatively to each other, to be, in all cases, the same, by actual measurement. There is, by measurement, the same distance laterally between the figure 5 on every coupon numbered 5 that is now appended to a K note, and the projected line of the seal on such note. In regard to the C notes, Mr. Gray says, that, in the whole eighteen (each of them having appended to it a coupon numbered 5), there is, by measurement, the same distance laterally between every one of such coupons numbered 5 and the projected line of the seal on the note. But he also says, that the distance between the line of the seal and the figure 5, on the coupon numbered 5 on the K notes, is over one-quarter of an inch greater than the like distance is on the C notes. It is for you to say what conclusions you will draw from these facts. The rule of law in regard to the application of evidence of a circumstantial character, like much of that in the present case, is this: If, in respect to a certain theory, you find any one circumstance clearly proved that is utterly inconsistent with that theory, that fact is sufficient to destroy the theory entirely. If, in respect to any point of evidence that is of a circumstantial character, you are satisfied, by proof, of the existence of any one circumstance that is entirely inconsistent with any theory advanced on either side in regard to either one of these two sets of notes, that theory must necessarily be regarded as unsound. This rule applies to every branch of the case where the evidence is circumstantial.

The government has given certain evidence, by Mr. Meloy and Mr. Irwin, in respect to the sending out from the treasury department of certain notes which it claims were the K notes, with a view to show that such notes were in fact issued by the United States. Mr. Meloy, it is claimed, wrote the receipts and letters which accompanied seven of the notes, and sent out the receipts unsigned with the notes, and received back signed the receipts which are produced. Mr. Irwin, it is claimed, sent out receipts unsigned with all the rest of the notes except one, and received back such receipts signed. The note for which there is no receipt, is, it is said, one which was sent, with others, to a person whose name is given, in exchange for other notes which had inadvertently been issued to his order. The act of issuing the notes was, under the statute, a physical act. The notes may be printed in the department, from the genuine plates, and may be all ready to issue, and yet, if they are not in fact issued, they do not come within the statute. It is for the purpose of showing the physical act of issuing the notes, that the government has given the testimony to which I have referred. The United States are not bound to redeem any notes which were not in fact issued. There is no authority to retire the notes unless they were issued, as a physical fact. In addition to the evidence alluded to, the government has also given evidence in respect to the recording

and numbering in a book, of every one of these notes, as it was issued—a book called the numerical register. It has also given evidence that no one of these notes that were issued was ever duplicated in number. Mr. Irwin states, that the whole number of seven-thirty notes of the second series, of the denomination of one thousand dollars, which was issued, was 186,272; that they were numbered consecutively from number 1 to number 180,272, both inclusive; that, as far as he knows, no duplicate number was ever issued; and that no duplicate numbers ever came back to the department except the eighty alleged counterfeits, of which the eighteen in question in this suit constitute a part. In this connection, as bearing upon the question of the genuineness of the K notes (which question, as I stated before, you may deem it proper to approach first, in the consideration of the subject), you will not lose sight of the inquiry which I put to one of the witnesses, when I asked him to examine the numbers on the K notes and see if he could discover any marks of those numbers having been tampered with, effaced, obliterated, or mutilated in any manner, and he said he could not.

I do not consider it necessary to detain you longer. It is for you to say whether any of these C notes were, in fact, passed to the government by the defendants, and paid for by the government with its money; and, if so, whether such notes were ever issued by the United States. In determining the question, as to the issuing of the C notes, a satisfactory conclusion as to whether such notes were printed from genuine plates, gotten up by the government will, undoubtedly, narrow the inquiry very much. A determination that such notes were printed from such genuine plates would lead to the conclusion, prima facie, that, if such notes got into circulation in the community, they were probably issued by the government; and thus the burden of proof would be thrown upon the government to show that they were not issued.

But, after all, the whole case comes back to the question, whether the notes marked C were ever issued by the government. Upon that question, I am requested by the counsel for the defendants to charge you, that "the burden of proving that the eighteen notes in question, marked C 1 to C 18, are not genuine obligations of the United States"—and by that must be understood obligations issued by the United States—"rests upon the plaintiffs, and, if the evidence be insufficient to establish the fact that such notes are not genuine obligations"—that is, obligations issued by the United States—"as aforesaid, the defendants are entitled to a verdict." With the alteration which I have thus made in the wording of the request, I charge you that the proposition is correct.

I am also requested by the counsel for the defendants to charge you, that, "in determining whether the eighteen notes in question are genuine obligations, the jury are entitled to take into consideration the fact, that said notes were received as genuine by the assistant treasurer in New York, and passed through his hands, and the hands of other officials connected with the treasury department." I decline so to charge. The allegation in the declaration is, that the notes were "supposed to be genuine," by the assistant treasurer and his officers. The language of the request assumes a fact which it is not for the court to assert, that is, that the notes were "received as genuine." The averment of the declaration, that the notes were supposed to be genuine, is the extent to which the court has any right to make an assumption as a matter of fact. But, even if the notes were "received as genuine" by the assistant treasurer, that would not bind the government of the United States in any manner, if the notes were, in fact, not genuine. Nevertheless, you have the right to take into consideration the facts proved on this subject, as to the manner in which these notes were received and handled at the subtreasury, and the manipulations they underwent at Washington, upon the question as to whether the C notes are spurious or genuine, as that question may bear upon the other question, as to whether they were or were not issued by the United States. But I decline to charge, as matter of fact, that the notes "were received as genuine;" and, even if it were so, it would not be of the slightest consequence in the case. Everything that took place is undoubtedly legitimate evidence, as bearing upon the question as to whether the C notes are genuine notes, in the sense in which I have used the word "genuine"—that is, printed from the same plates from which notes issued by the United States were printed.

I am also requested by the counsel for the defendants to charge you, that, if the defendants honestly believed the notes in question to be genuine obligations issued by the United States, and, so believing, and in good faith, passed them to the assistant treasurer of the United States, and the latter, under the like belief, and in good faith, received the notes, and paid for them, the plaintiffs are not entitled to recover, although the notes may not have been genuine obligations issued by the United States. I decline so to charge.

If you shall find for the defendants, on any one of the three propositions which I have stated, your verdict will be for the defendants; that is if the government has not satisfied you that the notes came from Jay Cooke & Co., you will find for the defendants; or, if the government has not satisfied you that it paid its money for the notes to Jay Cooke & Co., you will find for the defendants; or, if you shall find that these C notes were issued by the United

States, you will find for the defendants. You must find, by a preponderance of evidence, in favor of the plaintiffs, on all three of the propositions, to entitle them to your verdict. If you shall so find, your verdict will be for $23,630.88.

The jury found a verdict for the plaintiffs, for $23,630.88.

[NOTE. Judgment being entered, the defendants brought a writ of error, and the circuit court affirmed the judgment of this court. Case No. 3,178. On error the judgment of the circuit court was reversed by the supreme court, and the cause remanded, with directions to reverse the judgment of the district court and to award a venire de novo. 91 U. S. 389.]

Case No. 14,855.

UNITED STATES v. COOKE et al.

[29 Leg. Int. 221;[1] 16 Int. Rev. Rec. 143; 9 Phila. 468; 5 Am. Law T. 166.]

District Court, E. D. Pennsylvania. Nov. 25, 1871.

PAYMENT—MISTAKE—FORGED SIGNATURE—LACHES.

Where an officer of the United States paid a draft upon a forged signature, and more than six years afterwards suit was brought to recover the same from the banker, who had innocently collected the same: *Held*, the action not to be sustained.

[Cited in The Innocenta, Case No. 7,050.]

John K. Valentine and Aubrey H. Smith, for the United States.

George D. Budd and John Clayton, for Jay Cooke & Co.

Before CADWALADER, District Judge.

Charles M. Colton, Asst. Surgeon U. S. Army, placed in the hands of Ira B. M'Vay & Co., bankers of Pittsburgh, a pay roll for collection, which M'Vay & Co. sent to Jay Cooke & Co., at Philadelphia. The latter firm received the money from Paymaster Riche, June 24th, 1863, transmitted it to M'Vay & Co., who paid it over to the supposed Colton. The order attached to the pay roll, and the endorsement were as follows:

"Paymaster Major Taggart, U. S. Army will please pay to Messrs. Ira B. M'Vay & Co., or order, the amount of the within roll. Charles M. Colton, Asst. Surgeon U. S. A.

"Pay to Jay Cooke & Co., or order. Ira B. M'Vay & Co.

"Jay Cooke & Co."

Sometime in the year 1869, it was discovered that the signature of Charles M. Colton was a forgery, and November 6th, 1869, suit was brought against Jay Cooke & Co. by the United States, to recover the amount of the pay roll.

On the trial the learned judge charged the jury that the fact of the forgery was fully established, but that the case did not differ from the familiar one where an individual paid a check on the faith of the signature of the drawer, which subsequently proved to be a forgery. Under the directions of the court the jury rendered a verdict for the defendants.

The counsel for the United States, having moved for a new trial, were heard January 16th, 1872, when the learned judge said that there were several interesting points in the case, which might be discussed, but it was only necessary to say that the delay of more than six years which had elapsed was fatal to the claim of the United States—that all the cases required the utmost diligence on the part of the drawee, a diligence analogous to that required in giving notice of the dishonor of commercial paper. In this case had an individual been the plaintiff, the action would have been barred by the statute of limitations. He therefore refused the motion for a new trial.

[1] [Reprinted from 29 Leg. Int. 221, by permission.]

UNITED STATES (COOKE v.). See Case No. 3,178.

Case No. 14,856.

UNITED STATES v. COOKENDORFER.

[5 Cranch, C. C. 113.][1]

Circuit Court, District of Columbia. March Term, 1837.

RECOGNIZANCE—FORFEITURE—HOW REMITTED.

After the term in which a recognizance has been forfeited, in a criminal case, the court cannot remit the forfeiture; but the president of the United States can, under the act of congress of the 17th of June, 1812 [2 Stat. 752].

Scire facias on a recognizance dated January 12th, 1835, in the sum of $1,000, to be paid if Francis Dixon should not appear on the 13th of January, 1835, or should depart from the court without its leave. The recognizance was respited till March term, 1835, and from that term till November term, 1835, when Dixon was called, and, not appearing, his default, and that of his surety, the defendant [Thomas Cookendorfer], were entered of record, and this scire facias was issued thereon returnable to March term, 1836. A new capias was also issued against Dixon, returnable to the same term, and was returned non est. Neither the scire facias nor the recognizance states the offence with which Dixon was charged, or for which he was arrested; nor does it appear upon the record in this case.

Mr. Dandridge, for defendant, moved the court to discharge the parties, principal and bail, from the obligation of this recognizance; and contended that this court has the same power to remit the forfeiture that the court of exchequer has in England. The ground of the motion is that since the forfeiture, the indictment, for the offences with which Dixon was charged, has been quashed by the court for the reasons stated in U. S.

[1] [Reported by Hon. William Cranch, Chief Judge.]

v. Cooly [Case No. 14,859], at March term, 1836, which fact was conceded by the district attorney.

Mr. Dandridge cited Davidson v. Taylor, 12 Wheat. [25 U. S.] 604; Rex v. Tomb, 10 Mod. 278; Belither v. Gibbs, 4 Burrows, 2118; Rex v. Spencer, 1 Wils. 315; 3 Petersd. Abr. 251, 356; Act Md. 1782, c. 42, § 2; Beers v. Haughton, 9 Pet. [34 U. S.] 358. See, also, 1 Chit. Cr. Law, 300–303.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that after the term in which a recognizance has been forfeited, in a criminal case, they have no power to remit the forfeiture, and overruled Mr. Dandridge's motion, but recommended the case to the consideration of the president of the United States, who made this indorsement on the petition: "The indictment having been quashed, the recognizance ought not to be enforced. On that sole ground the remission is directed on payment of costs. M. V. B."

Case No. 14,857.

UNITED STATES v. COOLIDGE et al.

[1 Gall. 488.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.[2]

CRIMINAL LAW—OFFENCES AGAINST UNITED STATES —FEDERAL JURISDICTION.

Whether the circuit court of the United States has jurisdiction over common law offences against the United States?

[Cited in Henfield's Case, Case No. 6,360; Bains v. The James & Catherine, Id. 756; Allen v. Blunt, Id. 217; U. S. v. New Bedford Bridge, Id. 15,867; Re Metzger, Id. 9,511. Cited in brief in McElrath v. McIntosh, Id. 8,781.]

[Cited in State v. Gaunt (Or.) 9 Pac. 58; U. S. v. Marshall, 6 Mackey, 35.]

[This was an indictment against Cornelius Coolidge and others for forcibly rescuing a prize.]

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The simple question is, whether the circuit court of the United States has jurisdiction to punish offences against the United States, which have not been previously defined, and a specific punishment affixed, by some statute of the United States. I do not think it necessary, to consider the more broad question, whether the United States, as a sovereign power, have entirely adopted the common law. This might lead to very elaborate inquiries, and the present question may well be decided, without entering upon the discussion. I admit in the most explicit terms, that the courts of the United States are courts of limited jurisdiction, and cannot exercise any authorities, which are not confided to them by the constitution and laws made in pursuance thereof. But I do contend, that when once an authority is lawfully given, the nature and extent of that authority, and the mode, in which it shall be exercised, must be regulated by the rules of the common law. In my judgment, the whole difficulty and obscurity of the subject has arisen from losing sight of this distinction. Whether the common law of England, in its broadest sense, including equity and admiralty, as well as legal doctrines, be the common law of the United States or not, it can hardly be doubted, that the constitution and laws of the United States are predicated upon the existence of the common law. This has not, as I recollect, been denied by any person, who has maturely weighed the subject, and will abundantly appear upon the slightest examination. The constitution of the United States, for instance, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." I suppose that no person can doubt, that for the explanation of these terms, and for the mode of conducting trials by jury, recourse must be had to the common law. So the clause, that "the judicial power shall extend to all cases in law and equity arising under the constitution," &c. is inexplicable, without reference to the common law; and the extent of this power must be measured by the powers of courts of law and equity, as exercised and established by that system. Innumerable instances of a like nature may be adduced. I will mention but one more, and that is in the clause providing, that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. What is the writ of habeas corpus? What is the privilege which it grants? The common law, and that alone, furnishes the true answer. The existence, therefore, of the common law is not only supposed by the constitution, but is appealed to for the construction and interpretation of its powers.

There can be no doubt, that congress may, under the constitution, confide to the circuit court jurisdiction of all offences against the United States. Has it so done? The judicial act of 24th of September, 1789, c. 20, § 11 [1 Stat. 78], provides, that the circuit court "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." No subsequent act has narrowed the jurisdiction; it remains therefore in full operation. The jurisdiction is not, as has sometimes been supposed in argument, over all crimes and offences specially created and defined by statute. It is of all crimes and offences "cognizable under the authority of the United States," that is, of all crimes and offences, to

[1] [Reported by John Gallison, Esq.]

[2] [Reversed in 1 Wheat. (14 U. S.) 415.]

which by the constitution of the United States, the judicial power extends. The jurisdiction could not, therefore, have been given in more broad and comprehensive terms.

The court then having complete jurisdiction, the next point will be to ascertain, what are crimes and offences against the United States. And here I contend, that recourse must be had to the principles of the common law, taken in connexion with the constitution, in order to fix the definition, precisely as in other laws of congress, we resort to the rules of the common law to give them an interpretation. For instance, congress has provided for the punishment of murder, manslaughter and perjury, under certain circumstances; but it has no where defined these crimes. Yet no doubt is ever entertained on trials, that the explanation of them must be sought and exclusively governed by the common law; and upon any other supposition, the judicial power of the United States would be left, in its exercise, to the mere arbitrary pleasure of the judges, to an uncontrollable and undefined discretion. Whatever may be the dread of the common law, I presume, that such a despotic power could hardly be deemed more desirable. The necessity and propriety of this principle will be rendered still more apparent upon a further consideration. There are a great variety of cases arising under the laws of the United States, and particularly those which regard the judicial power, in which the legislative will cannot be effectuated, unless by the adoption of the common law. Many cases may be governed by the laws of the respective states; but still whole classes remain, which cannot be thus disposed of. For example, in Massachusetts no courts of equity exist, and consequently no recognition of the principles or practices of equity, as contradistinguished from law. How then shall a suit in equity pending in the circuit court for that district be managed or decided? There is no law of the United States, which provides for the process, the pleadings, or the principles of adjudication. By what rules then shall the court proceed? Certainly all reasoning and all practice pronounce, by the rules of equity recognised and enforced in the equity courts of England. The illustration is yet more decisive, as to causes of admiralty and maritime jurisdiction; for these exclusively belong to the United States, and nothing in the laws or practice of the respective states can regulate the proceedings or the principles of decision. In my judgment, nothing is more clear, than that the interpretation and exercise of the vested jurisdiction of the courts of the United States must, in the absence of positive law, be governed exclusively by the common law.

I would ask then, what are crimes and offences against the United States, under the construction of its limited sovereignty, by the rules of the common law? Without pretending to enumerate them in detail, I will venture to assert generally, that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States, are crimes and offences against the United States From the nature of the sovereignty of the United States, which is limited and circumscribed, it is clear that many common law offences, under each of these heads, will still remain cognizable by the states; but whenever the offence is directed against the sovereignty or powers confided to the United States, it is cognizable under its authority. Upon these principles and independent of any statute, I presume that treasons, and conspiracies to commit treason, embezzlement of the public records, bribery and resistance of the judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the United States, would be offences against the United States. At common law, these are clearly public offences, and when directed against the United States, they must upon principle be deemed offences against the United States. If then it be true, that these are offences against the United States, and the circuit court have cognizance thereof, does it not unavoidably follow, that the court must have a right to punish them? In my judgment no proposition of law admits of more perfect demonstration. To suppose a power in a court to try an offence, and not to award any punishment, is to suppose, that the legislature is guilty of the folly of promoting litigation without object, and prohibiting acts, only for the purpose of their being scoffed at in the most solemn manner. If, therefore, it authorize a trial of an offence, it must be deemed to authorize the court to render such a judgment, as the guilt or innocence of the party may require. As to civil actions, the application of the principle has never admitted a doubt; yet in no instance, that I recollect, is the form or the substance of the judgments prescribed by any law. These judgments, however, must unavoidably differ, not only in different actions, but in the same action, according to the nature of the claims and the pleadings of the parties. It is no answer, to say, that the laws of the states will govern in such cases; for these are not always applicable, as suits may be brought in the United States courts, which are not cognizable by state courts; as for instance, equity and admiralty causes. And further, no such general and universal adoption of the practice or laws of the states has been authorized by congress, or sanctioned by the courts of the United States. The invariable usage of these courts has been, in all cases not governed by state laws, to regulate the pleadings and pronounce the judgment of the common law. When I speak here of the common law, I use the word in its largest sense, as including the whole system of English jurisprudence. For the same reason, therefore, that governs in civil causes, I hold that the cognizance of offences includes the power of rendering a

judgment of punishment, when the guilt of the party is ascertained by a trial.

But it may be asked, what punishment shall be inflicted? The common law affords the proper answer. It is a settled principle, that where an offence exists, to which no specific punishment is affixed by statute, it is punishable by fine and imprisonment. This is so invariably true, that, in all cases, where the legislature prohibit any act without annexing any punishment, the common law considers it an indictable offence, and attaches to the breach the penalty of fine and imprisonment. Com. Dig. "Indictment," D; 8 Coke, 60b; 2 Inst. 131; Bac. Abr. "Fine," D. I have no difficulty in saying, that the same rule must be held to exist here, for the same reason that it is adopted there. If, therefore, treason had been left without punishment by the act of congress, I have no doubt, that the punishment by fine and imprisonment must have attached to the offence.

Upon what ground the common law can be referred to, and made the rule of decision in criminal trials in the courts of the United States, and not in the judgment or punishment, I am at a loss to conceive. In criminal cases, the right of trial by jury is preserved, but the proceedings are not specifically regulated. The forms of the indictment and pleadings, the definition and extent of the crime, in some cases the right of challenge, and in all the admission and rejection of evidence, are left unprovided for. Upon what ground then do the courts apply in such cases the rules of the common law? I can perceive no correct ground, unless it be, that the legislature have constantly had in view the rules of the common law, and deemed their application in casibus omissis peremptory upon the courts. The privilege of the writ of habeas corpus is so high and interesting, that it has become a prominent article in the constitution; and the judicial act of the 24th of September, 1789, c. 20, § 14, has authorized the courts of the United States, and the judges thereof, to issue that writ. But if nothing more could be done under it, than the legislature have expressly provided, it would be a mere dead letter for its most important purposes. It is only by engrafting on the authority of the statute the doctrines of the common law, that this writ is made the great bulwark of the citizen against the oppressions of the government. I might enforce the view, which I have already taken of this subject, by an examination in detail of the organization and exercise of the judicial powers of the courts of the United States, with reference to their equity, admiralty, and legal jurisdiction; but it cannot be necessary. If I am right in the positions, which I have already assumed and explained, there is an end of the question, which has been submitted. If I am wrong, the error is so fundamental, that I cannot hope to reach its source by any merely illustrative process.

The result of my opinion is: 1. That the circuit court has cognizance of all offences against the United States. 2. That what those offences are, depends upon the common law applied to the sovereignty and authorities confided to the United States. 3. That the circuit court, having cognizance of all offences against the United States, may punish them by fine and imprisonment, where no punishment is specially provided by statute. I have considered the point, as one open to be discussed, notwithstanding the decision in U. S. v. Hudson (February term, 1812 [7 Cranch (11 U. S.) 32]), which certainly is entitled to the most respectful consideration; but having been made without argument, and by a majority only of the court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, as it is not a question of mere ordinary import, but vitally affects the jurisdiction of the courts of the United States; a jurisdiction which they cannot lawfully enlarge or diminish. I shall submit, with the utmost cheerfulness, to the judgment of my brethren, and if I have hazarded a rash opinion, I have the consolation to know, that their superior learning and ability will save the public from an injury by my error. That decision, however broad in its language, has not, as I conceive, settled the question now before the court, so far as it respects offences of admiralty and maritime jurisdiction. The constitution has given to the judicial power of the United States the jurisdiction as "to all cases of admiralty and maritime jurisdiction," and this jurisdiction of course comprehends criminal, as well as civil suits. The admiralty is a court of extensive criminal, as well as civil jurisdiction, and has immemorially exercised both. At least no legal doubt of its criminal authority has ever been successfully urged. By the law of the admiralty, offences, for which no punishment is specially prescribed, are punishable by fine and imprisonment (see Clarke, Praxis Adm. tit. 60, sub finem); and as offences of admiralty jurisdiction are exclusively cognizable by the United States, it follows that all such offences are offences against the United States. We have adopted the law of the admiralty in all civil causes cognizable by the admiralty: must it not also be adopted in offences cognizable by the admiralty? It will perhaps be said, that express jurisdiction is given in civil cases of admiralty jurisdiction, but not in criminal cases. This is true in terms; but I contend, that criminal cases are necessarily included in the grant of cognizance of all "crimes and offences cognizable under the authority of the United States;" for crimes and offences within the admiralty jurisdiction are not only cognizable, but cognizable exclusively under the authority of the United States. And congress, in punishing certain offences upon the high seas, which are neither piracies nor felonies, have undoubtedly acted upon the conviction, that such offences were of admiralty and maritime jurisdiction. See Act Sept. 24, 1789, c. 20, §§ 12, 13, 16, 17, etc. Whatever room, therefore,

there may be for doubt, as to what common law offences are offences against the United States, there can be none as to admiralty offences. If this be true, then the reasoning, which I have before urged, applies in its full force, and I will not take up time in repeating it. On the whole, my judgment is, that all offences within the admiralty jurisdiction are cognizable by the circuit court, and in the absence of positive law are punishable by fine and imprisonment.

See 4 Bl. Comm. 5, 44, 268; 2 Browne, Civ. & Adm. Law.

DAVIS, District Judge, did not concur, with a view to bring the question solemnly before the supreme court; so it was certified to the supreme court, as upon a division of the judges.

NOTE Reversed by supreme court. 1 Wheat. [14 U. S.] 415. See, also, U. S. v. Hudson, 7 Cranch [11 U. S.] 32. But see the judgment, where the point seems left still unsettled. The attorney general declined arguing the case, because he considered the point as decided in U. S. v. Hudson. The majority of the court were willing to hear the argument, but no counsel appeared for the defendant. The decision was reversed on the authority of the case in 7 Cranch [11 U. S.]. See, also, U. S. v. Bevans, 3 Wheat. [16 U. S.] 336; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; Smith v. Jackson [Case No. 13,064]. See 1 Kent, Comm. 334–343.

Case No. 14,858.

UNITED STATES v. COOLIDGE.

[2 Gall. 364.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

WITNESS—REFUSAL TO BE SWORN—TRIAL—DISCHARGING JURY—INDICTMENT—WITNESS NOT SWORN—AFFIDAVIT.

1. One, who was not a Quaker, being called as a witness, and refusing to be sworn, on the ground of conscientious scruples arising from a declaration formerly made, was committed for a contempt, the liberty to affirm being strictly confined to Quakers by the laws and practice of Massachusetts.

[Cited in Donahoe v. Richards, 38 Me. 412; Com. v. Willard, 22 Pick. 477.]

2. The court has power to discharge the jury empanelled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice—and there is no exception of capital cases.

[Cited in Com. v. Fells, 9 Leigh (Va.) 616; Dobbins v. State, 14 Ohio St. 500; Mahala v. State, 10 Yerg. 536; People v. Brickner (O. & T.) 15 N. Y. Supp. 529, 530; State v. Davis, 31 W. Va. 393, 7 S. E. 26; State v. McCoy, 14 N. H. 365; State v. Shuchardt, 18 Neb. 457, 25 N. W. 723; State v. Walker, 26 Ind. 353.]

3. The grand jury having received testimony of a person not under oath, the indictment was quashed, as irregularly found.

[Cited in U. S. v. Farrington, 5 Fed. 346; U. S. v. Haynes, 29 Fed. 697.]

[Cited in Low's Case, 4 Greenl. 440; Mackin v. People, 115 Ill. 315, 3 N. E. 225; People v. Lauder, 82 Mich. 151, 46 N. W. 969; State v. Dayton, 23 N. J. Law, 57. Cited in brief in State v. Ward, 64 Me. 548. Cited in Washburn v. People, 10 Mich. 394.]

4. In every case of a motion to the court for a cassetur, the facts, on which it is grounded, must be proved by affidavit.

This was an indictment, found at the May term, 1813, for shipping on board of a vessel, called the Moranda, fifty barrels of rye flour, with intent to transport the same to Halifax, during the war, contrary to the second section of the act of 6th of July, 1812, c. 129 [2 Stat. 779]. In the course of the trial, William R. Lee, Jr. who was called as a witness on the part of the government, declined taking the oath usually administered to witnesses, but offered to affirm. When questioned by the court, he stated, that though he was not one of the religious sect usually called Quakers, yet he had conscientious scruples as to the taking of an oath, in consequence of a solemn declaration, which, on some former occasion, he had voluntarily made, not thereafter to take an oath. He was informed by the court, that the permission to affirm was strictly confined to those of the Society of Friends; that the law was peremptory, and that, however unwilling the court might be to adopt so harsh a measure, if he persisted in refusing to be sworn, and the attorney of the United States should not consent to waive his rights, it would become necessary to commit him for a contempt.

The district attorney, after attempting to proceed without Lee's testimony, and finding that, without it, certain papers, material to the prosecution, could not be identified, moved for a commitment.

THE COURT then ordered a process of commitment, which was issued accordingly.[2]

F. Blake, for Coolidge, moved the court to advise the district attorney to a nolle prosequi, on the ground that the trial could not proceed—but THE COURT replied, that it was not their practice in any case to advise or control the district attorney in this respect.

The district attorney then moved the court to discharge the jury, and that the cause should remain for trial at a future day.

F. Blake, opposed this motion. He admitted, that there were extreme cases, in which the court had power to withdraw a juror, and continue the cause; but he contended, that in no case had this ever been done on the motion of the government, when on a criminal trial it was deprived of evidence from some unforeseen accident. Had the tables been turned, and had one of the witnesses on behalf of the accused secretly withdrawn himself, no delay or indulgence could have been granted on this account.

Before STORY, Circuit Justice, and DAVIS, District Judge.

[1] [Reported by John Gallison, Esq.]

[2] He was again brought into court in the afternoon, and still refusing to testify, was recommitted, but shortly after addressing a letter to the court, in which he declared his readiness to obey the order of the court, he was discharged from custody.

STORY, Circuit Justice.—The question is simply this: A party is on trial before a jury, and a circumstance occurs, which will occasion a total failure of justice if the trial proceed; have the court, in such an emergency, power to withdraw a juror? It has been stated from the bar that, in capital cases, the court have not this power; but in a case in Foster's Crown Law, and in several other cases, it has been held, that they have. In misdemeanors, there is certainly a larger discretion, and until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held, that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose, that in the course of the trial the accused should be reduced to such a situation, as to be totally incapable of vindicating himself;—shall the trial proceed, and he be condemned? Suppose a juryman taken suddenly ill, and incapable of attending to the cause; shall the prisoner be acquitted? Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared, that on Lee's testimony depended a conviction or an acquittal; would it be reasonable that the cause should proceed? Lee may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion, that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see, whether the witness will not consent to an examination.

On a subsequent day of the term, F. Blake moved that the indictment be quashed, because the grand jury, who found the bill, received the testimony of Lee, who was a material witness for the government, without oath, he not being a Quaker; and to prove the fact, on which this motion was grounded, he offered Lee as a witness.

BY THE COURT.—This motion must be supported by affidavit. We cannot receive evidence of matter of fact, in support of a motion to quash, otherwise than in writing, as there would not then appear on record any ground for the exercise of the discretion of the court. Coolidge must also himself make affidavit, that he believes the fact to be as stated.

The affidavits were produced accordingly.

The district attorney read the affidavits of the marshal and his deputy, stating, that they recollected Lee to have been present among the witnesses for the government, at the term at which the indictment was found, and were strongly impressed, that he was sworn; but they could not say positively, that he held up his hand.[3]

[3] This is the usual ceremony of taking an oath in Massachusetts.

BY THE COURT.—Lee's affidavit is direct and positive, as to a fact, of which he could not be ignorant. The counter affidavits are merely of impressions. The court must be governed by the rules of evidence, and the facts must therefore be taken to be as stated by Lee. Of the law arising upon these facts there can be no doubt. The grand jury is the great inquest between the government and the citizen. It is of the highest importance, that this institution be preserved in its purity, and that no citizen be tried, until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court, and this indictment, having been found irregularly, and upon the mere statement of a witness without oath, which was not evidence, a cassetur must be entered.[4]

NOTE It was ordered by the court, that in future a record should be kept of every witness sworn to go before the grand jury, and that the foreman should also return a list of the witnesses examined.

Case No. 14,859.

UNITED STATES v. COOLY.

[4 Cranch, C. C. 707.][1]

Circuit Court, District of Columbia. March Term, 1836.

GAMING—FARO BANK—INDICTMENT.

An indictment, under the penitentiary act for the District of Columbia [4 Stat. 448], for keeping a faro-table, must charge the offence either to be the keeping of a common gaming-table, or must positively charge it to be the keeping of a faro-bank; not "a gaming-table called a faro-bank."

[Cited in U. S. v. Ringgold, Case No. 16,167; Marcus v. U. S., Id. 9,062a.]

The indictment charged that the defendant [Azariah Cooly] "on the first day of April, 1835, with force and arms, at the county aforesaid, did keep a certain gaming-table called a faro-bank, against the form of the statute," &c.

Mr. Dandridge, for the defendant, moved the court to quash the indictment, because it was too uncertain, and did not describe the offence stated in the statute. The first section of the penitentiary act of the 2d of March, 1831 [4 Stat. 448], enacts that every person, who shall be convicted, in any court in the District of Columbia, of any of the offences enumerated, and, among others, of the offence "of keeping a faro-bank or other common gaming-table," shall be sentenced to suffer punishment by imprisonment and labor for the time and times thereinafter described, in the penitentiary of the District of Columbia. And by the twelfth section it is enacted, that every person duly convicted

[4] See Rex v. Bridgewater & T. Canal Co., 7 Barn. & C. 514.

[1] [Reported by Hon. William Cranch, Chief Judge.]

"of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years." Thus, the first section refers to the twelfth to ascertain the duration of the punishment of the offence described in the first. The first describes the offence; the twelfth limits the time of imprisonment and labor. In U. S. v. Smith [Case No. 16,328], at November term, 1835, this court decided that the first section describes the offence, and the twelfth ascertains the duration of the punishment, and that both sections must be construed together; and that the punishment mentioned in the twelfth is to be applied to the offence described in the first. The offence described in the first section is the keeping of a "faro-bank or other common gaming-table." The indictment does not charge the keeping of a common gaming-table, nor of keeping a faro-bank; but of keeping "a gaming-table called a faro-bank." All the circumstances named in the statute as constituting the offence must be stated in the indictment. It is not sufficient to charge it as contra formam statuti. 1 Chit. Cr. Law, 282; Craven's Case, Russ. & R. 14, where, in an indictment upon the statute against stealing bank-notes, the offence charged was stealing a certain note commonly called a bank-note; and it was held to be insufficient, and was quashed.

Mr. Key, contrà. The twelfth section does not require the word "common;" and the court would instruct the jury, upon a count omitting the word "common," that they must be satisfied by the evidence that it was a common gaming-table. The indictment charges the defendant with keeping a faro-bank, which is clearly within the statute. A thing is what it is commonly called. To say that the defendant kept a gaming-table called a faro-bank, is to say that he kept a faro-bank. It is not necessary to use other words than those of the statute. Com. v. Arnold, 4 Pick. 251; Brown v. Com., 8 Mass. 59; People v. Holbrook, 13 Johns. 90; U. S. v. Bachelder [Case No. 14,490]; s. c., 6 Wheeler, Abr. 34. If there are two statutes in pari materiâ, it is sufficient to take the words of either. So of two sections in the same statute.

Mr. Dandridge, in reply, cited U. S. v. Bachelder, 6 Wheeler, Abr. 35.

THE COURT (nem con.) quashed the indictment, being of opinion that the indictment must charge the offence either to be the keeping of a common gaming-table, or must positively charge it to be the keeping of a faro-bank, not merely a gaming-table called a faro-bank.

THRUSTON, Circuit Judge, suggested that it would be better to charge it as the keeping of a faro-bank, the same being a common gaming-table. In a subsequent case against McCormick, at this term, for keeping "a certain public gaming-table called a faro-bank," the indictment was quashed, on the authority of Cooly's Case.

[See Case No. 17,226.]

Case No. 14,860.

UNITED STATES v. COONS.

[1 Bond, 1.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1856.

PERJURY—REQUISITES FOR CONVICTION—VARIANCE—AUTHORITY TO ADMINISTER OATH—CONFESSIONS—EVIDENCE—RECORD.

1. To convict of the crime of perjury, under section 13 of the act of congress of March 3, 1825 [4 Stat. 118], it must be shown by evidence that the defendant was sworn; that he was sworn in a case, matter, hearing, or other proceeding, where an oath or affirmation is required to be taken or administered under or by any law or laws of the United States, and that he "knowingly and willingly" swore to that which was false.

2. Under an indictment for this offense, the prosecution must stablish, by proof, that the oath was administered to the defendant by the person named in the indictment: that such person had authority to administer the oath, and that the defendant swore, with a wicked and corrupt intent, willfully false in regard to the matters alleged in the indictment to be untrue.

3. The statements of a defendant, which are made the basis of a charge of perjury, must be disproved by two witnesses, or one witness and corroborating circumstances.

4. Any discrepancy between what the defendant swore to, and what is set out in the indictment as having been sworn to by him, is fatal.

5. A commissioner for Ohio and Indiana, appointed by the circuit court of the United States in Indiana, to take depositions in a case pending in said court, has authority to administer an oath under the laws of the United States.

6. Confessions of a prisoner should be cautiously received.

7. The proper evidence of the pendency of a suit is the record of the court.

[This was an indictment against Nathan Coons, charging him with the crime of committing perjury in falsely swearing to a deposition.]

John O'Neal, U. S. Dist. Atty.

Thomas Ewing, for defendant.

LEAVITT, District Judge (charging jury). The defendant in this case is indicted for perjury, under section 13 of the act of congress, approved March 3, 1825, which reads as follows: "If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury," etc.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

The indictment contains one count wherein the defendant is charged with committing perjury on January 18, 1855, at Cincinnati, in the state of Ohio, by swearing to a deposition before Alexander H. McGuffey, a commissioner for Ohio and Indiana, who had been appointed as such on December 29, 1854, by the circuit court of the United States, in the state of Indiana, to take said deposition, to be used in a case then pending in said court, wherein Benjamin A. Earl was plaintiff, and the Madison Insurance Company was defendant. The indictment alleges that the defendant, Nathan Coons, testified in said deposition, among other things, "that Adams Chapin and Lyman Cole, and Filley & Chapin, in the month of December, 1851, and about the first of the month of January, 1852, had only a few sides of sole leather in their store, on Pearl street, in Cincinnati, and that they did not then have a great deal of stock on hand, and that about that time he was all through their said store and manufactory, in said city, and they then had little stock of any kind on hand; that they had a small quantity of red sole leather and sheep-skin, but very little of either; that about December 12, 1851, Filley, one of said firm of Filley & Chapin, told him to fill up two boxes, which were standing in said manufactory, with leather chips; that he did so, and that when they were so filled, the said Filley nailed the lids on them and marked on them "Kip Boots, No. 1," and the letter "C," and "Louisville, Ky.;" that another person had already filled two other boxes with leather chips, and also filled two more at the time he filled the two boxes at Filley's request, and that when he left the store the said Filley was engaged in nailing up the boxes so filled; that about January 1, 1852, he saw all of these boxes put on board the steamboat "Martha Washington," while she was lying at the Cincinnati wharf, prior to her departure on the trip when she was burnt. The indictment also contains the following assignments of perjury: (1) That Filley & Chapin, in the month of December, 1854, and in the month of January, 1852, had a large stock on hand in their store, on Pearl street, in Cincinnati. (2) That the said Coons was not about that time in or through their manufactory or store, on Pearl street, in Cincinnati. (3) The said Filley did not tell said Coons to fill up two boxes with leather chips. (4) That the said Coons did not fill any of said boxes with chips. (5) That the said Filley did not nail the lids on any boxes filled with leather chips. (6) That the said Filley did not mark upon any such box or boxes "Kip Boots, No. 1," or the letter "C," or any other marks. (7) That no other person filled any of the said boxes with leather chips. (8) That the said Coons did not see any boxes so filled with leather chips put on board the said steamboat "Martha Washington."

To justify a verdict of guilty in this case, the jury must be satisfied by the evidence that the defendant was sworn; that he was sworn in a case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, and that he knowingly and willingly swore to that which was false. It must also appear by the evidence that the oath was administered to him by the person named in the indictment, and that such person had authority to administer the oath. The proper evidence of the pendency of a suit between Benjamin A. Earl and the Madison Insurance Company, in the circuit court of the United States, in the state of Indiana, is the record of the court. During the progress of the case, the question has arisen, was the commissioner, McGuffey, duly authorized to take the defendant's deposition? The circuit court of the United States in Indiana was fully competent to give him such authority. It will be for the jury to say, from the evidence, whether the defendant swore falsely, with a wicked and corrupt intent to falsify in regard to matters alleged in the indictment to be false. The jury will have the defendant's deposition and will compare it with the indictment. There are several distinct assignments of perjury in the indictment, and the defendant can not be convicted except as to matters therein charged. A conviction can not be had on the assignment, respecting the quantity of stock Filley & Chapin had on hand, as the averment of the indictment is, that in December, 1854, and in the month of January, 1852, they had a large amount of stock on hand, while the statement of the defendant, in his deposition, is, that in the month of December, 1851, and about the first of the month of January, 1852, they had but a small amount of stock on hand. Any discrepancy between what the defendant swore to in his deposition, and what is set out in the indictment as having been sworn to by him, is fatal to a conviction. The assignment principally relied on by the prosecution is that respecting the filling up of the boxes with leather chips. Was this statement false? It must, to authorize a conviction, be disproved by two witnesses, or one witness and corroborating circumstances. The facts will be for the jury to determine from the evidence. If they believe the defendant to have sworn willfully false in testifying, as alleged in the indictment, it will be their duty to convict. The prosecution relies upon the testimony of the three Chapins and Earl, and has also proved some confessions of the defendant made by him while in jail. Confessions of an accused person should always be cautiously received. The jury are the exclusive judges of the credibility of evidence. It appears from the testimony that the Chapins were implicated in a case arising out of the burning of the steamboat "Martha Washington,"

and would be affected by evidence which would tend to establish their fraudulent conduct. Earl is a party to a suit against the Madison Insurance Company, seeking to enforce its liability under a policy insuring this property about which the defendant testified in his deposition. Perjury is an odious crime, and the defendant, if guilty, merits the punishment inflicted by the law; but the jury should weigh well the evidence and act with great deliberation.

The jury returned a verdict of not guilty.

[For the trial of the indictment against the Chapins and others for burning the Martha Washington, see Case No. 14,832.]

Case No. 14,861.

UNITED STATES v. COOPER.

[4 Dall. 341.]

Circuit Court, D. Pennsylvania. 1800.

WITNESSES—PRIVILEGE—MEMBERS OF CONGRESS.

[Members of congress are not exempt from compulsory process to require their attendance as witnesses in behalf of one charged with crime.]

The defendant, being indicted for a libel on the president [see Case No. 14,865] applied to the court, for a letter to be addressed by them to several members of congress (congress being in session), requesting their attendance as witnesses on his behalf. In support of the application a variety of similar cases arising under the government of Pennsylvania were referred to.

Before CHASE, Circuit Justice, and PETERS, District Judge.

CHASE, Circuit Justice. The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpœna, in such cases. I will not sign any letter of the kind proposed. If, upon service of a subpœna, the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after the service of a subpœna, that an attachment shall issue. A satisfactory reason may appear to the court to justify or excuse it.

PETERS, District Judge. I know the practice in Pennsylvania to be as it has been stated; for I have received such letters, from the supreme court, while I was speaker of the house of representatives, requesting that members might be permitted to attend as witnesses. In the present case, I should have no objection to acquiesce in the defendant's application, with the concurrence of the presiding judge. Motion refused.

Case No. 14,862.

UNITED STATES v. COOPER.

[Hoff. Land Cas. 101.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF CLAIM—LOCATION.

No objections made to the confirmation of this claim.

Claim [by John B. R. Cooper] for four leagues of land in Sonoma county [the Rancho El Molino], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellee.

HOFFMAN, District Judge. The claimant in this case, a naturalized Mexican citizen, obtained in December, 1833, a grant from the governor for the place called Rio Ojotska. This grant was approved by the departmental assembly, and a certificate of its confirmation delivered to the grantee, as appears from the testimony, and the expediente filed in this case. He subsequently applied to the governor for an exchange of the land granted for that now claimed by him. Proceedings on this application were commenced by Governor Figueroa, and the new grant was made, as desired by the petitioner, by Governor Gutierrez on the twenty-fourth of February, 1836. These facts are proved by the testimony of Hartnell and Vallejo, whose evidence is corroborated by the expediente on file in the archives. The genuineness of the grants is fully established. Previously to obtaining the last grant, the claimant had gone into possession of the tract solicited, and had built a house upon it. He also had, as early as 1834, placed a considerable number of cattle upon it, and had commenced the erection of a mill, upon which he expended more than $10,000. He also erected a blacksmith shop, and for two years had employed upon his rancho men to the average number of sixteen, and sometimes thirty or forty Indians. It is clear that the grantee fulfilled the conditions and carried out the objects of the colonization laws to an extent very unusual in the then condition of the country.

With regard to the location of the land, it appears from the testimony of O'Farrell and other witnesses, who are acquainted with the adjacent country, that there is no difficulty in ascertaining its locality by means of the diseño which accompanies the grant. O'Farrell, who had long been a surveyor under the Mexicans, testifies that he has, by means of the grant and the diseño, made a survey of the land, and that it contains, as surveyed by him, only the quantity specified in the grant.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

This claim was held to be valid by the board. No objections to it are suggested on the part of the United States, and we are of opinion that the decision of the board should be affirmed.

Case No. 14,863.

UNITED STATES v. COOPER.

[12 Int. Rev. Rec. 145.]

Circuit Court, E. D. Tennessee. 1870.

VIOLATION OF INTERNAL REVENUE LAWS—ILLICIT DISTILLING—WHO PUNISHABLE.

[A mere employe working in a distillery, but having no interest therein, or in the whisky produced, as a proprietor or partner, is not subject to indictment, even though he knows the special tax has not been paid; nor is it material that he is to be paid for his labor with whisky produced in the distillery.]

The defendant [Wesley Cooper] was indicted for distilling under the act of July 13, 1866 [14 Stat. 98].

G. Y. Durbeck, witness for the government, testified that he was an assistant assessor of internal revenue in Union county, Tennessee, and as such in August, 1868, was instructed to ascertain who was the party liable to be assessed, and for how much, for carrying on a certain distillery near to the house of Albert Mitchell, and which had been seized by Deputy Collector J. M. Sawyers, about the 1st of March preceding. The assessment had been made against Mitchell; but Mitchell claimed that it was erroneous; that the still, and land on which the distillery was situated, had been sold to defendant, Cooper, who was the party liable to said assessment. Witness went to the house of said Mitchell, who, after learning witness's object, sent for defendant Cooper. Defendant Cooper on his arrival stated and made oath to the fact before witness that at the time of seizing the distillery he, defendant, was carrying it on for himself; that he had before that time bought the distillery and the land it was on (one acre) from said Mitchell, and that Mitchell had nothing to do with the distillery. As near as witness could ascertain, the distillery had been running from about the 1st of December, 1867, to the time it was seized; in all some three months.

J. M. Sawyers, next witness for the government, testified that as deputy collector he seized the distillery spoken of, about the last of February, 1868. That C. M. Baker and another person were with him at the time. That they found the distillery in full blast; that the door was shut, and the defendant alone in the still-house; that witness unfastened the door and went in. The defendant told witness he was running the distillery for himself; that he had bought the land (one acre) and distillery from Albert Mitchell; but that some time after this defendant said he and Mitchell were partners in the distillery at the time.

C. M. Baker, next witness, testified that he was present when Sawyers seized the distillery. Heard defendant say at the time that he was making the run then being made for himself, and also thinks he heard defendant say that at some previous time he had been distilling for Mitchell. Still was running and only defendant was in or near to the distillery.

1. The government introduced no further proof.

Lemuel Linn, witness for the defendant, testified that he was brother-in-law of defendant. That defendant lived with witness at the time he was running the distillery in controversy. That witness knows defendant at first was running the distillery for Albert Mitchell to pay for a hog he had got from Mitchell. That after this defendant worked there, as he and Mitchell said, for a one-fourth gallon of the spirits distilled. Witness had been at distillery often; had helped take corn meal from Mitchell's to the still-house on one occasion about Christmas, and had helped take some whiskey from the distillery to Mitchell's on or about the same time. That he had seen Mitchell at the still-house assisting defendant in doing the work. Witness had heard Mitchell and defendant say, when at the still-house, that defendant was working for Mitchell.

Jacob Koontz, next witness for defendant, testified that defendant had married his mother. That he was at the still-house in question every two or three days, and knows that defendant was only working there for Mitchell. That he had heard both defendant and Mitchell while at the distillery say so. Witness does not know whether defendant was to get a part of the spirits made or not; does not know how he was to be satisfied for his labor; that it was about Christmas, 1867, he heard this conversation from defendant and Mitchell. Witness knows that at first defendant was working there to pay for some pork he had bought from Mitchell. Witness knows that Michell owned the land and distillery, but that Mitchell being a man of property and defendant not, it was a sham arrangement between defendant and Mitchell that if they were caught defendant should claim to be the owner of the still and one acre of land, so that they could not get after Mitchell.

Upon the trial the district attorney objected to the defendant's witnesses giving evidence of any conversation had, or statements made, or claims set up by either defendant or Albert Mitchell, upon the ground that as to the statements of defendant they could not be introduced in his own favor; and as to the statements of Mitchell, he was a competent witness now to be introduced to prove any material facts he may know; besides this, it was an effort to prove an immaterial fact. But the court overruled the objection, and permitted any statements either may have made while at the distillery and in the presence of the other to be given in evidence as part of the res gestæ.

This was all the evidence introduced.

Defendant's counsel insisted in argument that under the proof, Mitchell and not de-

fendant was the man; that Mitchell was the principal in the transaction, and that the defendant was only an employee of Mitchell; that whether defendant was working for wages to be paid in money or in a certain part of the whiskey distilled by him, yet in law Mitchell alone and not defendant can be said to be carrying on the business of a distiller, and Mitchell alone would be criminally liable if such business was carried on without the special tax being paid. Also that though defendant did state that he was the principal in the transaction and was running the distillery at the time it was seized for himself, yet it was evident such statement was false, and made only to shield Mitchell, not knowing that the effect thereof, unexplained, would involve him in criminal liability.

The district attorney in argument stated that though the principle of law contended for by defendant's counsel had been in the abstract heretofore given in charge to juries upon different occasions, yet to him it was not sustained by any principle of law, reason, or good judgment; that he hoped, by a reargument, to show the unsoundness of such a position. The district attorney referred to many authorities to show that in such cases the question of guilt is not affected in the least by the fact whether the defendant was the owner of the land or of the distillery, or whether he was merely doing the manual labor for some other person who did own the land or distillery. In either case, the fact of assisting in carrying on the business being admitted, the defendant would be guilty. To establish a different rule, and the one contended for by defendant's counsel, would practically defeat the revenue law itself. The district attorney next insisted that though the court still adhered to its former holding on this point, yet, 1st, as defendant was found in the act of distilling, the law would presume him to be the proprietor, and it would be for defendant to show affirmatively to the contrary; that to do this he should introduce the best available proof, which in this case would be to introduce Albert Mitchell as a witness, and if defendant fails without sufficient reason to do this and resorts to other evidence less certain and unsatisfactory, the jury are authorized to presume that such witness, Mitchell, would not have testified favorably to the defendant; and any doubt the jury may have on this point from the evidence before them will be resolved against the defendant.

2. The district attorney insisted that if the jury believe defendant merely an employee, yet if defendant had full knowledge of the fact that the distillery was being carried on without the special tax being paid, such guilty knowledge, together with a participation by defendant in the distillery, would make him equally guilty as though he was the proprietor.

3. The district attorney next insisted that notwithstanding the position taken by defendant's counsel be sustained, yet, if defendant's own evidence be true, and the defendant, though he did not own the distillery, did by the terms of his employment become entitled to any certain portion of the product of the distillery—any part of the whiskey made—then his interest in and connection with the distillery was such as to make defendant guilty as a principal in the transaction. The district attorney then presented to the court, as embodying the legal propositions he had made, with a request that they be given to the jury by the court in his charge, the following propositions:

The court is asked by the district attorney to charge—

1. That in cases of this kind, being misdemeanors only, all who aid or assist in the distilling or who have an interest in the distillery or the spirits made at the distillery, are equally guilty if such illicit distilling was done with their knowledge and assent.

2. If the jury shall believe from the proof that, though Mitchell was the owner of the still, furnished the grain that was distilled, and that the distilling was done on Mitchell's land, yet if the defendant was working there and was to receive such a part of the spirits made by him or him and Mitchell jointly, and distilling was done, then the defendant would have such an interest in and connection with the distillery and distilling as would make him guilty in contemplation of law.

3. If the proof shows that the defendant was found in the act of distilling, or by defendant's own admissions it is proven he was the person who was doing the distilling, the law will presume him to have been the party in interest who under the law may be said to be carrying on the business of a distillery, and will be guilty as charged unless he shall rebut that presumption by proving to you satisfactorily that he was not the party who was carrying on the business, and that he had no interest whatever in the distilling that was there being done.

4. This proof being in such case upon defendant to make out, the burden of proof is on him, and he should be required to prove the same by the best evidence he can produce and if the jury have any doubt as to this matter and shall believe the defendant had it in his power either by introducing Mitchell as a witness or by other means to remove such doubt, but fails in doing so, but resorts to evidence less direct and satisfactory, the jury will be authorized to presume that such other and more direct and satisfactory testimony which defendant might have introduced, would not have been favorable for him, and the jury will resolve that doubt against the defendant.

5. If the jury shall believe from the proof that although the defendant was merely employed and was not to receive a part of the spirits made as his compensation or interest in the matter, but to be paid otherwise by Mitchell for his labor, and that Mitchell was the proprietor, yet if the jury shall also believe that the defendant had knowledge at the time

of the fact that the distillery was being run in violation of the revenue law, and was there, knowingly and willingly, assisting in such unlawful distilling, then he would in law be equally guilty with Mitchell, and it will be your duty to return a verdict of guilty in this case.

6. Under the law any person who distils or manufactures spirits or alcohol, by continuous distillation from grain, who brews or makes mash, wort, or wash for distillation or the production of spirits, is deemed a distiller, under the act of July 15, 1866, under which this offence is charged.

7. If the jury shall find the defendant did distil, or did brew, or did make mash, wort, or wash for distillation, or for the production of spirits, he will be guilty as charged, unless the defendant shall have proven to you that the special tax had at the time been paid.

E. C. Camp, U. S. Dist. Atty.

L. C. Honk and L. A. Gratz, for defendant.

BY THE COURT (charging jury). The charge contained in this indictment is very simple. It is, did this defendant carry on the business of a distiller, and, if he did, did he pay the special tax? If not, he would be guilty. But, gentlemen of the jury, who can it be said "carries on the business of a distiller"? Can it be one who is only employed to do the work? Suppose Samuel Pike, who is a large distiller, and has some two hundred hands employed to do the work, should carry on the business without having paid the special tax. Can it be said that those two hundred men would be guilty of a violation of this law? Can it be said that these two hundred men are carrying on the business of distillers? No, gentlemen of the jury, such a proposition is absurd, is perfectly monstrous—the very statement of the case is ridiculous. Why, if a party other than the principal in the transaction is liable to a criminal prosecution because he works in the distillery, then he is also liable to be assessed and made to pay the special tax and other assessments. This the government does not require. They only look to the owner or proprietor for the special tax, and they alone are liable to a criminal prosecution if they fail to pay it. This court has so held the law to be time and time again. It sees no reason to change its views, and never will hold otherwise, unless some decision shall be made which is binding on this court, and which will require this court to change its ruling. This court does not believe any judge ever intended to decide otherwise; and this court will punish as a contempt hereof any counsel who will again argue this proposition with the earnestness and zeal with which it has been argued on the trial of this cause.

The defendant having been found at work in the distillery, he will be presumed to have been the proprietor, unless he shall rebut that presumption by proof. If from the proof the jury believe defendant was merely employed by Mitchell and was distilling for Mitchell, who was the proprietor, and that defendant had no interest in the distillery, or in the whiskey made, as a partner or proprietor, then they cannot find the defendant guilty, even though defendant may have had knowledge at the time that Mitchell had not paid the special tax.

As to the fact that defendant was to receive a part of the whiskey made, the court leaves it to the jury to say whether, by such a contract, the defendant became interested in the matter as a partner, if so, he would be liable, but if the jury shall believe that the one fourth gallon was paid to defendant by Mitchell merely as a compensation for his labor, then defendant would not be guilty, as the fact of being paid in the whiskey he distilled for Mitchell, would not in law make defendant guilty, any more than if Mitchell had paid him in money. If the jury shall find that the defendant was running the distillery for himself, or had an interest therein as partner or proprietor, and not working there as an employee for wages, then defendant will be guilty, and the jury will so find, as there is no claim set up that any special tax had ever been paid.

The court entirely disregarded the instructions asked for by the district attorney, except as the same may have been embraced in the charge above given.

The jury, after being out two days, being unable to agree, were discharged and a mistrial entered.

Case No. 14,864.

UNITED STATES v. COOPER.

[3 Quart. Law J. 42.]

District Court, W. D. Virginia. Oct. Term, 1857.

CRIMINAL LAW—EVIDENCE—CONFESSION TO MAGISTRATE—INDUCEMENT—SUBSEQUENT CONFESSIONS—WARNING.

1. Confessions made to a justice of the peace, while officially engaged in the examination of a criminal charge, are inadmissible, if obtained by any inducement held out by the justice.

2. A prisoner having been once induced, by improper influences, o make a confession, no other confessions of a like character, though made at a subsequent time and to different persons, are admissible, even when voluntarily made, unless it be shown that the prior improper influence has been removed, either by an explicit and distinct warning, or some other equally cogent means.

An indictment was found against James Cooper, charging him with abstracting and embezzling certain letters, taken by him out of a mail bag; he being a mail carrier. Plea, not guilty. The prisoner is a boy, fifteen years old.

F. B. Miller, U. S. Dist. Atty.

Floyd, Cook & Brown, for prisoner.

Robert F. Dorton was the first witness called for the prosecution, and he testified, in

substance, as follows: "The prisoner was a mail carrier on a route leading through Scott county, and he carried the mail from Pattonsville to Rye Cove, in that county. I am a justice of the peace for Scott county. On the 27th May last, the post-master at Rye Cove came to me, and said that the mail had been robbed, and applied for a warrant against the prisoner. I concluded to go to the post office before issuing a warrant. I did go, and found the prisoner there in custody. I examined the mail and mail bag. There was a hole or opening in the bag; and three or four letters were in a very confused and improper condition, having evidently been opened. I said to the prisoner: 'Mr. Nicholls (the post-master at Pattonsville) never put up the mail in this condition. It is a very plain case. You might as well confess the whole matter. It will not make the case any worse for you.' Thereupon, he said that he had taken the letters out of the mail bag, and that he took them out to get money."

The prisoner's counsel immediately objected to this testimony, and moved the court to exclude from the jury all evidence of confessions obtained under such circumstances. They relied upon Smith's Case, 10 Grat. 734.

Before deciding the question, THE COURT propounded some questions to the witness, from which it appeared uncertain whether the warrant was actually issued before the confessions were made or not; but the boy was in custody. It was also left uncertain whether the prisoner knew that the witness was a justice or not; but the witness distinctly stated that he was acting in his official capacity, and investigating the charge when the confessions were made.

BROCKENBROUGH, District Judge. The rules relative to the admission of confessions in criminal cases are well known to the profession. It has long been held that a free, voluntary confession is the most clear and satisfactory evidence of guilt. But to produce this effect, the confession must be strictly of the character I have mentioned. Such is the infirmity of human nature, in circumstances so distressing as those which often surround a prisoner, that men have been known to make false confessions, under a hope of ultimate escape. It has therefore been wisely and mercifully settled that such evidence is to be received with very great caution. If indeed either by threats of injury, or hopes of benefit, made or held out by others, standing in certain relations towards the prisoner, or the offence, then the confession must be rejected.

Among the rules most carefully elaborated, and strictly enforced is this: that if the confession has been made to a person in authority, in the premises, and has been induced by anything said or done by such person, calculated to excite either hope or fear in the prisoner's mind, then the confession is inadmissible. It has always been understood, without a dissenting voice, that a justice of the peace engaged in the official investigation of a criminal charge, is a person in authority in regard to such charge. In regard to persons bearing that character, too much care cannot be exercised to prevent them from this reprehensible tampering with parties arraigned before them. In this case, certainly the rule ought not to be relaxed, when we look to the prisoner's extreme youth, and the pretty plainly apparent fact that he does not, at any rate, possess more than a very moderate share of intellect. I should have no hesitation in rejecting this testimony if it were not for the hearing of the decision of the court of appeals of Virginia in Smith's Case.

In that case the prisoner made an explicit and important confession to the person to whom he was an apprentice, and that person was also a justice of the peace; but he was not engaged in the investigation of the offence, and had nothing whatever to do with the prosecution. It was contended that both in his character of master and of justice, this person was a person in authority, in the meaning of the rule. He induced the prisoner to make the confession. It was objected to, but the court of appeals decided that the confession was admissible. I cannot concur in the propriety of that decision. I think it goes a bow shot beyond all the former authorities. Moreover, it is to be noticed that the court was divided. It was a decision by three judges against two. If I were a circuit judge of Virginia, I should give the court of appeals an opportunity, if possible, to revise the decision. But in the capacity of a federal judge, I am bound by the decision. By the act of congress under which I derive my powers, the law of the state wherein the court is held is made the rule of its decisions; and it is well settled that the judgment of the supreme judicial tribunal of a state is the authoritative exposition of the law of that state. I would therefore be bound by the decision in Smith's Case [supra] if I did not think the case at bar could be distinguished from that case.

And I do think it is clearly distinguishable. This case contains the important element, wanting in Smith's Case, that here the justice was officially engaged in examining the very charge in relation to which he induced the prisoner to make the confession. He was undoubtedly a person in authority in the premises. I do not consider it material to enquire whether the warrant of arrest had actually emanated before the confession was made. The prisoner was confronted with his judge and his accuser; and his conduct was the subject of a pending enquiry. Nor do I deem it important to enquire into the fact as to his knowledge of Mr. Dorton's official character. At the most, this is an open question, and the prosecution ought to remove all doubt as to the fact, for, before the confession can be received, the United States must show the propriety of its admission. I think I am not

only justified in presuming that the prisoner did know that Mr. Dorton was a justice, but that I am bound so to presume in the absence of proof to the contrary. The evidence must be excluded.

Mr. Nottingham, the jailor of Scott county, was introduced, and said: "I know nothing of this case, except from confessions made to me by the prisoner, after he was committed to prison. He was confined in my jail on the 27th day of May last, and remained there till the 6th of September, and during that time he made several different confessions, relative to this matter." The prisoner's counsel objected to the admission of these confessions, until it should appear that full and fair warning had been given to the prisoner as to the effect of his confessions. It is contended that when it has once been shown, that the prisoner has been improperly induced to make a confession, no subsequent confession, though made at other times and to other persons, can be used against him, unless it be shown that his mind has been completely relieved of the improper influences formerly operating upon it. The court enquired of the witness whether he had warned the prisoner of the consequences of his confessions. He answered that he had not, but had only told him "that it was a penitentiary offence." He further stated that the confessions made to him were substantially identical with that made to the examining justice. He could not state the exact time at which the first confession was made; but thought it must have been soon after the prisoner came into custody.

BROCKENBROUGH, District Judge. A good abstract of the law on this point is found in 1 Greenl. Ev. § 221. I there find the rule laid down on satisfactory authority to be, that where improper means have once been used to induce a confession, which has therefore been rejected, a subsequent confession cannot be received, unless it appear that the influence of those improper means has been totally done away with. From lapse of time, or other circumstances and facts, the influence of former inducements may be presumed or proved to have ceased; but in the absence of any such circumstances, the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will therefore be rejected.

Applying this rule to this case, there can be no doubt as to the result. It is not pretended that any warning was ever given to this boy, after he was imprisoned, which was on the same day that he made his original confession, already rejected. A sufficient period of time had not elapsed to raise any presumption of freedom from improper influences; and this case affords an excellent illustration of the necessity for such a restriction. This boy has been improperly induced to make a confession. He could not know that such an admission could not be given in evidence. He considered his fate sealed by his former declarations, and, in the desperation of his condition, was ready to open his heart to any one who would listen to him. It would be cruel oppression to permit such admissions to go in evidence. Mr. Nottingham must stand aside.

Robert Gibbony, deputy marshall of the district, was called to the stand. He said that on the 6th September he took the prisoner out of Scott jail, and removed him to Wytheville. From Estillville to Abingdon he travelled with the prisoner in a buggy. On the way the prisoner made confessions to him, similar to those spoken of by the other witnesses. The witness gave prisoner no caution, but suffered him to talk as he pleased, using no efforts to extract anything from him, and his statements were voluntary so far as this witness was concerned.

BROCKENBROUGH, District Judge. This evidence falls within the same category as that of the jailor, and must share the same fate.

There being no other evidence, the jury, without leaving the box, found the prisoner not guilty.

Case No. 14,865.

UNITED STATES v. COOPER.

[Whart. St. Tr. 659.]

Circuit Court, D. Pennsylvania. April 30, 1800.

SEDITIOUS LIBEL—INTENT OF PUBLICATION—DEFAMATION OF PRESIDENT—CHARGES IN RELATION TO EXTRADITION OF FUGITIVES—STANDING ARMIES.

[1. In a prosecution under the sedition act of July 14, 1798 (1 Stat. 596), for the publication of a libel against the president of the United States, there must clearly appear an intent to defame him, to bring him into contempt and disrepute, and excite against him the hatred of the good people of the United States. If there be no such intent there can be no guilt.]

[2. It is false, within the meaning of the sedition act, to publish that our credit is brought so low that we are obliged to borrow money at 8 per cent. "in time of peace," when, although there has been no declaration of war, there have been actual hostilities, captures of vessels, and a prohibition of intercourse.]

[3. A murder committed on board a British ship of war is committed within the jurisdiction of Great Britain, within the meaning of article 27 of the treaty with that power, relating to the extradition of persons charged with murder and forgery.]

[4. The executive is the party upon whom devolves the duty of surrendering a fugitive in case of extradition under the treaty, and, although he makes use of a judge of the United States as an instrument for ascertaining whether there is sufficient evidence of criminality to require the surrender, the court has no jurisdiction of the crime, and the president cannot truthfully be accused, in connection with such a transaction, of attempting to influence or interfere with a court of justice.]

[5. To publish, in respect to the president, that we are threatened, under his auspices, with the existence of a standing army, betrays either the most egregious ignorance or the most wilful intention to deceive the public; for there are but

two descriptions of armies in the country, one called the "Western Army," enlisted for five years only, and the other called the "Provisional Army," enlisted during the existence of war with France; and neither of these can with any propriety be called a standing army, especially as the constitution declares that no appropriations shall be made for the support of an army longer than two years.]

The libellous matter complained of was as follows: "Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war. Mr. Adams had not yet projected his embassies to Prussia, Russia and the Sublime Porte, nor had he yet interfered, as president of the United States, to influence the decisions of a court of justice—a stretch of authority which the monarch of Great Britain would have shrunk from—an interference without precedent, against law and against mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country; a case too little known, but of which the people ought to be fully apprised, before the election, and they shall be." [1]

April 11, 1800. The bill was found upon the ex officio action of the district attorney, there having been no previous binding over. Some difficulty arose at the outset concerning the right of the defendant to compel the attendance, as witnesses, of several members of congress (congress being then in session), and of the president. An application was made to the court to address a letter to the speaker of the house, requesting him to have process served. This PETERS, Dis-

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[1] These passages were extracted from the following publication:

"To the Public.

"To the Printer—Sir: I should not condescend to answer anonymous slander, but the information on which the falsehoods contained in the following paragraph are grounded, must have been originally derived from the president himself. I cannot believe him capable of such misrepresentation, for I still think well of his intentions, however I may disapprove of his conduct: but the following narrative will show that some of his underlings are capable of anything:

"From the Reading Weekly Advertiser of October 26, 1799:

" 'Communication. Thomas Cooper's address to the readers of the Sunbury and Northumberland Gazette, of which he was editor, having been republished in this state, with an introduction approbatory of the piece, a correspondent wishes to know if it be the same Thomas Cooper, an Englishman, of whom the following anecdote is related? If it is, every paper devoted to truth, honour, and decency, ought to give it a thorough circulation. Not many months ago, it is said, a Mr. Cooper, an Englishman, applied to the president of the United States, to be appointed "agent for settling the respective claims of the citizens and subjects of this country and Great Britain." In his letter, he informs the president, that although he (Thomas Cooper) had been called a Democrat, yet his real political sentiments are such as would be agreeable to the president and government of the United States, or expressions to that effect. This letter was accompanied with another from Dr. Joseph Priestley, who did not fail to assure the president of the pliability of his friend Cooper's Democratic principles. The president, it is said, rejected Cooper's application with disdain, and Priestley's with still stronger marks of surprise, saying, it is said, as he threw the letter on the table, does he think that I would appoint any Englishman to that important office in preference to an American? What was the consequence? When Thomas Cooper found his application for a lucrative office under our president rejected, he writes in revenge the address which appeared in print, and Dr. Priestley exerted his influence in dispersing this very address, which he must know was the offspring of disappointment and revenge! The address is as cunning and insidious a production as ever appeared in the Aurora or the old Chronicle, and as for impudence, it exceeds, or at least equals, Porcupine himself. Priestley and Cooper are both called upon to deny the above narrative. A recourse to the letters themselves, would establish the accuracy of this anecdote, even to a syllable.'

"Yes; I am the Thomas Cooper alluded to—luckily possessed of more accurate information than the malignant writer of that paragraph, from whatever source his intelligence was derived. About the time of the appointment of commissioners under the British treaty, Doctor Ross, who had sedulously brought about an intercourse of civility between Mr. Liston and myself, urged me to permit him to apply on my behalf to that gentleman, for one of the appointments that must then take place. He pressed on me the folly, as he termed it, of my confining myself to Northumberland, his earnest wish to see me settled in Philadelphia, and the duty I owed my family to better my situation by every means in my power. He stated that Mr. Liston, he knew, thought highly of me, and though the post of the fifth commissioner was probably then disposed of, there must be an agent for the British claimants; an office which, from my situation as a barrister in England, and my knowledge of mercantile transactions, I was peculiarly fitted to fill. I replied, that he probably overrated Mr. Liston's opinion and his own influence, and that, at all events, my known political opinions must render it equally improper for Mr. Liston to give, and for me to accept, any office whatever connected with the British interests. That Mr. Liston and I understood each other on this question, and had hitherto avoided all politics whatever. That, being an American, I should not object to any office under this government, if I could fairly obtain it; but that I would never consent to any application to Mr. Liston. Through Mr. Coleman's interest, Mr. Hall of Sunbury was complimented with the offer of being appointed agent of American claims. On mentioning to Dr. Priestley, one night at supper, that Mr. Hall had declined it, Dr. Ross's persuasions occurred to me, and I said that such an office as that would have suited me very well. Dr. Priestley replied, if that was the case, he thought he had some interest with Mr. Adams, with whom he had long been acquainted, and who had always expressed himself in terms of the highest friendship: that,

trict Judge, acceded to, as the proper course. It was refused, however, by CHASE, Circuit Justice, who ordered process to issue without such letter, saying, at the same time, that if it was necessary to compel the attendance of the members, the case would be continued until the session was over. The court at the same time refused to permit a subpœna to issue directed to the president of the United States. The cause was then continued to April 19, in order to enable the defendant to procure documentary and other evidence which he considered material.

April 19, 1800. After some difficulty in obtaining the attendance of the members of congress who were subpœnaed, which ap-

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as he never intended to ask any favour of Mr. Adams for himself, I might as well let him try for once to ask one for me. On my objecting that Mr. Adams' politics and mine were probably very different, Dr. Priestley declared that this, so far from being an objection, might be an inducement in my favour; for if Mr. Adams meant to be the ruler of a nation, instead of the leader of a party, he would be glad of an opportunity to exhibit such an instance of liberal conduct. At length I consented, expressly requesting Dr. Priestley to take care that Mr. Adams should not mistake my politics. In consequence of this conversation, Dr. Priestley wrote the following letter,—not a few months, but above two years ago:

"'August 12, 1797. Dear Sir: It was far from being my intention or wish to trouble you with the request of any favours, though it is now in your power to grant them; and it is not at all probable that I shall ever take a second liberty of the kind. But circumstances have arisen which I think call upon me to do it once, though not for myself, but a friend. The office of agent for American claims was offered, I understand, to Mr. Hall of Sunbury, and he has declined it. If this be the case, and no other person be yet fixed upon, I shall be very happy if I could serve Mr. Cooper, a man I doubt not of equal ability, and possessed of every other qualification for the office, by recommending him. It is true, that both he and myself fall, in the language of our calumniators, under the description of Democrats, who are studiously represented as enemies to what is called government, both in England and here. What I have done to deserve that character, you well know, and Mr. Cooper has done very little more. In fact, we have both been persecuted for being friends to American liberty, and our preference of the government of this country has brought us both hither. However, were the accusations true, I think the appointment of a man of unquestionable ability and fidelity to his trust, for which I would make myself answerable, would be truly such a mark of superiority to popular prejudice as I should expect from you. I, therefore, think it no unfavourable circumstance in the recommendation. That you will act according to your best judgment, I have no doubt, with respect to this and other affairs of infinitely more moment, through which I am persuaded you will bring the country with reputation to yourself, though in circumstances of such uncommon difficulty, perhaps with less ease and satisfaction than I could wish. With my earnest wishes for the honour and tranquillity of your presidency, I am, &c., Joseph Priestley.'

"This letter was accompanied by the following from myself:

"'Sir: On my expressing an inclination for the office which Mr. Hall has declined, Dr. Priestley was so good as to offer his services with you on my behalf. Probably the office will be filled ere this letter can reach you: probably there may be objections to nominating a person not a native of the country: probably the objection mentioned by Dr. Priestley, may reasonably be deemed of weight in my instance. Be all this as it may, I see no impropriety in the present application to be appointed agent of American claims, for it is still possible I may suppose more weight in the objections than they will be found to deserve. If it should so happen that I am nominated to that office, I shall endeavour to merit the character the Doctor has given me, and your esteem. I am, &c., Thomas Cooper.'

"Is this the letter of a man, or not? I do not appeal to the cowardly propagator of anonymous falsehoods, but to the public. What is there in it of vanity or servility? Do not these letters take for granted that I am a Democrat, though not a disturber of all government? and that what I am I shall remain, even though it be deemed a reasonable objection to my appointment? Is this, or is this not, adhering to my principle, whatever becomes of my interest? Nor is it true that my address originated from any motives of revenge. Two years elapsed from the date of those letters, before I wrote anything on the politics of this country. Nor did I recollect them at the time. Nor do I see the objection to taking any fair means of improving my situation. This is a duty incumbent on every prudent man who has a family to raise, and which I have already too much neglected from public motives: nor can any office to which I am eligible in this country, recompense me for the offers I rejected in its favour. But it is not in the power of promises or threats, of wealth or poverty, to extinguish the political enthusiasm which has actuated my conduct for these twenty years. The prudence of middle age and the claims of duty may make me cautious of sacrificing my interest, but they cannot induce me to sacrifice my principle. Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. He had not at that time given the public to understand that he would bestow no office but under implicit conformity to his political opinions. He had not declared that 'a republican government may mean anything.' He had not yet sanctioned the abolition of trial by jury in the alien law, or entrenched his public character behind the legal barriers of the sedition law. Nor were we yet saddled with the expense of a permanent navy, or threatened under his auspices with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war; nor had the political acrimony which still poisons the pleasures of private society, been fostered by those who call themselves his friends and adherents: nor had the eminent services of Mr. Humphreys at that time received their reward. Mr. Adams had not yet projected his embassies to Prussia, Russia, and the Sublime Porte; nor had he yet interfered, as president of the United States, to influence the decisions of a court of justice; a stretch of authority which the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy! This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court martial, had not yet astonished the republican citizens of this free country. A case too little known, but of which the people ought to be fully apprised before the election, and they shall be. Most assuredly, had these transactions taken place in August, 1797, the President Adams would not have been troubled by any request from

"Thomas Cooper.

"Northumberland, Nov. 2, 1797."

pears ultimately to have been given under a waiver of the supposed privilege; and after considerable altercation between Judge CHASE and the defendant with regard to the character of the evidence to be produced, the jury was sworn, and Mr. Rawle opened the case to the jury substantially as follows:

The defendant stands charged with attempts which the practice and policy of all civilized nations have thought it right at all times to punish with severity, with having published a false, scandalous and malicious attack on the character of the president of the United States, with an intent to excite the hatred and contempt of the people of this country against the man of their choice. It was much to be lamented that every person who had a tolerable facility at writing should think he had a right to attack and overset those authorities and officers whom the people of this country had thought fit to appoint. Nor was it to be endured that foul and infamous falsehoods should be uttered and published with impunity against the president of the United States, whom the people themselves had placed in that high office, and in which he has acted with so much credit to himself and benefit to them. Thomas Cooper stands charged in the indictment as follows: (Here Mr. Rawle read the indictment.) It was a sense of public duty that called for this prosecution. It was necessary that an example should be made to deter others from misleading the people by such false and defamatory publications. There was a peculiarity in the manner also of this publication: we generally observe that persons who take these liberties endeavour to avoid punishment by sheltering themselves under fictitious signatures, or by concealing their names; but the defendant acted very differently. Being of the profession of the law, a man of education and literature, he availed himself of those advantages for the purpose of disseminating his dangerous productions in a remote part of the country where he had gained influence. Such conduct must have arisen from the basest motives. It would be proved to the jury that, at the time of this publication, the defendant went to a magistrate and acknowledged it to be his production, in the same formal manner as if it had been a deed. A conduct so grossly improper had occurred in no instance within his recollection, and the manner constituted no slight aggravation of the offence. Indeed, it was high time for the law to interfere and restrain the libellous spirit which had been so long permitted to extend itself against the highest and most deserving characters. To abuse the men with whom the public has entrusted the management of their national concerns, to withdraw from them the confidence of the people, so necessary for conducting the public business, was in direct opposition to the duties of a good citizen. Mischiefs of this kind were to be dreaded in proportion as the country around is less informed, and a man of sense and education has it more in his power to extend the mischief which he is inclined to propagate. Government should not encourage the idea, that they would not prosecute such atrocious conduct; for if this conduct was allowed to pass over, the peace of the country would be endangered. Error leads to discontent, discontent to a fancied idea of oppression, and that to insurrection, of which the two instances which had already happened were alarming proofs, and well-known to the jury. That the jury, as citizens, must determine whether, from publications of this kind, the prosperity of the country was not endangered; and whether it was not their duty, when a case of this nature was laid before them and the law was applicable, to bring in such a verdict as the law and the evidence would warrant; and show, that these kinds of attacks on the government of the country were not to be suffered with impunity.

Mr. Rawle, after reading the section of the sedition act applicable to the case on trial, proceeded to call John Buyers, who testified as follows: "I know this paper. Mr. Cooper brought it to me on the evening of the 6th of December, 1799, at my house at Sunbury. He came to me at the door of my house. Asked me to walk in. We walked in. This was between candle-light and day-light. He asked for a candle. He perused this paper which I have in my hand, pointed to his name, and said, 'This is my name, and I am the author of this piece.' There was nothing further passed, only he said, 'This may save you trouble another time.' I knew very well what he meant by it."

Cross-examined by Mr. Cooper: "Had not you and I been in the habit of frequently joking with each other upon political subjects? Ans. O yes—very often."

Mr. Rawle here read that part of the publication which is included in the indictment, for which reason it is omitted here.

Mr. Cooper then addressed the jury as follows:

If it were true, as it is not true, that, in the language of the attorney general of the district, I have been guilty of publishing with the basest motives a foul and infamous libel on the character of the president; of exciting against him the hatred and contempt of the people of this country, by gross and malicious falsehoods—then, indeed, would it be his duty to bring me before this tribunal, it would be yours to convict, and the duty of the court to punish me. But I hope, in the course of this trial, I shall be enabled to prove to your satisfaction, that I have published nothing which truth will not justify. That the assertions for which I am indicted are free from malicious imputation, and that my motives have been honest and

fair. You will observe, gentlemen of the jury, that the law requires it to be proved as a necessary part of the charge, that the passages for which I am indicted should be false and scandalous, and published from malicious motives: and before you will be able, consistently with your oaths, to convict upon this indictment, you must be thoroughly satisfied that both these parts of the charge are well founded. Nor does it appear to me that the expression of the act, to bring the president into contempt, can be fulfilled, if the accusation, as in the present instance, related to an examination of his public conduct, and no improper motives are imputed to him. And that I have carefully avoided imputing any impropriety of intention to the president, even in the very paper complained of; that the uniform tenor of my conduct and language has been to attribute honesty of motive even where I have strongly disapproved of the tendency of his measures, I can abundantly show. You, and all who hear me, well know that this country is divided, and almost equally divided, into two grand parties; usually termed, whether properly or improperly, Federalists and Anti-Federalists: and that the governing powers of the country are ranked in public opinion under the former denomination—of these divisions, the one wishes to increase, the other to diminish, the powers of the executive; the one thinks that the people (the democracy of the country) has too much, the other too little, influence on the measures of government: the one is friendly, the other hostile, to a standing army and a permanent navy: the one thinks them necessary to repel invasions and aggressions from without, and commotions within; the other, that a well-organized militia is a sufficient safeguard for all that an army could protect, and that a navy is more dangerous and expensive than any benefit derived from it can compensate; the one thinks the liberties of our country endangered by the licentiousness, the other, by the restrictions of the press. Such are some among the leading features of these notorious divisions of political party. It is evident, gentlemen of the jury, that each will view with a jealous eye the positions of the other, and that there cannot but be a bias among the partisans of the one side, against the principles and doctrines inculcated by the other. In the present instance, I fear it cannot but have its effects; for, without impeaching the integrity of any person directly concerned in the progress of the present trial, I may fairly state that, under the sedition law, a defendant, such as I stand before you, is placed in a situation unknown in any other case. Directly or indirectly, the public, if not the private, character of the president of the United States is involved in the present trial. Who nominates the judges who are to preside, the juries who are to judge of the evidence, the marshal who has the summoning of the jury? The president. Suppose a case of arbitration concerning the property of any one of you, where the adverse party should claim the right of nominating the persons whose legal opinions are to decide the law of the question, and of the very man who shall have the appointment of the arbitrators—what would you say to such a trial? and yet in fact such is mine, and such is the trial of every man who has the misfortune to be indicted under this law. But although I have a right to presume something of political bias against my opinions, from the court who try me, to you who sit there as jurymen, I am still satisfied you will feel that you have some character to support and some character to lose; and whatever your opinions may be on the subjects alluded to in the indictment, you will reverence as you ought the sacred obligation of the oath you have taken. Gentlemen of the jury, I acknowledge, as freely as any of you can, the necessity of a certain degree of confidence in the executive government of the country. But this confidence ought not to be unlimited, and need not be paid up in advance; let it be earned before it be reposed; let it be claimed by the evidence of benefits conferred, of measures that compel approbation, of conduct irreproachable. It cannot be exacted by the guarded provisions of sedition laws, by attacks on the freedom of the press, by prosecutions, pains and penalties on those who boldly express the truth, or who may honestly and innocently err in their political sentiments. Let this required confidence be the meed of desert, and the public will not be backward to pay it. But in the present state of affairs, the press is open to those who will praise, while the threats of the law hang over those who blame the conduct of the men in power. Indiscriminate approbation of the measures of the executive is not only unattacked, but fostered, and received with the utmost avidity; while those who venture to express a sentiment of opposition must do it in fear and trembling, and run the hazard of being dragged like myself before the frowning tribunal, erected by the sedition law. Be it so; but surely this anxiety to protect public character must arise from fear of attack. That conduct which will not bear investigation will naturally shun it; and whether my opinions are right or wrong, as they are stated in the charge, I cannot help thinking they would have been better confuted by evidence and argument than by indictment. Fines and imprisonment will produce conviction neither in the mind of the sufferer nor of the public. Nor do I see how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed. Electors are bound in conscience to reflect and decide who best deserves their suffrage; but how can they do it, if these prosecutions in terrorem close

all the avenues of information, and throw a veil over the grossest misconduct of our periodical rulers? After having offered these preliminary remarks, I shall give an account of the paper on which I am accused, and then proceed to examine the charges of the indictment in the order in which they are laid: much that I intended to have advanced I must relinquish, that I may not trespass too long on your time, or weaken the effect of my own defence by fatiguing your attention. The scored paper now handed to me by the attorney general, suggests an observation which, though trite, is material. Upon the plan usually adopted in these ex officio accusations, a good Christian might easily be proved an arrant atheist. "The fool hath said in his heart, there is no God." Take the four last words, and they are atheistical: take the sentence, and it is Scripture. So, take the marked passages in this paper, and they may, perhaps, be forced into something like improper imputation against the president: take the paper itself, and the very first paragraph is a plain and positive approbation of his intention. Though I must acknowledge that, however upright I might formerly have believed his motives of action, I cannot, upon reflection, pay that tribute to his conduct or his motives on the present occasion. The general circumstances that gave rise to the paper I now hold, are these: Dr. Priestley, a man whose name implies a greater combination of learning, science, and ability, of important discovery, of exertion for the benefit of mankind, and of private integrity, than any other man now living can boast—whose conduct towards me, in the instance detailed in this paper, is praise sufficient to bear up my mind against any consequences which the present trial can produce—had long been an acquaintance and an intimate acquaintance of Mr. Adams, in England and in this country. The letters of the latter to Dr. Priestley are full of strong expressions of friendship and esteem. Relying upon this long intercourse of cordiality between them, Dr. Priestley urged me to permit him to write to Mr. Adams on the subject of a vacancy mentioned in this paper, and which, as you will have it before you when you retire, I shall not read at length. This application was from one friend to another; upon the face of it a confidential communication; although containing nothing but what might do credit to all the parties concerned. Mr. Adams, however, did not think it so confidential; and from some disclosure on his part, has been founded the base and cowardly slander which dragged me in the first instance before the public in vindication of my moral and political character, and has at length dragged me before this tribunal, to protect, if I can, my personal liberty and my private fortune, against the legal attack of an ex officio information. Hence, it is evident, gentlemen of the jury, that this is not a voluntary, but an involuntary publication on my part: it has originated, not from motives of turbulence and malice, but from self-defence; not from a desire of attacking the character of the president, but of vindicating my own. And in what way have I done this? My motives, my private character, my public character, were the object of falsehood and calumny, apparently founded on information of high authority. In reply, I give credit to the intentions of the president: I say nothing of his private character; and I attack only the tendency of measures notorious to the world, which, having been known to disapprove publicly, I was charged with being ready, from motives of interest, to approve privately. I think, gentlemen, you cannot help feeling this contrast of behaviour, and if the president is satisfied with his side of the picture, I am mine.

The first article selected for accusation is, that, at the time I allude to, "he was but in the infancy of political mistake." Why this expression should have been fixed on as seditious, I know not, unless it be that "quem deus vult perdere prius dementat"; for have we advanced so far on the road to despotism in this republican country, that we dare not say our president may be mistaken? Is a plain citizen encircled at once by the mysterious attribute of political infallibility the instant he mounts the presidential chair? If so, then indeed may it be seditious to say he is mistaken; but before you can condemn me for this kind of sedition, you must become catholic believers in this new-fangled doctrine of infallibility. I know that in England the king can do no wrong, but I did not know till now that the president of the United States had the same attribute. I have said (and I am accused for saying it) "that even those who doubted his capacity thought well of his intentions." Is it a crime to doubt the capacity of the president? Suppose I had said that there were some who did not give him credit for capacity sufficient for the office he holds, is that a crime? Or if in them, is it a crime in me, who have not said it? Nor can the word "capacity" here be fairly construed into any other than a comparative meaning; for surely no one who has read his defence, as it is called, of the American constitution, or who reflects that he has had abilities enough to raise himself to his present situation, can say that he is devoid either of industry or talents. But those who voted for his opponent must have believed Mr. Adams of inferior capacity to that gentleman. Of that number was I; of that number was at least one-half of the people of the United States. If it be a crime thus to have thought and thus to have spoken, I fear I shall continue in this respect incorrigible. But if of two constructions the one is absurd, improbable and unfavourable, surely it should be rejected in favour of that meaning which was most likely to have occurred, and which in its effects will do

least injury to a defendant like myself. This is common, this is legal charity. "Nor had we yet, under his auspices, been saddled with the expense of a permanent navy." Gentlemen, is it true or not that we are saddled with the expense of a permanent navy? Is it necessary that I should enter into a detail of authorities to prove that the sun shines at noon-day? But farther, is it true that we incur this expense under his auspices and sanction? I have before me two publications: the one the Gazette of the United States, published by Mr. Fenno in this city; and another, in a form more portable and convenient, purporting to be a selection of addresses and answers to and from the president during the summer of 1798. Not having been able to procure office copies of the documents I wished to refer to, I must offer in evidence such publications as I can find; that class of publications, upon which in fact the mind of the public is usually made up; and upon whose authority the electors of this country determine the characters whom they honour with their suffrage. Indeed, if the opinion that fell from the court this morning be accurate, that no man should hazard an assertion but upon sufficient and legal evidence, and if documents from the public offices in proof of notorious facts are required as such evidence, then are the mouths of the people completely shut up on every question of public conduct or public character: but I cannot help thinking it a fair and reasonable position, that a defendant in such a case as this should be permitted to offer to the jury any evidence that appears to him a sufficient ground for his assertion, and let them decide on its credibility.

CHASE, Circuit Justice. What is it that you say, sir, fell from the court? They have not yet decided what was or what not proper evidence for you to adduce. The court said, if you thought the public documents at your service, you were mistaken. If you undertake to publish, without having proper evidence before you to justify your assertions, you do it at your own risk. Most assuredly, in common traverses, you could not offer the evidence you mention. But we acknowledge that, in such a case as this, greater latitude may be given. If you say the president did write a letter, you must prove it. We should incline to admit gazettes and acts of public authority and notoriety: you might read the speech of the president to both houses of congress in evidence. If you want to prove that the president advocated a navy, you may read the journals of congress or any authentic public document.

Mr. Cooper. If I am defeated in my endeavours to procure these documents, I must offer such evidence as I can procure; and where there is no reasonable suspicion or assignable motive why the publications I offer should misrepresent the transactions I allude to, the probability is in favour of their accuracy; especially when the printers of them are severely punishable for wilful misrepresentation or gross mistake in detailing the public acts of government.

PETERS, District Judge. I admit a great many things from Mr. Cooper, who is without counsel, which I would not admit from others.

CHASE, Circuit Justice. You may read anything and everything you please.

Mr. Cooper then went on to argue at great length, from a copious collection from the public documents of the day, that the policy of the president had been to saddle upon the country a permanent navy and army, and to keep down the liberties of the citizens by his arbitrary interference in the case of Jonathan Robbins. He then said:

Gentlemen, I have gone through all the charges, and I am satisfied that I have brought in support of my assertions the best evidence the nature of my case would admit of. It is true, by resorting to Danbury for depositions and to Charlestown for records, I might have made the evidence in the last charge more complete; but I did not and do not think them necessary to produce further conviction on your minds than you feel on the subject already. This is an important point under the law in question. If such strictness of testimony is required, there is an end at once of all political conversation in promiscuous society. The time, the labour, the difficulty, the expense, the harassment and fatigue of mind as well as of body, which such doctrine would occasion to every citizen whom a corrupt administration might determine to ruin, would be an engine of oppression of itself sufficiently powerful to establish a perfect despotism over the press; and would be a punishment for innocence before trial, too severe to be inflicted on sedition itself. I think you must feel the truth of these remarks: the proceedings on this trial irresistibly suggest them. Gentlemen, if the assertions I have made are true, whatever the motives of them may be, you cannot find me guilty. But I think it impossible, if you consider the paper altogether, that you can ascribe the publication of it to malice: it is on the face of it not voluntary, but compelled. I have, in the very outset of the paper, spoken well of the president: I have been in the habit of thinking his intentions right, and his public conduct wrong: and that this has been the general tenor of my language and behaviour, I believe I can even now bring proof enough from among my friends and my neighbors.

CHASE, Circuit Justice. This is not necessary: it is your conduct, not your character, that is in question. If this prosecution were for a crime against the United States, you might give evidence to your character, and show that you have always been a good citizen; but this is an indictment for a libel against the president, where your general character is not in question.

Mr. Cooper. I am satisfied. I shall fatigue the jury no longer; but rest my defence here.

Mr. Rawle, in reply, said:

Gentlemen of the jury, the defence you have just heard is one of the most extraordinary and unexampled I ever remember to have witnessed in a court of justice. It is no less than to call into decision whether Thomas Cooper, the defendant, or the president of the United States, to whom this country has thought proper to confide its most important interests, is best qualified to judge whether the measures adopted by our government are calculated to preserve the peace and promote the happiness of America. This, however, does not seem to me the real point which you are to try; and I shall therefore (under direction of the court) proceed to state what I conceive to be the question which you, gentlemen of the jury, are now called upon to determine. Thomas Cooper is charged in the indictment with having published a false, scandalous and malicious libel, with intent to defame the president of the United States, and to bring him into contempt and disrepute, and to excite against him the hatred of the good people of this country. In the act which defines this offence and points out the punishment, a liberality of defence is given, unknown, I believe, in any other country where the party is tried for a libel on the government. Here the defendant is allowed, under the third section of that act, to give in evidence the truth of the matters charged as a libel in the publication, and the jury have a right to determine the law and the fact under the direction of the court. The true spirit of the law is that the defendant shall not be found guilty of publishing defamatory writings, unless they be false, nor, although they may be false, shall he be considered as guilty under the law, unless the intent of the publication appear to be malicious. That such publication has proceeded upon a knowledge of the truth, he is permitted to give as matter of evidence; and if true, it must be allowed to go far to satisfy the minds of the jury that the malicious motives imputed to him are not true. In private actions for slander, where a man seeks pecuniary redress for the injury his character has sustained, the defendant is entitled to give in evidence, as a defence to the action, the truth of the words spoken or the written libel; and if the truth of the assertions be proved, it will amount to a justification. There is no difference, then, between the defence that may be set up to an action of slander, or libel on a private person, and that which is permitted under the law whereon this indictment is grounded. The defendant has undertaken to satisfy the mind of the jury that, in this publication, he had no malicious intention against the president of the United States; I join issue with him on the point, and request your particular attention to it. He alleges that he did not impute improper motives to the president, and attempts to substantiate his allegation by referring you to his declaration in the outset, where he says that "I cannot believe him (the president) capable of such gross misrepresentations, for I still think well of his intentions, however I may disapprove of his conduct." But to this I shall add that he goes on and concludes with a paragraph, evincing in the clearest manner a settled design to persuade the public that the president of the United States is not fit for the high office he bears, and of this you must be fully convinced from the whole tenor of the expressions which have been read to you in the indictment. It is very far from my views to press hard upon any part of his long address to you, or to make use against him of any unguarded expression, which, on more deliberate consideration, he might have omitted or corrected; yet, when I cannot but observe, from the whole tenor of his present argument, as well as from his publication, that his object is not so much to convince you, gentlemen of the jury, that his assertions are true, as to cast an unmerited reflection on the general character and conduct of the president, I cannot help suspecting him of the motives he disclaims, and I must do my duty by exposing the design as well as the fallacy of the justification he has set up. The defendant has used a little observation respecting the separating in the indictment the text from the context, as I believe he was pleased to term it; and argued that by this means the most upright intentions and laudable expressions might be perverted from their true and obvious meaning. Such an insinuation, however, is not calculated to influence your minds. In framing an indictment, it is my duty to leave out matters of little importance, and to introduce those circumstances only that are truly and legally reprehensible: and he well knows that he can read, if he pleases, the whole of the publication, and that you will have it with you when you consider of your verdict. You will judge, therefore, whether by this observation, it was his, or whether it is my design to confound and perplex the sense. Whether the reflections he has thrown upon the conduct of government, in so many instances throughout his defence as well as in his publication, evince the regard he professes to entertain for the intentions of the president, is to me, as it will be to you, extremely dubious; nor have those professions been confirmed by the singular manner in which he has cited and selected the passages on which his defence has been grounded. Throughout the quotations he has made, particularly from the addresses to the president, and the answers to them, there has been a series of misrepresentations, which it will be my duty to observe upon when I come to consider that part of the charge and his vindication of it. But it is fair to observe that if, from the perusal of partial extracts and passages selected from various publications, he has thought proper

to publish a libel, such as that for which he is indicted, against the character of our president, there is no excuse for his conduct; if, on the other hand, he had the whole of the publications before him, and has extracted from them partially and unfairly, his conduct is still more reprehensible, and there is the less excuse, as it is evident, and as you, gentlemen of the jury, must have observed, that he is a man of talents and letters.

Mr. Rawle then proceeded to consider at great length the several points of justification started by Mr. Cooper, and then said:

Gentlemen, you have attended to the words of this charge in the indictment, and you cannot but be impressed that they convey on the face and in the very tenor of them, a conclusive proof of a mala mens, of a malicious and deliberate intention to injure the character of the president: no man can read them without receiving this impression from the perusal. I have not touched on the article respecting the embassies to Prussia, Russia, and the Porte; because I did not think it of importance sufficient to occupy much of your time. Indeed, I believe no embassy was ever sent to Russia. There is enough for your consideration against the defendant, without dwelling on these lesser articles of the indictment. Gentlemen, I have no personal animosity against Mr. Cooper; but I have instituted this prosecution because I thought it my duty so to do, and I must make those remarks which the same duty calls forth. The defendant has endeavoured to show that his publication was without malice; but his conduct with Buyers, and his expressions in that publication, prove otherwise: the nature of his defence, though he has stated his opinion of the good intentions of the president, evidently shows that he meant to justify his own conduct and language throughout. You, gentlemen of the jury, under the direction of the court, will decide whether he has presented to you such a justification as will entitle him to your verdict in his favour.

CHASE, Circuit Justice (charging jury). Gentlemen of the jury: When men are found rash enough to commit an offence such as the traverser is charged with, it becomes the duty of the government to take care that they should not pass with impunity. It is my duty to state to you the law on which this indictment is preferred, and the substance of the accusation and defence. Thomas Cooper, the traverser, stands charged with having published a false, scandalous and malicious libel against the president of the United States, in his official character as president. There is no civilized country that I know of, that does not punish such offences; and it is necessary to the peace and welfare of this country, that these offences should meet with their proper punishment, since ours is a government founded on the opinions and confidence of the people. The representatives and the president are chosen by the people. It is a government made by themselves; and their officers are chosen by themselves; and, therefore, if any improper law is enacted, the people have it in their power to obtain the repeal of such law, or even of the constitution itself, if found defective, since provision is made for its amendment. Our government, therefore, is really republican; the people are truly represented, since all power is derived from them. It is a government of representation and responsibility. All officers of the government are liable to be displaced or removed, or their duration in office limited by elections at fixed periods. There is one department only, the judiciary, which is not subject to such removal; their offices being held "during good behaviour," and therefore they can only be removed for misbehaviour. All governments which I have ever read or heard of punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government. A republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow, but most sure and certain, means of bringing about the destruction of the government. The legislature of this country, knowing this maxim, has thought proper to pass a law to check this licentiousness of the press: by a clause in that law it is enacted. (Judge CHASE here read the second section of the sedition law.) It must, therefore, be observed, gentlemen of the jury, that the intent must be plainly manifest. It is an important word in the law; for if there is no such intent to defame, &c., there is no offence created by that law. Thomas Cooper, then, stands indicted for having published a false, scandalous and malicious libel upon the president of the United States, with intent to defame the president, to bring him into contempt and disrepute, and to excite against him the hatred of the good people of the United States. This is the charge. The traverser has pleaded not guilty, and that he has not published, &c., with these views. He has also pleaded in justification (which the law provides for), that the matters asserted by him are true, and that he will give the same in evidence.

It is incumbent on the part of the prosecution to prove two facts: (1) That the traverser did publish the matters contained in the indictment. (2) That he did publish with intent to defame, &c. For the intent is as much a fact as the other, and must be proved in the same manner as other facts; and must be proved as stated in the law of congress—the mere publication is no offence; and in making up your verdict, though you consider them separately, you must take the whole tenor and import of the publication, since the offence is committed by the two coupled together.

First, then, as to the publication. The fact of writing and publishing is clearly proved; nay, in fact, it is not denied. It is proved to have taken place at Sunbury, a considerable distance from the seat of government. It appears from the evidence that the traverser went to the house of a justice of the peace with this paper, whom, of all others, he ought to have avoided; for he must know that it was the duty of the justice of the peace to deliver it immediately to those who administer the government. He did so. It was indecent to deliver such a paper to a justice of the peace, and the manner in which it was delivered was yet more outrageous—if it was done in joke, as the traverser would wish to imply, it was still very improper—but there was the same solemnity in his expression, "This is my name, and I am the author of this handbill," as if the traverser was going to part with an estate. This conduct showed that he intended to dare and defy the government, and to provoke them, and his subsequent conduct satisfies my mind that such was his disposition. For he justifies the publication in all its parts, and declares it to be founded in truth. It is proved most clearly to be his publication. It is your business to consider the intent as coupled with that, and view the whole together. You must take that publication, and compare it with the indictment. If there are doubts as to the motives of the traverser, he has removed them; for, though he states in his defence that he does not arraign the motives of the president, yet he has boldly avowed that his own motives in this publication were to censure the conduct of the president, which his conduct, as he thought, deserved. Now, gentlemen, the motives of the president, in his official capacity, are not a subject of inquiry with you. Shall we say to the president, you are not fit for the government of this country? It is no apology for a man to say, that he believes the president to be honest, but that he has done acts which prove him unworthy the confidence of the people, incapable of executing the duties of his high station, and unfit for the important office to which the people have elected him: the motives and intent of the traverser, not of the president, are the subject to be inquired into by you.

Now we will consider this libel as published by the defendant, and observe what were his motives. You will find the traverser speaking of the president in the following words: "Even those who doubted his capacity, thought well of his intentions." This the traverser might suppose would be considered as a compliment as to the intentions of the president; but I have no doubt that it was meant to carry a sting with it which should be felt; for it was in substance saying of the president, "You may have good intentions, but I doubt your capacity." He then goes on to say: "Nor were we yet saddled with the expense of a permanent navy, nor threatened, under his (the president's) auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace." Now, gentlemen, if these things were true, can any one doubt what effect they would have on the public mind? If the people believed those things, what would be the consequence? What! the president of the United States saddle us with a permanent navy, encourage a standing army, and borrow money at a large premium? And are we told, too, that this is in time of peace? If you believe this to be true, what opinion can you, gentlemen, form of the president? One observation must strike you, viz.: That these charges are made not only against the president, but against yourselves who elect the house of representatives, for these acts cannot be done without first having been approved of by congress. Can a navy be built, can an army be raised, or money borrowed, without the consent of congress? The president is further charged for that "the unnecessary violence of his official expressions might justly have provoked a war." This is a very serious charge indeed. What, the president, by unnecessary violence, plunge this country into a war! and that a just war? It cannot be—I say, gentlemen, again, if you believe this, what opinion can you form of the president? Certainly the worst you can form: you would certainly consider him totally unfit for the high station which he has so honorably filled, and with such benefit to his country. The traverser states that, under the auspices of the president, "our credit is so low that we are obliged to borrow money at eight per cent. in time of peace." I cannot suppress my feelings at this gross attack upon the president. Can this be true? Can you believe it? Are we now in time of peace? Is there no war? No hostilities with France? Has she not captured our vessels and plundered us of our property to the amount of millions? Has not the intercourse been prohibited with her? Have we not armed our vessels to defend ourselves, and have we not captured several of her vessels of war? Although no formal declaration of war has been made, is it not notorious that actual hostilities have taken place? And is this, then, a time of peace? The very expense incurred, which rendered a loan necessary, was in consequence of the conduct of France. The traverser, therefore, has published an untruth, knowing it to be an untruth.

The other part of the publication is much more offensive. I do not allude to his assertions relating to the embassies to Prussia, Russia, and the Sublime Porte. They are matters of little consequence, and, therefore, I shall pass over them. The part to which I allude is that where the traverser charges the president with having influenced the judiciary department. I know of no charge which can be more injurious to the president than that of an attempt to influence a court of judicature; the judicature of the country is of the greatest consequence to the liberties and existence of a nation. If your constitution was de-

stroyed, so long as the judiciary department remained free and uncontrolled, the liberties of the people would not be endangered. Suffer your courts of judicature to be destroyed; there is an end to your liberties. The traverser says that this interference was a stretch of authority that the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy. Is not this an attack, and a most serious attack on the character of the president? The traverser goes on thus: "This melancholy case of Jonathan Robbins, a native of America, forcibly impressed by the British, and delivered, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country,—a case too little known, but of which the people ought to be fully apprised before the election, and they shall be." Now, gentlemen, there are circumstances in this publication which greatly aggravate the offence. The traverser does not only tell you that the president interfered to influence a court of justice without precedent, against law and against mercy; but that he so interfered in order to deliver up a native American citizen to be executed by a British court-martial under a mock trial, against law and against mercy. Another circumstance is adduced to complete the picture. He tells you that this Robbins was not only an American, but a native American, forcibly impressed by the British; and yet that the president of the United States, without precedent, against law and against mercy, interfered with a court of justice, and ordered this native American to be delivered up to a mock trial by a British court-martial. I can scarcely conceive a charge can be made against the president of so much consequence, or of a more heinous nature. But, says Mr. Cooper, he has done it. I will show you the case in which he has done it. It is the case of Jonathan Robbins. It appears then that this is a charge on the president, not only false and scandalous, but evidently made with intent to injure his character, and the manner in which it is made is well calculated to operate on the passions of Americans, and I fear such has been the effect. If this charge were true, there is not a man amongst you but would hate the president. I am sure I should hate him myself if I had thought he had done this. Upon the purity and independence of the judges depend the existence of your government and the preservation of your liberties. They should be under no influence—they are only accountable to God and their own consciences —your present judges are in that situation.

There is a little circumstance which the attorney-general, in his observations to you, omitted to state, but which I think it right to recall to your recollection, as it appears with what design the traverser made this publication. In this allusion to Jonathan Robbins he expressly tells you this is "a case too little known, but of which the people ought to be fully apprised before the election, and they shall be." Here, then, the evident design of the traverser was, to arouse the people against the president so as to influence their minds against him on the next election. I think it right to explain this to you, because it proves, that the traverser was actuated by improper motives to make this charge against the president. It is a very heavy charge, and made with intent to bring the president into contempt and disrepute, and excite against him the hatred of the people of the United States. The traverser has read in evidence a report made by the president to the house of representatives, and a letter written by the secretary of state, to show that the president had advised and directed this Robbins to be given up; but subsequent facts could not excuse the traverser for what he had written before. Now, gentlemen, with regard to this delivery of Jonathan Robbins, I am clearly of opinion that the president could not refuse to deliver him up. This same Jonathan Robbins, whose real name appears to have been Nash, was charged with murder committed on board the Hermione, British ship of war. This Nash being discovered in America, the British minister made a requisition to the president that he should be delivered up. Then we must inquire whether the president was obliged to give him up? By the twenty-seventh article of the treaty with Great Britain, it is stipulated, "that either of the contracting parties will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided this shall be done only on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had been there committed." If the president, therefore, by this treaty, was bound to give this Nash up to justice, he was so bound by law; for the treaty is the law of the land: if so, the charge of interference to influence the decisions of a court of justice, is without foundation. The reason why this article was inserted in the treaty, is evident. Murder is a crime against the laws of God and man, and ought never to be committed with impunity. Forgery is an offence affecting all commercial countries, and should never go unpunished; and therefore every government, especially a commercial one, acts wisely in delivering fugitives guilty of such crimes to justice. Nash was charged with having committed murder on board a British ship of war. Now a dispute has arisen whether murder committed on board such a ship of war, was committed within the jurisdiction of Great Britain. I have no doubt as to the point. All vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong. This is according to the law of nations. All nations have this jurisdiction, and the reason is obvi-

ous, for every country carrying on commerce, is answerable to other nations for the conduct of their subjects on the ocean. Were it not so, crimes committed on board vessels of war would go unpunished; for no other country can claim jurisdiction. This person, then, was charged with murder committed on board a British ship of war. I say it was committed within the jurisdiction of Great Britain. By the constitution, (since the treaty is the law of the land,) America was bound to give him up: but who is the person to deliver up a fugitive according to that article in the treaty? The president was the only person to take the proper steps, and to take cognizance of the business. He represents the United States in their concerns with foreign powers. This affair could not be tried before a court of law. No court of justice here has jurisdiction over the crime of murder committed on board a British ship of war. Now, as the requisition was made to the president on the part of the British government to deliver this man up, it became necessary to know whether there was sufficient evidence of his criminality pursuant to the treaty. The judge of the court of Carolina was therefore called upon to inquire into the evidence of his criminality. He was the instrument made use of by the president to ascertain that fact. His delivery was the necessary act of the president, which he was by the treaty and the law of the land, bound to perform; and had he not done so, we should have heard louder complaints from that party who are incessantly opposing and calumniating the government, that the president had grossly neglected his duty by not carrying a solemn treaty into effect. Was this, then, an interference on the part of the president with the judiciary without precedent, against law and against mercy; for doing an act which he was bound by the law of the land to carry into effect, and over which a court of justice had no jurisdiction? Surely not; neither has it merited to be treated in the manner in which the traverser has done in his publication. A defence of greater novelty I never heard before.

Take this publication in all its parts, and it is the boldest attempt I have known to poison the minds of the people. He asserts that Mr. Adams has countenanced a navy, that he has brought forward measures for raising a standing army in the country. The traverser is certainly a scholar, and has shown himself a man of learning, and has read much on the subject of armies. But to assert, as he has done, that we have a standing army in this country, betrays the most egregious ignorance, or the most wilful intentions to deceive the public. We have two descriptions of armies in this country—we have an army which is generally called the Western army, enlisted for five years only—can this be a standing army? Who raises them? Congress. Who pays them? The people. We have also another army, called the provisional army, which is enlisted during the existence of the war with France—neither of these can, with any propriety, be called a standing army. In fact, we cannot have a standing army in this country, the constitution having expressly declared that no appropriation shall be made for the support of an army longer than two years. Therefore, as congress may appropriate money for the support of the army annually, and are obliged to do it only for two years, there can be no standing army in this country until the constitution is first destroyed. There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government. Therefore, to say, that under the auspices of the president, we were saddled with a standing army, was directly calculated to bring him into contempt with the people, and excite their hatred against him.

It is too much to press this point on the traverser. But he deserves it. This publication is evidently intended to mislead the ignorant, and inflame their minds against the president, and to influence their votes on the next election. The traverser says, he has proved that the president has advocated a standing army—how has he proved it? There is no standing army; I have before stated, the army is only raised for five years, and during the existing differences—he tells you, Mr. Adams is a friend to the establishment of a navy; I wonder who is not a friend to a navy which is to protect the commerce and power of this country. The traverser has, to prove these points, read to you many extracts from the addresses and answers to the president. He has selected a number of passages, which, he asserts, prove the approbation of the president to the creation of a navy, and forming a standing army. But we are to recollect gentlemen, that when in consequence of the unjust proceedings of France, the great mass of the people thought proper to address the president, expressing in those addresses, sentiments of attachment and confidence in the president, and their determination to resist the oppression of the French government, the president replied to them, in answers which generally were the echo of their sentiments, and in fact, his expressions were as general as the nature of the addresses would permit—therefore, the traverser ought to have blamed the addressers, and not the president. The Marine Society of Boston, as old seamen, address the president in favour of a navy. The president in reply, thinks a navy is the proper defence of the country.

I believe, gentlemen, in the first part of my charge, I made remarks on the assertions of the traverser, that the president had borrowed money at eight per cent. in time of peace. Therefore, it will not be necessary to enlarge on that point. You will please to notice, gentlemen, that the traverser in his defence must prove every charge he has made to be true;

he must prove it to the marrow. If he asserts three things, and proves but one, he fails; if he proves but two, he fails in his defence, for he must prove the whole of his assertions to be true. If he were to prove, that the president had done everything charged against him in the first paragraph of the publication—though he should prove to your satisfaction, that the president had interfered to influence the decisions of a court of justice, that he had delivered up Jonathan Robbins without precedent, against law and against mercy, this would not be sufficient, unless he proved at the same time, that Jonathan Robbins was a native American, and had been forcibly impressed, and compelled to serve on board a British ship of war. If he fails, therefore, gentlemen, in this proof, you must then consider whether his intention in making these charges against the president were malicious or not. It is not necessary for me to go more minutely into an investigation of the defence. You must judge for yourselves —you must find the publication, and judge of the intent with which that publication was made, whether it was malice or not? If you believe that he has published it without malice, or an intent to defame the president of the United States, you must acquit him. If he has proved the truth of the facts asserted by him, you must find him not guilty.

After the jury had returned with a verdict of guilty:

CHASE, Circuit Justice. Mr. Cooper, as the jury have found you guilty, we wish to hear any circumstances you have to offer in point of the mitigation of the fine the court may think proper to impose on you, and also in extenuation of your punishment. We should therefore wish to know your situation in life, in regard to your circumstances. It will be proper for you to consider of this. As you are under recognizance, you will attend the court some time the latter end of the week. (The court appointed Wednesday.)

Proceedings on Wednesday, April 30, 1800.

CHASE, Circuit Justice. Mr. Cooper, have you anything to offer to the court previous to passing sentence?

Mr. Cooper. The court have desired me to offer anything relating to my circumstances in mitigation of the fine, or any observation that occurs to me in extenuation of the offence. I have thought it my duty (not for the purpose of deprecating any punishment which the court may deem it proper to inflict, but) to prevent any accidental or apparent harshness of punishment on part of the court, for want of that information which it is in my power to give. For this reason, therefore, and that the court may not be misled, I think it right to say, that my property in this country is moderate. That some resources I had in England, commercial failures there have lately cut off: that I depend principally on my practice: that practice, imprisonment will annihilate. Be it so. I have been accustomed to make sacrifices to opinion, and I can make this. As to circumstances in extenuation, not being conscious that I have set down aught in malice, I have nothing to extenuate.

CHASE, Circuit Justice. I have heard what you have to say. I am sorry you did not think proper to make an affidavit in regard to your circumstances; you are a perfect stranger to the court, to me at least. I do not know you personally—I know nothing of you, more than having lately heard your name mentioned in some publication. Every person knows the political disputes which have existed amongst us. It is notorious that there are two parties in the country; you have stated this yourself. You have taken one side—we do not pretend to say, that you have not a right to express your sentiments, only taking care not to injure the characters of those to whom you are opposed. Your circumstances ought to have been disclosed, on affidavit, that the court might have judged as to the amount of the offence; nor did we want to hurt you, by this open disclosure.

Mr. Cooper. I have nothing to disclose that I am ashamed of.

CHASE, Circuit Justice. If we were to indulge our own ideas, there is room to suspect that in cases of this kind, where one party is against the government, gentlemen who write for that party would be indemnified against any pecuniary loss; and that the party would pay any fine which might be imposed on the person convicted. You must know, I suppose, before you made any publication of this kind, whether you were to be supported by a party or not, and whether you would not be indemnified against any pecuniary loss. If the fine were only to fall on yourself, I would consider your circumstances; but, if I could believe you were supported by a party inimical to the government, and that they were to pay the fine, not you, I would go to the utmost extent of the power of the court. I understand you have a family, but you have not thought proper to state that to the court. From what I can gather from you, it appears that you depend on your profession for support; we do not wish to impose so rigorous a fine as to be beyond a person's abilities to support, but the government must be secured against these malicious attacks. You say that you are not conscious of having acted from malicious motives. It may be so; saying so, we must believe you; but, the jury have found otherwise. You are a gentleman of the profession, of such capacity and knowledge, as to have it more in your power to mislead the ignorant. I do not want to oppress, but I will restrain, as far as I can, all such licentious attacks on the government of the country.

Mr. Cooper. I have been asked by the court whether, in case of a fine being imposed upon me, I shall be supported by a party. Sir, I solemnly aver, that throughout my life, here and elsewhere, among all the political questions in which I have been concerned, I have

never so far demeaned myself as to be a party writer. I never was in the pay or under the support of any party; there is no party in this, or any other country, that can offer me a temptation to prostitute my pen. If there are any persons here who are acquainted with what I have published, they must feel and be satisfied that I have had higher and better motives, than a party could suggest. I have written, to the best of my ability, what I seriously thought would conduce to the general good of mankind. The exertions of my talents, such as they are, have been unbought, and so they shall continue; they have indeed been paid for, but they have been paid for by myself, and by myself only, and sometimes dearly. The public is my debtor, and what I have paid or suffered for them, if my duty should again call upon me to write or to act, I shall again most readily submit to. I do not pretend to have no party opinions, to have no predilection for particular descriptions of men or of measures; but I do not act upon minor considerations; I belong here, as in my former country, to the great party of mankind. With regard to any offers which may have been made to me, to enable me to discharge the fine which may be imposed, I will state candidly to the court what has passed, for I wish not to conceal the truth; I have had no previous communication or promise whatever, I have since had no specific promises of money or anything else. I wrote from my own suggestions. But, many of my friends have, in the expectation of a verdict against me, come forward with general offers of pecuniary assistance; these offers I have, hitherto, neither accepted nor rejected. If the court should impose a fine beyond my ability to pay, I shall accept them without hesitation; but if the fine be within my circumstances to discharge, I shall pay it myself. But the insinuations of the court are ill founded, and if you, sir, from misapprehension or misinformation have been tempted to make them, your mistake should be corrected.

PETERS, District Judge. I think we have nothing to do with parties; we are only to consider the subject before us. I wish you had thought proper to make an affidavit of your property. I have nothing to do, sitting here, to inquire whether a party in whose favour you may be, or you, are to pay the fine. I shall only consider your circumstances, and impose a fine which I think adequate; we ought to avoid any oppression. It appears that you depend chiefly upon your profession for support. Imprisonment for any time would tend to increase the fine, as your family would be deprived of your professional abilities to maintain them.

CHASE, Circuit Justice. We will take time to consider this. Mr. Cooper, you may attend here again.

Thursday, Mr. Cooper attended, and the court sentenced him to pay a fine of four hundred dollars; to be imprisoned for six months, and, at the end of that period, to find surety for his good behaviour, himself in a thousand, and two sureties in five hundred dollars each.

NOTE. Judge Chase's conduct in this case, which was marked with a moderation in strong contrast with the harshness afterwards exhibited in the prosecution of Callender [Case No. 14,709], was ably defended by Mr. Harper, in a speech on the sedition act, in the house of representatives in January, 1801 (Harper's Works, 375), and was not thought sufficiently marked, to entitle it even to a nominal place in the memorable articles of impeachment, of November, 1804. Mr. Cooper's defence, however, so written out by himself as to make up a review of the whole administration, attracted great attention; and his imprisonment for an offence thought so trivial, was a popular subject for electioneering declamation. Mr. Adams himself thought the thing had gone too far, and would have pardoned him, had not Mr. Cooper issued a letter, in which he told him, that, so far from asking for clemency, he would not "accept" it, unless coupled with an acknowledgment by the president of the breach of good faith which the publication of the alleged provocatory letter involved. See Aurora, for May 10, 1700. Of course nothing could be done but let the imprisonment run out. This it did, and the fine was paid. Forty years afterwards, at the same time with that imposed upon Lyon [Case No. 8,646], it was repaid with interest. In Porcupine, Mr. Cooper, as well as Dr. Priestley, were among the principal subjects of ridicule and denunciation; but, perhaps, the most bitter notice taken of them by Cobbett, was a poem called "Prison Eclogue," published by him in London, in 1801, and afterwards incorporated in Porcupine's works. The student will find in the Aurora of May 6, May 9, and May 19, papers of some interest emanating from Mr. Cooper on the subject of the trial in the text.

Mr. Cooper's life, however, is so connected with American history, as to require more than a general notice. He was born in London in 1759, and was educated at Oxford. Intended for the law, he did not confine himself to merely legal studies, but devoted himself with great success to the natural sciences, particularly chemistry, over which he soon obtained a mastery. His professional studies, so far as his history shows, never were very severely conducted: and soon after his advent at the bar, he allowed himself to be carried into another orbit, by accepting an ambassadorship from a democratic club in England, to a democratic club in France. For this both he, himself, and his patron, Mr. Watt, of steam-engine fame, from whom his diplomatic credentials had issued, were assailed in the house of commons by Mr. Burke. This gave Mr. Cooper an opportunity which he but too gladly seized; and at once there issued a pamphlet reply, which made up for the want of vivacity of its style by the excessive inflammation of its temper. "As long as you sell this at a high price," said Sir John Scott, "you can do no harm; but the moment it is turned into a penny slip, that moment I will prosecute you." This kindly caution of course shrunk the circulation of the "reply," and the result was, that Mr. Cooper, abandoning for a time politics, undertook to introduce into practice in Manchester, the important secret of extracting chlorine from common salt, which though afterwards so valuable, he was not then able to bring into successful operation.

Leaving the wreck both of business and of political fortune, Mr. Cooper at last made up his mind to accompany Dr. Priestley to America, not free, it must be admitted,—at least so far as Dr. Priestley is concerned,—from the conviction that, resist it as they might, the young republic would soon press them into the ranks of its law-makers. But this seemed to be a mistake, and the result was, that Mr. Cooper soon went into a violent opposition to Mr. Adams, the then president, not, however, until he had first some-

what circuitously intimated that he might accept the post of commissioner of the British treaty. Of this opposition, the prosecution in the text was the fruit. On coming out of prison, Mr. Cooper found the minority rapidly turning into a majority, and in a short time, the administration which had prosecuted him was overthrown. His untiring industry, his almost universal philosophical attainments, and his courageous temper, but more particularly the sufferings he had undergone in the maintenance of the freedom of the press, placed him high in the esteem of the dominant party. After having been appointed a commissioner to negotiate a settlement of the Luzerne difficulties in Pennsylvania—a duty he discharged with remarkable skill and success—he was nominated by Governor McKean to the president judgeship of a judicial district.

Mr. Cooper's proceedings after he became the wielder of judicial power, form an odd sequel to his experience when he was its subject. Scarcely five years had passed after he was out of prison, before he was on the bench; and scarcely five years more had passed before he was impeached before the senate of Pennsylvania, upon charges, which, were it not that they were gravely preferred and amply supported, might be considered burlesques of those upon which he was instrumental in impeaching Judge Chase, in the senate of the United States. He was charged with pouncing upon delinquent jurors on the first day of the court, with fines and bench warrants, in violation of the venerable Pennsylvania practice, of giving them the quarto die post; with imprisoning a Quaker for not pulling off his hat; with committing three parties for "whispering," an offence for which he declared he would hear no apology; with issuing warrants without previous oath, and then committing the constables who refused to serve them; with insisting in one case in examining under oath, a prisoner charged with crime, as to his own guilt; with sending private notes to juries in criminal cases, tending to extract a verdict of guilty; with carting a Luzerne convict to the Philadelphia prison, a thing not then provided for, which ended in the convict being kept in abeyance by the Philadelphia jailor, who refused to receive him, and the court who refused to take him back, thereby, under his new ambulatory commitment, withdrawing the sheriff from his public duties; and with brow-beating counsel, witnesses and parties, in cases so numerous as to make their recapitulation cover three pages. The Presbyterian and Quaker professions, he was charged with declaring in open court, to be "all damned hypocrisy and nonsense;" and divers specifications were given of illegal interference on his part in the profits of cases before him, and of private speculations in interests which were to pass under his adjudication. On February 21, 1811, these charges having been formally laid before the Pennsylvania house of representatives, were referred to a committee, who two days afterwards reported, that the evidence produced before them sufficiently substantiated the specifications of passionate and oppressive judicial bearing, leaving, however, the accusation of peculation without any further basis than that afforded by an imprudent purchase of certain property, sold at sheriff's sale under process from the court, a transaction which, though clear from any moral stain, the committee thought to be of doubtful propriety and dangerous precedent. They submitted, in conclusion, a resolution, "that a committee be appointed to draft an address to the governor for the removal of Thomas Cooper, Esq., from the office of president judge of the Eighth judicial district of Pennsylvania." Under this resolution, which passed 73 to 20, a committee was appointed which reported an address to the governor, which was carried 59 to 34, in the face of a very powerful protest by Mr. Gibson, now chief justice of Pennsylvania, who took the ground that the offences specified by the committee were misdemeanours, cognizable by impeachment alone. To this was joined a paper, in which the greater portion of the minority joined, declaring, that whatever may have been the peculiarities of manner of Mr. Cooper, there was no evidence which showed judicial misconduct. Under the Pennsylvania constitution, the governor "may," on address from the legislature, remove a judge from office; and, as Governor Snyder on a former occasion, when the attempt had been made to shake off the judges of the supreme court, had declared that "may" sometimes means "won't," a vigorous effort was now made to induce him to give once more the same lenient grammatical construction. The governor, it seems, had been the client of Mr. Cooper in former times, and had lived with him for many years on terms of personal intimacy, but whether from this account he felt a greater delicacy in interfering, or whether, in fact, he thought that the case was one in which he ought not to defeat the legislative will, the only reply he made, was a note through the secretary of the commonwealth, announcing that Mr. Cooper's judicial tenure was closed.

Of this procedure, in everything but its result, a duodecimo of the more solemn trial, which in the senate of the United States Judge Chase was the subject, not the least remarkable feature was, that it was carried on, with a few exceptions, by the very party of which Mr. Cooper had been lately one of the most lively leaders, and for which,—if political persecution by an outgoing administration is to be considered as a calamity,—he was one of the greatest sufferers. It may be that, like Callender, he felt a natural disgust when he found that under Mr. Jefferson, many men were put ahead of him who had not received the honours of martyrdom under Mr. Adams; or it may be that when he got on the bench,—for which, by the way, he had not received the necessary professional training,—he became subject to that nervous debility by which the most plethoric patriotism is sometimes there prostrated; but it is certain that very soon he cooled towards the Democrats, and, as was alleged in the evidence before the house committee, even went so far as to drop, when in court, expressions by no means complimentary to their persons, or their doctrines. This change—though not the overt acts said to have sprung from it—he confesses in an address issued from him at the close of the proceedings, at Lancaster, April 4, 1811. "Nor have I been anxious to conceal," he says, "that during a long course of observation on the conduct of parties in this country, I have not found that the Democrats or Republicans have much reason to boast of more disinterested views, or more tolerant principles, than their opponents. I have long found it impossible for me to go all lengths with the party to which I belonged, and, of course, I have shared the fate of all moderate men; I have influence with no party, and have willingly and deliberately incurred the decided hatred of the most violent and thorough going of my own. I went over to France in 1792, an enthusiast, and I left it in disgust. I came here; and seventeen years experience of a democratic government in this country, has also served to convince me it may have its faults; that it is not quite so perfect in practice, as it is beautiful in theory, and that the speculations of my youth do not receive the full sanction of my maturer age; nor do I find that justice and disinterestedness, wisdom, and tolerance, are the necessary fruits of universal suffrage, as it is exercised in Pennsylvania, for these are not always the qualifications that procure a man to be sent as the representative of the people."

Mr. Cooper's fine chemical acquirements, which, during all the storms of his eventful life, had never been submerged, now gave him a safe retreat. He was first placed in a philosophical professorship in Dickinson College, and afterwards in a highly honourable post in the University of Pennsylvania, which he finally abandoned for the chemical chair in Columbia College, South Carolina, of which he soon became president. In the nullification struggle he took

a bold part, issuing documents of the most ultra states' rights tone, and showing that if he had added nothing to the sprightliness, he had lost nothing of the fire, of the pamphleteer of 1795–1800. He died in 1840, when engaged in revising the South Carolina Statutes, a duty charged on him by the legislature, after having published, besides numberless tracts on politics, divinity, and metaphysics, a treatise on the bankrupt laws, a translation of Justinian, a treatise on political economy, a manual of chemistry, as well as a general compendium of useful information.

[The defendant applied to the court for a letter to be addressed to several members of congress requesting attendance as witnesses on his behalf, which motion was refused. See Case No. 14,861.]

Case No. 14,865a.

UNITED STATES v. COPELAND.

[2 Hayw. & H. 402.] [1]

Circuit Court, District of Columbia. May Term, 1862.

FUGITIVE SLAVE LAW — DISTRICT OF COLUMBIA — HABEAS CORPUS.

The fugitive slave law of 1850 is as applicable to this District as to any of the states, and as this is a circuit court of the United States its authority to appoint commissioners under that law is clear.

At law. This was a petition of Daniel Breed for a writ of habeas corpus for the discharge of the fugitive [William Copeland].

Before DUNLOP, Chief Judge, and MORSELL and MERRICK, Circuit Judges.

DUNLOP, Chief Judge. It was the duty of the court to decide this matter at once. It is a singular fact that for the first time in sixty years this matter has been contested in this court. The court was established in 1801. Three or four days after, the law of 1793, in regard to fugitive slaves and fugitives from justice, were made applicable to this District. From that time this court has decided all cases, both of fugitive slaves and fugitives from justice escaping from a state into this District, and no contest has heretofore been made. The law is precisely the same in regard to fugitives from justice as in relation to fugitive slaves. Contemporaneous expositions of the law will bear us out in this decision, that the law as applied to states is applicable to this District. Governors of states, including some of the free states, have always put this construction on the law, and made demands upon this court for escaped fugitives. It would be singular if we were required to decide, so as to make this District not only a refuge for all the runaway slaves, but for all the criminals and fugitives from justice of all the states in the Union. Judge Story says that the Union could not have been formed but for the principle which this law allows. This was incorporated into the constitution by a vote of all the states. Maryland and Virginia would not have consented to the Union if this District was to be a refuge for their fugitives. The one gave the whole Northwest Territory to the federal government, and both ceded ten miles of territory in the center of the United States for a federal capital. It would require language overbearing and powerful to cause us to make a decision which would deprive these states of the right to take their fugitives here. It is our duty to conform to the unanimous decision of the supreme court, and insist upon the enforcement of a law which has been enforced for sixty years. The court insisted that not only the spirit but the letter of the law of 1850 [9 Stat. 462] rendered it strictly applicable to this District. The language is such as to place it beyond all dispute that congress intended to embrace the District in the provisions of this act. It would certainly be an objectionable construction of the law that all slaves which we own are to be brought here, and all slaves escaping here shall stay. In regard to the appointment of commissioners, we contend that our right is clear, under the law of congress, which makes this a circuit court of the United States. The first section of the law of 1850 authorizes the appointment of commissioners by any circuit court of the United States. The man Copeland is now in the lawful custody of a lawful officer, for a lawful purpose, and we do not feel authorized to interfere in this case. Therefore the writ of habeas corpus is refused.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

Case No. 14,866.

UNITED STATES v. COPPER STILL.

[See Case No. 15,928.]

Case No. 14,867.

UNITED STATES v. CORNELL.

[2 Mason, 60.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1819.

COURTS—FEDERAL JURISDICTION—MILITARY POST—CONSENT OF STATE LEGISLATURE.

1. The purchase of lands by the United States for public purposes, within the territorial limits of a state does not of itself oust the jurisdiction or sovereignty of such state over such lands, so purchased

[Cited in Lee v. Kaufman, Case No. 8,191; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 533, 5 Sup. Ct. 999; Woodfin v. Phœbus, 30 Fed. 297; U. S. v. Penn, 48 Fed. 670.]

[Cited in Foley v. Shriver, 81 Va. 572; Ft. Leavenworth R. Co. v. Lowe, 27 Kan. 762; People v. Collins (Cal.) 39 Pac. 17.]

2. Exclusive jurisdiction is the necessary attendant upon exclusive legislation.

3. The constitution of the United States declares that congress shall have power to exercise "exclusive legislation" in all "cases whatsoever," over all places purchased by the consent of the legislature of the state in which the same shall

[1] [Reported by William P. Mason, Esq.]

be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings. When, therefore, a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased, by the very terms of the constitution, ipso facto, falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted.

[Cited in U. S. v. Davis, Case No. 14,930; U. S. v. Ames, Id. 14,441; Ex parte Tatem, Id. 13,759; U. S. v. Meagher, 37 Fed. 877; U. S. v. Penn, 48 Fed. 670; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 533, 5 Sup. Ct. 999.]

[Cited in Lasher v. State (Tex. App.) 17 S. W. 1065; Re O'Connor, 37 Wis. 380; People v. Collins (Cal.) 39 Pac. 17; Sinks v. Reese, 19 Ohio St. 318; State v. Pike, 15 N. H. 91; In re Stephens, 4 Gray, 560. Cited in brief in Teall v. Felton, 1 N. Y. 542; Re Town of Highlands (Sup.) 22 N. Y. Supp. 138.]

Indictment [against William G. Cornell] for the murder of one William Kane in Fort Adams in Newport Harbor, alleged to be a place within the sole and exclusive jurisdiction of the United States.

At the trial of the cause, the prisoner having pleaded not guilty, it appeared in evidence, that the prisoner was placed on post at 8 o'clock in the evening of the 4th day of July, 1819, and remained on post until relieved by a guard at 10 p. m. of the same night. He was then returning with another soldier (composing, with himself, the relieved guard) under the direction of a corporal, to his quarters, having his musket in his hand, which was loaded according to the common usage, with a ball and three buck shot. As the relieved guard passed along the quarters of the soldiers, the deceased was standing in the door-way of his quarters leaning against the side of the door-frame and laughing; and when the relieved guard had passed a rod or two beyond him, the deceased stepped out of the door-way about a yard, stooped down and took up a handful of gravel, advanced a yard, and carelessly pitched it (to use the expression of a witness), but not with great violence, at the guard; quarrelsome words immediately ensued, and the corporal, who was a little in advance of the relieved guard, said, "Don't make a noise there, come along;" and as he turned round to see what the matter was, the gun flashed; and upon going up to the spot, he found the deceased mortally wounded; and the prisoner upon being asked if he had shot him, answered, "Yes, by God; I hope I have." He also admitted that he had done the act on purpose. The deceased died in a minute or two; and from the time when the gravel was first thrown, to the firing of the gun was so very short a time, that it seemed almost instantaneous. The prisoner appeared to be in a great passion, and was conveyed to the guard-house, where he expressed himself with considerable rage, and upon being told that he had killed the deceased, said among other things, "I don't care a damn, I hope I have." The soldiers at this time appeared greatly exasperated at him. The size of the gravel which was thrown did not appear, but it was testified that the gravel about the spot where the occurrence took place was from an ounce weight in size, to a very small size. It did not appear that there was any injury to the prisoner by the throwing of it. There was some evidence of a previous quarrel, ten or twelve days before, between the prisoner and the deceased, in which the prisoner threatened to kill the deceased the first chance he could get. But it appeared that the parties were then in a high passion, and were good friends afterwards, living in the same quarters. There was also evidence that the soldiers in the garrison had received an extra gill of rum that day, being the customary allowance on the celebration of Independence. But there was no evidence that they were intoxicated. The prisoner was proved to be illiterate, and badly educated, and to be of an irascible temper.

Rivers & Correns were counsel for the prisoner; and the defence at the trial turned mainly on the following points:

(1) That the place where the offence was committed was not under the sole and exclusive jurisdiction of the United States, and therefore the court had no jurisdiction. The argument on this point is fully stated in the charge of the court.

(2) That the petit jury were not duly returned and impannelled. The ground of this objection was, that sixteen jurymen were summoned from the county of Newport, where the offence was committed, on a day of the term previous to that in which the indictment was found by the grand jury, whereas the counsel contended that the venire for this purpose, under the twenty-ninth section of the judicial act of 1789, c. 20 [1 Stat. 88], should not have been until after the prisoner had pleaded. But the court instantly overruled this objection, as forming no part of the issue on trial before the jury, leaving the objection, which they thought of little weight, to be moved afterwards on a motion for a new trial, if the counsel should think there was any thing in it.

(3) That the trial under the same section of the judicial act of 1789, ought to have been in the county of Newport; but the court overruled this objection also, for a similar reason, and for this further reason, that no application had been made to the court for this purpose, either by the prisoner or the United States.

(4) That the offence committed by the prisoner amounted to manslaughter only—and not to murder, and the counsel argued very much at large on this point, and cited the following authorities: 4 Bl. Comm. 191, 192, 357; Gill, Ev. (Lofft.) 738, 780, 740; 1 Hale, P. C. 455, 456, 499, 465; Foster, Cr. Law, 290, 240, 292; 2 Ld. Raym. 1296, 1492; 1 Hawk. P. C. 192; 5 Burrows, 2796; 1

East, P. C. 236, 244. 760, 87; 1 Hawk. P. C. p. 425, § 36; Co. Litt. 282; 1 Esp. 312; [Respublica v. De Longchamps] 1 Dall. [1 U. S.] 114.

Mr. Robbins, for the United States, contested all the points, and on the last point cited, in addition to the other authorities, 4 Bl. Comm. 195, 198, 199.

STORY, Circuit Justice, in summing up to the jury, said: The first question for the consideration of the jury, is, whether the offence is proved to be committed as alleged in the indictment, in a place within the sole and exclusive jurisdiction of the United States. If so, then the crime falls within the prohibitions of the third or seventh section of the act of 1790, c. 9 [1 Stat. 112], and is clearly cognizable by this court; if otherwise, then the jurisdiction entirely fails, and it is quite immaterial to us, what other court possesses jurisdiction. It is completely proved by the evidence, that Fort Adams, the place in which the offence was committed, is the property of the United States, having been duly purchased by the president more than nineteen years ago, under the authority of an act of congress (as we shall presently see), and ever since exclusively possessed by the United States. Copies of the deeds are now before us, and their sufficiency to pass the fee of the lands is not now disputed. But although the United States may well purchase and hold lands for public purposes, within the territorial limits of a state, this does not of itself oust the jurisdiction of sovereignty of such state over the lands so purchased. It remains until the state has relinquished its authority over the land either expressly or by necessary implication.

The constitution of the United States declares that congress shall have power to exercise "exclusive legislation" in all "cases whatsoever" over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the state legislature is by the very terms of the constitution, by which all the states are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place. Nor is there anything novel in this construction. It is under the like terms in the same clause of the constitution that exclusive jurisdiction is now exercised by congress in the District of Columbia; for if exclusive jurisdiction and exclusive legislation do not import the same thing, the states could not cede or the United States accept for the purposes enumerated in this clause, any exclusive jurisdiction. And such was manifestly the avowed intention of those wise and great men who framed the constitution.

We are then to consider whether the United States have authorized this purchase, and the legislature of Rhode Island has given its consent to it. By an act of congress of March 20, 1794, c. 9 [1 Stat. 345], several harbors and ports, and among them, that of Newport, were authorized to be fortified under the direction of the president; and he was authorized to receive from any state, in behalf of the United States, a cession of the lands on which any of the fortifications with the necessary buildings might be erected, or be intended to be erected; or where such cessions should not be made, to purchase such lands, not being the property of a state, on behalf of the United States. The legislature of Rhode Island, in furtherance of this object, by an act passed in the same year (Laws R. I. p. 551), authorized any town or person in the state, by and with the consent of the governor of the state, to sell and dispose of to the president, for the use of the United States, all such lands as should be deemed necessary to erect fortifications upon, for the defence of the port and harbor of Newport, and to execute deeds thereof in due form of law. The act contains a proviso that all civil and criminal processes issued under the authority of the state, or any officer thereof, may be executed on the lands so ceded, and within the fortifications which may be erected thereon, in the same way and manner as if such lands had not been ceded as aforesaid. The governor of Rhode Island gave his consent in writing to the purchase of the lands in question in due form, by a certificate on the original deeds. The argument of the prisoner's counsel is, in the first place, that the act of Rhode Island contains no cession of jurisdiction in terms, and the consent of the legislature through the governor to the purchase is not a virtual cession of its sovereignty over the place. That argument has been sufficiently considered already, and stands repudiated by the express terms of the constitution. The counsel for the prisoner next contend that the state has retained a concurrent jurisdiction over the place; and, if so, then the averment in the indictment is not supported in point of fact. This leads us to the consideration of the true intent and effect of the proviso already mentioned. In its terms it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil and criminal processes, issued under the authority of the state, which must of course be for acts done within, and cognizable by, the state, may be executed within the ceded lands, notwithstanding the cession.

Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state. Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits. And a cession, or exclusive jurisdiction, may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as quoad hoc his own process. This is the light in which clauses of this nature, (which are very frequent in grants made by the states to the United States,) have been received by this court on various occasions, on which the subject has been heretofore brought before it for consideration; and it is the same light in which it has also been received by a very learned state court. Com. v. Clary, 8 Mass. 72. In our judgment it comports entirely with the apparent intention of the parties, and gives effect to acts which might otherwise perhaps be construed entirely nugatory. For it may well be doubted whether congress are by the terms of the constitution, at liberty to purchase lands for forts, dockyards, &c. with the consent of a state legislature, where such consent is so qualified that it will not justify the "exclusive legislation" of congress there. It may well be doubted if such consent be not utterly void. "Ut res magis valeat quam pereat," we are bound to give the present act a different construction, if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States.

As to the law applicable to the merits of the case, although a great variety of cases have been cited, some of which are of great and some of very little authority, yet the doctrine for the deliberate consideration of the jury lies within a narrow compass. It is conceded on all sides that the prisoner's offence, at least, amounts to manslaughter. Whether it amounts to murder depends upon the point whether the act was done "with malice aforethought." Now the legal notion of malice is not confined to cases where the crime has been committed in cool blood, with deliberate cruelty, and in execution of a settled design; as where a person deliberately plans the destruction of another by assassination or poisoning. But it includes also all cases of homicide, however sudden, which are attended with such cruel circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, or, (to use the language of Sir Michael Foster,) with such circumstances as carry in them "the plain indications of a heart regardless of social duty, and fatally bent on mischief." Foster, Cr. Law, 257. It is not therefore every trivial provocation which in point of law amounts to an assault, or even a blow that will reduce the crime to manslaughter. If the punishment inflicted by the party killing be outrageous in its nature or continuance, and beyond all proportion to the offence, it is rather to be attributed to the effect of a brutal and diabolical malignity, the genuine malice of the law, than of human frailty; and therefore the crime will amount to murder in such cases, notwithstanding the provocation. 1 East, P. C. 234. Nor is it any legal extenuation of the offence, that the party killing is very irritable and easily excited to the most ungovernable passion by slight provocation. These are the common attendants upon a cruel and revengeful disposition. There must be a reasonable provocation, such as would awaken passion in reasonable men, before the law will hold the party in any degree excused on the score of human infirmity. Such is the case of offering indignity to a man's person, by pulling him violently by the nose.

In cases, too, of homicide upon provocation, much depends upon the instrument employed, and upon the manner of chastisement. If the instrument be such in its nature as is likely to endanger life, as a sword or a musket, and the provocation be slight, and death ensue, the party killing will be guilty of murder. Much more will it be murder, if in such case the party killing shoot at the other with intent to kill. But if the instrument be not of a deadly nature, nor used with brutal violence; but the chastisement may be fairly attributed to an intention to correct and not gratify a cruel and malignant spirit of revenge, the crime will amount only to manslaughter. 1 East, P. C. 235.

These are the material principles of law, which I deem it necessary to bring to the consideration of the jury. If upon weighing the facts they are satisfied that there was not a reasonable provocation in the present case, but that it was slight, and the punishment utterly disproportioned to the offence; if they are satisfied that the party was stimulated by a malignant spirit of revenge, and diabolical fury, and sought the life of the deceased with brutal passion, having received no injury that ought to provoke a reasonable man to such an act, then the prisoner is guilty of murder—if otherwise, then he is guilty of manslaughter only.

Verdict, guilty of murder.

A motion was made for a new trial, and the motion was argued at June term, 1820, at Newport, and the opinion of the court delivered thereon. [The motion was overruled and sentence of death pronounced. Case No. 14,868.]

Case No. 14,868.

UNITED STATES v. CORNELL.

[2 Mason, 91.] [1]

Circuit Court, D. Rhode Island. June Term, 1820.

CRIMINAL JURISDICTION OF FEDERAL COURTS—MILITARY POSTS—VENUE—DISCRETION OF COURT—SPECIAL CRIMINAL SESSIONS — VENIRE — RIGHT OF PRISONER TO COPY OF INDICTMENT—SETTING ASIDE JURORS—EVIDENCE—HOMICIDE — INTOXICATION—MALICE.

1. The constitution of the United States declares, that congress shall have power to exercise "exclusive legislation in all cases whatsoever," over all places purchased by the consent of the legislature of a state in which the same shall be for the erection of forts, &c. *Held*, that the right of exclusive legislation carries with it the right of exclusive jurisdiction; and where a murder is committed within a fort so purchased with the consent of a state legislature, the circuit court has jurisdiction over the offence under the act of 1790, c. 9, §§ 3, 7 [1 Stat. 112], although in the cession the state reserved a right to execute the civil and criminal processes issuing under state authority in such places.

[Cited in U. S. v. Clark, 31 Fed. 711.]

[Cited in People v. Kelly, 38 Cal. 151.]

2. The legal meaning of "malice aforethought," in cases of homicide, is not confined to homicide committed in cold blood, with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is done with such cruel circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit. As when the punishment inflicted by a party even upon provocation, is outrageous in its nature or continuance, and beyond all proportion to the offence, so that it is rather to be attributed to diabolical malignity and brutality than human infirmity. And much in these cases depends upon the instrument employed, whether dangerous to life or not.

[Cited in Tucker v. U. S., 151 U. S. 170, 14 Sup. Ct. 301.]

[3. Quære: Whether a fort or other place under the exclusive jurisdiction of the United States is to be considered as within a county of the state wherein it is situated so as to render applicable to a capital crime committed there the provision of the twenty-ninth section of the judiciary act of 1789 (1 Stat. 118), which declares "that in all cases punishable with death, the trial shall be had in the county where the offence was committed; or where that cannot be done without great inconvenience, twelve petit jurors, at least, shall be summoned from thence."]

[4. The court has no power to adjourn a general stated session from the place at which it is directed by statute to be held, to another place, for the purpose of trying there a person indicted for a capital crime, in compliance with the provisions of the 29th section of the judiciary act of 1789.]

[5. Quære: Whether the provision in the third section of the act of March 2, 1793 (1 Stat. 333), that the supreme court, or a justice thereof, together with the judge of the district, may direct special sessions of the circuit courts to be holden for the trial of criminal causes, at "any convenient place" within the district, nearer to the place where the offences are alleged to have been committed than the place appointed by the ordinary sessions, does not modify or repeal pro tanto the provisions of the fifth and twenty-ninth sections of the act of 1789.]

[6. The fifth and twenty-ninth sections of the act of 1789, even if still in full force, contemplate that the prisoner may rightfully be tried at a regular stated session of the court; and that it is in the discretion of the court to appoint a special session upon considerations of inconvenience. The prisoner may be tried at a regular session without an express adjudication by the court that there would be inconvenience in having the trial at a special session, where neither the prisoner nor the United States makes any application to the court upon the subject or any objection to the time or place of trial.]

[7. Even if the court, of its own motion, might have ordered a special session within the county where the crime was committed, yet it would have no authority to try the prisoner upon an indictment which was not found at such special session, but at the regular session of the court; and, after the finding of an indictment at the general session, it is doubtful whether another indictment for the same offence could be found at the special session while the former remained undetermined.]

[Cited in Memorandum, Case No. 9,411.]

[8. A motion for a special session comes too late after an indictment found at a general session, and a fortiori when a trial has been had upon such indictment. The right to trial in the county where the offence is committed is a privilege granted to the prisoner. He is not bound to insist upon it, and may waive it, and require an immediate trial. Hence, where an indictment might be tried in the county where the offence was committed by obtaining a continuance until the next stated session of the court, which, by law, is required to be held at a place in that county, but the prisoner fails to move for a continuance, this is a waiver of his right, and the trial of the case out of that county cannot thereafter be insisted upon as invalidating the verdict.]

[9. It is no objection to the verdict that the venire was issued and served before the indictment was returned, where the jury is not drawn for a single cause, but the panel is returned to serve in all proper causes, civil as well as criminal, which may be pending at the term.]

[10. The fact that the copy of the indictment furnished to defendant two entire days before his trial (Act April 30, 1790, c. 9, § 29) was not a true copy, in that the words "a true bill" indorsed thereon by the grand jury were omitted, is waived where the prisoner makes no objection on that ground, and admits, while acting under the advice of counsel, that he has had the benefit of the statute.]

[Cited in U. S. v. Curtis, Case No. 14,905.]

[11. If a juror attend the court for which he is regularly drawn, this is sufficient, and no exception lies as to his competency based on the fact that he was not warned to attend as directed by the statute.]

[Cited in Northern Pac. R. Co. v. Herbert, 116 U. S. 646, 6 Sup. Ct. 592.]

[12. The fact that the court set aside certain jurors because they were Quakers, without any objection being made to them by either party, and upon their statement, not under oath, that they were such, is no ground of exception. The fact being well known, and there being no doubt of their veracity, it was not necessary that they should be sworn.]

[Cited in U. S. v. Wilson, Case No. 16,730; Logan v. U. S., 144 U. S. 298, 12 Sup. Ct. 628.]

[Cited in Montague v. Com., 10 Grat. 770; Sutton v. Fox, 55 Wis. 540, 13 N. W. 480; Williams v. State, 32 Miss. 389.]

[13. Where, after the evidence was closed and the district attorney had finished his argument to the jury, the court, after adjourning over Sunday, permitted the United States to introduce the records of the town to show a conveyance of the locus of the crime, as affecting the jurisdic-

[1] [Reported by William P. Mason, Esq.]

tion of a federal court, together with the explanations thereof by the town clerk, *held*, that it was not an abuse of discretion to refuse to allow defendant's attorneys to ask additional questions in respect to the incidents immediately preceding the crime, where no new witnesses were offered and no new facts suggested.]

[14. If it is not suggested that one accused of murder is not deficient in understanding, it is no defense that he was more ignorant and somewhat more stupid than common men of bad education, bad passions, and bad habits.]

[15. That the prisoner was more or less intoxicated at the time of committing a homicide is no excuse or mitigation of the crime.]

[This was an indictment against William G. Cornell, for the murder of William Kane. At the trial there was a verdict of guilty of murder. Case No. 14,867. Heard on motion for a new trial.]

This motion for a new trial was made at the last November term, at Providence, and was continued over to this term for argument. It contained the following causes for a new trial: First. That the trial of said indictment was not had in the county of Newport, where the said supposed offence was committed; but in the county of Providence, although said trial might have been had in said county of Newport, without "great inconvenience." Secondly. That the said court did not decide, that it was greatly inconvenient to have said trial in said county of Newport, after first allowing said Cornell an opportunity to be heard upon said question. Thirdly. That the venire or order for summoning the jury who were to try said indictment, was issued and served before the said bill of indictment was found by the grand jury. Fourthly. That said court had no jurisdiction to try said indictment, the place within which said offence was supposed to have been committed, not being proved in said trial to be within the sole and exclusive jurisdiction of the United States aforesaid. Fifthly. That said Cornell had not a true copy of said indictment, two full days before his trial; the words, "a true bill," endorsed thereon by the grand jury, not being contained in the copy which was delivered to said Cornell. Sixthly. That jurors from the town of Portsmouth, who were summoned in said cause, were not legally warned to attend said court; being warned by the town clerk of said town, and not by the town sergeant, as by the statute of Rhode-Island it is required; and the jurors from the town of Newport, who also were summoned in said cause, and sat in said trial, were not legally warned to attend said court, being warned by a constable of said town, to whom said summons was directed. Seventhly. That the said court did set aside two jurors who were summoned in said cause, upon said jurors expressing, without being under oath or affirmation, that they had conscientious scruples against sitting as jurors in said cause, and without said jurors being challenged either by the said Cornell or the district attorney. Eighthly. That, at said trial, the said court rejected evidence which was offered by said Cornell, to show the manner of the education of said Cornell, in order to mitigate and extenuate said offence, and to show it was only manslaughter. Ninthly. That after the said Cornell's defence was closed to the jury on Saturday evening, the said court adjourned till Monday morning, and then permitted the district attorney to introduce new and further evidence in said cause: to wit, the testimony of Jonathan Almy, and the records of the town of Newport. And immediately after the introduction of said evidence, the said Cornell offered further evidence to explain the facts in said cause, and to prove his defence, which was not objected to by the district attorney, but rejected by the said court; and the said Cornell prayed to be then further heard by his counsel in said cause, which was denied by said court, except as to the testimony of Jonathan Almy, and said records. The principal witnesses by whom said Cornell expected to prove said further facts, having already been examined in said cause. Tenthly. That said court in their charge to the jury, did not instruct them, that said Cornell being on guard at the time of said transaction, increased the provocation given by the deceased, and although they instructed said jury, that in cases of this kind, much depends upon the instrument or weapon with which the mortal blow is inflicted, said jury were not informed that the weight of this circumstance was lessened in the present case, by the musket being lawfully in said Cornell's hands at the time. Eleventhly. That the said court instructed said jury that the said Cornell being deficient in understanding, or having received a bad, or little, or no education, should have no effect to mitigate, extenuate, or lessen, or in any degree to answer or apologize for said offence, and also did instruct said jury, that they had a right, and it was their duty to weigh the evidence in said cause. Twelfthly. That since said trial, evidence has been discovered, which was before unknown to said Cornell, or his counsel, that Benjamin Raymer, a witness in said cause, who testified to previous threats used by said Cornell towards the deceased, did say, previous to said trial, that "he would do all in his power to hang said Cornell." Thirteenthly. That since said trial, the said Cornell has discovered new and further evidence, to wit: that of Isaac Wilmot, who was summoned by said Cornell to attend said trial, but who was confined by sickness at Newport; and this fact was not known till the said trial had commenced: That said Wilmot, had he been present at said trial, would have testified that the said deceased insulted and threw gravel-stones at said Cornell, while on post, on the night of the said fourth of July; and also that the gravel-stones which were proved to have been thrown by the said deceased, at said Cornell, hit him on his face and back, and were thrown with great violence and an-

ger; and that he expects said Wilmot will testify to said facts, should a new trial be granted. Fourteenthly. That the further evidence mentioned above in said ninth cause, and which may be had at a new trial, should such trial be granted, would show that all the soldiers in said garrison or fort, had as much liquor as they wanted, and many of them, including several of the United States' witnesses, and more especially the said deceased, were intoxicated at the time of said transaction.

Rivers & Correns. for prisoner.
Mr. Robbins, U. S. Dist. Atty.

STORY, Circuit Justice. The motion for a new trial in this case, was filed at the last term of the court, and together with some new grounds now for the first time suggested, has been argued with uncommon diligence by counsel. If I felt any doubt as to the principles of law involved in the discussion, I should take time to consider them. In any case, where a reasonable doubt lingered in my mind, I should pause a long time before I should pronounce judgment. In a capital cause, every motive of humanity and justice, combining with the precepts of the law, would compel me to postpone a decision until all such doubts were dissipated. I never will be instrumental in taking away life, until I am clearly persuaded that the law imposes upon me this painful and melancholy duty. On the present occasion, however, on the most mature reflection, I am constrained to say, that I entertain no doubt as to the law of the case; and, however reluctantly, I am bound to overrule the motion for a new trial. I might indeed postpone judgment to another term; and if I thought that there could be any benefit in such a course, I would cheerfully pursue it. But it would be injustice to the public, and scarcely be mercy to the prisoner, to keep him in a state of apparent suspense, when there was no reasonable hope of coming to a conclusion that must not be unfavourable to him.

I will now proceed to give briefly my reasons for overruling the motion for a new trial, premising that the reasons filed, do not present a fair and just state of the case. I dare say, this was done without any design to misrepresent, but from a desire to present every objection in the manner best adapted to avail for the prisoner. There are many omissions and mistakes in these reasons, which give an untrue colouring to the cause, and do injustice to the court. When any part of a charge is excepted to, it should be stated with accuracy, and with all the qualifications and circumstances which belonged to it, as it was delivered. However, I do not complain: it is sufficient to say, that I enter my protest against its being taken for granted, that the language and doctrines imputed to the court, are accurately stated either in substance or form. I will pursue the order of the causes assigned for a new trial, by the counsel themselves.

1st and 2d. As to the first and second causes. The judicial act of 1789, c. 20, § 11 [1 Stat. 78], gives exclusive cognizance to the circuit courts, "of all crimes and offences cognizable under the authority of the United States," with some exceptions, not material for our present consideration. It is clear that the circuit courts have jurisdiction over the offence of murder, for it is not pretended to be within any exception contemplated by the act; and if this crime be committed in any place under the exclusive authority of the United States, within this district, (as in the present case it was) it follows that this court has jurisdiction to hear and try it; for the statute contains no limitation of places within the district, where the jurisdiction is to be exclusive. The grand jury then, at the last term of this court, at Providence, were fully authorized to inquire into this particular offence, and the indictment found by them against the prisoner, was then and there regularly before the court. This doctrine has not, as far as my knowledge extends, ever been brought into judicial doubt in any of the capital trials which have taken place since the passage of the statute. It has been denied, however, in the present case, plain and incontestable as it seems to be, and that, as I gather, principally with a view to sustain the objection contained in the first and second causes assigned for a new trial. And yet if the doctrine be not well founded, it is extremely difficult to perceive what jurisdiction the circuit court sitting at Newport, could possess over the offence, for no other clause of the statute specifically gives it; and yet the objection itself admits it. The principal objection is founded on another section of the act of 1789. The 5th section of that act declares, "that the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion," than the regular terms prescribed by law. And the 29th section of the same act declares, "that in all cases punishable with death, the trial shall be had in the county where the offence was committed; or where that cannot be done without great inconvenience, twelve petit jurors at least, shall be summoned from thence." The argument is, that this last section is peremptory upon the court, to try the cause in the proper county, unless there be great inconvenience; and that such an adjudication ought to be solemnly made by the court upon argument in behalf of the prisoner, before it can proceed to the trial in any other county.

Now in the first place, it may admit of doubt, whether this clause of the statute was meant to apply to any crimes against the United States, excepting such as should

be committed within the body of some county of the state. The place where the crime was committed by the prisoner, was a fort, ceded to and within the exclusive jurisdiction of, the United States. Strictly speaking, it was not within the body of any county of Rhode Island, for the state had no jurisdiction there. It was as to the state as much a foreign territory, as if it had been occupied by a foreign sovereign. I mention this only in passing, not meaning to rely on it, and suggesting it only for further consideration, whenever any case may specially require it.

To proceed with the objection. Every statute must have a reasonable construction: and every clause in it is so to be construed as if possible to avoid any repugnancy, and to give effect to all the provisions. If the indictment was well found by the grand jury, at the term at Providence, and the court there had jurisdiction of it, as in my judgment is beyond the reach of any legal doubt, our first inquiry naturally is in what manner the trial could be removed to the county of Newport, supposing the crime to be committed there. There is no pretence to say, that the statute anywhere authorizes a general stated session of the circuit court to be adjourned to any other place or county, than that in which it is directed to be first holden. If it can be done for one cause pending in the court, it may be done for all; yet it never was imagined, that a circuit court directed to be held at Providence, could at the option of the judges, be adjourned to meet at Newport or Bristol. The statute by naming a particular place, has been always supposed to exclude every other. And in my judgment, there is no ground upon which any other construction can reasonably be given to it. But if it were merely a matter of doubt, the court ought not to direct an adjournment; for the business of a court of justice is too serious and important to run the hazard of having all the proceedings void for want of jurisdiction; if no such right of adjournment should exist, all that should be done on such adjournment, would be coram non judice. In fact, the counsel for the prisoner do not contend that such a power of adjournment of a general stated term does exist.

Then as to a special session to be holden for the trial of criminal causes. This is provided for in the 5th section of the act of 1789, already quoted. It is remarkable, however, that in terms it only authorizes such special courts to be holden at any other time than the general sessions, but contains not one word as to the place where such special sessions are to be holden. And if this section were to be construed by itself, it would be difficult to show that the special sessions were not by necessary implication to be held at such places only as the general sessions enumerated in the preceding part of the section. But with reference to the exigency of the 29th section, it may perhaps be fairly construed to authorize such special sessions in cases punishable with death, in the county where the crime is committed. Vide [U. S. v. Insurgents of Pennsylvania], 3 Dall. [3 U. S.] 513. Yet, if at such a special session, an indictment for murder should be found, and the prisoner on his trial be convicted of manslaughter only, it might deserve consideration whether the court could proceed to award judgment upon the verdict. It is also matter of very earnest inquiry, how far these sections have been modified or repealed by the 3d section of the act of 2d of March 1793, c. 22 [1 Stat. 333]. That section declares, that the supreme court, or when it is not sitting, any one of the justices thereof, together with the judge of the district, within which a special session as thereafter authorized shall be holden, may direct special sessions of the circuit courts to be holden for the trial of criminal causes, at any convenient place within the district, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions. I do not profess to know the history of this provision, but I cannot but suspect, that it grew out of the very difficulties, which have been above suggested. It embraces "criminal cases" generally, and therefore includes capital cases as well as others. It provides for holding special courts not in the county where the crime is committed, as in the act of 1789, but at any convenient place nearer the place where the offence is said to be committed, than the place appointed for the regular sessions; and it further provides that such special sessions may (not shall) be holden, leaving the appointment of course to the sound discretion of the judges; as indeed it had been left by the former act. It appears to me that this section from its whole scope, was intended to operate as a material modification, and in some respects as a repeal pro tanto of the provisions of the 5th and 29th sections of the act of 1789. The provisions of these acts are not in all respects compatible; and wherever the authority confided by the last act is exercised, it manifestly excludes the exercise of like authority under the first. I have seen and considered the case of U. S. v. Insurgents of Pennsylvania, 3 Dall. [3 U. S.] 513, on this point; and it has not at all shaken the opinion I had previously formed.

But supposing the clauses in the 5th and 29th sections of the act of 1789, to be in full force in all respects, still they contemplate in the plainest manner that the prisoner may rightfully be tried at a regular stated session of the court; and that it is in the discretion of the court to appoint a special session. This is the positive language of the 5th section, and though the language of the 29th section, as to capital cases, uses the impera-

tive "shall," yet it leaves the case to be judged of in the discretion of the court upon considerations of inconvenience, and has been uniformly so interpreted. [U. S. v. Hamilton] 3 Dall. [3 U. S.] 17; [U. S. v. Insurgents of Pennsylvania] Id. 513. It is very true that in the case at bar, the court did not adjudge that there would be any inconvenience in trying the offence at a special session; and this arose from the obvious cause, that neither the United States nor the prisoner, ever applied to the court on the subject. No objection was made by either party to the time or place of trial; and unless upon motion by some party, I do not perceive that the court was bound to order a special session.

But admitting that the court might have ordered a special session in this case ex mero motu, still it seems to me that if it were ordered, unless the indictment were found at such special session, there could be no trial of the prisoner at such special session. He could not be tried upon an indictment found at a regular stated session, because no authority is by law given to remove an indictment found at such session to any special session. It must be tried at a regular stated session and none other. This was manifestly the opinion of the supreme court in the case of U. S. v. Hamilton, 3 Dall. [3 U. S.] 17, and acted upon in the case of U. S. v. Insurgents of Pennsylvania, Id. 513. The indictment, therefore, found against the prisoner, could not have been removed to any special session; and after such an indictment found at a general session, there seems to me extreme difficulty in admitting that another indictment for the same offence could have been found at any special session, while the former remained undetermined. There are other difficulties in respect to a special session, which are stated in the cases above cited, which it would not be easy to overcome; but that already mentioned is decisive. The indictment being regularly found at a general session, could only be tried at such session; and the court, therefore, if it had been applied to for this purpose, would have been compelled to deny the application. I agree, also, to the soundness of the doctrine in [U. S. v. Insurgents of Pennsylvania] Id. 513, 514, that a motion for a special session comes too late after an indictment found at a general session; and a fortiori it comes too late, when a trial has been had upon such an indictment. For the reasons already suggested, we may safely conclude that no special session could have been properly held after the indictment was found; and if held, the court would have been without competent authority to try this indictment at such special session. And certainly it can be no error in the court not to have exercised a discretion which it was not called upon to exercise.

Still, however, the trial in the present cause, might have been had in the county of Newport, by continuing the cause to the next general session of this court, which by law is required to be at that place. And if any application had been made to the court for this purpose, it would have been most cheerfully acceded to. But no such application was made; the objection was indeed taken after the trial had commenced, but was urged at that time not to procure a continuance, but to procure a verdict of acquittal, upon the ground that the whole proceedings were coram non judice. The right to a trial in the county where the offence is committed, is a privilege granted to the prisoner. He is not bound to insist upon it, unless he chooses. He may waive it, and require an immediate trial. In fact, when a person is in custody on a charge for any offence, if no indictment be found against him, at the next term of the court, he is regularly entitled to be discharged, unless a very special cause be shewn to the court, authorizing a further detention. If an indictment be found, he is entitled to an immediate trial at the same term, unless the most weighty reasons to the contrary exist. The law will not endure that a man shall be kept in confinement for six months after a regular term of the court, when it is uncertain whether he has committed any offence or not. Such confinement would be an extreme hardship, and operate as a punishment upon a man whom a jury may pronounce guiltless. It is, therefore, only under extraordinary circumstances, that courts of justice allow delays in such cases. And when the indictment is for a capital offence, every reason of justice and of convenience, both to the public and to the prisoner, still more forcibly applies. But where neither the government nor the prisoner apply for any delay, where, as in the present case, both parties professed to be ready for a trial, and were earnest for it; where no objection to the course is hinted at from any quarter, it would be an extraordinary use, not to say abuse, of the discretion of a court to compel the parties to undergo the inconveniences of a long delay, whereby they might be in danger of losing part of their testimony, or of having unfavorable impressions excited against them. It appears to me, therefore, that in the present case, the court, when the parties were ready, was bound to proceed to the trial; and as the prisoner neither asked nor wished a trial at Newport, he waived any benefit and avoided any disadvantage to be derived from the provision of the act, (supposing it in force,) addressed to that object. He had the full benefit of a fair trial by impartial men, and sixteen of the panel were summoned from the county of Newport. The court, therefore, followed out in the most liberal manner, the directions of the act. And I may add, never was a criminal convicted upon plainer or more conclusive evidence. Hav-

ing spoken thus largely on these points, I proceed to the third exception.

3d. As to this little need be said. The jury were summoned from the proper county; and were summoned in the only way known to our laws. Here, a jury is not drawn for a single cause, but the panel is returned to serve in all proper causes, civil as well as criminal, which may be depending at that term before the court. It was apparent, that if an indictment was found against the prisoner, there would be a defect of jurymen, if he exercised the full right of challenge; and the court did only its duty in providing in the speediest manner for this defect according to the known, settled, and universal usage in like cases. This objection is not now insisted upon; and I therefore pass it over without any farther notice. And see U. S. v. Fries, 3 Dall. [3 U. S.] 515.

4th. The fourth exception was fully considered at the trial; and I have pondered upon it deliberately since; and am entirely satisfied that the charge of the court was correct in point of law; and I have nothing further to add to what has been already suggested.

5th. The fifth exception admits of a short reply. The prisoner was asked before his arraignment if he had received a copy of the indictment two entire days before his trial, according to the provisions of the act of 30th of April, 1790, c. 9, § 29. He admitted that he had. And there is no pretence to say, that the omission alluded to, was in the slightest degree prejudicial to him. The right to a copy is a privilege granted by the law for his benefit, and he is at liberty to receive it, if he pleases. By his conduct on this occasion he did waive it, and that too at a time when he had the full benefit and advice of counsel. He might have expressly waived having any copy; and in such a case could it be justly said that there was a mis-trial? In the nature of things, this is a preliminary proceeding, and if not insisted upon before pleading and trial, the objection cannot afterwards be insisted on. Mr. Justice Foster, in commenting on an analogous provision of the statute 7 Wm. III. c. 3, § 1, and 7 Anne, c. 21, § 11, after stating that a copy of the caption of the indictment ought to be delivered, says: "But if the prisoner pleadeth without a copy of the caption, as some of the assassins did, he is too late to make that objection, or indeed any other objection that turneth on a defect in the copy, for by pleading he admitteth that he hath a copy sufficient for the purposes intended by the act." Foster, Cr. Law, Discourse 1, c. 3, § 6, pp. 229, 230. And this doctrine has been recognized as good law ever since. Rockwood's Case, 4 State Tr. 667; 1 East, P. C. c. 2, § 49, p. 113.

6th. The sixth exception turns upon the language of the statute of Rhode-Island respecting jurors, which directs that the jurors drawn to serve at any court, shall be warned to attend by the town sergeant, six days before the court at which they are to serve. Laws R. I. 1798, pp. 182, 183. This is plainly a mere direction to the public officers to prevent a defect of jurors. It has nothing to do with the qualifications of jurors, or with the regularity of their draft. The jurors are not less qualified because they attend without warning; although, if not warned, they certainly are not liable to any penalty for non-attendance. Even in the state courts of Rhode-Island, this exception must be utterly nugatory. If a juror attend the court, for which he is regularly drawn, it is sufficient, and no exception on this account lies to his competency. Assuming, therefore, that the state laws as to these collateral proceedings, are, under the acts of congress (Act Sept. 29, 1789, c. 20, § 29; Act May 13, 1800, c. 61 [2 Stat. 82]), obligatory upon this court, (which is assumed merely for the sake of the argument) there is nothing in the objection. There is another answer equally conclusive. The jurymen from Portsmouth, though returned on the panel, did not sit in the cause, but were put aside for another cause. The prisoner made no challenge to the array or to the polls on this account. Indeed the setting aside of these jurors, and not suffering them to be sworn on the jury, constitutes the next exception in the case, and is entirely repugnant to the present. If the prisoner was tried by lawful jurors, it is after the trial utterly unimportant what were the defects of other jurors, who were summoned and were not sworn.

7th. The seventh exception may be disposed of in a very few words. When the jurors mentioned in this exception, were called to be sworn, they both appeared to be Quakers, and excepted to themselves as disqualified, because they were conscientiously scrupulous of taking away life, and did not think themselves impartial in a capital cause. In point of fact, one of them is now of the sect of Friends or Quakers, and the other professes their tenets, but has latterly been excluded from their meetings. It is well known, that the Quakers entertain peculiar opinions on the subject of capital punishment. They believe men may be rightfully punished with death for the causes set down in the divine law, but for none others; and in point of conscience they will not give a verdict for a conviction where the punishment is death, unless the case be directly within the terms of the divine law. Now it is well known to us all, that our laws annex the punishment of death in several cases where the divine law is silent, and under circumstances different from those expressed in that law. To compel a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense. To insist on a juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict ac-

cording to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to procure the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice which the law requires of us; and I am not bold enough to introduce a practice, which corrupts the very sources of justice. The objection, however, affects to place some reliance upon the fact, that the jurors were not sworn or affirmed to the truth of their statements. But this was surely unnecessary, where no doubt was entertained of their perfect veracity. I agree with the doctrine laid down in the book cited by the prisoner's counsel, that where the jurors challenge themselves, they may be sworn to the truth of their asseverations. 1 Chit. Cr. Law, 443. But when these are undoubted, of what use can it be to make assurance doubly sure? I may add, that in all the courts of New-England, where I have seen practice, the course pursued on this occasion, has been uniformly adopted. I do not deny, that the facts to establish a lawful challenge to the polls may be ascertained by triors according to the course of the common law; all I assert is, that this is not the usual or necessary mode with us; and least of all is it proper, where the facts are not disputed, and the cause of challenge is apparent and admitted, and resolves itself into a mere point of law. Even if a juror had been set aside by the court, for an insufficient cause, I do not know that it is matter of error, if the trial has been by a jury duly sworn and impanelled, and above all exceptions. Neither the prisoner nor the government in such a case have suffered any injury.

8th. I pass over the eighth exception, because it is abandoned by the counsel for the prisoner, with the single remark, that if a bad or low education would in point of law justify or excuse crimes, it would be the most facile mode of avoiding punishment that could be devised; for to this cause is generally to be attributed many of the most shocking crimes and immoralities committed in all countries.

9th. The ninth exception presents a specious, but when the facts are ascertained, a most delusive objection. The trial commenced on Friday, and the whole evidence was gone through on both sides by Saturday noon. The counsel for the prisoner were then indulged with the utmost latitude of discussion, and occupied the attention of the jury for nine hours, and then came voluntarily to a conclusion of their arguments. In the course of the trial, it became necessary to ascertain whether the land, on which the crime was committed, had been granted by the proprietors, as well as ceded by the state, to the United States. Copies were produced from the proper town records, (where, by the laws of the state, all deeds of lands lying in the town are recorded) duly certified; but upon inspection of these copies, it was apparent that the certifying officer, from the great haste in which these copies had been made, had erroneously stated the dates of one or more of them. The real dates were scarcely susceptible of doubt. But under all the circumstances, it was thought advisable to send for the original records, and they were accordingly brought into court, by Mr. Almy, the town-clerk, on Monday morning, (the court having been adjourned from Saturday evening to give the district attorney an opportunity to close the case) and Mr. Almy was then sworn to the single fact, that these were the original records, and upon inspection, the errors in date were immediately detected and admitted by the counsel for the prisoner. Application was then made by the counsel for the prisoner to the court, to permit them again to interrogate the witnesses, who had been produced on the part of the United States, as to a single fact, (the fact stated in the thirteenth exception) to wit: that the soldiers had had more liquor on the day the offence was committed, than usual, and as much as they wanted, so as to raise an inference, that they, or some of them, as well as the prisoner, were intoxicated. Every one of these witnesses had been interrogated by the prisoner's counsel upon their prior examination again and again, as to this fact, and every one gave a distinct decisive answer in general, negativing any notion of intoxication. They stated the quantity of liquor which had been given; and the whole testimony on this point was fully sifted by the prisoner's counsel in their argument. It is to be observed, that the defence of the prisoner did not turn upon any doubt of the testimony as to the principal facts. It was admitted that he killed the deceased; that he did it voluntarily; that the prosecution was truly stated. The principal grounds of defence were, that the provocation was such as legally reduced the crime from murder to manslaughter; that the prisoner was intoxicated at the time, and this was a legal extenuation of the crime, that is to say, that murder committed by a drunken man, is ipso facto reduced to manslaughter; that Cornell was an illiterate man, of gross and furious passions; and that a crime which would be murder in an intelligent moderate man of reasonable discretion, could be but manslaughter in the prisoner, because of his ignorance and his furious passions. The court were of opinion, that under all the circumstances of the case, there was no reasonable ground for entering again upon a re-examination of the testimony, on the point above stated. It was an application to their sound discretion, and should have been granted only when it was manifest that public justice required it. Here, no new witnesses were offered, no new facts were suggested. The witnesses had already deliberately given their testimony on the very point, and it had been deliberately examined. There was nothing but a suggestion of counsel, that they might be able to draw forth contradictory answers from the

same witnesses; a thing certainly not to be presumed at such a time, and upon such a trial. And the bearing of the facts upon the merits of the case, in point of law, was so slight, that in the opinion of the court, it was a waste of time to dwell longer upon it. It had the air of pressing a solemn defence against all the principles of law, and of grasping after shadows to postpone a verdict. The court felt that the dignity of the law, and the justice of the country, ought not to be left open to the imputation of being but a solemn trifling.

10th. The tenth exception has been almost abandoned by the counsel. The suggestions of the court, that the nature of the weapon, by which the death is inflicted, is often extremely material in cases of homicide, were made in order to explain the doctrines of the cases cited by the counsel for the prisoner. There was no room for the application of the principle of such cases to the present, for it was proved and admitted, that the prisoner intended to kill, and that his musket was a deadly weapon. Nor could it have been proper for the court, in the prisoner's case, to have stated that his being lawfully possessed of the musket, made any legal difference as to the crime. God forbid that it should ever be supposed to be law, that the lawful possession of a deadly weapon, justifies or excuses any man in the commission of murder. But surely the omission of the court to state a circumstance, which may be material for the prisoner, is not matter of error. In a long and complicated cause, such an omission may and certainly sometimes does occur; but it is always in the power of counsel, by suggesting the omission, to recall the fact to the attention of the court, and then to prevent any injury. If this course had been pursued on the present occasion, the suggestion would have been cheerfully listened to. But it could have been of no avail, unless we are ready to uproot the foundations of the law.

11th. The eleventh exception has been explicitly abandoned, and for the best reasons. There is no pretence to say, that the prisoner is in any legal or accurate sense, "deficient in understanding." It was proved by all the witnesses, by his own witnesses, it was admitted by his counsel, that he was compos mentis, having intelligence to discern what was right and what was wrong. All that was suggested was, that he was more ignorant and somewhat more stupid than common men, of bad education, and bad passions, and bad habits. Now these are precisely the common causes of crimes; but certainly they form no legal excuse or justification for the commission of them. As to the other part of the exception, that the court instructed the jury that "it was their duty to weigh the evidence in the cause," I profess not to be able to comprehend the nature of the objection to it. I had always humbly presumed that such was the duty of every juror in every cause. Juries are not to give a blind verdict, merely because witnesses swear to the existence of certain facts. They are to examine those facts, to consider the credibility of the witnesses, to weigh the force and ascertain the value of the testimony, and to give a verdict according to their oaths and their consciences. Upon any other supposition of duty, juries would be a most fraudulent imposition upon the public, and a mischievous appendage to the administration of justice. Until I can learn a different rule, I shall continue to believe, that to weigh evidence is of the last importance in all judicial tribunals, and is so emphatically the duty of juries, that to abandon it, is to jeopard their consciences and violate their oaths.

These are all the original exceptions filed in the cause. But three additional exceptions are now offered, which I will briefly consider, however irregularly they may have come to my notice.

12th. The twelfth exception turns upon new evidence discovered since the trial. In order to justify the court in granting a new trial for such cause, it should be most manifest that injustice has been done the prisoner, or that the new evidence would materially vary the complexion of the cause. The new evidence as now stated, (for it rests in mere assertion, and there is not even an affidavit to sustain it) goes merely to the credibility of Raymer's testimony. Now it is somewhat remarkable, that the testimony of this witness as to the only fact, to which he singly spoke, the fact of a previous quarrel and threat of revenge by the prisoner, was commented on at large by the court, and the jury were expressly advised to consider that quarrel and threat as merely a sudden ebullition of passion, and affording no proof of any previous deliberate malice in the prisoner. There is not the slightest reason to suppose that the jury did not act upon this advice. As to all the other facts in the case, they were proved by four or five unimpeached and unimpeachable witnesses; and indeed, as has already been remarked, the material facts were admitted by the prisoner's counsel. The verdict was in my judgment most entirely justified by the principles of law and by the evidence. It was as clear and unequivocal a case of murder, as I ever recollect to have tried in a court of justice. Under such circumstances, if the court were to grant a new trial, it would surrender itself to a most unpardonable abuse of the discretion committed to its charge.

13th. The thirteenth exception is abandoned by the counsel, because it cannot be sustained, and I need not comment on it.

14th. The last exception has been in some measure anticipated. If the prisoner was at the time of committing the offence, intoxicated, as his counsel have earnestly contended, I cannot perceive how it can, in point of law, help his case. This is the first time, that I ever remember it to have been contended, that the commission of one crime was an ex-

cuse for another. Drunkenness is a gross vice, and in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity. 4 Bl. Comm. 25; 1 Inst. 247; 1 Hale, P. C. 32; Plowd. 19. If it be fit, that another rule of law should prevail, it will be for the legislature to prescribe it. It is my duty to administer the law upon its settled principles; and I confess, that I do not well know, how a doctrine more dangerous to the peace and good order of society, could be established than that the vices of men, (as this voluntary madness is,) should constitute an excuse for their crimes.

I have gone over all the causes assigned for a new trial; and I have no hesitation in declaring that they afford not the slightest foundation to sustain it. It would have given me more satisfaction, if I could, consistently with the dictates of my judgment, have come to a different result. If there are any circumstances in the prisoner's case entitling him to mercy, it belongs to another department of the government to administer it. I overrule the motion for a new trial.

Motion overruled, and sentence of death pronounced.

Case No. 14,869.

UNITED STATES v. CORRIE.

[Charleston (S. C.) Daily Courier, April 19, 1860; 1 Brunner, Col. Cas. 686; 23 Law Rep. 145.] [1]

Circuit Court, D. South Carolina. April Term, 1860.

PIRACY — SLAVE TRADE — JURISDICTION — NOLLE PROSEQUI.

[1. Under Act May 15, 1820, §§ 4, 5, declaring certain acts by the master and crew of a vessel, relative to negroes, piracy, and giving jurisdiction of the offense to the federal courts of the state in which the offender is "brought" or "found," the mere landing in a state of negroes with intent to sell them as slaves is not piracy, which would be an offence committed within that state, and therefore triable there (under Const. art. 3, § 2, declaring that the trial of crimes shall be in the state where the crimes were committed; but, when not committed within any state, the trial shall be where congress directs); but it is part of such offense that the crew landed on a foreign shore, and there seized free negroes with intent to make them slaves, and confined them in the vessel, from which they were landed.]

[2. Leave to enter nolle prosequi in a piracy case pending in a federal court will not be granted, the motion of the United States attorney therefor not being made in the exercise of his discretion, or for the purpose of abandoning a prosecution, for any of the causes which suggest that course, but having been made at the direction of the attorney general of the United States, with the sanction of the president, for the purpose of overcoming the judgment of the court in which the case is pending, that it, and not the federal court of another state, has jurisdiction of the case.]

[Cited in Confiscation Cases, 7 Wall. (74 U. S.) 457.]

[1] [1 Brunner, Col. Cas. 686, and 23 Law Rep. 145, contain only partial reports.]

MAGRATH, District Judge. The question raised in this case is of so much importance that I have considered it proper to set forth the reasons which had led me to the conclusion I shall announce. And to the right understanding of the case, it is necessary to give a concise statement of it, from the time when first it was brought before me to the present moment.

The first proceeding in this court against Wm. C. Corrie rested upon an affidavit made by Mr. Ganahl, then the attorney of the United States for the district of Georgia, in which it was charged, from "credible information," that William C. Corrie, master or commander of the vessel called Wanderer, did land in the Southern district of Georgia certain negros not held to service by the laws of either of the states or territories of the United States, with intent to make them slaves; and that the said William C. Corrie, master or commander of a vessel called the Wanderer, on a foreign shore, did seize, decoy, and forcibly bring, carry and receive on board the said vessel such negros, landed by him as aforesaid in the Southern district of Georgia, with intent to make them slaves, contrary to the fourth and fifth sections of the act of congress of the 15th May, 1820 [3 Stat. 600]. The affidavit, of course, is more full and circumstantial than this synopsis of it. Upon this affidavit a warrant was ordered to issue for the arrest of the said William C. Corrie, to answer the charge so made against him. At the same time an order was asked for his removal to the state of Georgia, there to be tried for the offence with which he was charged. I considered the question, and refused to make the order, because by the express provision of the act of congress of the 15th May, 1820, under which he was charged and arrested, jurisdiction of the offence was in the circuit courts of the state in which the offender was "brought" or "found," and the offender having been "found" in the state of South Carolina. It was at the same time declared that the jurisdiction which thus became vested in the courts of the United States for the state of South Carolina was exclusive of jurisdiction in the courts of any other state; and application having been made in that behalf, he was admitted to bail, and became bound with sureties to appear and answer the charge against him, at the next ensuing term of the circuit court of the United States for the state of South Carolina. After these proceedings had taken place, and before the term of the circuit court of the United States, for the state of South Carolina, to which the accused had been bound to appear; in the district court of the United States for the state of Georgia, a true bill was returned to that court, by the grand jury, against Wm. C. Corrie for piracy, under the act of May 15, 1820. An exemplification of it was laid before me, and the motion renewed for the removal of the accused to the state of Georgia for trial. I refused again to order the removal, but ordered that the amount of the recognizances in which

he was bound to answer here should be doubled. During the term of the circuit court of the United States for South Carolina, and before the grand jury had been charged in the case against Wm. C. Corrie, a bench warrant was issued against him, out of the courts of the United States in the state of Georgia, for his arrest to answer to the charge of having violated the act of congress of 1818; and again I was applied to for an order directing his removal for trial to the courts of the United States for Georgia. I again refused for several reasons, one of which was, that it was without precedent to ask a court having before it a criminal accused of a capital offence, and whose case the grand jury were in waiting to consider, to send him to another tribunal, there to be tried for a minor offence. Subsequently to this, the case of the U. S. v. Wm. C. Corrie, charging him with piracy under the act of congress of the 15th May, 1820, was submitted to the grand jury, then in attendance upon the circuit court of the United States for the state of South Carolina; and the charge in the case was delivered to the grand jury by Judge Wayne, the associate judge of the supreme court, assigned to this circuit. The grand jury retired, with the witnesses, and returned into court without having found a bill. The next day the foreman of the grand jury asked that the bill against Wm. C. Corrie should be again committed to it. Judge Wayne thought it should not be; I differed in opinion. The grounds of that difference need not be stated here. I adhere to the opinion I then expressed. The grand jury should have been impeached or allowed to reconsider the case; if they desired to do so; for I see no ground upon which they could be refused the exercise of their privilege, unless they had rendered themselves unfit. The grand jury then retired, and came into court with a presentment, charging Wm. C. Corrie with a violation of the act of congress of the 15th May, 1820, and asking the court to make the necessary orders for his prosecution. The grand jury were then discharged. William C. Corrie, who had been by me admitted to bail, had been ordered to be taken by the marshal into his custody. His sureties of course had been discharged. At the close of the term, through his counsel, he applied again to be admitted to bail. Judge Wayne, who was sitting with me, stated that he felt no obligation to change the position in which I had placed the case,—before the term,—when I had admitted the accused to bail; that he did not feel called upon to dissent or commit himself at all upon the question of bail, and left the matter with me. I admitted the accused again to bail. My opinion as to the nature and extent of the power devolved upon me in such cases, in relation to bail, as also in regard to the obligation which the grant of the power carries with it for its exercise, is set forth in the opinion prepared at that time, and on the files of this court. The accused became, thereupon, bound with his sureties, to appear and answer at the next term of the circuit court of the United States for the state of South Carolina.

At Greenville no proceedings were taken, and the case was postponed to the next term of the circuit court in Columbia. And, at at that term, the attorney for the United States, having read to the court the evidences of all efforts used to obtain the necessary witness, upon his motion, the accused was ordered again to enter into new recognizances to appear and answer at this term of the circuit court of the United States. It is proper to bear in mind that the accused, so far as is known to this court, has never, in the terms of the act of 1820, been "brought" or "found" within the limits of the state of Georgia; it is believed of this there can be no doubt. But he was "found" within the limits of the state of South Carolina. And, as already said, when "found" within the limits of the state of South Carolina, jurisdiction of the offence was vested, by the express provisions of the act of 1820, in the circuit court of the United States for this state. While held subject to the jurisdiction of this court, the grand jury of the United States court in Georgia returned into court a true bill against him for a violation of the same act, which he was here held to answer. In regard to these cases there was a direct conflict of jurisdiction. In the proceedings subsequently adopted against him in the courts of the United States for Georgia, and which related to a violation of an act of 1818 (a minor offence), it never was denied in this court that there was jurisdiction of that offence in the courts of the United States for the state of Georgia.

Nor was it because of a question of jurisdiction that the order for his removal was refused. Two reasons did, however, induce the refusal. The one, stated in the opinion then delivered in this court, already noticed, and which was, that, while held here to answer for a capital offence, he could not be transferred to another court, there to be tried for a misdemeanor. It was in relation to a question similar to that then before the court, but not presented with so many objectionable circumstances, that Chief Justice Marshall said: "Such a thing has never been done; it is contrary to all correct principles." But this sufficient in itself, as it undoubtedly was, did not alone guide me in the decision. I had great reason to believe that the application to remove him, under a charge of having violated the act of 1818, was not intended to secure his presence at the trial of that charge; but that when removed under the charge of having violated the act of 1818, he was to be tried for a violation of the act of 1820—the same offence for which he was held here to answer, and of which it had been decided by this court that it alone had rightful and exclusive jurisdiction. To Judge Wayne all the reasons which led me to refuse the order asked were fully communicated. It is proper to say that Judge Wayne assured me that

he had no knowledge of the purpose for which the removal was asked for. In the statement now made to the court, of the proceedings which are to succeed the entry of the nolle prosequi, it is understood the purpose is now, as it was then; to remove to the courts of the United States in Georgia, under an alleged violation of the act of 1818, but to try him for a violation of the act of 1820. I said then that I would not use the power, with which I was vested, to remove a criminal for any such purpose; and I have not since then, changed my determination. It is obvious that there must be a very wide difference in opinion, between the courts of the United States in Georgia and South Carolina, as to the court having jurisdiction of the offence with which the accused is charged, under the act of 15th May, 1820. And it is proper once again to express the opinion that in the circuit courts of the United States for this state is jurisdiction of the offence, and in such courts must the offender be tried. The place at which the trials of all crimes and offences cognizable in the courts of the United States, under the laws thereof, shall be had, is to be determined, in the first place, by the consideration of the place where the crime or offence was committed. By the third article, third section of the constitution, such trial shall be held in the state where the crime has been committed; but if not committed within any state, the trial shall be at such place or places as congress may, by law, have directed. And in the 6th article of the amendments it is declared, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." It is undoubtedly the duty of a court to suppose that congress, in the exercise of its legislative functions, regards the provisions of the constitution. It is outside of the duty of a court to presume that congress ignorantly or willfully disregards a plain provision of the constitution. It must therefore be conceded that if, in the creation of an offence, congress has declared that the place of its trial shall be such place or places as it was competent to provide for offences only that could be committed outside of the limits of a state, the fact of the designation of such place or places for the trial is equivalent to the declaration that the offences created by the act are only such as may be committed outside of the limits of a state.

In the act of 1820, congress has plainly declared the places in which there shall be jurisdiction of the offences it creates. These places exclude the idea of any of these offences being considered by congress as offences to be committed within the limits of a state. To none other than such offences is the designation of the place of jurisdiction consistent with the constitution. If, then, we regard congress as legislating under the sanction of the constitution, we must consider the offences created by the act of 1820. because of the place or places at which they are to be tried, as offences committed without the limits of a state. If we insist that the offences, any or all, are to be considered as committed within the limits of a state, then did the congress which passed the act of 1820, either not know the article in the constitution and the amendment to which I have referred, or, knowing them, willfully violate their positive command. In the interpretation of a statute, a cardinal rule instructs us to read it so that all its provisions may be consistently preserved. It is enough, according to this rule, to show that by the interpretation of certain words in one sense, other material words must be rejected which by another construction, may be preserved, to command us to adopt that which preserves every provision of the law. In this act of 1820, the place for the trial of offences is plainly and positively expressed. If such offences are regarded as offences not to be considered as committed within the limits of a state, but outside of such limits, then is the designation of the place for the trial thereof constitutional and operative. But if they are considered as to be committed within the limits of a state, the designation of a place or places for the trial thereof is unconstitutional and inoperative. Is there any room for a court, under such circumstances, to entertain a doubt of the construction which it is bound to adopt? If there is an offence under the act of 1820 which is to be held an offence committed within the limits of a state, then that part of the same act which declares the place or places at which jurisdiction shall be exercised of the offences it creates, must be stricken out, because in such a case it would be unconstitutional. I can very well understand in what manner, if any of the offences created by the act of 1820, should or could occur on land, or within the limits of a state, a court would refuse its cognizance of it; because the act in fixing a place for the trial, had so evidently intended to create an offence not to be committed within the limits of a state; but I cannot understand why with that intention of congress so plainly manifested by the designation of a place for trial, exclusively appropriate for offences not committed within the limits of a state, it should be insisted that offences not intended to be included should be included.

To insist that other offences can be tried under the act of 1820, than such as are cognizable, according to the words of the act. in the circuit court of the United States for the state in which the offender is brought or found, is subversive of a fundamental principle in the construction of any criminal law. It has been sometimes contended, but never permitted by a court, that the intention of a law should give a meaning to its words wider than they generally receive. But I have never known before of a case in which the oper-

ation of a severe criminal law was claimed to be carried further than the plain meaning of the words, and the equally plain intention of the law maker would suggest. It is, of course, manifest, that as the accused in this case has been "found" in the state of South Carolina, by the terms of the act of 1820, it is in the circuit court of the United States for this state that he must be tried. It is equally manifest, that if tried for this offence under the act of 1820, in the circuit court of the United States for the state of Georgia, within which state he has not been brought nor found, the words of the act which describe the place or places where the trial must be had, are virtually stricken out. We may be benefited by the language of Chief Justice Marshall when a similar proposition was before him. "It would be (says he) carrying construction very far to strike out these words. Their whole effect is to limit the operation which the sentence would have without them, and it is making very free with legislative language to declare them totally useless when they are sensible, and are calculated to have a decided influence on the meaning of the clause." And, in the case from which this extract is taken, we may further learn with what caution Judge Marshall proceeded when he was asked, by construction, to increase the offences which the act of congress then under consideration had enumerated. He admitted the probability of that construction which he was asked to make. "But (said he) probability is not a guide which a court in construing a penal statute can safely take. * * * Congress has not made them punishable, and this court cannot enlarge the statute." In another part of the same opinion, he adds: "The conclusion seems irresistible that congress has not in this section inserted the limitation of place inadvertently, and the distinction which the legislature has taken, must of course be respected by the court." "It is (says he) the legislature, not the court, which is to define a crime and ordain its punishment."

When, therefore, I have claimed that the rightful jurisdiction of the offence with which the accused is charged is in the circuit court of the United States for the state of South Carolina, I do so because the act which creates the offence has so declared it. It was here that he was first arrested. When rightful jurisdiction of the case once vested in the circuit court of the United States for the state of South Carolina, it became exclusive of jurisdiction elsewhere, and the accused could not be transported to a different district for trial. And when, because of offences charged to have been committed in violation of the act of 1820, jurisdiction was claimed by the circuit court of the United States for Georgia of the offence then before this court, and of the offender held to answer here, it could not maintain its claim while in this court there was jurisdiction. And when the right to the exercise of jurisdiction over the offence was claimed by the circuit court of the United States for the state of Georgia, the offence being a violation of the act of 1820, because it was alleged that the offence was committed within the limits of the state of Georgia, the answer is to be derived from the principles laid down by Chief Justice Marshall. No offence committed under the act of 1820 can be within the limits of a state: the place or places appointed for such trials are applicable exclusively to offences committed without the limits of a state. To construe the act as relating to offences within the limits of a state, is to disregard, in its designation of the place or places for trial, "a distinction which the legislature has taken, and must of course be respected by the court." The designation of a place or places for trial, applicable only to offences which could be committed outside of the limits of a state, is equivalent to the words, if used "without the jurisdiction of any state." The creation by congress, therefore, of an offence not cognizable in courts having jurisdiction of offences committed outside of the limits of a state, but cognizable in courts having jurisdiction of offences committed within the limits of a state, is a matter of which the legislature has been silent. "Congress has not made such punishable, and the court cannot enlarge the statute." It seems to me, therefore, that the circumstance relied on to support a claim for the exercise of jurisdiction in this case by the courts of the United States for the state of Georgia, which is that the violation of the act of 1820 occurred within the limits of the state of Georgia, and therefore must be tried in the courts of that state, is the circumstance which conclusively repels the claim so made for jurisdiction, because an act committed within the limits of the state of Georgia, and cognizable therefore, only in the courts of the United States for that state, is not an offence within the terms of the act of 1820, which relates exclusively to offences cognizable in courts exercising jurisdiction under the act of congress over crimes and offences not committed within the jurisdiction of any state. Cognizance of this offence, therefore, by the courts of the United States for the state of Georgia, because alleged to have been committed within the limits of the state of Georgia, and, therefore, cognizable only in the courts of that state, is not consistent with the plain meaning or obvious intention of the act of 1820. It does not respect a distinction which congress has taken; operates to enlarge a penal statute; makes punishable other offences than such as congress has declared; and this no court can do, according to the judgment of the supreme court. And thus, the alleged locality of the offence, under the act of 1820, upon which jurisdiction is claimed, is the circumstance which, if it does exist, would disprove any right to jurisdiction under the act of 1820, because no such offence is declared by that act. It is proper always to bear in mind,

that in a question of jurisdiction in a court of the United States, the right to exercise that jurisdiction must, in the language of Chief Justice Marshall, in the case of Ex parte Bollman and Swartwout [4 Cranch (8 U. S.) 75], "be given by the written law." "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles, but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

The great vital principle, that the powers exercised in all or any of the departments, by which the government of the United States is administered, are delegated and specific, applies to the judicial as strongly as to the executive or legislative departments. No court of the United States can take cognizance of a crime or offence, until that charged to be such crime or offence shall have been so declared by the congress of the United States; nor can congress declare it to be a crime or offence, unless authorized by the constitution of the United States so to do? Nor with these sanctions, can a court proceed to the trial of such a crime or offence, unless it shall have been authorized to take cognizance thereof? I have said that the ground upon which jurisdiction is claimed for the courts of the United States in Georgia of itself defeats the claim, because it creates an offence within a locality, inconsistent with the intention and language of congress as they appear in the act of 1820. And I will now proceed to show what are the crimes declared by the act of the 15th May, 1820. This act has been in the statute book for nearly forty years; but as yet no court has been called on to give to it a construction which would show the true nature of the offences which it creates. Whatever hesitancy I might feel in undertaking now to give a construction to this act it is, as it should be, altogether removed by the reflection, that it is proper, nay imperative, as I conceive upon those whose duty it is to expound the law, to declare what this act means.

I consider it, moreover, necessary to do so, because there have been verdicts of acquittal rendered by juries in the case of persons charged with a violation of this act; and such verdicts have been regarded as indicative of a purpose on the part of juries not to enforce its provisions. How far such an opinion has a just foundation, may be seen in the statement which I now make; that no case has been tried in the court of the United States for the state of South Carolina, for alleged violations of the act of 15th May, 1820, in which any other verdict than that which acquitted could have been given consistently with the law and the evidence in such case. I will go farther and say, that had in any of the cases which were tried in the courts of the United States for this state a verdict of guilty been rendered, I do not believe that any judge of the United States would have hesitated in directing a new trial. And this declaration is warranted by the construction which Judge Story, and after him Judge Woodbury, both judges of the supreme court, have given to the criminal intent by the act itself, made an essential part of the crime which the same act has declared. I am now referring to my own opinion, but I have not any reason to suppose, that, in this respect, there was or is any difference between the judges before whom these cases in the courts of the United States, in this state were tried. I have always thought, and the most careful consideration has strengthened the conviction, that there exists a misapprehension of the act of congress of the 15th May, 1820.

It has been said that by this act of congress the slave trade has been declared piracy. I cannot find in this act anything which sustains that construction; while in the act, and in the other acts distinctly passed for the suppression of the slave trade, everything leads us to reject that conclusion. Offences similar to such as are prohibited by the act of congress of 1820, were declared to be; and punished as offences by the British parliament, when the slave trade itself was legalized by that body. I intend to speak from the act itself. The authority to which I refer for the correctness of the opinion I am expressing, is in the words which congress has used in this declaration of its purpose. It is the legislature, not the court, which is to define a crime and ordain its punishment; and the intention of that legislature is to be found in the words they employ. "To determine that a case is within the intention of a statute, its language must authorize us to say so." And this rule, declared by Chief Justice Marshall, has been affirmed in terms equally explicit by Chief Justice Taney. "The law, as it passed, is the will of the majority of both houses; and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the history of the times in which it passed."

The first thing which strikes attention in the consideration of the act of 1820, is that it does not, in its title, nor in any part of the act, either by way of modification, amendment or repeal, refer to the previously existing slave trade laws, or to the slave trade as the object for which its provisions were intended. In every other act passed for the suppression of the slave trade, the purpose is plainly declared in the title and every section of such act In the only portions of this act in which the slave trade is mentioned; to the mention of it are added certain other things; which other things, when committed, constitute the offences which the act prohibits. These offences, referring to them,

now only generally, consist of landing on a foreign shore, and there seizing or decoying a negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make him a slave. And this offence, commencing on a foreign coast, is followed out, in its several stages, as it affects that negro or mulatto, in forcibly bringing, carrying, or receiving him on board of the vessel; there confining and detaining him, with intent to make him a slave; or transferring him to another vessel on the high seas or tide-water, or from on board landing or delivering him on shore, with intent to sell or having sold him as a slave. From a very early period to 1819, various acts had been passed by the congress of the United States in relation to the slave trade, considering it as a trade. As a trade, it has been prohibited under heavy penalties. But while prohibited as a trade, no act of congress had made the seizure and decoying of negros or mulattos on a foreign coast, with the intent to make them slaves, an offence to be tried and punished in its courts. That the slave trade itself, and such acts of violence and spoliation are distinct, is seen, as already stated, in the fact; that in the 23 Geo. III. c. 31, by which the slave trade was legalized, it is, also, provided, that no commander or master of any ship trading to Africa shall, by force or fraud, take on board or carry away from the coast of Africa any native or negro of said country, or commit, or suffer to be committed, any violence on the natives, to the prejudice of the trade. As far back, then, as 1750, force, fraud, or indirect practices, in obtaining possession of the negro, was held so distinct from the slave trade that it was prohibited and punished as injurious to the trade; while the slave trade itself was permitted and legalized. In 1819, congress passed two acts, now requiring our attention. One additional to such as were then of force in relation to the slave trade, the purpose of which is distinctly set forth in its title and in all of its provisions, to be for the suppression of the slave trade. The other act was in regard to a purpose equally clear in its titles and its provisions; it was to protect the commerce of the United States. In the progress of and towards the conclusion of the South American war, privateering had degenerated into piracy, and the depredations committed had been so numerous and daring that it became necessary to legislate for the protection of the commerce of the United States; hence the act of 1819. But the duration of that act was fixed, and consequently, in 1820, if still necessary, it had to be re-enacted. In the house of representatives it was amended, by what are now the fourth and fifth sections of the act; and in this form became a law. Such is a brief narrative of the circumstances connected with the legislation of congress in the act of the 15th May, 1820. For its meaning, we must refer to its language. I am aware that it has been not unusual to seek for a guide in its interpretation to the report of the committee, which recommended these sections, of the house of representatives. Without any more special reference to this report than in saying that its language is so general as to make it unsafe, if it were legal, to adopt it as a guide, it is necessary to understand that the highest authority compels us to reject it, in the construction of this act. "In expounding (says Chief Justice Taney, in another case) this law, the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage; nor by the reasons assigned by them for supporting or opposing amendments that were offered." And if it shall be said that because the act relates to the offence of seizing or decoying a negro or mulatto, or using such a negro or mulatto in any of the modes prohibited by the act, with the intent to make him or her a slave, that, therefore, it relates to the slave trade, enough has already been said to show that such a proposition involves a confusion in the apprehension of degrees of crime made very manifest in the act of 1820; the slave trade laws of the United States up to the year 1819; the legislation of the British parliament; and the obvious distinction between participation in a trade or traffic, business or commerce, declared unlawful; and acts of force or fraud, spoliation or rapine, in regard to the subject matter of that trade or traffic, business or commerce; which may very well be considered as robbery and piracy. But still more: When congress, in the exercise of a power which it has, if it is pleased to exercise it, shall make the slave trade a piracy, it must do so in terms which refer to it as a trade. To infer that the slave trade is piracy because seizing and decoying on a foreign shore, a negro or mulatto, with intent to make him a slave, is so declared, is not, in my mind, recommended by a rule of reason, or consistent with fact. If we consider now the persons who by the act of 1820 are made liable upon conviction to the punishment it inflicts, we will see, more clearly, how inconsistent it is with the idea of its connection with the slave trade.

No one can be punished under the act of 1820, unless he is of the crew or ship's company. Hence no one on board, although the owner of the negros or mulattos, with which the vessel is laden, can be convicted or punished under its provisions. In all other acts of congress passed for the suppression of the slave trade, all persons are embraced, who by violating these laws, can be made liable for such offences in the courts of the United States. In the act of 1794 the prohibition is directed to a citizen or citizens of the United States, or any other person coming into or residing in the same; and words of the same or like general description in regard to persons who shall be liable to the punishment

imposed, will be found in the several acts down to 1819. It may very well be understood, that such acts were intended for the suppression of the slave trade, when they were directed to all persons upon whom the courts could impose punishment, in cases where they were convicted of its violation. But, with what show of reason is it to be urged that an act is intended for the suppression of the slave trade, as a trade or business, which imposes its penalties only on those persons who may be fairly presumed never able to engage in it as a trade or business? Nor can it be said by the severe penalty visited by the act of 1820, upon the crew or ships company, it was intended to destroy the agencies by which the slave trade could be carried on, and in this manner extinguish the trade. For that construction has been given to the intent, by the act made an essential part of the offence, which relieves the crew of the penalty, unless in cases where they claim and exercise over the negros or mulattos, the control of ownership. Without this evidence, they may be guilty of transporting, which is a misdemeanor, punished by fine and imprisonment; but they cannot be held guilty of piracy, and for it punished by death. If then all persons are exempted from the operation of the act of 1820, except the crew or ship's company; and if the crew or ship's company can never have been considered as the persons for whose benefit the slave trade is carried on, or who are able to engage in it as a trade or business; does it not at once appear almost absurd to consider such an act as intended for the suppression of the slave trade? It would suppress the trade by inculpating only those who never could be found guilty of its violations. But, if we will enquire why is it, that the act of 1820 relates exclusively to the crew or ship's company, and no one else, we will understand the crimes which the act declares. It has been seen that if they are persons never engaged in the slave trade as a trade or traffic, the act is meaningless. But if it is remembered that the crew or ship's company were the persons by whom the lawless acts were committed, which in number and daring had, in 1819, called for the protection to commerce which the most stringent penal legislation could impose; that their depredations had been committed in all places and against every flag; that they had braved the municipal laws of the United States; defrauded its revenues by the establishment of depots on its frontier, whence constant violations of its laws were committed; and among these violations was the unlawful introduction of negros,—it may then be seen that the crew or ship's company were the proper objects to which the penalties of the act were directed; because they were the only persons who would commit the offences which it prohibited. The offences so committed were not violations of the slave trade laws, so far as these laws regard that trade, as a trade, business or employment; laws which were then severe, and have not for forty years required an addition to the penalties they then enforced; but those acts of seizing and decoying, of force and fraud, or indirect practices in obtaining possession of free negros and mulattos, and making them slaves; such acts as were, in fact, piracy; which, if committed within the limits of the states having slaves, had been by many, if not all, of those states made felonies; and were by the law of those states, as by those of the United States, punished with death.

A brief reference thus to the act of 1820, its language and some reference to the history of the times in which it was passed, and the only persons upon whom its penalties can be imposed, indicate that line of reasoning, which has led me to the conclusion that it is not a part of the slave trade laws of the United States, using that term as it is generally received; as referring to a trade, traffic, business, or employment, in which sense it is used in all of the acts passed expressly for the suppression of the slave trade. And a brief examination of the intent, a material element in the offence under the act of 1820, confirms this view. The intent which the act prohibits is to make a slave of such negro or mulatto. It is peculiar to the act of 1820. What does it mean? If expressed in language different from such as is used in any other act, and if the words used have in themselves a "plain meaning," that meaning they must have. "Where there is no ambiguity, there is no room for construction." It has been said that it matters not in the consideration of an offence under the act of 1820, what may have been on a foreign coast, the condition of the negro or mulatto, whether he was bond or free. But from such a proposition I dissent altogether. And to me it seems not only a matter of easy demonstration to show that, in regard to the offences created by this act, it is of much consequence under the fourth and fifth sections to determine whether the negro or mulatto was bond or free, but that the act itself plainly teaches by the line of evidence which it prescribes, that the court must have that fact established. It seems to me that a regard to his antecedent condition is indispensably necessary in the consideration of the intent. The intent is to make a slave. Of whom? A negro or mulatto; I omit as unnecessary here all other circumstances; not held to service by the laws of either of the states or territories of the United States. The negative of this servitude is part of the evidence to sustain the prosecution. But why disprove this servitude? Of a negro or mulatto decoyed or seized on the coast of Africa, why negative a servitude by the laws of either the states or territories of the United States? The explanation seems plain. The intent prohibited is to make a slave. To make implies the creation of that condition. Of one already a slave it could never be said of him

who continued his servitude that he had made him a slave. The law may presume a condition of freedom until one of subjection is proved. But no such general presumption could prevail, while in the United States over negros and mulattos there was and is a recognized lawful control and established right of property in them. When, however, that condition of servitude recognized in the United States becomes disproved, then it is competent to proceed upon the presumption that the negro or mulatto charged to have been taken or held in violation of the act of 1820 is free until it is proved that he is not. But if the presumption of freedom, unless it was disproved, might support the charge, and be evidence in the charge of an intent to make that negro or mulatto a slave; so, upon the negation of that presumption, and proof of his servitude at the place from which he was taken, the charge of an intent to make him a slave would be disproved; in the same manner as it would be, in a case where the negro or mulatto was proved to be held in servitude by the laws of a state or territory of the United States. The same reason would in both cases lead to the same conclusion.

Whether the negro or mulatto was held to servitude by the laws of either of the states or territories of the United States, by the laws of Brazil, of Cuba or of Africa, of him it could not be said that there was proof of an intent to make him a slave, if he was already a slave. To purchase on that foreign coast a slave may be by other laws of the United States, passed for the suppression of the slave trade, an offence punishable by fine and imprisonment; but no law has yet said that it is piracy. Now, the intent being as is said to make a slave,—that is, create a servitude which did not exist until it was imposed by him who was charged with its commission,—it will be seen how consistent is such an intent with the offence which the act creates. The whole scope of the act of 1820 in regard to the 4th and 5th sections is not perceived unless the 3d section of the same act is also considered. The 3d, 4th, and 5th sections embrace all the cases in which robbery may be committed; and whether that robbery relates to the rights of property or the rights of persons. As in the 3rd section, whatever may be the subject of property, if stolen, is declared piracy, for which, upon conviction, the offender shall suffer death; so in the 4th and 5th sections, the right of personal freedom is protected; and he who violates it by force or fraud, in whatever stage of the transaction he is detected, is a pirate, and upon conviction will suffer death. Such crimes are piracies, because robberies. Robberies, because, by force, fraud, or indirect practices they deprive the negro or mulatto of his right to freedom; that right to freedom being a presumption upon which the court is to act, when the servitude recognized by the constitution and laws of the United States are proved not to exist in the particular case. But if that presumption is repelled by proof of antecedent servitude, then the intent to make a slave or rob him of his right to freedom cannot be sustained; for he cannot be robbed of that which he did not possess. And the possession of the negro or mulatto under such circumstances would be a violation, according to the circumstances of some of the laws passed for the suppression of the slave trade; but it is not a piracy nor a violation of the act of 1820.

This exposition of my construction of the act of 1820, and of the true nature of the crimes which it declares, has been given in explanation of the opinion I hold as to the jurisdiction which the act confers. I have not elaborated nor said more than seemed necessary for the apprehension of that view of the law which I have adopted. But it would not be proper to leave it without applying a few tests, which, perhaps, will serve to show how far the construction which I have given is proper. I have said that the object of the law was to protect in his right to freedom, a negro or mulatto, by force or fraud, taken with the intent to make him a slave. And that every one of the offences mentioned in the 4th and 5th sections, which are but successive stages in the same transaction, relate to the negro or mulatto so taken. If this is not so,—if the several offences as set forth in the 4th and 5th sections [2] relate only to a negro or mu-

[2] [The 4th and 5th sections of the act of May 15, 1820 (Act 1820, c. 113; 3 Stat. 600), are as follows:

[Sec. 4. If any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave-trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for or in behalf of any citizen or citizens of the United States, shall land, from any such ship or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring, or carry, or shall receive such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district wherein he may be brought or found, shall suffer death.

[Sec. 5. If any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave-trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for or in behalf of any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel, any negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall, on the high seas, or anywhere on tide-water, transfer or deliver over, to any other ship or vessel, any negro or mulatto,

latto not held to servitude by the laws of either of the states or territories of the United States, and have no reference to the mode in which the possession of such a negro or mulatto was acquired,—then the master of a vessel who purchases a negro or mulatto in Brazil or Cuba, and lands him upon the shore of the United States, or upon another part of the coast of Brazil or Cuba, with intent to sell him again, is a pirate. If it could be necessary to show that this was not the piracy which the act contemplated, it is but necessary to bear in mind that if a passenger shall land, with intent to sell, one hundred negros or mulattos, purchased by him in Cuba, he is subject to fine and imprisonment. But if the captain of the vessel purchases but one, and lands him with the same intent, he would be considered a pirate and must suffer death. The piracy would then not consist in the wrong done to the negro or mulatto; nor in the landing or selling him; but in the fact that in the latter case it was done by the master or one of the crew of the vessel. Surely the statement of such a consequence would be of itself sufficient to show that the construction which leads to it must be alike irrational and illegal. But the act itself shows that it is not merely landing with intent to sell the negro or mulatto, which is an offence declared by it to be piracy for one of the offences specially described is transferring or delivering over to any other ship or vessel such negro or mulatto, with intent to make him a slave. This, done by the crew or ship's company, or any one or more of them is declared piracy; but it is nowhere declared by the act that anything done on board of the vessel to which the negro or mulatto is transferred is piracy; nor will it do to say that the crime is as much in the vessel to which the negro or mulatto has been transferred, as in that from which he was transferred. The answer is given by Chief Justice Marshall: "It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable imitation, which it would be unsafe to consider as precedents favoring a general rule for other cases." That landing or delivering on shore to which the act of 1820 relates must be connected with the antecedent circumstances of the case; otherwise, as readily seen, it would convert mere misdemeanors into crimes of the darkest hue. Under the act of 1820, it is a landing or delivering on shore "from on board any such ship or vessel." What is "such ship or vessel"? It must first be referred to the preceding part of the 5th section, and then understood as the ship or vessel on board of which is confined or detained a negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make him a slave. The same intent which makes, in the 4th section, the seizure or decoy a piracy; the intent to rob of the right to freedom. But this intent, made essential is seen under certain circumstances, in the 5th section which necessarily connect it with the 4th section, and make the two sections comprise all stages and phases of the same transaction. Whence came this negro or mulatto who, on board of this ship or vessel, is confined or detained, or treated in any of the modes described in this section? I cannot doubt that it is the negro or mulatto of whom unlawful or piratical possession was obtained, in the modes described in the 4th section. Landing or delivering on shore, with intent to sell or having sold, a negro or mulatto, not held to service by the laws of either of the states or territories of the United States, is an offence under the laws of the United States, as it is under the laws of many of the states; but it is not the crime of piracy under the act of the 15th May, 1820. The landing or delivering on shore, which is made piracy under the act of 1820, must be of a negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to sell or having sold him as a slave; and the ship or vessel from on board of which he is so landed or delivered on shore, is that ship or vessel in which he has been kept forcibly confined and detained with intent to make him a slave: and this intent to make him a slave, is the intent to deprive him of his right of personal liberty, to rob him of his freedom; and such intent can only be affirmed of an antecedent right to freedom. This forcibly confining and detaining on board of such ship or vessel, such negro or mulatto, with such intent, is, although an independent act in itself, yet a stage or condition of the crime, which commenced with the seizure or decoy of the negro or mulatto, on the foreign coast. Landing or delivering on shore, in the 5th section, is connected with antecedent circumstances in the 5th section, all of which are essential in establishing the crimes enumerated in it; and all of which repel the idea of congress, in the creation of these crimes, having intended or considered, that this, or any other of them, was to be regarded as a crime committed within the

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not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto as a slave, such citizen or person shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death.]

limits of a state; therefore to be tried in the courts of the United States for that state; and therefore inconsistent with and repugnant to the plain meaning and manifest intention of congress, in its declaration of the place or places where jurisdiction should be exercised in cases under this act. Such is my construction of the act of 1820. I consider it wholly distinct from that portion of the legislation of the states passed for the suppression of the slave trade.

If the act of 1820 is a part of the slave trade legislation of the United States, there are many portions of that legislation, with which it is in conflict, and which, therefore, it must repeal. But no principle which governs a repeal by implication, will sanction it here. It is only by assuming that it is a part of the legislation of the United States, passed for the suppression of the slave trade, that you produce an inconsistency between it and the slave trade laws of the United States. Regarding the various acts passed from 1794 to 1819, as intended for the suppression of trade, traffic, business or employment, in slaves; which is not permitted; and the act of 1820 as intended to suppress acts of piracy, consisting in the unlawful possession of negros, with the intent to make slaves of those, by force or fraud, who are entitled to their freedom; no inconsistency is created between any of these acts. If the most complete evidence should be sought of the difference between legislation which makes the slave trade, as a trade, piracy, and the legislation of congress in the act of 1820, it would be found in a comparison of the act of 1820 with the act of the British parliament, the 9th section of 5 Geo. IV. c. 113, in which the slave trade is made piracy. 5 Geo. IV. c. 113, in the 9th section, plainly sets forth the offence; makes all persons who violate it liable to its penalties; and in the 10th section includes and makes subject to the penalties declared in the 9th section, the captain, mate, surgeon and supercargo, if they know that the vessel is employed or intended so to be, in violation of the act. But the 11th section makes the petty officers, seamen, marines or servants, liable only for a misdemeanor. In another circumstance the difference is still more remarkable. While in the United States, by the most forced construction, it is sought to make the act of 1820 apply to the slave trade as a trade, and extend its penalties to those who cannot be brought within its provisions, the British parliament in 1 Vict. c. 91, abolished the punishment of death, which it enacted in 5 Geo. IV., and substituted therefor other punishment. It declared death as the penalty for being engaged in the slave trade in 1824; it repealed that penalty in 1837. I have already shown that if jurisdiction is claimed in the courts of the United States for Georgia, because, as is said, the crime charged against the accused was committed within the limits of that state, that the statement itself would exclude jurisdiction because the act of 1820 creates no crime which could be committed within the limits of the state.

I have now examined the act, for the purpose of showing, from the nature of the crimes it creates, that they are not such as can be committed within the limits of a state. I come now to the consideration of the motion made in this case to enter a nolle prosequi in the proceedings against William C. Corrie. By the act of congress of 1789, it is directed that there shall be appointed in each district, "a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office; whose duty it shall be to prosecute in such district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned except before the supreme court in the district in which that court shall be holden." And this law continues to be the source from which this officer derives the knowledge of his duties. The prosecution of offenders is thus made the special duty of this officer. His control over and direction of cases thus committed to his charge is exclusive, until they come under the control of the court. In that stage of the case it becomes subject to judicial power, and this is vested in certain courts, according to article 3, § 1, of the constitution. But although the case may have come under the control of the judicial power, yet, practically, the discretion of the district attorney is exercised in relation to it and its discontinuance, until the trial has commenced, as freely as before. This difference is, however, always recognized, that after it has become subject to judicial control, the district attorney then acts with the express assent or tacit acquiescence of the court.

It would be difficult to describe the relation which the court and the prosecuting officer bear to each other with more exactness than was done by Mr. Taney, now the chief justice, when attorney-general for the United States: "This power (said he, referring to the nolle prosequi) over criminal prosecution has been familiarly exercised by the attorneys for the United States, and also by the attorneys for the several states prosecuting in behalf of the public. It is true that in all such cases, they uniformly act, I believe, with the approbation of the court; but this approbation is commonly asked for by the attorney for his own protection. It is not necessary in order to give him the authority, but it is his justification for the manner in which his authority is used, and since he cannot consult his client (the United States) the sanction of the court is regarded as sufficient evidence that he exercised his power honestly and discreetly. Hence he,

invariably asks for it. It is defence to the public, if his conduct in that respect should be impeached; for if any doubts rested in the mind of the court of the fairness and propriety of the measure, they would not suffer the entry to be made." Judge Conklin, after stating the most usual causes for which a nolle prosequi is entered, as laid down by Mr. Chitty, adds: "It is supposed the several district attorneys possess this power. Probably before exercising it, they would in general consider it advisable to state the circumstances of the case informally to the court, for the purpose of obtaining its assent, tacit or expressed, to the propriety of the step." Page 417. And Judge McLeans says it is the undoubted right of the prosecuting attorney before the trial is gone into, under leave of the court, to enter a nolle prosequi on any indictment. Although not so declared by any law, it has been regarded as proper, that the president of the United States should, at least in such public prosecutions as affected the domestic tranquility or foreign relations of the United States, be considered as entitled by his suggestion to the prosecuting officer to justify their abandonment. And this upon consideration of public policy. The president has, it is true, the power to pardon and reprieve; but it is not to this source that the practice must be referred. He swears to take care that the laws shall be faithfully executed. And this binds him to assist in their execution, by all the modes which he can command. But this power, so to speak of it, in the president, in prosecutions where consideration of public policy lead him to interfere by suggesting or directing their abandonment, is not and cannot be enlarged, or confounded with any right, to interfere with the course of legal proceedings; and least of all to exercise it so that it will directly or indirectly overrule the judgment of a court; or change the place at which the trial of a crime or offence shall be had. And, although no one will regard without great respect any suggestion which may come from the president of the United States; yet whenever that suggestion is presented in a form in which it shall interfere with the exercise of judicial power, except in cases of pardon and reprieve, it should not be heeded. It is easy to understand why in public prosecutions which involve domestic tranquility, or the preservation of foreign relations, the opinion of the president of the United States should be potential, if not conclusive, in directing the conduct of the prosecuting officer. But it is so because of the respect paid to the opinions of one occupying that high position, in relation to matters with which he may be presumed to be intimately acquainted; and, therefore, a prosecuting officer may very properly consider that, in the judgment of the president of the United States, a guide is furnished him which he may safely and properly follow. But this is not because any law of the land so declares it; for if the prosecuting officer shall feel that his duty requires him not to abandon a prosecution, there is no law which forces him to do so; nor would the wish of the president be heard in opposition to his proceeding. After the prosecuting officer had discharged his duty, if conviction followed, the president may reprieve or pardon, remit the forfeiture or release the penalty. The fact that the power of the president to interfere in criminal prosecutions is derived from the obligation to see that the laws are properly executed, and that, in matters which involve internal or external tranquility, his experience may well be regarded as the safest guide, because in these respects of his greater knowledge, shows that, in all cases where there is not involved a question of either internal or external quiet, the reasons which we have seen for such interference with the functions of prosecuting officers wholly cease. Except so far as it may be considered proper, because in all cases, respectful and safe, to give great weight to the suggestions of the president, I doubt the propriety of imposing any higher obligation on the prosecuting officer. For, after all, it is but adding to the prescribed legal duties of that officer, the obligation to obey the directions of the president. Where that direction leads the prosecuting officer to abandon a prosecution, it generally commends itself to our approbation, because it seems an exercise of mercy.

But it should be remembered, that a general power, derived in the manner we have seen, to interfere with public prosecutions, and direct their abandonment, would, in like manner, justify the president in requiring the prosecuting officer to institute and conduct prosecutions, in cases where the judgment of that officer would suggest a contrary course. Such a power existing without the color of law, in derogation of law, so far as it would impose on the prosecuting officer a control unknown to the law, and, by the imposition of that control, extinguish his responsibility to the law, and substitute therefor a dependence on the president, would be in itself so full of mischief, and so much at war with the system of direct responsibility to the country intended to be imposed on all public officers, through the laws which define their duties, that it only requires to be stated, to be fully understood. Of this, however, there can be no doubt. The right of the president to interfere in criminal cases, and cause the abandonment of prosecutions, is exercised only for the purpose of putting an end to such prosecution and discharging the accused. It has never been claimed, never exercised, never permitted, for the purpose of changing the proceedings; still less for the purpose of changing the place of the trial of the accused. So jealous is the law of the United States in this regard, that, as we have seen, it requires the place of trial to

have been previously ascertained by law. And no principle is better established than that where a right to exercise jurisdiction has attached in one place, it excludes jurisdiction in every other place. This principle, declared in the case of Ex parte Bollman and Swartwout, by Chief Justice Marshall, has never been questioned. And if a proceeding operating directly to subvert this principle would find no favor with a court, it would have no better recommendation by tending indirectly to accomplish the same result. It is well to remember that the unquestioned exercise of any power in the course of time is claimed as a right; and precedents, however mischievous, acquire the force of laws. That which in the hands of one ruler, considered as the source of danger, would be regarded as imaginary; in the hands of another as a tyranny is felt to be real. For all the purposes of government, I know not any powers, but such as the law confers; and I know not any administration of these powers but such as the law appoints. Convenience; a proper regard for the opinions of those who have superior opportunities for obtaining information; and confidence in the judgment of those whose position entitles them to it, may well and properly lead one to seek in these guides for his conduct or aids to a conclusion. But with all this, where an officer is created by law, and his functions are declared by law, his ultimate responsibility is to the law.

It will be seen with what pertinency I am led to the consideration of the relations of these officers when in the argument it is said that the attorney of the United States for the state of South Carolina may enter a nolle prosequi without leave of the court; but that his discretion in doing so is controlled by the president. I speak of the president because I am bound to suppose that the directions said to have been given by the attorney-general have the sanction of the president. It is true that the court has no power to command the prosecuting officer to proceed in a criminal case if he is unwilling to do so. It is equally true that when the court permits an entry to be made in its minutes of the entry of a nolle prosequi it adopts and justifies that proceeding. If then, the court cannot refuse its leave to the entry of a nolle prosequi, it cannot refuse its assent or withhold its justification to the prosecuting officer, however desirous or even bound it may be to do so. That to answer all the purposes for which a nolle prosequi is intended, it should be entered in the minutes of the court; that it cannot be entered in these minutes without the assent of a judge; would seem to lead to no other conclusion than that a motion to enter it must be addressed to the discretion of the court. In this case I refuse assent to an entry of it. It is not made in the exercise of that discretion of the attorney of the United States, which is necessary, if not indispensable with me, as the evidence of its propriety. It is not made for the purpose either of abandoning a prosecution, for any of the various causes which suggest that course; but to prepare the way for other proceedings, which, in their practical operation, overrule and set aside a judgment of the court. Such a proceeding, operating for such purposes, has nothing to recommend it to me, nor can it have a place in the minutes of this court. I have thus fairly, and I hope plainly, set forth the grounds upon which all of the proceedings in this court have rested. The opinion which I have given as to the true construction of the act of 15th May, 1820, is the same which was by me made known to those who had a right to be informed of it, before this case in which it is now expressed had any existence. When in Columbia, at the term of the United States court, I delivered an opinion upon the general question of the right in congress to declare the slave-trade piracy; it was not intended then to decide that the act of the 15th May, 1820, was the exercise of that right. It was considered proper not at that time, to signify a difference in the court as to the construction of that act. But now the necessity does exist, because the question of jurisdiction involves that of the nature of the offence, and that involves the construction of the act. I think now, as I did then, that congress had the power, but that the power has not been exercised by the act of the 15th May, 1820. If the slave trade, regarding it as a trade or business, is to be declared piracy, the act is yet to be passed by congress. If the power to congress was granted at a time and under circumstances which are so wholly different from the time in which we live and the circumstances which surround us, as to show that the grant of it without restriction was improvident, it is for the states by whom the grant of power was made, to resume it or require modifications of its exercise.

Case No. 14,870.

UNITED STATES v. CORWIN et al.

[1 Bond, 149.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1857.

OFFICIAL BOND—ACTION ON—CREDITS—ACCOUNTING OFFICERS—EVIDENCE—TREASURY TRANSCRIPTS.

1. Treasury transcripts, showing the state of accounts as between the government and a disbursing officer of the United States, are prima facie evidence, and admissible as such in a suit against the officer or his sureties on an official bond.

2. The act of congress provides that in a suit on such bond no item of credit shall be allowed, unless it has previously been submitted to and disallowed by the proper accounting officers.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

3. But it is competent for the officer or his sureties to prove that a disputed item of credit claimed had been thus presented and disallowed, although the treasury transcript does not show such presentation and rejection.

4. Where the evidence proves, to the satisfaction of a jury, in a suit on the bond of a disbursing officer, that money, reasonable in amount, was paid by such officer, and services were rendered by him in good faith, in the proper discharge of his official duties, such payment and service, if not prohibited by law, may be allowed as credits.

[Suit by the United States against R. C. Corwin and others to recover a shortage in the account of Henry Harvey, a sub-Indian agent, upon whose bond the defendants were sureties.]

Stanley Matthews, U. S. Dist. Atty.
Corwin & Warden, for defendants.

LEAVITT, District Judge (charging jury). This is a suit against the defendants, as sureties in the official bond of Henry Harvey, a sub-Indian agent of the United States for the Osage Indians. The condition of the bond is, in substance, that Harvey shall faithfully perform all his duties as such sub-Indian agent, and faithfully account for all moneys received by him, and all property which shall come officially into his possession. Transcripts from the books of the treasury department have been offered in evidence, purporting to show the moneys advanced by the United States to the subagent, and showing a nominal balance against him of $13,553. Although, by act of congress, these treasury transcripts are made legal evidence for the government, they are not conclusive as to the amount due, and it is the right of the principal and the sureties, in an official bond, to prove that there are credits which do not appear in the account, and which ought justly to be allowed. And in the present case, it is admitted by the district attorney that the sub-Indian agent is entitled to large items of credit, reducing the actual claim of the government to the sum of $1,545.56, for which he claims a verdict. This, then, is the amount in controversy, and it will be for the jury to decide whether the defendants in this suit are liable for the sum claimed, or any other amount. And the decision of this issue must depend on the evidence in the case For the government, although the party plaintiff, occupies a footing of perfect equality with a citizen as to the admissibility and force and effect of evidence, except in cases where, from considerations of public policy, immunities and privileges may have been specially conferred upon it by law, it has been found necessary, for the prevention of frauds on the treasury, to provide by law, that in any suit by the government for a balance due on an official bond, no credit shall be allowed, unless the items claimed as credits have been previously presented to the proper accounting officer, and have been by him disallowed in whole or in part. The only exceptions in the law are, where the officer claiming the credits was absent in a foreign country, or prevented by some other unavoidable cause from their presentation. But any items of credit, which do not appear in the treasury statement, and which have been presented and disallowed by the accounting officer, may be proved by the party charged; and if just and legal, will be admitted as proper credits. And, with a commendable spirit of liberality, the courts of the United States, in controversies between the government and the sureties in an official bond, have held that where an item of expenditure, or an act of official service, was fairly within the range of the legal duties and obligations of an officer, he and his sureties are entitled to a just allowance. But, in the strictness required by law in passing on the claims of an officer or his sureties, there is a necessity that this limitation should be strictly observed.

It is not proposed to detain the jury by a critical reference to the items of the treasury statements in this case. This document will be with the jury, and, with other evidence adduced, will be considered by them. There are some disputed items in controversy. Without referring to these in detail, it will be sufficient to state the following general rules for the guidance of the jury in forming their verdict: First. Every item of credit claimed by Harvey, as Indian subagent, which has been presented to the accounting officer of the treasury department, and by him rejected, if proved to the satisfaction of the jury to be just and equitable, ought to be allowed. Second. If the credit claimed is for money paid by the subagent, or for a service rendered by him in pursuance of law, or instructions from the proper department sanctioned by law, he and his sureties are entitled to its allowance. Third. If the jury are satisfied that the money paid by the officer, or the service rendered, was in good faith and the charge reasonable in amount, and that the payments or service pertained properly to his official duties, and were not prohibited by law, they may be allowed as credits.

Applying these rules to the disputed items of the defendant's claim, it will be for the jury to say what shall be allowed and what rejected. They will carefully examine and weigh the evidence before them, and return such a verdict as in their judgment shall be just and equitable.

The jury returned a verdict for the United States for the amount claimed as due from the subagent.

Case No. 14,871.

UNITED STATES v. CORWINE et al.

[1 Bond, 339;[1] 1 Wkly. Law Gaz. 413.]

Circuit Court, S. D. Ohio. April Term, 1860.

PRINCIPAL AND SURETY—GOVERNMENT CONTRACT—DISCHARGE OF SURETIES—CHANGE OF CONTRACT.

1. The sureties upon a bond, wherein the principals have obligated themselves to the United States to open a ship canal three hundred feet in width and twenty feet in depth, and keep it open the same width and depth for four and a half years from the time of the acceptance of the work by the secretary of war, are discharged from all liability on the same if the principals do not perform their agreement for opening the channel according to its terms, and the government accepts the work with a channel only eighteen feet in depth instead of twenty, as required by the contract.

2. A surety is not bound beyond the terms of his contract, and his liability can not be extended or enlarged by implication, and any change in terms, unless expressly assented to by him, releases him from his legal responsibility.

[Cited in U S v. Case, Case No. 14,743.]

At law.

Stanley Matthews, for the United States.

R. M. Corwine, for defendants.

LEAVITT, District Judge. This is an action of debt against Richard M. Corwine, John A. Corwine, and Wm. Wiswell, Jr., as the sureties of Waldo Putnam Craig and William Russell Righter. There is a general demurrer to the declaration on which the questions submitted to the court are presented. The declaration avers, that on November 13, 1856, the defendants executed a bond to the United States, in the penalty of $75,000, to avoid on the condition that the said Craig and Righter should faithfully fulfill their written contract of the same date, whereby they agreed to open a straight ship channel at the outlet of the Mississippi river, known as the Pass de l'Outre, to a depth of twenty feet, throughout a well-defined width of three hundred feet, to the deep water of the Gulf of Mexico, and keep the same open to the same width and depth for the period of four and a half years from the time of the completion and acceptance of the work. It is further averred, that by the said contract Craig and Righter were to finish the work within fifteen months from the said November 13, 1856, and that upon its completion to the satisfaction of the secretary of war, the United States was to pay them $125,000. The declaration also avers, that in consideration of the agreement of said Craig and Righter to keep open the said channel as above stated, the United States agreed to pay them $36,000 for the period of four and a half years, and at the same rate for the further time they should keep said channel open, until the appropriation for that purpose should be exhausted. It is also recited as a part of said contract, that in order to determine whether the agreement to keep open the said channel had been complied with, the secretary of war should appoint an officer or officers to examine the work, at such time as he might deem necessary; and that, if the secretary should be satisfied from the report of such examinations that the channel had been constantly maintained of the width and depth before stated, at the expiration of one-third of said period of four and a half years, eighty per cent. of one-third of the amount of the contract to keep said channel open was to be paid to said Craig and Righter, and one-third more at the expiration of two-thirds of the said time, and the balance at the end of said four and a half years. The declaration then avers that Craig and Righter proceeded to execute said contract to open said channel; and that on September 10, 1858, they had opened the same at the width of three hundred feet, and with the depth of eighteen feet, and that on that day the work was accepted by the secretary of war, and the contract price of $125,000 was then paid in full. The breach of the condition of the bond, as assigned, is that Craig and Righter, since the said September 10, 1858, have not kept the said channel open, with a width of three hundred feet, and the depth of eighteen feet, and that thereby an action has accrued against the defendants, as the sureties of Craig and Righter. The second count of the declaration is upon a bond which recites a contract identical with that set forth in the first, with the exception that it refers to the opening of another channel at the mouth of the Mississippi. There is, of course, no occasion for the separate consideration of the two counts.

It is not my purpose to examine all the points of exception to the declaration urged in support of the demurrer. There is one, which, in my judgment, is conclusive as to the plaintiff's right to recover against these defendants on the cause of action set out in the declaration. The point of this exception may be stated thus: That the declaration shows on its face that Craig and Righter did not perform their agreement for opening the channel, according to its terms, and that the government accepted the work with a channel of only eighteen feet in depth, instead of twenty, as required by the contract, without any averment that the defendants had any knowledge of, or assented to such modification. On this ground, it is insisted the sureties in the bond are relieved from all liability and that this action can not be maintained against them. The contract, as has been stated, obligated Craig and Righter to make the channel of a specified width and depth, and to keep it open, of that width and depth, for four and a half years from the time of the acceptance of the work by the secretary of war. The defendants became their sureties in a bond conditioned for the faithful performance of these stipulations. The work was accepted by the secretary of war and paid for in full, as if completed according to the contract. The

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government had a right to forego the terms of the contract, in regard to the depth of the channel, and to accept one of less depth. In doing this, the obligation of the contract as to the dimensions of the channel was at an end, both as to the principals and the sureties, and the government was estopped from asserting any claim for a violation of that part of the contract. It was, in effect, the substitution of a new contract for that originally entered into by the parties. But it is claimed that the defendants, as sureties, are liable upon the averment in the declaration that Craig and Righter failed to keep open the channel as accepted by the United States. There seems to be an incongruity between the contract set out in the declaration and the averment of its breach. In other words, the declaration avers a breach of a contract, for the performance of which these defendants contracted no obligation as sureties. Their undertaking was, that a channel twenty feet in depth, made in all respects according to the requirement of the contract, should be kept open for a specified time. The United States waived that part of the contract which specified the depth of the channel, and accepted the work with a channel of a less depth. The sureties are in no sense parties to this arrangement, and therefore not bound by it.

There is no principle better settled than that a surety is not bound beyond the terms of his contract, and that his liability can not be extended or enlarged by implication; and any change in its terms, unless expressly assented to by him, releases him from his legal responsibility. This is famaliar law—so long and so well settled that it is not necessary to cite the numerous cases by which it is sustained. Its application to the present case is so apparent, as not to admit of doubt or controversy. As already stated, these defendants as sureties, guarantied that Craig and Righter should maintain a channel of a specified depth. The bond to which they were parties, though executed at the same date of the execution of the contract, could not take effect, so far as it related to keeping the channel open, until the channel was excavated as required by the contract. The averment of the declaration, however, is that such a channel has not been made, and was not insisted on by the government. It follows as an inevitable conclusion, that the condition on which alone the sureties became bound for the maintenance or continuance of the channel, and on which their obligation was to attach, did not occur. There never was a channel of twenty feet depth, and their undertaking to keep it open was never operative, and is of no obligation on them. The contract provided that the work should be inspected by an officer to be appointed by the secretary of war; and if it appeared from his report "that the work has been properly executed, and that a straight channel of the above width and depth actually exists," it was to be paid for; but if it should be found "that the work had not been completed agreeably to the contract," the contractors were to receive no pay for what they had done. It is clear, therefore, that the acceptance of the work by the government before a channel was opened, as required by the contract, left nothing on which the guaranty of the sureties could operate.

This view would seem to be decisive of the question raised on this demurrer, and it is not a material inquiry whether the interference of the government, and its acceptance of the work not executed according to the contract, could affect, injuriously or otherwise, the interests of the sureties. The only ground on which it is claimed that the sureties are liable is, that the acceptance of the work in its incomplete state has not placed them in any worse condition than if the contract had been strictly complied with, and that their liability on their undertaking that the channel should be kept open, continues unaffected by the act of the government. The first reply to this assumption is, that any change in the terms or obligation of a surety, without his consent, releases him from liability. And it is well settled, that this principle applies, even in cases where a modification of the contract is favorable to the sureties. But in this case, if it be conceded that the government had a right to waive a strict performance of this contract on the part of Craig and Righter, and to insist on the continued legal liability of the sureties, for the reason that they were not injured by the act of the government, the facts will not sustain the position. Their obligation was, that the contractors should keep open a channel of the depth of twenty feet. Now, it needs no argument to prove that a channel of only eighteen feet in depth would be much more liable to fill up or become obstructed than if it were twenty feet deep. The pressure of the water being so much greater in the latter case, the probabilities that the channel would fill up would be greatly lessened; in a word, there is a palpable difference in an undertaking to maintain an open channel made to the depth of twenty feet, and one but eighteen feet deep. I will only add, that while, in my judgment, the law of the case is with these defendants, and am clear that this action can not be maintained against them, I am equally clear that no claim of justice is invaded by holding them to be exempt from liability. Under the circumstances of the case, an opposite conclusion would operate inequitably on them. There was a moral obligation on the government, to protect the rights of these sureties as far as practicable, without a sacrifice of its own interest. Under the contract, the government was not bound to pay anything for the work, unless it was completed according to the terms of the contract. If, without consulting the sureties, it was deemed expedient to pay the full contract price for the excavation of a channel but partially made, they are fully justified in asserting their exemption from liability. And it would be a most rigorous appli-

cation of law that would enforce the payment of the penalty of their bond. But without further discussion of the points presented on this demurrer, I am led unhesitatingly to the conclusion that it must be sustained.

Case No. 14,872.

UNITED STATES v. COTTINGHAM.

[2 Blatchf. 470.] [1]

Circuit Court, N. D. New York. Oct. 20, 1852.

JURY—PEREMPTORY CHALLENGES—WHEN ALLOWED—EMBEZZLEMENT FROM MAIL—DECOY LETTER.

1. Peremptory challenges to jurors are not allowed in the courts of the United States in any other than capital cases, even though they are allowed in other cases by the state law.

[Cited in U. S. v. Randall, Case No. 16,118; U. S. v. Coppersmith, 4 Fed. 199.]

2. A decoy-letter, containing money, mailed for the purpose of entrapping a clerk in a post-office, who opens it and takes the money, is within the 21st section of the act of March 3, 1825 (4 Stat. 107).

[Cited in U. S. v. Whittier, Case No. 16,688; U. S. v. Rapp, 30 Fed. 822; U. S. v. Wight, 38 Fed. 109; Walster v. U. S., 42 Fed. 896; U. S. v. Grimm, 50 Fed. 530.]

This was an indictment against [George Cottingham] a clerk in the post office at Albany, New-York, under the 21st section of the act of March 3, 1825 (4 Stat. 107), for opening a letter and stealing money therefrom. The punishment fixed by law for the offence was imprisonment for not less than ten nor more than twenty-one years. On the trial, the counsel for the prisoner claimed the right to challenge peremptorily twenty of the jurors, under the provisions of the 2d section of the state statute (2 Rev. St. 734, § 9), which is as follows: "Every person arraigned and put on trial for any offence punishable with death, or with imprisonment in a state prison ten years or any longer time, shall be entitled to challenge peremptorily twenty of the persons drawn as jurors for such trial, and no more." The letter containing money, which it was proved the prisoner had opened, and from which he had taken the money, was a decoy-letter, prepared and mailed by an officer of the government for the purpose of entrapping the prisoner. The counsel for the prisoner raised the objection that such a letter was not within the act.

James R. Lawrence, U. S. Dist. Atty.
Deodatus Wright, for prisoner.

THE COURT decided that the prisoner had no right to any of the peremptory challenges claimed, because such challenges were not allowed at common law in any other than capital cases. See note to U. S. v. Reed [Case No. 16,134.]

It also charged the jury that the purpose for which the letter from which the money was taken was mailed, was not a question under the act.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

Case No. 14,873.

UNITED STATES v. COTTOM.

[1 Cranch, C. C. 55.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

CRIMINAL PROCEDURE—CAPIAS—TRIAL—ARGUMENT OF COUNSEL.

1. A capias may be issued as the first process against a person for unlawful gaming.

2. The court will not suffer counsel in a criminal prosecution to argue to the jury, a point of law which has been decided by the court.

[Cited in Stettinius v. U. S., Case No. 13,387.]

Indictment for gaming, contrary to the act of Virginia. A capias had issued upon the indictment, as the first process.

Mr. Swann, for defendant, moved to quash it, as being illegal and oppressive. But THE COURT overruled the motion.

Mr. Taylor began to address the jury on the points of law heretofore decided by the court, that the offence was not committed within the jurisdiction of the court, being before the first Monday of December, 1800; and that an indictment is not the proper and legal process in such cases.

THE COURT stopped him, and said they had before prevented Mr. Jones from arguing points of law to the jury, which the court had decided against him, (see Virginia v. Zimmerman [Case No. 16,968]), and they had not altered their opinion on that subject.

Mr. Jones, for defendant, tendered a bill of exceptions.

Case No. 14,874.

UNITED STATES v. COUCH.

[5 Hunt, Mer. Mag. 168.]

Circuit Court, S. D. New York. April Term, 1841.

INSOLVENCY—PROOF—CLAIMS OF UNITED STATES—SUIT TO ENFORCE PRIORITY—PARTIES.

[1. A bill by the United States to enforce a preference out of the estate of its insolvent debtor, who has made an assignment, cannot be maintained against one of its debtors, without making his assignee party.]

[2. The assignment of firm property and the property of one only of the partners does not establish insolvency of the firm, which will entitle the United States, a creditor of the firm, to maintain a bill to enforce the priority given it by Act March 2, 1799, § 65, in the estate of an insolvent debtor.]

[In equity. Suit by the United States against William Couch, survivor, etc., for an accounting in regard to certain property alleged to belong to a judgment debtor of the government, and to have such property ap-

[1] [Reported by Hon. William Cranch, Chief Judge.]

plied to the payment of such judgment in preference to other creditors.]

The prayer of the bill demanded an account in respect to effects and moneys alleged to have belonged to the late firm of Castro & Henriquez, and that the right of the plaintiff thereto, in preference to others, might be decreed, and the amount applied on outstanding judgments and customhouse bonds in favor of the United States against Castro & Henriquez. The bill presented this state of facts: That Castro and Henriquez, prior to April, 1823, had been in partnership, carrying on the distillery business in this city; and, in connection with that business, imported merchandise, and became indebted to the United States on customhouse bonds to a large amount. On the 20th April, 1823, the firm stopped payment, then being indebted to the United States on duty bonds for over $74,000. Henriquez was at that time in Europe. The business of the concern was managed by Castro, who also had a full power of attorney from Henriquez. On the day of their failure, or the day following, Castro made an assignment of the property of the firm and that of himself to Lewis A. Brunell, and immediately departed from New York, without the knowledge of his creditors. On the same day, proceedings were taken under the state act against Castro & Henriquez, as absconding or absent debtors, by the defendant Couch and his then partner, Stebbins, and others of their creditors. A few days thereafter, Castro returned to the city, and his assignment to Brunell being supposed imperfect, or insufficient in law, he resumed and cancelled it, and executed another, prepared under the advice of counsel, in which he assigned all the partnership estate, and all his individual estate, to Brunell, for the payment of the debts of the partnership, giving preference to the debts due the United States. That prior to the failure, the firm had consigned to Stebbins & Couch large quantities of distilled spirits for sale, some of which had been sold on credit, and some remained unsold on the day of their failure, but has been since sold, and the proceeds realized, which are now held by the defendant Couch, survivor of Stebbins & Couch. That after the assignment, Brunell, the assignee, placed like property, belonging to Castro & Henriquez, in the hands of Stebbins & Couch, the avails of which defendant has received and yet retains; and, also, that Brunell carried on the distillery of Castro & Henriquez, with their stock assigned him, and consigned the liquors to Stebbins & Couch for sale, and that the proceeds of such sale are retained by the defendant. The bill also avers that judgments have been recovered by the United States on the customhouse bonds, and executions thereon have been returned unsatisfied, to the amount of $24,000, which Brunell is unable to satisfy; and it charges that the United States are entitled to have such proceeds (realized by Stebbins & Couch) applied to the satisfaction of the balance. The bill was filed April, 1832. Couch filed his answer January, 1833. The cause was brought to hearing December, 1840.

Butler & Paine, for the United States.
D. Lord, Jr., for defendant.

Before THOMPSON, Circuit Justice, and BETTS, District Judge.

THE COURT remarked that there might be a serious difficulty, in the present posture of the case, in giving the plaintiff the relief sought, if the merits were beyond all question on that side. The action rests upon the authority of U. S. v. Howland, 4 Wheat. [17 U. S.] 108, and in its institution conformed to that precedent; but has since varied from it, by discharging the assignee from the suit. That the original debtors (Castro & Henriquez), or their assignee, seemed to be indispensable parties to a bill of this description, not only for the purpose of discharging the debtor from his liabilities to those from whom he received the funds, and to authorize the institution of a new cestui que trust in their place; but, also, because an accounting is called for, and the equity of the United States can only intercept what is due the party directly responsible to them, on a just amount taken between such party and his debtor. The assignee ought, therefore, to have been retained a party to the taking of such account, to enable the court to decree definitely upon the rights of all interested in the subject-matter. This formal difficulty might be obviated if the case, as now disclosed, established any right in the United States upon the merits, unless the staleness of the claim and the extraordinary delays in prosecuting it should be regarded as outweighing any equity on the part of the United States to amend the proceedings. The unvaried construction of the 65th section of the act of March 2, 1799, settles this point, that the priority therein given the United States, to be paid out of the estate of an insolvent debtor, takes effect only when the insolvency is established by an assignment of all his property, either by his own act, or by act of law, and when such assignment is carried into execution by the assignee. [U. S. v. Howland] 4 Wheat. [17 U. S.] 108; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386; [Brent v. Bank of Washington] 10 Pet. [35 U. S.] 597; [Beaston v. Farmers' Bank of Delaware] 12 Pet. [37 U. S.] 102; [U. S. v. Hove] 3 Cranch [7 U. S.] 73; [Prince v. Bartlett] 8 Cranch [12 U. S.] 431; U. S. v. Mott [Case No. 15,826]; U. S. v. Clark [Id. 14,807]. The evidence on the part of the plaintiff is very faint upon this head, and it is in no respect aided by the answer. There is ground for implication that Brunell took control of the partnership effects as assignee, yet the evidence equally comports with his having acted merely as factor or agent, and it is not a little remarkable that no trace of the assignment among his papers,

or proof of his claim under it, could be produced, if that was the only foundation of his powers in respect to the estate and interests of Castro & Henriquez.

But independent of all questions upon the effect of this evidence, the assignment fails to establish the insolvency of the partners, because the individual property of Henriquez was not included in it. As the insolvency of one partner, or the insufficiency of their joint means to pay the partnership debts, does not necessarily prove the insolvency of the other partner, it is clear that the assignment made by Castro does not secure an entire preference or priority to the United States. The rights of the creditors of Henriquez, at least, are not displaced by it. [U. S. v. Hack] 8 Pet. [33 U. S.] 271. This is independent of the doubt that might be raised as to the sufficiency of Castro's assignment of even partnership effects, to supply proof of the insolvency of the firm. Pearpoint v. Graham [Case No. 10,877].

THE COURT further observed that, as it appeared from the answer and proofs, the attachment sued out of the state court was carried no further than the arrest of partnership property, and was discontinued within a few days, without the appointment of trustees, or any order of assignment. This initiatory arrest of property, and holding it in custody of the law to abide the decision of the proper forum, whether it shall pass to assignees, is not the proof of insolvency contemplated by the act of congress. For although it is declared that cases of insolvency mentioned therein shall be deemed to extend to cases in which the estate and effects of an absconding, concealed, or absent debtor shall have been attached by process of law (Act March 2, 1799, § 65), yet manifestly the term "attached" must be understood as having relation to the ultimate disposition of the property, and not its simple seizure; because that is often divested immediately, for the want of due grounds for the procedure; but, more especially, because the priority of the United States arises and is enforced, not that the property of their debtor has been taken from his possession, but for the reason that it is invested in some other party (assignee or executor) who has power to distribute and dispose of it. [Beaston v. Farmers' Bank], 12 Pet. [37 U. S.] 136, 137; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386. The sheriff becomes no such party by serving a process of attachment. He could not be made amenable to the United States, either by means of his possession of the property, or because he had surrendered it to the owner, or transferred it to the assignees. When the property is placed, by means of the attachment, in a situation to be distributed, the priority of the United States comes into existence, and then only, for the act renders the assignee paying any debt previous to those due to the United States answerable in his own person and estate for such debts (section 65); and this liability necessarily imports that the party charged with it had full dominion over the estate and effects of the insolvent, because he is regarded as having committed a devastavit, or misapplied funds, by paying them out in disregard of legal priorities, and not as a debtor to the United States, or subject to their action merely, by having the estate in his possession. The court accordingly ruled that neither the assignment made by Castro, nor the attachment levied on the property of the firm, proved the insolvency of Castro & Henriquez so as to enable the United States to sustain this action. It was therefore ordered that the bill be dismissed.

Case No. 14,875.

UNITED STATES v. COULTER.

[1 Cranch, C. C. 203.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

DISORDERLY HOUSE—SELLING LIQUOR TO NEGROES—SUNDAY SELLING—LICENSE.

The practice of selling spirituous liquors, in a public manner, to negroes and slaves, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes the offence of keeping a disorderly house, although the owner may have a tavern license

[Cited in State v. Crawford, 28 Kan. 733.]

Indictment for keeping a disorderly house.

Mr. Morsell, for the defendant, contended that a disorderly house is only indictable at common law as a common nuisance, and that actual disorder must be proved. Coulter had a license to keep a tavern; he is only prohibited by statute from selling on Sundays; from dealing with slaves, &c.

Mr. Jones, for the United States. A bawdy-house is indictable as a common nuisance, and yet it is not necessary to prove that any one person has been disturbed by it. The tendency to corrupt the morals makes it a common nuisance.

THE COURT. The license does not authorize the defendant to sell to slaves or negroes on a Sunday; it is therefore no justification as to those facts. The practice of selling spirituous liquors in a public manner to negroes and slaves, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes the offence of keeping a disorderly house.

Verdict guilty. Fined $10.

Case No. 14,876.

UNITED STATES ex rel. SISTERS OF CHARITY OF ST. JOSEPH v. COUNTY COURT OF OUACHITA COUNTY.

[Cited in U. S. v. Jefferson Co., Case No. 15,472. Nowhere reported; opinion not now accessible.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,877.

UNITED STATES ex rel. McKEE v. COUNTY COURT OF VERNON COUNTY.

[3 Dill. 281;[1] 2 Cent. Law J. 771; 1 N. J. Wkly. Dig. 378.]

Circuit Court, W. D Missouri. Nov., 1875.

MUNICIPAL BONDS—RIGHT OF JUDGMENT CREDITOR TO MANDAMUS—SPECIAL TAX—PRACTICE.

1. A judgment creditor of a county who has received a warrant on the treasurer which is refused payment, may have a mandamus to enforce the collection of a tax to pay such judgment, and is not bound to wait and take his turn among other warrant-holders.

[Cited in U. S. v. Johnson Co., Case No. 15,489.]

2. When the court will order a special tax against a county to pay a judgment; the practice in such cases stated.

In this case motion was made by respondent at this term to quash the alternative writ which had been issued requiring respondent to levy and cause to be collected a special tax for the payment of the relator's judgment. It seems that upon representation made by the respondent that there was money in the county treasury for the purpose, the court at the last term by mandamus ordered a warrant issued for the amount, but said warrant when presented was not paid. Township organization has been adopted by the county, and May last, the three judges of the county court went out of office and one single judge came into office to continue the court under the new law. The present mandamus was served, as well on the retiring judges as the new judge. The former made return of their departure from office, and the motion to quash was made on behalf of the single judge now constituting the court. The grounds of the motion were: (1) That it was premature, not showing failure in respondent to comply with any demand. (2) That this court has not the power to order a special tax for the purpose. In support of these positions, the township organization law of 1873 was cited by the defendant's counsel, to show the process and machinery therein provided for the management of county affairs and collection of its revenues. And it was urged that the only duty or power of the county court is to levy the tax annually in April, after proper assessment has been made; that said relator, although he has a judgment, must have his warrant endorsed by the treasurer—"no funds"—and take his turn with other creditors in succession in obtaining payment of the warrant; that this court could not create a revenue law and appoint officers and levy special taxes every time a judgment is obtained against a municipality. If this be so, it was argued that every time a physician attends a pauper, and gets a warrant for his services, he can put in motion all the machinery of the law and have a special tax levied and collected for his benefit.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Ewing & Smith, for relator.

C. G. Burton, for respondent.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge, orally rendered decision, in substance saying: We cannot go through all the maze of procedure proposed by counsel for enforcing the judgments of this court against municipal corporations. If we should adopt the views of the defendant's counsel, our judgments would be reduced to a sham and a farce. The practice in these proceedings is largely settled already in this circuit. Our ordinary course is not to require a special assessment, and levy at a special and arbitrary time, but to have the tax levied and collected with the general annual levy. Such special levy can then be made on the books and collected without much additional expense or trouble, and in the exercise of its discretion the court aims to avoid all unnecessary severity and useless costs. Some delay may thereby be occasioned to the creditor, but in theory of law, he is compensated therefor by interest. This is the method we have taken and carried out in all cases.

When we have the right to order a special levy, we do not hesitate to do so, if it becomes necessary; but if the respondent appears and gives satisfactory assurance that the requisite amount will be embraced in the general levy, and that sufficient will be appropriated therefrom by a proper order to pay the particular debt, in such case a special levy may be dispensed with. We are governed by the circumstances of each case.

In the case at bar, McKee recovered a judgment against Vernon county in November, 1874 [Case No. 8,851], whereon execution issued in December and payment was demanded. The execution was returned nulla bona. It was the duty of the county court, after what had been done by the relator, to levy a tax the following April, to pay this debt, but it did not do it. It was represented to us at the last term, that funds therefor were in the treasury, and if warrant were drawn the creditor would have a short road to obtain payment. Having received his warrant he was met with response of "no funds," and he is asked to register this warrant and wait for his turn to get his money in the order that warrants are presented. We hold that he is not required to do so.

The motion to quash is refused, and let order go for a peremptory writ on respondent to levy at the next April term, a special tax, at the time when the general annual levy is made for county purposes, to pay the judgment. The costs of the writ served on persons not officers must be paid by the relators. Ordered accordingly.

Case No. 14,877a.

UNITED STATES v. COURT.

[See Case No. 14,874.]

Case No. 14,878.

UNITED STATES v. COUSINERY et al.

[7 Ben. 251; [1] 19 Int. Rev. Rec. 125.]

District Court, S. D. New York. April, 1874.

CUSTOMS DUTIES—FINALITY OF COLLECTOR'S DECISION—APPEAL TO SECRETARY—RECOVERY OF DUTIES—CONSTITUTIONAL LAW.

1. C. & Co. imported, on two occasions, a quantity of olive oil, which they entered as "olive oil, not salad," and on which they paid the estimated duty of twenty-five cents a gallon, under the 5th section of the act of July 14, 1862 (12 Stat. 548), and received the goods. Subsequently the appraiser returned the oil as being "olive oil, salad," and the collector then liquidated the duty at $1 a gallon, under the 11th section of the act of June 30, 1864 (13 Stat. 212). On one of the importations the importers protested against the rate of $1 a gallon, and appealed to the secretary of the treasury, who approved the decision of the collector. The United States brought suit against the importers to recover the difference between the estimated and the liquidated duty. On the trial evidence was received, under objection, to show that the oil was "olive oil, not salad," and the jury found that it was such. The defendants then moved for judgment on the verdict: *Held*, that under the 14th section of the act of June 30, 1864 (13 Stat. 214), the decision of the collector is final as to the amount of duty to be paid, in all cases except where there is an appeal to the secretary of the treasury, and suit brought to recover back the duty, as is provided in that section.

[Cited in U. S. v. Frazer, Case No. 15,161; Watt v. U. S., Id. 17,292; Chase v. U. S., 9 Fed. 883; U. S. v. De Visser, 10 Fed. 660; U. S. v. Campbell, Id. 818, 819; U. S. v. Cobb, 11 Fed. 79. Disapproved in U. S. v. Schlesinger, 14 Fed. 682, 685. Cited in same case on appeal, 120 U. S. 113, 7 Sup. Ct. 445; U. S. v. Leng, 18 Fed. 21; U. S. v. McDowell, 21 Fed. 564; U. S. v. George, 44 Fed. 256.]

2. The words "decision of the collector," in that section, mean the ascertainment and liquidation of the duties in the usual manner by the proper officers.

3. The above construction is not contrary to the provision of the 5th amendment to the constitution.

4. Therefore, the evidence to show the character of the article, as not justifying the collector's decision, was wrongly received, and the defendants were not entitled to judgment upon the verdict.

[This was a suit by the United States against Firmin Cousinery and others to recover the difference between an estimated and a liquidated duty.]

T. Simons and E. H. Smith, for the United States.

J. H. Choate, for defendants.

BLATCHFORD, District Judge. This suit is brought to recover an alleged balance of duties on two importations of olive oil, in casks, made by the defendants in January and February, 1871, respectively. The oil was entered as "olive oil, not salad," and estimated duty was paid on it at the rate of 25 cents per gallon, under section 5 of the act of July 14, 1862 (12 Stat. 548). Subsequently the appraiser returned the oil as "olive oil, salad," and the collector then liquidated the duty at the rate of $1 per gallon, under section 11 of the act of June 30, 1864 (13 Stat. 212). The duty paid was $506 25. The duty as liquidated is $3,173. This suit is brought to recover the difference between those two sums. The goods passed into the possession of the defendants on the payment of the 25 cents per gallon duty, and before the liquidation. In the case of one of the two importations the defendants protested against the rate of duty at $1 per gallon, and appealed to the secretary of the treasury from the decision of the collector assessing duty at that rate, and the decision of the collector was affirmed by the secretary.

The case was tried before the court and a jury, and, on the trial, after the plaintiffs had made out a prima facie case entitling them to recover, the defendants offered evidence to show that the oil in question was olive oil, not salad, and so not liable to the duty of $1 per gallon. The plaintiffs objected to the admissibility, competency, and relevancy of the evidence, on the ground that, under the act of congress hereafter referred to, the liquidation by the collector was conclusive as to the right of the plaintiffs to recover in this suit the balance of duties claimed; but the court admitted the evidence. The jury, on the evidence, found a special verdict, that the goods in question were "olive oil, not salad." On this verdict, the defendants move that judgment be entered for them in the suit.

The principal question involved and discussed on the motion is as to the operation and effect of the 14th section of the act of June 30, 1864 (13 Stat. 214.) That section is as follows: "On the entry of any vessel, or of any goods, wares or merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel, or on such goods, wares or merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the master, commander or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee or agent of the merchandise, in the case of duties levied on goods, wares or merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector, on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

the treasury, whose decision on such appeal shall be final and conclusive; and such vessel, goods, wares or merchandise, or costs and charges, shall be liable to duty accordingly, any act of congress to the contrary notwithstanding, unless suit shall be brought within ninety days after the decision of the secretary of the treasury on such appeal, for any duties which shall have been paid before the date of such decision, on such vessel, or on such goods, wares or merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the secretary. And no suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the secretary of the treasury shall have been first had on such appeal, unless said decision of the secretary shall be delayed more than ninety days from the date of such appeal, in case of an entry at any port east of the Rocky Mountains, or more than five months in case of entry west of those mountains." It is contended, for the defendants, that this section has relation only to duties which have been paid; that its sole object is to regulate suits to recover back such duties after they have been paid; that it has no application to a suit by the United States to recover unpaid duties; and that it is to be read as if all it said was, that, in case the notice of dissatisfaction is given, and the appeal is taken, and the duties are paid, and the suit is brought, within the time limited, to recover them back, then the decision of the collector and the decision on appeal shall not be final and conclusive, so as to prevent an inquiry, in such suit, into what was the proper rate and amount of duties. But this view ignores the actual structure of the section and the plain meaning of its language. It enacts that the decision of the collector shall be final and conclusive against all persons interested therein, unless the notice of dissatisfaction is given and the appeal is taken. If the notice is not given, or if, the notice being given, the appeal is not taken, then the decision of the collector is final and conclusive. If the notice is given and the appeal is taken, the decision of the secretary is final and conclusive. This finality and conclusiveness are such against all persons interested in the goods. The section then goes on to say what is meant by being "final and conclusive," by saying, that the goods shall be "liable to duty accordingly, any act of congress to the contrary notwithstanding"—that is, shall be liable to duty in accordance with the decision of the collector, or, in case of an appeal, in accordance with the decision of the secretary, any act of congress to the contrary notwithstanding, unless suit shall be brought, within the limited times specified, to recover back what shall be paid as duties. This means, that the decision is made the test and standard for the payment of the duties to the government, even if there be an act of congress which appears to prescribe something different from the decision, and that the duties must be paid according to the decision, subject to the proviso, that, if a suit is brought, as permitted, to recover back duties so paid, then such decision is not final or conclusive for the purposes of that suit, but the court which tries such suit may inquire whether, in point of fact, the decision was correct, and whether the duties paid were the proper duties. This entirely excludes from consideration in a suit brought by the United States to enforce payment of the duties, all questions as to whether the decision of the collector or that of the secretary was correct, or as to what duties ought, in the absence of such decision, to have been exacted, and confines the question to be determined in such suit solely to the one, whether the duties claimed to be recovered are those decided by the collector, or by the secretary, on appeal, to be the proper duties. This court, in such a suit, is, therefore, inhibited from inquiring as to what the collector or the secretary ought to have decided, or from reviewing the decision of either officer. That power is reserved for the court in which a suit may be brought against the collector, to recover back the duties, after they shall have been paid.

These provisions of law maintain and enforce a policy which is found to prevail in the enactments of congress in regard to raising revenue. The policy is, that the collection of the revenue shall be enforced through summary provisions, and shall not await the slow processes of litigation as to rates and amounts of taxes and duties. A rate is prescribed, an officer is appointed to determine the proper amount, and then that amount must be paid, leaving open a brief time for an appeal. Suits to stay the collection of taxes and duties are not permitted. The very existence of the government depends on its receiving its revenue. It collects it, and the aggrieved party is left to a suit to recover back any improper exaction.

The decision of the supreme court in the case of Westray v. U. S., 18 Wall. [85 U. S.] 322, is entirely inconsistent with the view that the 14th section of the act of 1864, as to the conclusiveness of the decision of the collector or of the secretary, does not apply to suits brought by the United States. In that case, a suit was brought by the United States on a bond given on the entry of goods for warehousing. One condition of the bond was, that the obligors should pay to the collector the amount of duties to be ascertained, due and owing on the goods in question. The suit was brought to recover the amount of duties unpaid on the goods, as ascertained and liquidated by the collector. The defendants, at the trial, offered evidence to show that the goods were subject to less duty than that which had been ascertained and liquidated by the collector. The court

refused to receive the evidence. The supreme court, on the ground that no appeal had been taken from the decision of the collector, held, that, under the 14th section of the act of 1864, the decision of the collector was final and conclusive for the purposes of that suit, and that it was proper to refuse to receive the evidence offered. Whether the suit is brought on a bond conditioned to pay the amount of duties to be ascertained, or is brought to recover the amount of duties as ascertained, can make no difference on the point now under consideration. The evidence offered by the defendants in the present case, and on which the jury found the special verdict, ought not to have been admitted, as the objection to its admission, taken by the plaintiffs, was a valid one.

It is contended, for the defendants, that there was no decision of the collector made in this case, within the meaning of the statute. The evidence at the trial showed that everything was done in this case in respect to the ascertainment and liquidation of the duties by the proper officers of the customs, which is ever done in any case, to perfect and indicate and record such ascertainment and liquidation. The usage and practice of the collector's office was shown, to which the proceedings in this case conformed. The 14th section of the act of 1864 uses the phrase "decision of the collector of customs," and the phrase "ascertainment and liquidation of the duties by the proper officers of the customs," as synonymous phrases. The decision of the collector is declared to be conclusive, unless the party, if dissatisfied with his decision, gives notice thereof "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs," and also, "within thirty days after the date of such ascertainment and liquidation," appeals "therefrom" to the secretary of the treasury. Such ascertainment and liquidation of the duties by the proper officers of the customs, that is, the proper officers in the collector's office or department, is the decision of the collector. An appeal from such ascertainment and liquidation is an appeal from the decision of the collector, and an appeal from the decision of the collector is an appeal from such ascertainment and liquidation. Congress must be assumed to have been legislating in reference to a well understood course of business, conducted under the revenue laws, when it speaks of "the ascertainment and liquidation of the duties by the proper officers of the customs," and to have intended that, when the duties were ascertained and liquidated in the usual manner by such officers, and the usual indicia thereof by checks and stamps were placed on the usual papers in the collector's office, such transaction was the decision of the collector of customs in the premises. See Act March 2, 1799, §§ 21, 49 (1 Stat. 642, 664).

The objection is taken, that, if the statute is capable of the construction above given to it, it violates the provision of the 5th amendment to the constitution of the United States, which declares that no person shall be deprived of property without due process of law. The view taken is, that, as the article in question is found by the special verdict to have been "olive oil, not salad," the amount sought to be recovered in this suit is not for duties imposed by law, but is for an unlawful charge imposed by the collector. The answer to this view is, that the amount fixed by the collector is, by the statute, made the duty, for the purpose of collecting it as duty.

The motion for judgment on the part of the defendants is denied.

Case No. 14,879.

UNITED STATES v. COVILLAND.

[Hoff. Dec. 52.]

District Court, N. D. California. Feb. 15, 1862.

MEXICAN LAND GRANT—SURVEY—LOCATION WITHIN EXTERIOR BOUNDARIES—RIGHT OF ELECTION.

[When, in locating a given quantity of land granted to a claimant within exterior boundaries containing a much larger quantity, the survey is made on instructions by the government, without any consultation with the claimant, or allowance to him of an opportunity to make an election as to the land to be surveyed, the survey should be set aside.]

HOFFMAN, District Judge. By the decree of the board of commissioners, there was confirmed to the claimants a tract of land of the extent of seven leagues, of which the boundaries were given. A survey having been made of the quantity confirmed, within the exterior boundaries, (which were found to embrace a much larger extent of land), it was, on objections made to the secretary of the interior, set aside, and a new survey made pursuant to his instructions. This last survey has been returned into court, under the provisions of the act of 1860 [12 Stat. 33]. It is an admitted rule, not only of this court, but of the executive department of the government, that, in locating a given quantity of land granted to a claimant within exterior boundaries containing a much larger quantity, the claimant has the right of election as to the land to be surveyed. The election so to be exercised must be reasonable, nor must it be unnecessarily injurious to the adjacent public lands of the United States. If, by the acts of the grantee, such as occupying and cultivating a portion of the land, or selling parts of it to third persons, the election appears to have already been made, he will be estopped to make a new election, or to float the grant to other parts of the tract than those which he has, by his acts and declarations, selected. In this case it appears that the claimant has had no opportunity to make any election whatever. The survey has been made on instructions by the government, as to which he was

not consulted. Admitting (which is not intended to be affirmed) that the first survey was improper, for the reason that the land was not surveyed in a sufficiently compact form, it does not appear that the claimant may not elect to have it surveyed in another form, so as to obviate that or any other objection. It cannot, I think, be pretended that the location elected by the executive officers of the government is the only one that can be made consistently with the calls of the grant, and the just exercise of his rights by the claimant. I therefore think that the present survey should be set aside, and a new survey and location made of seven leagues of land, to be taken within the exterior boundaries of the grant, at the election of the claimant, such election to be controlled and governed by the principles and rules applicable to the subjects.

It will be understood that, in setting aside this survey, no opinion is intended to be expressed as to the ultimate location of the land. When the tract shall have been surveyed, at the election of the claimant, the question will properly arise whether he has in any respect gone beyond his exterior boundaries, and whether his election has been properly and legally exercised.

Case No. 14,880.

UNITED STATES v. COWING.

[4 Cranch, C. C. 613.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

PERJURY — MATERIALITY OF FACTS SWORN TO — INDICTMENT—OATH—AUTHORITY TO ADMINISTER.

1. A justice of the peace has authority to administer an oath to an answer in chancery.

2. In an indictment for perjury, the materiality of the facts sworn to, must appear in the indictment, either by averment, or by a statement of facts which show their materiality.

This was an indictment for perjury in the answer to a bill in chancery. The defendant [William Cowing] demurred to the indictment, because it neither averred that the allegations in which the perjury was said to consist, were material, nor did it aver facts showing their materiality.

The plaintiffs in the bill in chancery were merchants; the defendant was their clerk. The bill charged him with embezzlement of the complainants' money and goods. The defendant, in his answer, denied the embezzlement; and in order to account for the fact, charged in the bill, that he had large sums of money deposited in some of the banks to his credit, he stated in his answer a variety of facts and circumstances tending to show that he had honestly acquired the money so deposited. The perjury assigned was in the allegation of those facts and circumstances.

Mr. Semmes, for defendant. The defendant was not bound to answer specially how he obtained the money; nor was his answer to that effect, evidence for him. The indictment does not state that those matters were material, nor do they appear to be so upon the face of the indictment. If the bill would have been bad upon demurrer, perjury cannot be assigned in the answer; for the answer was immaterial and unnecessary. The court dissolved the injunction, (which was to prevent him from withdrawing his funds from the respective banks in which they were deposited, upon the allegation that they were the funds of the complainants,) upon the bill itself without answer; upon the ground that the complainants did not in their bill show a title to the specific funds lodged in the banks; that they had no right to require the defendant to discover the matters charged; and that the matter charged amounted to felony; to which he was not bound to answer. If the court had no jurisdiction, or if the defendant was not bound to answer, he could not commit perjury in the answer. The assignment of the perjury is only upon immaterial allegations in the answer. By thus assigning the perjury upon the immaterial allegations of the answer, they admitted the truth of the material allegations. 2 Russ. Crimes, 519, note 2; Rex v. Dunston, Ryan & M. 109; Abrahams v. Bunn, 4 Burrows, 2255; Bartlett v. Pickersgill, 4 East, 577, note b.

Mr. Jones, on the same side. The gist of the charge, in the bill in chancery, was embezzlement of the money and goods of the complainants. It was not a bill for discovery, as ancillary to an action at law, but an original bill for an account of the embezzlement and for general relief. It is true that the complainants say that they have brought a suit at law, and need the defendant's answer, but they do not say to what facts. If the averments in which the perjury is not assigned are true (and they must be taken to be so,) the others will appear to be immaterial; and it is settled law that either it must appear upon the indictment that the matter, in respect of which the perjury is assigned, was material, or it must be expressly alleged to have been so. 2 Russ. 517, note a, 519, 541, 542; Com. v. Knight, 12 Mass. 274; 2 Chit. Cr. Law, 305, 306. It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant; and the general averment that the defendant falsely swore, &c., upon the whole matter, will not be sufficient; the indictment must proceed, by particular averments, to negative that which is false. 2 Russ. 542; Rex v. Dunston, 1 Ryan & M. 109. But a justice of the peace has no jurisdiction to administer an oath to an answer in chancery. In England it is taken by a master in chancery, or by a commissioner appointed by the court. 4 Com. Dig. tit. "Justice of the Peace," B, 102; 16 Vin. Abr. 315, "Perjury," E.

R. S. Coxe, for the United States, was stopped by the court as to the question of authority of the justice of the peace to administer the oath to an answer in chancery; the au-

[1] [Reported by Hon. William Cranch, Chief Judge.]

thority being expressly given by the ninth rule prescribed by the supreme court for the equity practice of the circuit courts.

An answer to a demurrable bill is a waiver of the right to demur. The averment of embezzlement was only an inference from the circumstances stated in the bill. Those circumstances therefore were material; and the facts stated by the defendant to avoid the force of those circumstances, were therefore also material. The case of Rex v. Dunston, cited from Ryan & M. 109, is not supported by Bartlett v. Pickersgill, in 4 East, 577, note b; for in this latter case, the defendant was convicted of perjury in denying a parol agreement void by the statute of frauds. The materiality of the matter is a fact to be ascertained by the jury. Com. v. Weaver [unreported], Judge Lomax's opinion.

Mr. Key, on the same side. The defendant had a right to demur or answer to the bill in chancery; but having answered and put the facts in issue, they became material. The bill charged a trust in the defendant and required an account. The court therefore had jurisdiction. The facts stated by the defendant for the purpose of corroborating his answer are material.

Mr. Jones, in reply. The putting of the facts in issue does not make them material. The materiality of all questions, in a chancery suit, depends upon the purpose for which the suit is instituted; and if it does not appear upon the face of the indictment that the question, upon which the perjury is assigned was material or not, the indictment cannot be supported. Rex v. Bignold, 2 Russ. Crimes, 541, note z.

THE COURT (nem. con.) was of opinion that the indictment was insufficient in not averring the materiality of the facts upon which the perjury was assigned; and in not stating facts which would show their materiality.

Judgment for the defendant on the demurrer.

Case No. 14,881.

UNITED STATES v. CRAFTON et al.

[4 Dill. 145;[1] 17 Am. Law Reg. (N. S.) 127; 23 Int. Rev. Rec. 186; 4 Cent. Law J. 441.]

Circuit Court, W. D. Missouri. April, 1877.

CONSPIRACY TO DEFRAUD—REQUISITES OF INDICTMENT—REV. ST. § 5440, CONSTRUED.

Requisites of an indictment for conspiracy to defraud the United States, under section 5440 of the Revised Statutes, considered; and that section *held* not to extend to a case where the contemplated fraud depends entirely upon the passage of a future act of congress to make it effective.

Demurrer to indictment for conspiracy to defraud the United States. The indictment, in substance, charges: 1. That John D. Crafton, one of the defendants, was, at the time charged, the adjutant-general and acting paymaster-general of the state of Missouri; that John D. Crafton, Jr., was a clerk in his office; that the defendants, George M. Irvin, John C. Bender, and Waller Young, were acting as the agents and attorneys for the collection of a claim and demand alleged to be due the members of a certain company of enrolled Missouri militia, growing out of their alleged services in the war for the suppression of the Rebellion. 2. That, for the purpose of defrauding the United States out of the money alleged to be due for such services, the said defendants conspired together to obtain the payment thereof out of the treasury of the United States. 3. That, to effect the object of said conspiracy, the defendants, Irvin, Bender, and Young, made a false and fictitious muster and pay-roll of said company, and presented the same to the defendant John D. Crafton, as such acting paymaster-general, to audit, approve, and allow the claim contained in said roll. 4. That, to further effect the object of said conspiracy, the defendant John D. Crafton, as acting paymaster-general, did audit, approve, and allow such claim, and issued certificates of indebtedness of the state of Missouri for the amount claimed to be due on said roll, and delivered them to the defendant Young. 5. That, further to effect the object of the conspiracy, all of the defendants transmitted the false and fictitious muster and pay-roll of said company to the third auditor of the treasury of the United States, with the amount on said roll as audited, approved, and allowed, and showing the issue of the certificates of indebtedness therefor, for file by the third auditor of the treasury department of the United States, until such time as congress should thereafter provide for the payment of the fraudulent claim contained in and upon said roll. 6. That, further to effect the object of the conspiracy, the defendants employed Craig and Strong to secure the passage of a bill which had been introduced into the senate of the United States for the payment of said fraudulent claims.

Mr. Mullins, U. S. Dist. Atty.

Mr. Chandler, Mr. Kemp, and Mr. Lay, for defendants.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. The indictment is founded upon section 5440 of the Revised Statutes, which is as follows: "If two or more persons conspire * * to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of," etc.

The nature of the acts charged against the defendants in the indictment, are more fully

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

seen by reference to the act of the legislature of Missouri, approved March 19th, 1874, entitled "An act to audit and adjust the war debt of the state." Laws 1874, p. 102, § 10 et seq. The claims "of officers and soldiers of the enrolled Missouri militia" were primarily, and, until assumed by congress, exclusively, against the state, and not against the general government. The latter has never assumed their payment. If, at the time that the acts set forth in the indictment were done, the general government had provided for the payment of such claims out of its own treasury, undoubtedly those acts, fraudulent in their nature and object, would have been criminally punishable. It is just at this point that the case stated in the indictment is vulnerable Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and, to the required extent, the manner in which, or the means by which, it was to be effected, must be averred. U. S. v. Cruikshank, 92 U. S. 542, 558. In the case at bar, this has been attempted by the pleader, but the difficulty is that, it appears from the averments, the alleged conspiracy to defraud the United States was, under the existing legislation of congress, legally impossible of execution. The fraudulent muster and pay-roll was transmitted to the third auditor to be filed, to await the passage of an act of congress which should provide for the payment of the fraudulent claims contained therein. It was not filed as an existing claim against the United States; on the contrary, the debt to the persons named in the roll was the debt of the state, and would remain such unless congress should assume it. It could not be known that such assumption would ever be made, or, if made, that the said rolls would have any legal significance or value.

However fraudulent in ulterior design, or morally reprehensible the acts charged in the indictment may be, still our judgment is that section 5440 of the Revised Statutes cannot be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an act of congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained. Judgment accordingly.

Case No. 14,882.

UNITED STATES v. CRAIG.

[2 Cranch, C. C. 36.] [1]

Circuit Court, District of Columbia. Dec. Term, 1811.

JURY—PEREMPTORY CHALLENGE.

Upon an indictment for manslaughter by killing one Hilliard, the prisoner was allowed the right of peremptory challenge.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,883.

UNITED STATES v. CRAIG.

[4 Wash. C. C. 729.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

COUNTERFEITING — APPLIANCES USED — DECLARATIONS—EVIDENCE—WITNESS.

1. In a prosecution for forgery of bank notes against one, the prosecutor, after laying a foundation by proof for connecting the prisoner with other persons in the general transactions, may give evidence that different parts of the machine employed in the counterfeiting were found in the possession of other persons respectively; but as to the effect of such evidence and the fact, the jury must decide.

2. The declaration of the prisoner, when he was apprehended, that he had never been at the house where he was apprehended till that time, may be given in evidence; not as proof of the fact, but to repel any unfavourable conclusion which his silence might have warranted.

[Cited in State v. Knapp, 45 N. H. 156.]

3. Comparison of hands is not evidence in a criminal case.

4. A paper found in a trunk, with a signature of a person other than the prisoner, and not addressed to him; is not evidence unless it is proved that he was the owner of the trunk, and in some way connected with the paper.

5. A question to a witness which ought not to be answered; for example, to state the contents of a written instrument; the court will not permit to be put to him, or to be answered. But if the question be one which he may answer or not; for example, if it tend to disgrace or criminate himself; it is a legal question, although the witness may decline answering it.

[Cited in Fries v. Brugler, 12 N. J. Law, 81.]

6. A witness is not bound to answer a question which may render him infamous, or may disgrace him.

7. The declaration of the prisoner to the witness, of the purpose for which he was going to the house where he was apprehended amongst counterfeiters, may be given in evidence; but the materiality of the evidence in relation to the innocence of his intentions and acts, will depend upon the accordance of these declarations with his subsequent conduct.

The prisoner [J. W. Craig] was indicted for counterfeiting sundry notes of different denominations, purporting to be notes of the Bank of the United States; and for having in his possession other blank notes, in the similitude of the notes of that bank, with intent, &c.

The following points of evidence were ruled by the court:

1. That the evidence given in the case of U. S. v. Moses [Case No. 15,825], of the press, and the parts fitting it, having been found, the former in the house of the brother of Reuben Moses, and the latter in the house of Reuben Moses, may be given in this case; the evidence being sufficient, in the opinion of the court, so to connect the prisoner with Johnson and Reuben Moses in the several transactions, as to let in the same. That evidence appears in the charge of the court in the case of U. S.

[1] [Originally reported from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

v. Moses [supra]. In counterfeiting bank notes, there are or may be various acts to be performed, and after a foundation is laid by proof of a connection between two or more persons in the general transaction, evidence may be given upon the separate trial of each, that the gravers, for example, were found in the possession of one of the parties, the press in that of another of them, and the ink and paper in that of a third. As to the effect of that evidence, and as to a connection between the parties; which the court assumes merely for the purpose of deciding on the admissibility of the evidence; these are questions proper for the decision of the jury.

2. That the declarations of Johnson and of the prisoner in the room where the notes were discovered; and also upon the examination before the mayor; that the prisoner had never before been at the house of Johnson, and had been there not more than twenty minutes; might be given in evidence; not to prove the truth of these declarations, but to repel any unfavourable conclusion from the silence of the prisoner, and his declining to give some explanation of the situation in which he was found.

3. The two first points of evidence, ruled in the case of U. S. v. Moses, were reargued in this case, and were confirmed by both judges; PETERS, District Judge, having been absent at the trial of that case.

[For hearing on a motion by defendant to show cause why he should not have delivered to him certain bank notes which were on his person at the time of his examination on the charge of forgery, see Case No. 3,321.]

WASHINGTON, Circuit Justice. It is insisted by the district attorney that by compelling the witness to answer the question "whether B. Johnson had told him that if he would come to his house on a certain day he would have Moses, the prisoner there:" the court departed from the reason and policy of the general rule first laid down; that the witness was not bound to disclose the name of the person from whom the confidential information came which led to the detection and apprehension of the accused. The court think quite otherwise. In the latter case individual security is not sacrificed to public policy, since it never can be material to the defence of the accused that the name of the informer should be disclosed in the trial. But it is quite otherwise in the former case. The situation in which the defendant was found, at the time of his apprehension, warrants the presumption of his guilt; and it may therefore be all important to his defence to repel this presumption by showing that he was at Johnson's by accident, or by the really insidious but apparently friendly invitation of the owner of the house; which latter fact the jury might possibly believe to be made out by the affirmative answer of the witness to this question. If this be so, it is certainly much better that the encouragement of persons to assist in detecting and apprehending those who are suspected of crimes, which the suppression of this evidence is designed to hold out, should be withheld, than that the safety of the accused should be hazarded, by denying to him the benefit of the disclosure. For myself I declare that I never will consent judicially to sacrifice any individual, whether it concerns his life, liberty or property, to notions of public policy, unless I am commanded by positive law to do so.

The district attorney having proved the hand writing of the prisoner, by his acknowledgment that a certain paper exhibited in court was written by him, asked the witness if he believed that another paper, purporting to be an order signed by the prisoner, directing his trunks to be delivered to the bearer, was of the hand writing of the prisoner. The witness answered that he had never seen the prisoner write, nor had he ever received a letter from him or corresponded with him; but that he believed the order to be his hand writing, having compared it with the writing which he acknowledged to be his. The district attorney then offered to read the order, which was objected to by the prisoner's counsel; the evidence being nothing but comparison of hands, which is not evidence in a court, much less in criminal cases. The counsel cited, Martin v. Taylor [Case No. 9,166]; Starkie, Ev. 654. In support of the evidence, were cited the following cases: 10 Serg. & R. 110; Bull. N. P. 232; 1 Bin. 664; 4 Esp. 117, 122; Id. (Day's Ed.) 273, note.

WASHINGTON, Circuit Justice. I confess for myself, that I never was well satisfied with the reason of the general rule, that comparison of hand writing is not competent evidence to go to the jury; and yet that a paper is such evidence, if the witness has seen the person write, and expresses his belief that the paper so offered is evidence of the hand writing of the person. For it seems to me that the rejected evidence is, in most cases, a much more satisfactory test of the hand writing than that which is admitted. Nevertheless, I consider the rule to have been for a long time so settled in England; and the decision of this court in the case of Martin v. Taylor, proceeded upon that ground. Farmers' Bank of Lancaster v. Whitehill, 10 Serg. & R. 110, decides that in a civil case, and in corroboration of other evidence to prove hand writing, comparison of hands is good evidence by the common law of Pennsylvania. Wherever therefore such a case comes before this court, that case will be respectfully considered. But this being a criminal case, I shall govern myself by what I consider the general rule settled in England, which excludes the evidence. The evidence must be overruled.

The order, and also another were afterwards admitted, on the evidence of a person who had often seen the defendant write. A paper found in a trunk at the half way house between Philadelphia and Trenton, with the signature of E. Gleeson, not addressed to the prisoner, was offered in evidence. The court

rejected the evidence until proof should be given that the trunk was the property of the prisoner, or in some way to connect the prisoner with the paper.

A question to a witness, which the law will not permit him to answer, as if he be asked to state the contents of a record; or to an attorney to disclose the secrets of his client; or, as in this case, whether his petition for the benefit of the insolvent law was not refused, and he remanded to jail upon the ground of his fraudulent conduct,—is improper, and the court will not permit it to be put. But if the question be such as if merely answered in one way would disgrace or criminate the witness, the question is proper; because it is the privilege of the witness to refuse to answer it, and not the law which forbids him to do so, as in the former case. But being a privilege merely, he may waive it, or give the answer.

WASHINGTON, Circuit Justice, delivered the charge; and after summing up the evidence, left it to the jury to decide upon the guilt or innocence of the prisoner, as to the several offences charged in the indictments. He stated that the materiality of his declarations to a witness, that he was going to Johnson's house, for the purpose of obtaining bail for his brother-in-law, Gleeson, which, contrary to his first impressions, he was now satisfied was proper evidence for the consideration of the jury (1 Starkie, Ev. 46–48, and cases cited), depended very much, if not entirely, upon the accordance of his subsequent conduct with these declarations. From that conduct the jury were to judge whether the prisoner was sincere in the avowal of his purpose in going, or merely intended to serve a purpose, and to provide testimony in his favour in case of need. If in the opinion of the jury the latter was intended, then the prisoner's declarations of the motive which took him to Johnson's, ought to be entirely disregarded.

The jury found the defendant guilty upon all the indictments.

C. J. Ingersoll, Dist. Atty., and Mr. Sergeant, for the United States.

Randall & Philips, for defendant.

NOTE. The weight of authority seems to be in favour of the doctrine, that a witness is not bound to answer a question which may render him infamous, or disgrace him, although it is not fully settled in England. 1 Starkie, Ev. 137, 145; 3 Starkie, Ev. 1742, note.

Case No. 14,884.

UNITED STATES v. CRANDELL.

[2 Cranch, C. C. 373.] [1]

Circuit Court, District of Columbia. April Term, 1823.

WITNESS—INTEREST—INDICTMENT FOR FORGERY.

The person intended to be injured by a forgery, and the person whose name is forged to a certificate, are competent witnesses to prove the forgery. But, if the witness has paid money upon the forged paper, he is not competent to prove the forgery.

There were three indictments against the defendant [William Crandell] for forgery. In one he was charged with forging a certificate purporting to be signed by one Henry Naylor with intent to defraud one Holmead.

Mr. Key, for defendant, objected to Naylor and Holmead as witnesses for the prosecution.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection. Upon another indictment against him for forgery, a witness was sworn who had paid five dollars upon the forged paper. THE COURT instructed the jury that he was not a competent witness (CRANCH, Chief Judge, doubting). Upon a third indictment for forging the name of G. Bomford to a bond, with intent to injure one Digges. Mr. Key, for defendant, objected to Digges as a witness, but the objection was overruled by THE COURT.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,885.

UNITED STATES v. CRANDELL.

[4 Cranch, C. C. 683.] [1]

Circuit Court, District of Columbia. March Term, 1836.

SEDITIOUS LIBEL—INTENT—PUBLICATION—WITNESS—MULATTO.

1. Upon an indictment for a seditious libel, it is not competent for the United States, for the purpose of proving the intent of the defendant in publishing the libel charged in the indictment, to give in evidence any papers subsequently published by the defendant, or found in his possession, unpublished by him, which would be libels, and might be substantive subjects of public prosecution, if published.

2. After having given evidence tending to prove a publication of the libel here, evidence may be given that other copies of the same libel were found in the possession of the defendant, with certain other papers or pamphlets, but not of the contents of such other papers or pamphlets, unless they have relation to the libels charged in the indictment, and would not, in themselves, be substantive ground of prosecution.

3. Publication of pamphlets in New York is not evidence of their publication here, in Washington county, so as to fix upon the defendant here such a knowledge of their publication as to make his possession, alone, of other copies of the same, even with the words "read and circulate" written upon them, evidence of the publication of them, by him, here.

4. The United States cannot, in order to show the evil intent with which the defendant published the paper, give, in evidence, other unpublished papers or pamphlets, found in the defendant's possession, unless accompanied by evidence of some acknowledgment or admission, by the defendant, that he knew and approved their contents.

5. Upon the trial, on the plea of not guilty, the court will not prevent the United States from giving evidence in support of a count which

[1] [Reported by Hon. William Cranch, Chief Judge.]

might be deemed insufficient, upon a motion in arrest of judgment.

6. The fact that certain papers were found in the possession of the defendant, may be given in evidence, although the papers may have been seized under an illegal warrant.

7. In a prosecution for a libel, the United States may give evidence to the jury that the defendant was found in possession of printed copies of the libel charged in the indictment, if some evidence has been given of the publication of the same libel, in this district.

8. Upon a count for publishing certain libellous pictures, the court will not suffer the pamphlets to which they were attached to be read, in evidence, to the jury, to show the evil intent with which the defendant published the pictures, nothing but the pictures being charged as a libel in that count.

9. The counsel for the prosecution, in opening the argument, may read to the jury any part of the pamphlet given in evidence by the United States, which is pertinent to the issue, although not read in the opening of the evidence.

10. A mulatto, born of a white woman, is a competent witness against a Christian white person.

This was an indictment [against Reuben Crandell], for publishing libels tending to excite sedition among the slaves and free colored persons in this district. It contained five counts.

1st. The first charged the defendant with publishing a libel containing, in one part thereof, these words: "Then we are not to meddle with the subject of slavery in any manner; neither by appeals to patriotism, by exhortations to humanity, by application of the truth to the conscience. Nor, even to propose, in congress, that the seat of our republican government may be purified from this crying abomination, under penalty of a dissolution of the Union." And in another part thereof, in an article entitled, "Reply to Mr. Gurley's Letter, Addressed to the Reverend R. R. Gurley, Secretary of the American Colonization Society, Washington City," signed by Arthur Tappan and others, the following words: "We will not insult your understanding, sir, with any labored attempt to prove to you that the descendants of African parents, born in this country, have as good a claim to a residence in it as the descendants of English, German, Danish, Scotch, or Irish parents. You will not attempt to prove that every native colored person you meet in the streets has not the same right to remain in this, his native land, that you and we have. Assuming this as an incontrovertible truth, we hold it self-evident that they have as good right to deport us to Europe, under pretext that there we shall be prosperous and happy, as we have to deport them to Africa, on a similar plea." And in another part thereof, in the said reply, the following words: "In what language could the unrighteous principles of denying freedom to colored people, in this country, (which amounts to the same thing as demanding the expulsion of those already free,) be more effectually, and yet more plausibly, inculcated, than in those very words of General Harper, you have, with so much approbation, quoted to us." And in another part thereof, in the said reply, the following words: "Against this doctrine of suspending emancipation, upon the contingency or condition of expatriation, we feel bound to protest; because we believe that every man has a right to reside in his native country, if he chooses, and that every man's native country is the country in which he was born; that no man's right to freedom is suspended upon, or taken away by, his desire to remain in his native country; that to make a removal from one's own native country, a sine qua non of setting him free, when held in involuntary bondage, is the climax of moral absurdity." And in another part thereof, in another article entitled, "Three Months' Residence, or Seven Weeks on a Sugar Plantation, by Henry Whitby," containing the most disgusting and shocking details of cruel, inhuman, and immoral treatment of slaves, by the owners and overseers, and attorneys, or agents of proprietors, according to the tenor and effect following, that is to say: "On this and other occasions, I thought it my duty to acquaint the attorney with my observations and feelings in regard to the cruel floggings and severe treatment, generally, which I have witnessed at New Ground. He admitted the facts, but said that plantation work could not be carried on without the cart-whip. He moreover labored hard to convince me that the flogging did not injure the health of the negroes. I also told him of the exceeding immorality and licentiousness which I had witnessed, mentioning, in substance, the facts previously detailed. He replied that that was a thing which they must wink at." "If a man, in manner, so much the gentleman, and in other respects, so estimable, was necessarily led to countenance or wink at the enormities I have feebly attempted to describe, what, I ask, is to be expected from its subordinate administrators, who are continually exposed to the demoralizing influences of slavery? What, indeed, but the frightful wickedness and cruelty which are its actual fruits?" "In contempt of the laws, to the disturbance of the public peace, to the evil example of all others, and against the peace and government of the United States."

2d. The second count charges the publication of another libel, containing, among other things, the following words, namely: "Our plan of emancipation is simply this: To promulgate the doctrine of human rights in high places and low places, and in all places where there are human beings; to whisper it in chimney-corners, and to proclaim it from the house-tops, yea, from the mountain-tops; to pour it out, like water, from the pulpit and the press; to raise it up with all the force of the inner man, from infancy to gray hairs; to give line upon line, precept upon precept, till it forms one of the foundation principles and parts indestructible, of the public soul." And in another part thereof, the following, namely: "I (meaning the said

Crandell,) am not unaware that my remarks may be regarded, by many, as dangerous and exceptionable; that I may be regarded as a fanatic for quoting the language of eternal truth; and denounced as an incendiary for maintaining, in the spirit as well as the letter, the doctrines of American Independence. But if such are the consequences of a simple performance of duty, I shall not regard them. If my feeble appeal but reaches the hearts of any who are now slumbering in iniquity; if it shall have power given to it to shake down one stone from that foul temple where the blood of human victims is offered to the Moloch of slavery; if, under Providence, it can break one fetter from off the image of God, and enable one suffering African

'To feel
The weight of human misery less, and glide
Ungroaning to the tomb,'

I shall not have written in vain; my conscience will be satisfied. Far be it from me to cast new bitters into the gall and wormwood waters of sectional prejudice. No, I desire peace; the peace of universal love; of catholic sympathy; the peace of common interest; a common feeling, a common humanity. But so long as slavery is tolerated, no such peace can exist. Liberty and slavery cannot dwell in harmony together. There will be a perpetual war in the members of the political Mezentius; between the living and the dead. God and man have placed between them an everlasting barrier, an eternal separation. No matter under what law or compact their union is attempted, the ordination of Providence has forbidden it, and it cannot stand. Peace! There can be no peace between justice and oppression; between robbery and righteousness, truth and falsehood, freedom and slavery. The slaveholding states are not free. The name of liberty is there, but the spirit is wanting. They do not partake of its invaluable blessings. Wherever slavery exists to any considerable extent, with the exception of some recently-settled portions of the country, and which have not yet felt, in a great degree, the baneful and deteriorating influences of slave labor, we hear, at this moment, the cry of suffering. We are told of grass-grown streets; of crumbling mansions; of beggared planters, and barren plantations; of fear from without, of terror within. The once fertile fields are wasted and tenantless, for the curse of slavery, the improvidence of that laborer whose hire has been kept back by fraud, has been there, poisoning the very earth beyond the reviving influence of the early and the latter rain. A moral mildew mingles with and blasts the economy of nature. It is as if the finger of the everlasting God had written upon the soil of the slaveholder, the language of his displeasure. Let, then, the slaveholding states consult their present interest, by beginning, without delay, the work of emancipation. If they fear not, and mock at, the fiery indignation of Him to whom vengeance belongeth, let temporal interests persuade them. They know, they must know, that the present state of things cannot continue. Mind is the same everywhere, no matter what may be the complexion of the frame which it animates. There is a love of liberty which the scourge cannot eradicate: a hatred of oppression which centuries of degradation cannot extinguish. The slave will become conscious, sooner or later, of his strength; his physical superiority; and will exert it. His torch will be at the threshold, and his knife at the throat of the planter. Horrible and indiscriminate will be the vengeance. Where, then, will be the pride, the beauty, and the chivalry of the South? The smoke of her torment will rise upward, like a thick cloud, visible over the whole earth."

3d. The third count charged the defendant with publishing twelve other libels, in which were represented and exhibited "several disgusting prints and pictures of white men in the act of inflicting, with whips, cruel and inhuman beatings and stripes upon young and helpless and unresisting black children; and inflicting with other instruments, cruel and inhuman violence upon slaves, and in a manner not fit and proper to be seen and represented; calculated and intended to excite the good people of the United States, in said county, to violence against the holders of slaves in said county as aforesaid; and calculated and intended to excite the said slaves, in the said county, to violence and rebellion against their said masters, in said county, in contempt of the laws, to the disturbance of the public peace, to the evil example of all others, and against the peace and government of the United States."

No evidence having been offered upon the fourth and fifth counts, they are omitted.

All these counts contained averments that, at the time of the publication of these libels, the citizens of the United States, residing in the county of Washington, in the District of Columbia, were lawfully authorized to hold slaves as property, and that many of them did so hold them; and that many free persons of color, also, reside in the district; and that the defendant unlawfully, maliciously, and seditiously contriving and intending to traduce, vilify, and bring into hatred and contempt, among the citizens of the United States, the laws and government of the United States, in the county of Washington, as duly established and in force, and to inflame and excite the people of the United States to resist, and oppose, and disregard the laws and government aforesaid, and the rights of proprietors of slaves in the said county, and to inflame and excite to violence against the said proprietors of the said slaves, not only the ignorant and ill-disposed among the free people of the United States, and the free persons of color in the said county, but also the slaves; and to produce among the said slaves and free persons of color, insubordina-

tion, violence, and rebellion, and to stir up war and insurrection between the said slaves and their said masters, published the said libels, containing, among other things, divers false, malicious, and seditious matters of and concerning the laws and government of the United States in the said district, and of and concerning the citizens of the United States holding slaves in the said district, and of and concerning the said slaves and free persons of color, and their labor, services, and treatment, and the state of slavery in the said district. The defendant pleaded not guilty.

Upon the trial, prima facie evidence of the publication by the defendant having been given, THE COURT permitted the pamphlet to be read to the jury, or as much thereof as either party might think proper to be read, and pertinent to the issue.

The district-attorney, Mr. Key, in order to show the evil intent with which the defendant published the libel charged in the first count, offered to prove that the defendant had in his possession other libels of the same tendency.

Mr. Bradley and R. S. Coxe, for the defendant, objected, and cited 1 Russ. 242, and Finnerty v. Tipper, 2 Camp. 72.

Mr. Key, contra, cited Rex v. Amphlit, 4 Barn. & C. 35.

THE COURT was of opinion that the United States could not, for the purpose of proving the intent of the defendant in publishing the libel stated in the first count, give in evidence to the jury any papers subsequently published by the defendant, or found in his possession unpublished by him, which would be libels, and might be substantive subjects of public prosecution, if published.

Mr. Key then offered to prove the publication, by the defendant, of the libels stated in the first, second, and third counts, by proving the following facts, namely: That a large collection of libels, and among them several copies of those charged in those counts, with the words, "read and circulate" written thereon in his handwriting, were found upon the traverser; that he undertook to account for their being in his possession, and gave untrue and contradictory accounts; that he acknowledged that he had brought here those then shown to him, being the same now in court, and that they comprehended all he brought here except about a dozen; and that prior to the traverser's arrest sundry similar publications had been privately sent to various persons in this district by some unknown person or persons in the district. 1 Hawk. P. C. c. 73, § 13. "The having in one's custody a written copy of a libel, publicly known, is an evidence of the publication of it." Rex v. Beare, 1 Ld. Raym. 414; 3 Chit. Cr. Law, 871, 875; 1 Chit. Cr. Law, 568; Maloney v. Bartley, 3 Camp. 210; 1 Russ. 235.

The counsel for defendant objected, and cited Holt, Libel, 291; Rex v. Burdett, 4 Barn. & Ald. 95; Starkie, Ev. pt. 4, pp. 849, 853; 1 Vent. 31; Smith v. Wood, 3 Camp. 323; 12 Vin. Abr. 227, "Evidence," T, 661; Rex v. Fitton, 2 Keb. 502.

THE COURT was of opinion that the attorney of the United States may give evidence of the publication, in this district, of any copies of the libels charged in the first and second counts of the indictment. That if he shall have given any evidence tending to show such a publication here, he will be permitted to show that other copies of the same libels were found in the possession of the defendant. He may then give evidence that a certain number of papers or pamphlets were found in the possession of the defendant, together with the copies of the libels charged, and of the publication of which, in this district, he shall have given evidence; but he will not be permitted to give in evidence to the jury the contents of any of the papers other than those charged as libels in this indictment, unless such other papers have relation to the libels charged in the indictment, and would not, in themselves, be substantive ground of prosecution. He may then give evidence to the jury of any confessions or acknowledgments made by the defendant in relation to any of the matters charged in the indictment. Starkie, Sland. & L. 351, 352, and Wyatt v. Gore, Holt, N. P. 299.

The attorney for the United States, having offered evidence to prove that the defendant was asked if he was aware of the nature of the pamphlets put into his hands in New York, and said he supposed they were of the same nature as those he had been a subscriber for, and that he approved the sentiments they contained, offered in evidence to the jury the publications found on the defendant relating to the same subject with the libels charged in the indictment; and contended that they were competent to be given to the jury with evidence that some of them were indorsed in the defendant's handwriting with the words, "read and circulate," to prove, not only the evil intent of the defendant in publishing the libellous paper charged in the first count, but as evidence of the publication, by the defendant, of the paper charged as a libel in the second count. He contended also that the pamphlets themselves purporting, upon their title page, to be printed and published in New York, are evidence of their own publication, and that it is only necessary to prove a copy to have been found in the defendant's possession, with the words, "read and circulate" indorsed thereon by the defendant to charge him with the publication of them here.

THE COURT was of opinion that the printing and publishing of these pamphlets, in New York, is not evidence of their publication here, so as to fix upon the defendant here such a knowledge of their publication as to make his possession alone, even with the words "read and circulate" written upon them, evidence of the publication of them,

by him, here. That, in order to show the evil intent with which the defendant published the paper charged in the first count, it is not competent for the United States to give, in evidence to the jury, other unpublished papers or pamphlets, found in the defendant's possession, unless accompanied by evidence of some acknowledgment or admission by the defendant that he knew and approved their contents. That the evidence did not appear to the court to justify the inference that the defendant knew and approved the contents of those pamphlets, unless it can be connected with evidence that they were of the same nature with those which he had been a subscriber for.

The attorney for the United States then gave evidence tending to show that the defendant had been a subscriber for the "Emancipator;" and the court permitted the attorney of the United States to give in evidence several numbers of that paper, as containing the sentiments alluded to by the defendant, as those which he approved, to show the evil intent with which he published the libel charged in the first count; but confined him to the reading of the sentiments contained in the "Emancipator" itself; and refused to permit him to read to the jury the publications advertised for sale by the secretary of the Anti-Slavery Society, in the Emancipator, although evidence had been given tending to prove that the defendant was a member of that society.

The attorney of the United States then being about to offer evidence in support of the third count; the counsel of the defendant objected that the count was so vague, uncertain, and imperfect, that the court ought not to permit evidence to be given in support of it; and the counsel on both sides agreed that the court should now consider the question as if upon a motion to quash that count.

Mr. Key, for the United States, and in support of the indictment, cited the precedents in 2 Chit. 45, 47, and 48.

The defendant's counsel cited 3 Chit. 901, 903, 904; 1 Russ. 210.

THE COURT (MORSELL, Circuit Judge, contra) permitted evidence to be given upon the third count, without prejudice to a motion in arrest of judgment upon that count, if the verdict should be against the defendant.

On the part of the defendant, it was then urged that the papers, found upon the defendant, had been illegally seized under pretence of an unlawful warrant commanding the officer, to whom it was directed, to arrest the defendant, and to search for and seize any incendiary pamphlets or papers which should be found in the defendant's possession, and bring them, with the defendant, before the justices who issued the warrant, and that therefore the pamphlets and papers so found are not admissible in evidence to the jury. Upon that point the defendant's counsel cited Entick v. Carrington, 2 Wils. 275, 282, 291; State Trials, 1052, 1063; Lord Chief Justice Lee's Opinion; and St. 7 & 8 Geo. IV. c. 29, § 63.

Mr. Key, for the United States, contended, that if the warrant was illegal, (which he did not admit,) yet the fact that the libels were found upon him, may be given in evidence, in the same manner as you may, upon an indictment for counterfeiting coin, prove that the defendant was found in possession of the instruments and implements of coining; or upon an indictment for burglary, give evidence of false keys, &c.

THE COURT was of opinion that the seizure of the papers, even if illegal, cannot prevent the United States from giving, in evidence, the fact that the defendant had in his possession some of the libels charged in the indictment, and of the publication of which, in this district, evidence shall have been given.

The attorney for the United States having offered evidence tending to show that the libel charged in the second count, and one of those charged in the third count, had been published in this county, offered to prove that printed copies of the same were found in the possession of the defendant, at the time of his arrest, with the words "read and circulate," written by the defendant, upon some of them.

The counsel for the defendant, contended, that, if, in any case, the possession of a copy of a libel is evidence of a publication by the possessor, it must be a written copy of a known published libel. 1 Hawk. P. C. c. 73, § 13; 1 Vent. 31; Rex v. Fitton, 2 Keb. 502; Rex v. Beare, 2 Salk. 418, Carth. 409, and 1 Ld. Raym. 414; Want's Case, Moore, 627; 1 Russ. 235; Barrow v. Lewellin, Hob. 62; 2 Saund. Pl. & Ev. 209; Burdett's Case, 4 Barn. & Ald. 135; Starkie, 419; 12 Vin. Abr. 239.

The attorney of the United States, in reply, cited Starkie, Ev. pt. 4, pp. 849, 871, 875; 3 Chit. 875c; 1 Russ. 235; 12 Vin. Abr. tit. "Evidence," T, b, 61.

THE COURT permitted the United States to give evidence to the jury, that the defendant was found in possession of printed copies of the libel charged in the second count, and of one of those charged in the third count; of the publication of which, in this district, some evidence had been given.

The attorney for the United States then offered, in evidence, the pamphlets containing the pictures, which were charged as libellous, in the third count.

THE COURT permitted the pictures to be given in evidence, and shown to the jury, but refused to suffer the pamphlets, attached to the pictures, to be read to the jury by the attorney of the United States, as no part but the pictures was charged as libels in that count.

The attorney of the United States then offered to read to the jury the pamphlets attached to the pictures, to show the evil intent with which the pictures were published.

THE COURT said, that if the matter now proposed to be read, is not charged in the indictment, and would be, of itself, a substantive libel, and therefore indictable, it cannot be given in evidence.

The attorney for the United States offered to examine, as a witness, one John Colclazer, a colored man, born of a white woman.

The counsel for the defendant objected.

But THE COURT (THRUSTON, Circuit Judge, contrà) overruled the objection, and the witness was sworn and examined.

The evidence being closed, Mr. Carlisle, who opened the argument to the jury, on behalf of the prosecution, was about to read some parts of the pamphlets containing the libellous matter charged in the indictment, which parts had not been read in the opening of the evidence.

The defendant's counsel objected to anything being read in argument, to the jury, which had not been read when the pamphlets were offered in evidence.

But THE COURT overruled the objection, and said that the United States had not only the right, but were bound, to give in evidence the whole of the publication which contains the libellous matter charged; and either party has a right to read any part of it, pertinent to the issue.

Verdict, not guilty.

[See Case No. 3,350.]

Case No. 14,886.

UNITED STATES v. CRANE.

[Cited in the Case of Lange, Case No. 8,065. Nowhere reported; opinion not now accessible.]

Case No. 14,887.

UNITED STATES v. CRANE.

[3 Cliff. 211.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1868.

BANKRUPTCY—INDICTMENT FOR FRAUDULENT CONCEALMENT OF PROPERTY.

1. Under section 44 of the bankrupt act of March, 1867 [14 Stat. 539], it was objected to an indictment that it did not sufficiently allege that the accused had attempted to account for certain of his property by fictitious losses, and that he had secreted and concealed certain portions of his property, after the commencement of proceedings in bankruptcy. The indictment alleged that the defendant was lawfully adjudged a bankrupt; that after commencement of proceedings in bankruptcy he was required by the district court to submit to examination on oath as to the disposal and condition of his property; that such examination was held; that the bankrupt was sworn to make true answers; and that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss. *Held*, that the objection as to the sufficiency of the allegation could not be sustained.

2. Section 38 of the act provides that the filing of a petition for adjudication in bankruptcy, either by the debtor or by a creditor, upon which an order may be issued by the court or by the register, shall be deemed the commencement of proceedings in bankruptcy.

3. An averment in the indictment that the defendant was lawfully adjudged a bankrupt was sufficient to admit the record.

4. Such an averment is only a preliminary allegation to let in the record of the examination, which is itself a proceeding in bankruptcy.

5. The objection that the averment of a conclusion is insufficient is not applicable to the one in this case, which was only essential to lay the foundation for the admission of the record to which it refers.

6. If this were not so, then it would be necessary to set out the whole record in the indictment.

7. Where in an indictment it was alleged in substance that the property falsely accounted for belonged to the bankrupt and was assignable under the bankrupt act, *held*, that such averment was equivalent to charging that the property was that of the defendant.

Motion in arrest of judgment. Indictment under section 44 of the bankrupt act of March 2, 1867, charging the defendant [John Crane] with attempting to account for a certain part of his property by fictitious losses, and for secreting certain of his property after the commencement of proceedings in bankruptcy.

The following causes were assigned: First. It is not alleged, nor does it appear in either count of said indictment, that he has committed an offence of which this court has jurisdiction. Second. It is not alleged, and it does not appear, that the omissions charged in the first count of the indictment, or that the attempt to account for fifteen thousand six hundred and eighty-three dollars by a fictitious loss thereof charged in the second count, or that the concealment charged in the third and last count, was after the commencement of proceedings in bankruptcy. Third. It is not alleged, and it does not appear, that the omission or either of the acts with which he is charged in said indictment was after the commencement of legal proceedings in bankruptcy. Fourth. If the second counts be, in other respects, sufficient, it is not alleged that the sum of fifteen thousand six hundred and eighty-three dollars was the property of him, the said Crane. Fifth. The said indictment and each and all the counts thereof are otherwise defective and insufficient to support or warrant a judgment against him.

G. S. Hillard, U. S. Atty.

H. W. Paine and H. W. Muzzey, for defendant.

CLIFFORD, Circuit Justice. The indictment is founded upon the forty-fourth section of the act of congress of the second of March, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States" (14 Stat. 539).

By that section it is provided, among oth-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

er things, "that if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate * * * with intent to prevent it from coming into the possession of the assignee in bankruptcy, * * * or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever, * * * or shall attempt to account for any of his property by fictitious losses or expenses, * * * he shall be deemed guilty of a misdemeanor," etc. 14 Stat. 539.

The charge in the first count of the indictment is that the defendant at Boston on the 19th of February, 1868, wilfully and fraudulently, and with intent to defraud his creditors, did omit from the schedule annexed to his petition in bankruptcy, purporting to contain an inventory of all his estate, real and personal, a large part of his personal property, assignable under said act, to wit, thirty thousand dollars in money, together with a large amount of goods and chattels.

The second count is drawn upon that clause of the same section which makes it an offence to attempt to account for any of his property by fictitious losses or expenses, as is more fully set forth in the indictment.

The third count is drawn on that clause of the section which provides for the punishment of any such debtor or bankrupt, who, after the commencement of proceedings in bankruptcy, secretes or conceals any property belonging to his estate, with intent to prevent it from coming into the possession of the assignee in bankruptcy.

Motions in arrest of judgment in criminal cases are addressed to the entire indictment, so that in cases where the indictment contains more than one count, if any one of the counts is good, the motion must be denied.

Strong doubts are entertained whether the first count can be supported; but it is unnecessary to decide the point, as the court is of the opinion that the allegations of the second and third counts are sufficient.

Special consideration need not be bestowed upon the first cause assigned in the motion, as the supposed objections therein specified are more definitely set forth in the second and third causes, and those two causes may be considered together.

The precise import of the objection is that the counts, or either of them, do not show definite and sufficient allegations; that the several supposed criminal acts therein imputed to the defendant were done and committed by him after the commencement of the proceedings in bankruptcy.

The argument is, that the allegation that the proceedings in bankruptcy were previously commenced is essential in the indictment, because the acts imputed to the defendant were not criminal unless they were done and committed after those proceedings were commenced; and it is doubtless true that the proposition is well founded. Suppose that to be so, still the inquiry remains whether the allegations as made are sufficient.

The substance of the allegations of the second count upon that subject is, that the defendant, on his own petition, filed in said district court on the 19th of February, 1868, was lawfully adjudged a bankrupt, and after the commencement of proceedings in bankruptcy in the said case, he was required by the said district court to attend and submit to an examination on oath upon all matters relating to the disposal and condition of his property, and that he did submit to such examination in pursuance of such requirements, and was then and there duly sworn to make true answers to such questions as should be propounded to him in reference to the disposal of his property and estate. Such is the substance of the allegation in respect to the commencement of the proceedings; but the grand jury go on to allege that he was then and there inquired of as to the disposal of fifteen thousand six hundred and eighty-three dollars previously received by him on a certain day, therein specified; and the averment is, that he then and there, with intent to defraud his creditors, falsely and fraudulently attempted to account for that sum by a fictitious loss of the same, as therein more fully set forth and alleged. The direct provision of the thirty-eighth section is, that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf or by any creditor against a debtor, upon which an order may be issued by the court or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under that act. 14 Stat. 35. Doubt cannot be entertained that the averment that the defendant was lawfully adjudged a bankrupt, as therein alleged, was sufficient to admit the record, or an exemplified copy thereof, in evidence; and inasmuch as the act alleged could not be proved in any other way, the court is of the opinion that the allegation in the form pleaded is sufficient. Taken in any point of view, it is only a preliminary allegation, to let in the record of the examination of the bankrupt, which is itself a proceeding in bankruptcy.

An averment of a conclusion is said to be insufficient; but the rule has many exceptions, and cannot properly be applied to an allegation like the one under consideration, which is only essential as laying the foundation for the admission of the record to which it refers. Unless that be the rule in this case, then it was necessary to set out the whole record, which cannot be admitted, as it would require unnecessary complexity in indictments under this act of congress without any possible advantage to the accused. Objection was not made to the ad-

missibility of the record, under this allegation, and certainly, where it was received in evidence, every right of the accused was as effectually protected as if the record had been copied into the indictment.

Suffice it to say, without entering more into detail, that the court is of the opinion that neither the second nor the third cause assigned in support of the motion is well founded, whether applied to the second or third count.

The ground assumed in the fourth cause assigned is, that it is not alleged in the second count that the money therein described was the property of the defendant. But it is therein alleged, in substance and effect, that the money belonged to him, and was assignable under the bankrupt act.

Motion overruled. Judgment on the verdict.

Case No. 14,888.

UNITED STATES v. CRANE.

[4 McLean, 317.] [1]

Circuit Court, D. Ohio. Nov. Term, 1847.

CRIMINAL LAW—ACCESSORY—EFFECT OF ACQUITTAL OF PRINCIPAL.

1. When an individual is charged as accessory, he may, under the statute, be tried and convicted, if the principal can not be found.

[Cited in Stockwell v. U. S., 13 Wall. (80 U. S.) 559.]

2. But when the principal has been tried and acquitted, on the charges, on which another is indicted as accessory, the person charged as accessory will be discharged on motion.

[This was an indictment against Joel W. Crane, charging him with knowingly and willfully receiving and secreting stolen mail.]

Bartley, U. S. Dist. Atty.

Ewing & Swayne, for defendant.

OPINION OF THE COURT. The defendant is indicted, as accessory under the 45th section of the post office act [of 1825 (4 Stat. 114)], which declares, "that if any person shall buy, receive or conceal, or aid in buying, receiving or concealing any article mentioned in the 21st section of the act, knowing the same to have been stolen from the mail of the United States, shall be punished on conviction, etc. And such person so offending, may be tried and convicted without the principal offender being first tried, provided he has fled from justice and can not be put upon his trial." The principal offender was convicted on the first, second and fifth counts of the indictments found against him. "The first count charged him with stealing the mail; the second count contained the same charge, somewhat varied, and the fifth count charged the defendant with stealing the mail containing sundry letters and packets." The indictment against Pettis, the principal, contained six counts, and the jury found him guilty on three counts and not guilty on the other three. In the third count he was charged with stealing the mail, containing fifty letters. The fourth charged him with stealing the mail containing sundry articles of great value, to wit, of the value of five hundred dollars, the particular description of which, being to the jurors unknown. Also containing sundry bank notes of great value, being to the jurors unknown. Also containing sundry bank notes of great value, to wit, of the value of five hundred dollars, the particular description of which being to the jurors unknown. Also containing bank notes specified of the value of thirty-five dollars. The sixth count charged him with ripping, cutting, etc., the mail bag. There are three counts against the defendant as accessory. The first count is abandoned. The second count charges that Pettis stole the mail of the United States of great value, to wit, of the value of five thousand dollars; and that the defendant Crane then and there well knowing, that the said Pettis had stolen the said mail as aforesaid, did knowingly and feloniously afford and furnish comfort and assistance to the said Pettis, by keeping and secreting the said last mentioned money for the said Pettis, etc. The third count charges Pettis with stealing the mail, of the value of five hundred dollars and containing letters inclosing a large quantity of bank notes, to wit, five thousand dollars which were received and secreted by the defendant Crane.

A motion is made to discharge the defendant on the ground that Pettis, his principal, was found not guilty on the counts against him for stealing the mail containing bank notes, etc.

1. There seems to be no objection against hearing this motion, as it presents only a question of law arising from facts of record.

2. The offense charged against Crane is under the statute; but it is governed by the same principles as the offense at common law, except that if the principal can not be found, the accessory may be convicted.

3. If the principal be acquitted, the accessory must be discharged.

4. The principal must be convicted, if found, of the thing which the accessory is charged with concealing.

5. If the accessory be charged with stealing bank notes, the principal must be convicted of stealing, from the mail, bank notes.

6. It is not sufficient to show, that he did in fact steal them, but, if found, he must be convicted of stealing them, before the accessory can be punished. 1 Chit. Cr. Law 218; Hale, P. C. 623.

The defendant is discharged.

[1] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 14,889.

UNITED STATES v. CRANSTON et al.

[3 Cranch, C. C. 289.] [1]

Circuit Court, District of Columbia. April Term, 1828.

CONSTABLE—SURETIES ON BOND—MONEY COLLECTED.

The sureties in a constable's bond are not liable for money collected by the constable without legal process.

Debt upon a constable's bond. The breach assigned was that the creditor, A. B., for whose use this suit was brought, had put a note into the hands of Cranston, the constable, to collect; that he collected the money, and refused to pay it over to the creditor. It appeared that he collected it without legal process.

Mr. Mason, for defendants, denied that they were liable upon their bond for the money thus collected.

Mr. Wise, for plaintiff, and Mr. Mason, for defendants, submitted the question to the court without argument.

And THE COURT (THRUSTON, Circuit Judge, absent), said that the defendant (the constable) was not liable upon his official bond for this money, although he gave a receipt, as constable, for the note. His official duty only commences when he has legal process; and he is only liable officially, for money officially collected, that is, upon legal process.

Case No. 14,890.

UNITED STATES v. CRAWFORD et al.

[1 N. Y. Leg. Obs. 388.]

Circuit Court, S. D. New York. 1843.

CRIMINAL PRACTICE—ARREST OF JUDGMENT—SEAMEN—INDICTMENT FOR MUTINY AND REVOLT.

1. Where the crew of an American vessel sailing on a whaling voyage were convicted for endeavoring to make a mutiny and revolt, and no objection on the trial of the prisoners was made, that no proof had been adduced in support of the averment in the indictment that the Southern district of New York was the district court in which the prisoners were first brought and apprehended, *held*, that although such objection might have availed on the trial, it was too late on a motion in arrest of judgment.

2. The constitution of the United States gave congress the power to punish for misdemeanors.

3. The character of the vessel must be proved to be an American vessel, and the title of the ship may be proved by parol.

4. The names of the grand jurors did not appear in the indictment itself.

5. Persons who were not citizens of the United States, and had enlisted on board of an American vessel, could not be punished for disobedience of orders in the absence of a treaty with the government to which they belonged, unless such act of disobedience amount to a violation of the law of nations.

This was an indictment against [Lewis Crawford and others] certain seamen composing a part of the crew of the American ship called "The Clifford Wayne," which sailed on a whaling voyage to the South Atlantic Ocean from the port of New Bedford in Massachusetts. The offence charged, was for endeavoring to make a mutiny and revolt on board of said ship on the high seas on said voyage. The vessel, after being at sea for nine months, returned to the port of New Bedford with a part of the disobedient crew, and the remainder, being the prisoners, had been taken out at Buenos Ayres, and sent home in a ship of war to the United States. The prisoners, on being arraigned, severally pleaded not guilty. Upon the trial before the learned district judge, on the evidence of the master and officers of the vessel, they were convicted.

Mr. Nash, for prisoners, now moved to arrest the judgment on the following grounds:

1. That no proof on the trial had been adduced in support of the averment in the indictment, that the Southern district of New York in the Second circuit was the district and circuit in which the defendants were first brought and apprehended; that such fact was necessary to give the court jurisdiction. The learned counsel referred to the act of congress of March 3, 1825, § 14,—Gard. Dig. p. 754 [4 Stat. 118]; and he contended that the averment of that fact ought to have been proved on the trial; U. S. v. Tillotson [Case No. 16,524]; 1 Kent, Comm. 344; Bingham v. Cabot, 3 Dall. [3 U. S.] 382; Starkie, Cr. Pl. 278, 279; 3 Starkie, Ev. 1552, note; Doug. 665; 5 E. C. L. 180; 12 East, 452; 1 Brod. & B. 538; 1 Esp. 302; 5 Wheat. [18 U. S.] 14, 15, Append.; Pet. Cond. R. 587; 1 Chit. Pl. 319, 320; Peake, 119; Gres. Eq. Ev. 172; Halst. Ev. 169; 2 Bibb, 4, 26; Starkie, Cr. Pl. p. 13, note 6; East, P. C. 469; 2 How. State Tr. 200; Cromp. Jur. Cts. 4, 61; Rosc. Cr. Ev. 84, 85.

2. That the constitution of the United States (article 9, § 8) gave congress the power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, and the old confederation gave congress the power of appointing courts for the trial of piracies and felonies committed on the high seas; but there was nothing in either of those instruments to punish misdemeanors, and the prisoners in this case having been indicted under the act of March 3d, 1835, § 2 [4 Stat. 776], were accused only of committing a misdemeanor. The indictment therefore ought to be quashed. The Exchange, 7 Cranch [11 U. S.] 116; 1 Kent, Comm. 355, 333; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 97, 105.

3. That no proof on the trial had been adduced in support of the averment contained in the indictment, that the offence was committed on board of an American vessel. That as the United States had not jurisdiction of offences committed on board foreign ships, such averment in the indictment became necessary, and being necessary it should have been proved. U. S. v. Robins [Case No. 16,175]; 1 Chit. Pl. 320; Gres. Eq. Ev. 172; 1 Story's

[1] [Reported by Hon. William Cranch, Chief Judge.]

Laws, 26S [1 Stat. 287]; 2 Phil. Ins. 37; Ohl v. Eagle Ins. Co. [Case No. 10,472]; Rosc. Cr. Ev. 3; Tayloe v. Riggs, 1 Pet. [26 U. S.] 596; 1 Starkie, Ev. 437; 1 Chit. Cr. Law, 566, 567; Rosc. Cr. Ev. 221; Catlett v. Pacific Ins. Co. [Case No. 2,517]; 2 Ld. Raym. 15, 35; Russ. Crimes, 14, 95.

4. That the names of the grand jurors who found the indictment did not appear in the indictment. That such omission was fatal, inasmuch as the courts of the United States in the absence of their own rules were bound by the practice of the king's bench in England. 1 Kent, Comm. 341, 342; Precedents of Indictments in the Crown Circuit Companion, 4 Dallas' Rep., title "Indictment;" [Robinson v. Campbell] 3 Wheat. [16 U. S.] 212; [Elmendorf v. Taylor] 10 Wheat. [23 U. S.] 159; Hall, P. C. 167; [Case No. 14,692a].

5. That the indictment ought to have averred, and proof ought to have been adduced on the trial in support of that averment, that the prisoners were citizens of the United States. For the want of such averment and proof, the indictment is bad; 2 Story's Laws U. S. 1302 [4 Stat. 809]; Rosc. Cr. Ev. 23, 221, 228; [Tayloe v. Riggs] 1 Pet. [26 U. S.] 596; 1 Starkie, Ev. 437; 1 Chit. Cr. Law, 566, 567; 17 Mass. 258.

6. That the shipping articles between the master and the prisoners ought to have been introduced on the trial to show that the voyage or term of time for which the crew shipped had not expired at the time of the alleged mutiny. Gord. Dig. arts. 14, 70; [U. S. v. Gooding] 12 Wheat. [25 U. S.] 471; Rosc. Cr. Ev. 2, 3, 228; 15 East, 244; 7 Barn. & C. 625; 3 Barn. & C. 665; Rosc. Cr. Ev. 31.

7. For multifariousness in the several counts of the indictment. Cowp. 675.

The district attorney, for the United States, relied on the following points:

1. That the prisoners having been indicted and tried in the Southern district of New York, the court would presume after verdict that this district and circuit was the one in which the prisoners were first apprehended and brought.

2. That congress had passed laws repeatedly to punish misdemeanors, and he denied the right of the judges at the assizes to disregard the acts of congress.

3. That the presumption of law was that the offence was committed on board of an American vessel, and as the prisoners had not called for the proof of the character of the vessel, the court might presume that the offence was committed as charged in the indictment.

4. That the state court practice was to omit the names of the grand jurors in the indictment, that this ought to be the rule in the present case. (BY THE COURT. We do not admit that the state courts' practice is to govern where it conflicts with the practice of the court of king's bench in England.)

See Rule 7, Sup. Ct. U. S.

5th. That it was not necessary that the prisoners should have been citizens of the United States, inasmuch as had they enlisted on board of an American vessel they would be bound by the laws of the United States.

6th. That inasmuch as the prisoners had not set up in their defence, that the voyage was not ended, the court would presume that the prisoners were not entitled to their discharge.

7th. That the several counts were not multifarious.

Before THOMPSON, Circuit Justice, and BETTS, District Judge.

THOMPSON, Circuit Justice. This is a case involving many serious and important questions. It appears that the prisoners, after having cruised for whales in the Southern Atlantic Ocean for several months and taken little or nothing, a large part of them became dissatisfied, and alleged that they had shipped for only one season, and refused to go into the high southern latitudes and Indian Ocean for whales, inasmuch as they did not know where the voyage might end; that the master found them disobedient, unwilling to proceed further; and that after the crew had refused to continue the voyage, he put back to Buenos Ayres, where the prisoners were taken out of the vessel. The master then, after sending home the prisoners to New York in an American ship of war, proceeded to return to New Bedford, where the crew were re-shipped and others substituted in the stead of those who refused to do duty.

As to the first point we admitted the rule to be as laid down by the defendants' counsel, but inasmuch as the objection was not made at the trial, the prisoners must be deemed to have assented to the truth of the averment in the indictment, and this was all that was necessary to convict the prisoners, and the jury were therefore warranted in finding the defendants guilty.

With respect to the second point, the constitution of the United States and the articles of the confederation, both contain provisions to punish piracies and felonies committed on the high seas, and the new constitution has gone further, and added offences against the law of nations. Now we are of opinion that it was an offence against the law of nations for a crew of a vessel to disobey orders of the master, and to endeavor to commit a mutiny and revolt on board of a vessel. Although there is no express adjudication on this subject, we think that in this case the offences charged in the indictment were within the terms of the constitution. The congress of the United States on various occasions have passed laws in regard to misdemeanors, and it would be calling upon the court to say at the assizes that the acts of congress for a long series of years have been unconstitutional. It is too much to ask this court at the circuit to say that such acts have

been unconstitutional, inasmuch as the supreme court has never yet directly passed upon this question.

As to the third point, there can be no doubt that the character of the vessel must be proved to be American, and this court would not take jurisdiction of offences committed on board of foreign ships. The jury must have been satisfied on this point, or they would not have been warranted in finding a verdict against the prisoners. The vessel was proved to have cleared and sailed from an American port, to wit, New Bedford, in Massachusetts, on a whaling voyage, and to have returned there after the voyage was broken up, and the jury might reasonably infer that she was an American vessel. We have previously held that the title to a ship might be proved by parol, without production of written documents of its ownership. Whether the court was right or wrong on this point, we adhere to the decision already given until over-ruled by the supreme court of the United States.

As to the fourth point, many precedents showed that the names of the grand jurors who found the indictment appeared in the caption of it, and the case in 3 Dall. [3 U. S.] 382 [Bingham v. Cabot], appears to be an authority in favor of the defendants, but we are not satisfied that this was the settled practice in all cases in the king's bench or at the assizes in England. The state court practice in the state of New York has for a long time been different. The indictment and the caption appear to be regarded as two distinct instruments in practice. There is no doubt that on a certiorari from an inferior court to a superior one, the names of the grand jurors, as well as of all the officers of the court, and the court itself, must be sent up in the record, but we are disposed to hold that the names of the grand jurors need not appear in the indictment itself; at least, this being an unsettled question, we rule that this indictment is sufficient.

With regard to the fifth point, it is not clear that persons who were not citizens of the United States, and enlisted on board of American vessels, could not be punished for disobedience of orders or other acts of felony and piracy: If they were pirates, they could clearly be punished as such by the laws of nations, let them be citizens of what country they might. Besides, there was no proof in this case but that the whole of the defendants were not citizens of the United States. If they were, they could clearly be punished. If they were citizens of Great Britain, then the act of congress did not apply, inasmuch as we had no treaty with Great Britain, which prohibited their seamen or our seamen from being employed on board of vessels in each other's service. See Act March 3d, 1813, § 10.

With reference to the sixth point, the shipping articles were the usual instruments of contracts between the master and his crew to the voyage, and were required by the acts of congress for foreign voyages, and for voyages other than to an adjacent state. The defendants had not called for the shipping articles on the trial. The master clearly would not be authorized to force the defendants to go on a new voyage when the old one had ended, but it did not appear that the old one was finished when the revolt took place. We think the proof should have been offered by the defendants distinctly on this point, if this was the ground of their refusal to do duty. But the court had previously held that the voyage might be proved without the production of the shipping articles.

As to the last point, we do not hold the doctrine in regard to the arrest of judgment so strict as Lord Mansfield has in Horne's Case [Cowp. 672]. We look to the substantial ends of justice, and if the defendants have not been fairly prejudiced by the form of the indictment, we should hold it is not enough to arrest the judgment, if the averments against the prisoners were sufficient, although there were several serious and grave questions raised by the defendants' counsel in his argument, yet we have come to the conclusion to pass sentence upon the verdict. The prisoners were subsequently brought into court, and sentenced each to six months' imprisonment in the county gaol.

Case No. 14,890a.

UNITED STATES v. CRITTENDEN.

[Hempst. 61.] [1]

Superior Court, Territory of Arkansas. Oct., 1828.

INDICTMENT—ALLEGATION OF TIME—CONCLUSION.

1. Indictment is quashable in which the time is alleged "on or about" such a day.

2. It is also quashable for failing to conclude "against the peace and dignity of the United States."

Indictment [against Robert Crittenden] for sending a challenge to fight a duel.

Before JOHNSON ESKRIDGE, BATES, and TRIMBLE, JJ.

OPINION OF THE COURT. The defendant moved the court to quash the indictment, because the time therein stated was in the alternative "on or about," and because the indictment does not conclude "against the peace and dignity of the United States;" and the parties being heard, and full consideration thereof had, it is the opinion of the court that for either of the objections the indictment should be quashed.

Indictment quashed, and defendant discharged.

[1] [Reported by Hon. Samuel H. Hempstead, Esq.]

Case No. 14,891.

UNITED STATES ex rel. STANDING BEAR v. CROOK.

[5 Dill. 453.] [1]

Circuit Court, D. Nebraska. 1879.

HABEAS CORPUS—RIGHT OF INDIAN TO WRIT—REMOVAL INTO INDIAN TERRITORY—CONSENT OF INDIANS.

1. An Indian is a "person" within the meaning of the habeas corpus act, and as such is entitled to sue out a writ of habeas corpus in the federal courts when it is shown that the petitioner is deprived of liberty under color of authority of the United States, or is in custody of an officer in violation of the constitution or a law of the United States, or in violation of a treaty made in pursuance thereof.

2. The right of expatriation is a natural, inherent, and inalienable right, and extends to the Indian as well as to the white race.

[Cited in Elk v. Wilkins, 112 U. S. 120, 5 Sup. Ct. 55.]

3. The commissioner of Indian affairs has ample authority for removing from an Indian reservation all persons found thereon without authority of law, or whose presence may be detrimental to the peace and welfare of the Indians.

4. The military power of the government may be employed to effect such removal; but where the removal is effected, it is the duty of the troops to convey the persons so removed, by the most convenient and safe route, to the civil authorities of the judicial district in which the offence may be committed, to be proceeded against in due course of law. In time of peace, no authority, civil or military, exists for transporting Indians from one section of the country to another, without the consent of the Indians, nor to confine them to any particular reservation against their will; and where officers of the government attempt to do this, and arrest and hold Indians who are at peace with the government, for the purpose of removing them to and confining them on a reservation in the Indian Territory, they will be released on habeas corpus.

[Cited in Elk v. Wilkins, 112 U. S. 109, 5 Sup. Ct. 49.]

[This was a hearing upon return to writ of habeas corpus issued against George Crook, a brigadier general of the army of the United States, at the relation of Standing Bear and other Indians, formerly belonging to the Ponca tribe of Indians.]

A. J. Poppleton and John L. Webster, for relators.

G. M. Lambertson, U. S. Atty.

DUNDY, District Judge. During the fifteen years in which I have been engaged in administering the laws of my country, I have never been called upon to hear or decide a case that appealed so strongly to my sympathy as the one now under consideration. On the one side, we have a few of the remnants of a once numerous and powerful, but now weak, insignificant, unlettered, and generally despised race; on the other, we have the representative of one of the most powerful, most enlightened, and most Christianized nations of modern times. On the one side, we have the representatives of this wasted race coming into this national tribunal of ours, asking for justice and liberty to enable them to adopt our boasted civilization, and to pursue the arts of peace, which have made us great and happy as a nation; on the other side, we have this magnificent, if not magnanimous, government, resisting this application with the determination of sending these people back to the country which is to them less desirable than perpetual imprisonment in their own native land. But I think it is creditable to the heart and mind of the brave and distinguished officer who is made respondent herein to say that he has no sort of sympathy in the business in which he is forced by his position to bear a part so conspicuous; and, so far as I am individually concerned, I think it not improper to say that, if the strongest possible sympathy could give the relators title to freedom, they would have been restored to liberty the moment the arguments in their behalf were closed. No examination or further thought would then have been necessary or expedient. But in a country where liberty is regulated by law, something more satisfactory and enduring than mere sympathy must furnish and constitute the rule and basis of judicial action. It follows that this case must be examined and decided on principles of law, and that unless the relators are entitled to their discharge under the constitution or laws of the United States, or some treaty made pursuant thereto, they must be remanded to the custody of the officer who caused their arrest, to be returned to the Indian Territory, which they left without the consent of the government.

On the 8th of April, 1879, the relators, Standing Bear and twenty-five others, during the session of the court held at that time at Lincoln, presented their petition, duly verified, praying for the allowance of a writ of habeas corpus and their final discharge from custody thereunder.

The petition alleges, in substance, that the relators are Indians who have formerly belonged to the Ponca tribe of Indians, now located in the Indian Territory; that they had some time previously withdrawn from the tribe, and completely severed their tribal relations therewith, and had adopted the general habits of the whites, and were then endeavoring to maintain themselves by their own exertions, and without aid or assistance from the general government; that whilst they were thus engaged, and without being guilty of violating any of the laws of the United States, they were arrested and restrained of their liberty by order of the respondent, George Crook.

The writ was issued and served on the respondent on the 8th day of April, and, the distance between the place where the writ was made returnable and the place where the relators were confined being more than

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

twenty miles, ten days were allotted in which to make return.

On the 18th of April the writ was returned, and the authority for the arrest and detention is therein shown. The substance of the return to the writ, and the additional statement since filed, is that the relators are individual members of, and connected with, the Ponca tribe of Indians; that they had fled or escaped from a reservation situated some place within the limits of the Indian Territory—had departed therefrom without permission from the government; and, at the request of the secretary of the interior, the general of the army had issued an order which required the respondent to arrest and return the relators to their tribe in the Indian Territory, and that, pursuant to the said order, he had caused the relators to be arrested on the Omaha Indian reservation, and that they were in his custody for the purpose of being returned to the Indian Territory.

It is claimed upon the one side, and denied upon the other, that the relators had withdrawn and severed, for all time, their connection with the tribe to which they belonged; and upon this point alone was there any testimony produced by either party hereto. The other matters stated in the petition and the return to the writ are conceded to be true; so that the questions to be determined are purely questions of law.

On the 8th of March, 1859, a treaty was made by the United States with the Ponca tribe of Indians, by which a certain tract of country, north of the Niobrara river and west of the Missouri, was set apart for the permanent home of the said Indians, in which the government agreed to protect them during their good behavior. But just when, or how, or why, or under what circumstances, the Indians left their reservation in Dakota and went to the Indian Territory, does not appear.

The district attorney very earnestly questions the jurisdiction of the court to issue the writ, and to hear and determine the case made herein, and has supported his theory with an argument of great ingenuity and much ability. But, nevertheless, I am of the opinion that his premises are erroneous, and his conclusions, therefore, wrong and unjust. The great respect I entertain for that officer, and the very able manner in which his views were presented, make it necessary for me to give somewhat at length the reasons which lead me to this conclusion.

The district attorney discussed at length the reasons which led to the origin of the writ of habeas corpus, and the character of the proceedings and practice in connection therewith in the parent country. It was claimed that the laws of the realm limited the right to sue out this writ to the free subjects of the kingdom, and that none others came within the benefits of such beneficent laws; and, reasoning from analogy, it is claimed that none but American citizens are entitled to sue out this high prerogative writ in any of the federal courts. I have not examined the English laws regulating the suing out of the writ, nor have I thought it necessary so to do. Of this I will only observe that if the laws of England are as they are claimed to be, they will appear at a disadvantage when compared with our own. This only proves that the laws of a limited monarchy are sometimes less wise and humane than the laws of our own republic—that whilst the parliament of Great Britain was legislating in behalf of the favored few, the congress of the United States was legislating in behalf of all mankind who come within our jurisdiction.

Section 751 of the Revised Statutes declares that "the supreme court and the circuit and district courts shall have power to issue writs of habeas corpus." Section 752 confers the power to issue writs on the judges of said courts, within their jurisdiction, and declares this to be "for the purpose of inquiry into the cause of restraint of liberty." Section 753 restricts the power, limits the jurisdiction, and defines the cases where the writ may properly issue. That may be done under this section where the prisoner "is in custody under or by color of authority of the United States, * * * or is in custody for an act done or omitted in pursuance of a law of the United States, * * * or in custody in violation of the constitution or of a law or treaty of the United States." Thus, it will be seen that when a person is in custody or deprived of his liberty under color of authority of the United States, or in violation of the constitution or laws or treaties of the United States, the federal judges have jurisdiction, and the writ can properly issue. I take it that the true construction to be placed upon this act is this, that in all cases where federal officers, civil or military, have the custody and control of a person claimed to be unlawfully restrained of liberty, they are then restrained of liberty under color of authority of the United States, and the federal courts can properly proceed to determine the question of unlawful restraint, because no other courts can properly do so. In the other instance, the federal courts and judges can properly issue the writ in all cases where the person is alleged to be in custody in violation of the constitution or a law or treaty of the United States. In such a case, it is wholly immaterial what officer, state or federal, has custody of the person seeking the relief. These relators may be entitled to the writ in either case. Under the first paragraph they certainly are—that is, if an Indian can be entitled to it at all—because they are in custody of a federal officer, under color of authority of the United States. And they may be entitled to the writ under the other par-

agraph, before recited, for the reason, as they allege, that they are restrained of liberty in violation of a provision of their treaty, before referred to. Now, it must be borne in mind that the habeas corpus act describes applicants for the writ as "persons," or "parties," who may be entitled thereto. It nowhere describes them as "citizens," nor is citizenship in any way or place made a qualification for suing out the writ, and, in the absence of express provision or necessary implication which would require the interpretation contended for by the district attorney, I should not feel justified in giving the words "person" and "party" such a narrow construction. The most natural, and therefore most reasonable, way is to attach the same meaning to words and phrases when found in a statute that is attached to them when and where found in general use. If we do so in this instance, then the question cannot be open to serious doubt. Webster describes a person as "a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race." This is comprehensive enough, it would seem, to include even an Indian. In defining certain generic terms, the first section of the Revised Statutes, declares that the word "person" includes copartnerships and corporations. On the whole, it seems to me quite evident that the comprehensive language used in this section is intended to apply to all mankind—as well the relators as the more favored white race. This will be doing no violence to language, or to the spirit or letter of the law, nor to the intention, as it is believed, of the law-making power of the government. I must hold, then, that Indians, and consequently the relators, are "persons," such as are described by and included within the laws before quoted. It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court, and therefore the court must be without jurisdiction in the premises. This is a non sequitur. I confess I do not know of another instance where this has been done, but I can also say that the occasion for it perhaps has never before been so great. It may be that the Indians think it wiser and better, in the end, to resort to this peaceful process than it would be to undertake the hopeless task of redressing their own alleged wrongs by force of arms. Returning reason, and the sad experience of others similarly situated, have taught them the folly and madness of the arbitrament of the sword. They can readily see that any serious resistance on their part would be the signal for their utter extermination. Have they not, then, chosen the wiser part by resorting to the very tribunal erected by those they claim have wronged and oppressed them? This, however, is not the tribunal of their own choice, but it is the only one into which they can lawfully go for deliverance. It cannot, therefore, be fairly said that because no Indian ever before invoked the aid of this writ in a federal court, the rightful authority to issue it does not exist. Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user. Though much time has elapsed, and many generations have passed away, since the passage of the original habeas corpus act, from which I have quoted, it will not do to say that these Indians cannot avail themselves of its beneficent provisions simply because none of their ancestors ever sought relief thereunder.

Every "person" who comes within our jurisdiction, whether he be European, Asiatic, African, or "native to the manor born," must obey the laws of the United States. Every one who violates them incurs the penalty provided thereby. When a "person" is charged, in a proper way, with the commission of crime, we do not inquire upon the trial in what country the accused was born, nor to what sovereign or government allegiance is due, nor to what race he belongs. The questions of guilt and innocence only form the subjects of inquiry. An Indian, then, especially off from his reservation, is amenable to the criminal laws of the United States, the same as all other persons. They being subject to arrest for the violation of our criminal laws, and being "persons" such as the law contemplates and includes in the description of parties who may sue out the writ, it would indeed be a sad commentary on the justice and impartiality of our laws to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment in this manner, as well as a subject of a foreign government who may happen to be sojourning in this country, but owing it no sort of allegiance. I cannot doubt that congress intended to give to every person who might be unlawfully restrained of liberty under color of authority of the United States, the right to the writ and a discharge thereon. I conclude, then, that, so far as the issuing of the writ is concerned, it was properly issued, and that the relators are within the jurisdiction conferred by the habeas corpus act.

A question of much greater importance remains for consideration, which, when determined, will be decisive of this whole controversy. This relates to the right of the government to arrest and hold the relators for a time, for the purpose of being returned to a point in the Indian Territory from which it is alleged the Indians escaped. I am not vain enough to think that I can do full justice to a question like the one under consideration. But, as the matter furnishes so much valuable material for discussion,

and so much food for reflection, I shall try to present it as viewed from my own standpoint, without reference to consequences or criticisms, which, though not specially invited, will be sure to follow.

A review of the policy of the government adopted in its dealings with the friendly tribe of Poncas, to which the relators at one time belonged, seems not only appropriate, but almost indispensable to a correct understanding of this controversy. The Ponca Indians have been at peace with the government, and have remained the steadfast friends of the whites, for many years. They lived peaceably upon the land and in the country they claimed and called their own.

On the 12th of March, 1858, they made a treaty with the United States, by which they ceded all claims to lands, except the following tract: "Beginning at a point on the Niobrara river, and running due north so as to intersect the Ponca river twenty-five miles from its mouth; thence from said point of intersection up and along the Ponca river twenty miles; thence due south to the Niobrara river; and thence down and along said river to the place of beginning; which tract is hereby reserved for the future homes of said Indians." In consideration of this cession, the government agreed "to protect the Poncas in the possession of the tract of land reserved for their future homes, and their persons and property thereon, during good behavior on their part." Annuities were to be paid them for thirty years, houses were to be built, schools were to be established, and other things were to be done by the government, in consideration of said cession. See 12 Stat. 997.

On the 10th of March, 1865, another treaty was made, and a part of the other reservation was ceded to the government. Other lands, however, were, to some extent, substituted therefor, "by way of rewarding them for their constant fidelity to the government, and citizens thereof, and with a view of returning to the said tribe of Ponca Indians their old burying-grounds and cornfields." This treaty also provides for paying $15,080 for spoliations committed on the Indians. See 14 Stat. 675.

On the 29th day of April, 1868, the government made a treaty with the several bands of Sioux Indians, which treaty was ratified by the senate on the 16th of the following February, in and by which the reservations set apart for the Poncas under former treaties were completely absolved. 15 Stat. 635. This was done without consultation with, or knowledge or consent on the part of, the Ponca tribe of Indians.

On the 15th of August, 1876, congress passed the general Indian appropriation bill, and in it we find a provision authorizing the secretary of the interior to use $25,000 for the removal of the Poncas to the Indian Territory, and providing them a home therein, with consent of the tribe. 19 Stat. 192.

In the Indian appropriation bill passed by congress on the 27th day of May, 1878, we find a provision authorizing the secretary of the interior to expend the sum of $30,000 for the purpose of removing and locating the Ponca Indians on a new reservation, near the Kaw river.

No reference has been made to any other treaties or laws, under which the right to arrest and remove the Indians is claimed to exist.

The Poncas lived upon their reservation in southern Dakota, and cultivated a portion of the same, until two or three years ago, when they removed therefrom, but whether by force or otherwise does not appear. At all events, we find a portion of them, including the relators, located at some point in the Indian Territory. There, the testimony seems to show, is where the trouble commenced. Standing Bear, the principal witness, states that out of five hundred and eighty-one Indians who went from the reservation in Dakota to the Indian Territory, one hundred and fifty-eight died within a year or so, and a great proportion of the others were sick and disabled, caused, in a great measure, no doubt, from change of climate; and to save himself and the survivors of his wasted family, and the feeble remnant of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, "he might live and die in peace, and be buried with his fathers." He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully, and forever severed his and their connection with the Ponca tribe of Indians, and had resolved to disband as a tribe, or band, of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose, all who were able so to do went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have long continued to intermarry, gave them employment and ground to cultivate, so as to make them self-sustaining. And it was when at the Omaha reservation, and when thus employed, that they were arrested by order of the government, for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or necessity, of removing them by force from their own native plains and blood relations to a far-off country, in which they can see little but new-made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son

of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. Such instances of parental affection, and such love of home and native land, may be heathen in origin, but it seems to me that they are not unlike Christian in principle.

What is here stated in this connection is mainly for the purpose of showing that the relators did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self-sustaining and living without support from the government. This being so, it presents the question as to whether or not an Indian can withdraw from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.

If Indian tribes are to be regarded and treated as separate but dependent nations, there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could, therefore, withdraw therefrom at any time. The question of expatriation has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government, and it is now no longer an open question. It can make but little difference, then, whether we accord to the Indian tribes a national character or not, as in either case I think the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence. If the right of expatriation was open to doubt in this country down to the year 1868, certainly since that time no sort of question as to the right can now exist. On the 27th of July of that year congress passed an act, now appearing as section 1999 of the Revised Statutes, which declares that: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights of citizenship. * * * Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

This declaration must forever settle the question until it is reopened by other legislation upon the same subject. This is, however, only reaffirming in the most solemn and authoritative manner a principle well settled and understood in this country for many years past.

In most, if not all, instances in which treaties have been made with the several Indian tribes, where reservations have been set apart for their occupancy, the government has either reserved the right or bound itself to protect the Indians thereon. Many of the treaties expressly prohibit white persons being on the reservations unless specially authorized by the treaties or acts of congress for the purpose of carrying out treaty stipulations.

Laws passed for the government of the Indian country, and for the purpose of regulating trade and intercourse with the Indian tribes, confer upon certain officers of the government almost unlimited power over the persons who go upon the reservations without lawful authority. Section 2149 of the Revised Statutes authorizes and requires the commissioner of Indian affairs, with the approval of the secretary of the interior, to remove from any "tribal reservation" any person being thereon without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians. The authority here conferred upon the commissioner fully justifies him in causing to be removed from Indian reservations all persons thereon in violation of law, or whose presence thereon may be detrimental to the peace and welfare of the Indians upon the reservations. This applies as well to an Indian as to a white person, and manifestly for the same reason, the object of the law being to prevent unwarranted interference between the Indians and the agent representing the government. Whether such an extensive discretionary power is wisely vested in the commissioner of Indian affairs or not, need not be questioned. It is enough to know that the power rightfully exists, and, where existing, the exercise of the power must be upheld. If, then, the commissioner has the right to cause the expulsion from the Omaha Indian reservation of all persons thereon who are there in violation of law, or whose presence may be detrimental to the peace and welfare of the Indians, then he must of necessity be authorized to use the necessary force to accomplish his purpose. Where, then, is he to look for this necessary force? The military arm of the government is the most natural and most potent force to be used on such occasions, and section 2150 of the Revised Statutes, specially authorizes the use of the army for this service. The army, then, it seems, is the proper force to employ when intruders and trespassers who go upon the reservations are to be ejected therefrom.

The first subdivision of the Revised Stat-

utes last referred to provides that "the military forces of the United States may be employed, in such manner and under such regulations as the president may direct, in the apprehension of every person who may be in the Indian country in violation of law, and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law." This is the authority under which the military can be lawfully employed to remove intruders from an Indian reservation. What may be done by the troops in such cases is here fully and clearly stated; and it is this authority, it is believed, under which the respondent acted.

All Indian reservations held under treaty stipulations with the government must be deemed and taken to be a part of the "Indian country," within the meaning of our laws on that subject. The relators were found upon the Omaha Indian reservation. That being a part of the Indian country, and they not being a part of the Omaha tribe of Indians, they were there without lawful authority, and if the commissioner of Indian affairs deemed their presence detrimental to the peace and welfare of the Omaha Indians, he had lawful warrant to remove them from the reservation, and to employ the necessary military force to effect this object in safety.

General Crook had the rightful authority to remove the relators from the reservation, and must stand justified in removing them therefrom. But when the troops are thus employed they must exercise the authority in the manner provided by the section of the law just read. This law makes it the duty of the troops to convey the parties arrested, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such persons shall be found, to be proceeded against in due course of law. The duty of the military authorities is here very clearly and sharply defined, and no one can be justified in departing therefrom, especially in time of peace. As General Crook had the right to arrest and remove the relators from the Omaha Indian reservation, it follows, from what has been stated, that the law required him to convey them to this city and turn them over to the marshal and United States attorney, to be proceeded against in due course of law. Then proceedings could be instituted against them in either the circuit or district court, and if the relators had incurred a penalty under the law, punishment would follow; otherwise, they would be discharged from custody. But this course was not pursued in this case; neither was it intended to observe the laws in that regard, for General Crook's orders, emanating from higher authority, expressly required him to apprehend the relators and remove them by force to the Indian Territory, from which it is alleged they escaped. But in what General Crook has done in the premises no fault can be imputed to him. He was simply obeying the orders of his superior officers, but the orders, as we think, lack the necessary authority of law, and are, therefore, not binding on the relators.

I have searched in vain for the semblance of any authority justifying the commissioner in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place, or for any other purpose than what has been stated. Certainly, without some specific authority found in an act of congress, or in a treaty with the Ponca tribe of Indians, he could not lawfully force the relators back to the Indian Territory, to remain and die in that country, against their will. In the absence of all treaty stipulations or laws of the United States authorizing such removal, I must conclude that no such arbitrary authority exists. It is true, if the relators are to be regarded as a part of the great nation of Ponca Indians, the government might, in time of war, remove them to any place of safety so long as the war should last, but perhaps no longer, unless they were charged with the commission of some crime. This is a war power merely, and exists in time of war only. Every nation exercises the right to arrest and detain an alien enemy during the existence of a war, and all subjects or citizens of the hostile nations are subject to be dealt with under this rule.

But it is not claimed that the Ponca tribe of Indians are at war with the United States, so that this war power might be used against them; in fact, they are amongst the most peaceable and friendly of all the Indian tribes, and have at times received from the government unmistakable and substantial recognition of their long-continued friendship for the whites. In time of peace the war power remains in abeyance, and must be subservient to the civil authority of the government until something occurs to justify its exercise. No fact exists, and nothing has occurred, so far as the relators are concerned, to make it necessary or lawful to exercise such an authority over them. If they could be removed to the Indian Territory by force, and kept there in the same way, I can see no good reason why they might not be taken and kept by force in the penitentiary at Lincoln, or Leavenworth, or Jefferson City, or any other place which the commander of the forces might, in his judgment, see proper to designate. I cannot think that any such arbitrary authority exists in this country.

The reasoning advanced in support of my views, leads me to conclude:

1. That an Indian is a "person" within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of author-

ity of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States.

2. That General George Crook, the respondent, being commander of the military department of the Platte, has the custody of the relators, under color of authority of the United States, and in violation of the laws thereof.

3. That no rightful authority exists for removing by force any of the relators to the Indian Territory, as the respondent has been directed to do.

4. That the Indians possess the inherent right of expatriation, as well as the more fortunate white race, and have the inalienable right to "life, liberty, and the pursuit of happiness," so long as they obey the laws and do not trepass on forbidden ground. And,

5. Being restrained of liberty under color of authority of the United States, and in violation of the laws thereof, the relators must be discharged from custody, and it is so ordered.

Ordered accordingly.

NOTE. At the May term, 1879, Mr. Justice Miller refused to hear an appeal prosecuted by the United States, because the Indians who had petitioned for the writ of habeas corpus were not present, having been released by the order of Dundy, District Judge, and no security for their appearance having been taken.

Case No. 14,892.

UNITED STATES v. CROPLEY.

[4 Cranch, C. C. 517.] [1]

Circuit Court, District of Columbia. March Term, 1835.

ASSAULT WITH INTENT TO KILL — CONVICTION OF SIMPLE ASSAULT.

Upon an indictment at common law for assault with intent to kill and murder, the defendant may be found guilty of the simple assault only.

Upon the trial, W. L. Brent, for defendant, moved the court to instruct the jury that if they should not find the assault to be with intent to murder, they must find the defendant not guilty. 1 East, Cr. Law, 411, which was a case decided by Lord Kenyon at nisi prius on an indictment in which there were two counts, namely: 1. For an assault with intent to murder. 2. A common count for assault and battery. The evidence was that if death had ensued it would have been manslaughter only; and Lord Kenyon directed the jury to find the defendant not guilty on the first count.

Mr. Key, contrà, cited 1 Chit. Cr. Law, 232, 248, 250, 251; Hunt's Case, 2 Camp. 583; and Williams' Case, Id. 646.

THE COURT (THRUSTON, Circuit Judge, absent, but concurring) refused to give the instruction; and directed the jury, that they might, if justified by the evidence, find the defendant guilty of the assault only, without the intent charged.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,893.

UNITED STATES v. CROSBY et al.[1]

[1 Hughes, 448.] [2]

Circuit Court, D. South Carolina. Nov. Term, 1871.

ELECTIONS — INTIMIDATING VOTERS — FOURTEENTH AND FIFTEENTH AMENDMENTS TO CONSTITUTION — INDICTMENT — STATUTES — PROTECTION OF VOTERS.

1. The first section of the act of May 31st, 1870 (16 Stat. 140), declared a right, and section 7 of the same act defines the punishment for its violation.

2. It is not necessary that each section of the act should contain or disclose the penalty for its infraction That is often, as in this statute, referred to a later and generally to the closing section of the act defining the crime or offence, and is made applicable to all the antecedent sections.

3. In charging a statutory offence it is generally sufficient to set it out in the words of the statute. If the statute uses a common law name for a crime which it proposes to punish, the indictment must set forth the various ingredients of the crime which go to make up the offence at common law.

4. Congress has never assumed the power to prescribe the qualifications of voters in the several states. To do so is left entirely to the states themselves. The right of a citizen to vote depends upon the laws of the state in which he resides, and is not granted to him by the constitution of the United States; nor is such right guaranteed to him by that instrument. All that is guaranteed is that he shall not be deprived of suffrage by reason of his race, color, or previous condition of servitude.

5. The right to be secure in one's house is not a right derived from the constitution. It existed long before the adoption of the constitution, at common law, and cannot be said to come within the meaning of the words of the act, "right, privilege, or immunity granted or secured by the constitution of the United States."

6. Congress has power to interfere for the protection of voters at federal elections, and that power existed before the adoption of the fourteenth or fifteenth amendments to the constitution.

This was an indictment [against Allen Crosby, Sherod Childers, and others] for conspiracy contrary to the provisions of sections 5, 6, and 7 of the act of congress of May 31st, 1870, to enforce the rights of citizens to vote, etc., and section 2 of the act of April 20th, 1871, to enforce the provisions of the fourteenth amendment. The indictment contained eleven counts, which charged as follows: First Count. That Allen Crosby, etc., on the first day of February, 1871, unlawfully did conspire together with intent to violate the first section of the act entitled "An act to enforce the rights of the citizens of the United States to vote in the several states of this Union, and for other purposes," approved May 31st, 1870, to wit: "That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city,

[1] The report of this case was prepared for this volume by William Stone, Esq., late United States attorney for South Carolina.

[2] [Reprinted by permission.]

parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding," contrary to the act of congress in such case made and provided, and against the peace and dignity of the United States. Second Count. That on the same day, the defendants "unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Amzi Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the constitution and laws of the United States, to wit, the right of suffrage contrary," etc. Third Count. Same as the second, with the addition of a charge of burglary, in the following words: "That said Allen Crosby . . . . about the hour of eleven of the clock in the night, on the day and year aforesaid, at the county, etc., in the act of committing the offence aforesaid as aforesaid set forth and alleged, with force and arms the dwelling-house of the said Amzi Rainey, there situate, feloniously and burglariously did break and enter with intent to commit a felony; and that the defendants in the said dwelling-house there being, in and upon the said Amzi Rainey, in the said dwelling-house then being, then and there, unlawfully, maliciously, and feloniously did make an assault; and the said defendants, the said Amzi Rainey, in and upon the head, shoulders, and back of the said Amzi Rainey, then and there unlawfully, maliciously, and feloniously did strike, cut, and wound, with intent to do unto said Amzi Rainey some grievous bodily harm, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of South Carolina." Fourth Count. That the same day the defendants unlawfully did attempt to control Amzi Rainey in exercising the right of suffrage, to whom the right of suffrage is secured and guaranteed by the fifteenth amendment to the constitution of the United States, by threats of violence to himself, contrary, etc. Fifth Count. Same as the fourth count, with the addition of a charge of burglary, as set out in the third count. Sixth Count. That on the same day, defendants unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Amzi Rainey, a citizen of the United States, because of his free exercise of a right and privilege granted and secured to him by the constitution and laws of the United States, to wit, the right of suffrage, contrary, etc. Seventh Count. Same as the sixth count, with the addition of a charge of burglary, as set out in the third count. Eighth Count. That on the same day, defendants unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Amzi Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the constitution of the United States, to wit, the right to be secure in his person, houses, papers, and effects against unreasonable search and seizure, contrary, etc. Ninth Count. That on the 21st day of April, 1871, the defendants unlawfully did conspire together for the purpose of depriving Amzi Rainey of the equal protection of the laws, contrary, etc. Tenth Count. That on the 21st day of April, 1871, defendants unlawfully did conspire together for the purpose of depriving Amzi Rainey of equal privileges and immunities under the laws, contrary, etc. Eleventh Count. That on the 21st day of April, 1871, defendants unlawfully did conspire together to injure Amzi Rainey, a citizen of the United States, lawfully entitled to vote, in his person, on account of giving his support, in a lawful manner, in favor of the election of A. S. Wallace, a lawfully qualified person, as a member of the congress of the United States, contrary, etc.

On December 4th, 1871, it was moved in behalf of the defendants, to quash the indictment on the following grounds: As to the first count: 1. The conspiracy charged is, to violate the first section of the act of May 31st, 1870, which section defines no crime or offence, and forbids nothing. 2. The names of the persons hindered or prevented, or not allowed to vote, are not set forth, nor is it alleged that their names were unknown to the grand jury. 3. The means by which the unlawful prevention was effected are not set forth. 4. The specific election at which they were not allowed to vote, whether for state, county, municipal, United States officers or representatives in congress, is not set forth. 5. Nor the date of the election, as stated, third Wednesday of October, 1872. 6. The qualifications of said male citizens to vote are not set forth. As to the second count: 1. It is not alleged that said Rainey was qualified to vote. 2. Nor that there was any election. 3. The unlawful means are not set forth. As to the third count: The defendants rely here upon this further objection, to wit: The burglary and battery charged in this count is not alleged as an overt act of the conspiracy, but as a distinct offence against the state of South Carolina, as is cognizable by, or within, the jurisdiction of this court, but is exclusively cognizable by the state court, having jurisdiction of such offences in the said county of York. As to the fourth count: 1. It does not allege that said Rainey was, at the time when, etc., a citizen of the United States; or, that the right of suffrage was then secured to him by the said fifteenth amendment. 2. It is not alleged that he was otherwise qualified to vote than by force of the said amendment. 3. No election is set forth. As to the fifth count: The defendants rely upon the same objections to this count as set forth to the said second and third

counts. As to the sixth count: The defendants rely upon the same objections to this count as are set forth to the said second count; and in addition, that it is not alleged that he had exercised the privilege therein mentioned. As to the seventh count: The defendants rely upon the same objections to this count as are set forth to the second, third, and fourth counts. As to the eighth count: 1. The means by which he was to be hindered are not set forth. 2. It is not alleged which of the rights—those of person or property—were intended to be invaded, searched, or seized. 3. It is not alleged that he was a householder. As to the ninth count: 1. It is not averred in what way, or by what means, the said Rainey was so deprived of the equal protection of the laws. 2. It is not averred what were the laws, federal or state, of the protection of which he was so deprived. 3. It is not alleged that he was a citizen of the United States, or of any state, or any territory of the United States. As to the tenth count: The defendants rely upon the same objections as set forth to the ninth count; and, further, that it is not set forth what privileges or immunities he was so deprived of. As to the eleventh count: 1. It is uncertain, because it does not appear that the conspiracy and injury were before or after the election. 2. The particular election, or when, or where, it occurred, is not set forth, and no day is given, except the date of the conspiracy; that is to say, the 21st of April, 1871, the next day after the act was passed. 3. It is not alleged that said Rainey was qualified to vote at that election, or that he was a citizen of the state or resident of the congressional district where the election was held. 4. It was not alleged that said Wallace was a citizen of the United States, or a citizen of the state or district in which said election was held, nor that he was a candidate for election, or that said Rainey voted or intended to vote for him.

[See Case No. 15,790.]

D. T. Corbin, U. S. Atty., and D. H. Chamberlain, for the United States.

Clawson, Thompson & Clawson, Reverdy Johnson, and Henry Stanberry, for defendants.

BOND, Circuit Judge. After the prolonged and very able argument of counsel upon this motion to quash, we feel embarrassed, gentlemen, that, upon so little deliberation, we are to pass judgment upon the grave questions raised here. But the fact that so many persons are now in confinement upon these charges and that so many witnesses are in attendance upon the court, at great personal expense, makes it necessary that we should not delay longer. And the first objection to the first count in the indictment is, that the section of the act of May 31st, 1870, which this count charges the parties with conspiring to violate, declares no penalty for the offence. The first section of the act declares a right. It is referred to in this count by its number, and with sufficient certainty it seems to us to enable the parties charged, after trial, to plead the verdict rendered in this case in bar to another indictment. After declaring the right, the statute proceeds, in section 7, to define the punishment for its violation. It is not necessary, it seems to us, that each section of the act should contain or disclose the penalty for its infraction. That is often, as in this statute, referred to a later and generally to the closing section of the act defining the crime or offence, and is made applicable to all the antecedent sections. It is objected, moreover, that this count does not contain the names of the parties who, being entitled to vote, were to be hindered and prevented from the exercise of the elective franchise by the traversers. It must be remembered that this is not an indictment to punish a wrong done to individuals, against the peace and dignity of the United States, but for a conspiracy to do that wrong. The offence is completed the moment the compact is formed, whether any person, within the contemplation of the first section, has actually been hindered or not. If the traversers never committed any overt act, but separated and went home after the completion of the conspiracy, they have incurred the penalty which the seventh section prescribes. So it makes no difference what particular person the conspiracy when put in motion first reached. The act complained of is the conspiracy; and if it be true that any person was hindered or prevented from the exercise of the right granted by the first section, such hindrance and prevention is only proof of the conspiracy, and does not in anywise tend to make the crime more complete. It is generally sufficient, in charging a statutory offence, to set it out in the words of the statute. If the statute uses a common law name for a crime which it proposes to punish, the indictment must set forth the various ingredients of the crime which go to make up the offence at common law. But when the statute itself creates the offence and defines it, it is sufficient if the indictment uses the words of the statute, unless the words be indefinite and vague, ambiguous or general, in which case the indictment must so particularize the act complained of that the party charged shall be in no doubt of the offence alleged against him. The certainty required is that which will enable him to plead the verdict in bar of any future action. It is alleged, in this count, that this conspiracy was to go into operation at an election not yet held, to wit, the third Wednesday of October, 1872, and it is objected that this is not sufficient, that the right to vote is not a continuing right, but exists only at the time of its immediate exercise. It would be strange, indeed, if parties could not be punished, if it be neces-

sary to punish them at all, for any offence but those committed against this act on election day, and in the direct exercise of the elective franchise. The usefulness of the act of congress would be entirely frustrated by such requirement. A man may be so effectually intimidated weeks before the election that he would not dare to go within a mile of the polls, and all the mischief the act is intended to remedy would flourish, and no punishment could be awarded them, under this construction, because the right to vote is not a subsisting right, but one which recurs to the citizen on election day. We do not so hold. The uncertainty which the count leaves as to whether this was a state election or a federal is urged as fatal. The indictment charges that this was a conspiracy to violate the first section of this act. This section declares that all citizens shall be allowed to vote at all elections, who are qualified by law to vote, without distinction of race, or color, or previous condition of servitude. Congress has never assumed the power to prescribe the qualifications of voters in the several states. To do so is left entirely with the states themselves. But the constitution has declared that the states shall make no distinction on the grounds stated in this first section. And, by this legislation, congress has endeavored, in a way which congress thought appropriate, to enforce it. It is this act of appropriate legislation, and the first section of it, which the defendants are charged with violating, and we think it makes no difference at what election, whether it be state or federal, he is intimidated or hindered from voting because of his race, color, or previous condition of servitude. Congress may have found it difficult to devise a method by which to punish a state which, by law, made such distinction, and may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a state law or upon his individual responsibility. If the act be within the scope of the amendment, and in the line of its purpose, congress is the sole judge of its appropriateness. The next objection, which is that the count does not set forth the qualification of the voter, is sufficiently answered, we think, in the remarks we have made respecting the requirements of indictments setting forth statutory offences.

We are of opinion that the second count of the indictment is bad, because it does not allege that Amzi Rainey was qualified to vote; and for another reason, more fatal, that it alleges the right of Rainey to vote to be a right and privilege granted to him by the constitution of the United States. This, as we have shown, is not so. The right of a citizen to vote depends upon the laws of the state in which he resides, and is not granted to him by the constitution of the United States, nor is such right guaranteed to him by that instrument. All that is guaranteed is, that he shall not be deprived of the suffrage by reason of his race, color, or previous condition of servitude.

The third count is a repetition of the second, with a clause setting out a charge of burglary. Concerning the court's jurisdiction over such charge, the court is divided in opinion, and will, therefore, make no comment on it at this time.

The fourth count is obnoxious to the objection that neither the citizenship of Rainey nor the fact of his qualifications to vote is set out.

The fifth count repeats the charge contained in the fourth, with the additional clause contained in the third count, and the court refrains from noticing it for the reasons given as to the first count.

The sixth count is intended to charge a conspiracy to oppress Rainey for having prior to 1st February, 1871, exercised the right of suffrage; and would be good if it were drawn with the particularity of the first count, which charges a conspiracy to oppress, to prevent the future exercise of this right. It does not, however, contain any allegation of the fact of qualification, nor that the party was entitled to vote in York county, or anywhere else, or that he ever exercised his right to vote.

The seventh count is a repetition of the sixth, with the charge of burglary added, as in the third count.

The eighth count alleges a conspiracy to prevent and hinder Rainey from the exercise of a right secured to him by the constitution of the United States, which is defined to be the right to be secured in his person and papers against unreasonable search. The article in the constitution of the United States, to enforce which this count is supposed to be drawn, has long been decided to be a mere restriction upon the United States itself. The right to be secure in one's house is not a right derived from the constitution, but it existed long before the adoption of the constitution, at common law, and cannot be said to come within the meaning of the words of the act "right, privilege, or immunity granted or secured by the constitution of the United States."

The ninth count is entirely too indefinite, and the defendants could not possibly know, from its language, with what offence they were charged; and the same objection is valid as to the tenth count.

The eleventh and last count of the indictment charges a conspiracy to injure Rainey because he had previously voted for a member of congress. We have no doubt of the power of congress to interfere in the protection of voters at federal elections, and that that power existed before the adoption of either of the recent amendments. It is a power necessary to the existence of congress, and this count seems to set forth the charge with sufficient perspicuity, and is not liable to the objections urged against it.

The motion to quash is overruled as to the first and eleventh counts of the indictment, and sustained as to the others, excepting such as the court is divided respecting.

UNITED STATES v. CROSBY. See Case No. 14,781.

Case No. 14,894.

UNITED STATES v. CROSS.

[4 Cranch, C. C. 603.] [1]

Circuit Court, District of Columbia. Nov. Term. 1835.

INDICTMENT FOR BEATING SLAVE.

It is an indictable offence to cruelly beat the slave of another, in the public highway and leave her there, exposed to public view.

The first count of the indictment was for a common assault and battery on "one negro Milly." The second count charged the defendant [George Cross] with an assault upon one negro Milly, "in a public road and highway in the county aforesaid," and cruelly beating her, "to the great damage of the said Milly and to the terror and disturbance and annoyance of the good citizens of the United States then and there passing and repassing on and near the said public road and highway, and there and thereabouts living and abiding, and against the peace and government of the United States." It appeared in evidence that Milly was the slave of Mr. Z. Walker; and at the prayer of the attorney of the United States—

THE COURT instructed the jury that if they should be of opinion, from the evidence, that the defendant cruelly beat the slave in the public highway, and left her there, exposed to public view, it was an indictable offence.

THRUSTON, Circuit Judge, however, was of opinion that it was not an indictable offence unless the beating was in the public view.

UNITED STATES (CROSS v.). See Case No. 3,434.

Case No. 14,895.

UNITED STATES v. CROW.

[1 Bond, 51.] [2]

Circuit Court, S. D. Ohio. April Term, 1856.

LARCENY FROM MAIL — EVIDENCE — INCULPATING CIRCUMSTANCES—PROOF OF CHARACTER.

1. On the trial of an indictment for abstracting a letter or package from the mail, the most satisfactory evidence that it had been in the mail is that of the person who deposited it in the post-office; and of its loss, that of the person to whom it was addressed, to the effect that it was never received by him.

2. In the absence of any direct testimony connecting the defendant with the violation of the mail, collateral circumstances tending to his inculpation are admissible in evidence to the jury.

3. Evidence having been introduced showing that a letter had been mailed at Carlisle, in the state of Pennsylvania, addressed to parties in Ohio, inclosing a draft or bill, the prosecution, for the purpose of proving that the draft or bill had been in the defendant's possession, and to raise the presumption that he had stolen it from the mail, offered in evidence a letter purporting to have been written and signed by Martin Smith, transmitting the draft or bill to a banker in Marietta, Ohio, to be cashed, and proposed to prove by a witness that said letter was in the handwriting of the defendant; and the witness stated that it was his impression and belief that the handwriting of the letter, including the signature of Martin Smith, was the proper handwriting of the defendant; but having sworn that he had seen the defendant write but once, and had no other means of knowing his handwriting, the court instructed the jury that the proof of the handwriting was not sufficient, and would not justify a verdict of guilty.

4. Proof of the previous good character of the defendant, and that without compulsion he sought an investigation of the charge is not only admissible, but should have weight with the jury if the evidence implicating him creates a reasonable doubt of his guilt.

[This was an indictment against Robert J. Crow, charging him with abstracting a letter from the United States mail.]

H. J. Jewett, U. S. Dist. Atty.
Johnson & Carroll, for defendant.

LEAVITT, District Judge (charging jury). The indictment against the defendant contains several distinct charges, one or more of which must be substantiated by the evidence to justify a verdict of guilty. The first, second, and third counts are for stealing letters and packages from the mail of the United States without any particular description or designation of them. The fourth count charges the stealing of a letter from the mail, which had been deposited in the post-office at Carlisle, in the state of Pennsylvania, written by R. M. Henderson, addressed to J. D. & J. Brown, Amesville, Ohio, which, it is averred, inclosed a draft in favor of said Browns, drawn by the cashier of a bank at Carlisle on one of the banks of Philadelphia. The fifth count charges the defendant with having fraudulently taken from the post-office, at Beverly, Ohio, a letter addressed to one Martin Smith. These several charges are based on different provisions of the laws of the United States, designed for the protection of the mails and the punishment of persons guilty of violating them. The case for the prosecution rests wholly on circumstantial evidence, which, it is insisted by the counsel for the government, must lead the jury to the conclusion that the defendant is guilty. It is proper here to remark, that to justify the conviction of the defendant the jury must be satisfied, not only that the mail has been violated, but that the let-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

ters or packages, with the stealing of which the defendant is charged, had been in, and were taken from, the mail of the United States. The usual, and certainly the most satisfactory, evidence that a letter or package was put into the mail for transmission, is that of the person who deposited it in the post-office; and the best evidence of its loss is that of the person to whom the letter or package was addressed. In this case neither the person mailing the letter or package, nor the person to whom it was directed, has been called as a witness; and the jury are therefore to consider whether other circumstances in proof connect the defendant with the criminal acts charged.

It will not be necessary to recite at length the testimony of the witnesses for the prosecution, which it is claimed proves the guilt of the defendant. I will refer only to the more material facts relied upon for this purpose. The witness, Harvey Smith, says that about the 4th of May last he was informed that some letters and fragments of letters and envelopes had been found under a school-house, in the village of Plymouth, Washington county, Ohio. Upon examination he found some mutilated letters, with envelopes and postmarks upon them. And he identifies some of these now presented to the jury as being the same that were found under the school-house. This evidence proves that there was a violation of the mail of the United States at the place mentioned, but there seems to be no proof directly implicating the defendant with such violation. It is insisted, however, that the evidence establishes the fact that the defendant was in possession of the draft or bill described in the fourth count of the indictment, and that until he shows that he came honestly into the possession he must be presumed to have stolen it from the mail. It will be for the jury to inquire and determine, first, whether the evidence sufficiently proves the fact of the possession of the draft by the defendant; and, secondly, whether, if in possession, he abstracted it from the mail. On the last point, I may as well remark here that, though the jury may have sufficient grounds for finding the fact of possession in the defendant, they must also be satisfied that it was feloniously stolen from the mail to constitute his guilt under this indictment. If he came, even feloniously, into the possession of the draft by other means than stealing it from the mail, the offense would be one cognizable in a state court, but of which this court has no jurisdiction.

It is an important inquiry for the jury, whether there is sufficient proof that the draft was in the possession of the defendant. For, it will be obvious, if the draft be proved to have been in his possession, in connection with the fact that it was inclosed in the letter from Carlisle, addressed to the Browns at Amesville and sent by mail, a prima facie case of guilt against the defendant would seem to be made out. And it would be necessary for him to repel the presumption of guilt by proof that he obtained possession of the draft by other means than those charged in the indictment.

The evidence mainly relied on by the prosecution to show that the draft had been in defendant's possession, is that of George Benedict, who swears that on April 17, 1855, he took from the post-office at Marietta a letter addressed to him, purporting to be written by Martin Smith, dated the 14th of April, which contained the draft in question, with a request that Benedict would cash the draft and remit the proceeds to the writer. The envelope of this letter is produced to this witness, and he identifies it as being the same that covered the letter received from Smith. The postmark shows that it was mailed at Amesville. The witness, Benedict, swears that he remitted the proceeds of the draft in bank-notes, inclosed in a letter addressed to Martin Smith. He thinks there were two $50 notes on Wheeling banks, and that the rest was in Ohio notes.

It is insisted by the prosecution that the letter purporting to be written and signed by Martin Smith was written by the defendant, and is, therefore, conclusive evidence that the draft had been in his hands, and that he resorted to the trick of transmitting it to Benedict for the purpose of getting it cashed, under the feigned name of Martin Smith, that he might reap the proceeds of his crime without danger of detection. It is, therefore, a most important inquiry for the jury whether the defendant wrote the letter to Benedict under the name of Martin Smith. The only witness for the prosecution to show that this letter was in the handwriting of the defendant is Harvey Smith, who swears that it is his impression and belief that the letter is in the handwriting of the defendant. He does not swear positively on this subject; and on cross-examination the witness says he saw the defendant write but once, and that was at an election, where he wrote some tickets. The letter in question has been permitted to go to the jury, and they are to decide whether it was written by the defendant. It is the duty and the province of the court, however, to state the law on this subject to the jury. Now, it is undoubtedly true that proof of handwriting if often a most reliable species of evidence, and is admissible as such both in civil and criminal cases. But to entitle it to any consideration, the witness who testifies to the handwriting of another must have had adequate means of becoming acquainted with it, and must be able to swear to it with some degree of positiveness. He must have seen the person write frequently, or must otherwise have obtained a satisfactory knowledge of the character of his writing. It is not enough that he has seen the person, as is the proof in this case, write but once, and then under circumstances showing that the atten-

tion of the witness was not specially directed to the peculiarities of the penmanship. It would be dangerous, in a criminal case, to rely on such vague and unsatisfactory evidence as the basis of a verdict which will subject the accused to severe punishment and operate as a perpetual brand of infamy on his character.

If the jury are of the opinion that the letter inclosing the draft addressed to Benedict was not written by the defendant, or that the evidence as to that fact leaves it in doubt whether he was the writer, they will inquire whether there are other facts in proof which satisfactorily establish his guilt. Apart from the alleged possession of the draft, there is no evidence that the defendant has been in possession of anything which was taken from the mail. It is stated by one witness, Mr. Faris, that some short time after the receipt of the proceeds of the draft the defendant requested him to change a $50 bank-note on the Merchants and Manufacturers' Bank of Wheeling. And this fact is relied on as sustaining the inference that this was one of the notes remitted by Benedict in the purchase of the draft sent to him by the person calling himself Martin Smith. There is no proof, however, identifying this as one of the notes sent by Benedict. It will, however, be for the jury to give such weight to this evidence as it may be fairly entitled to. If the note exchanged by Faris, at the request of the defendant, was one of the notes sent in Benedict's letter addressed to Smith, it would undoubtedly be a fact strongly implicating the defendant, and which, unexplained, would be sufficient to warrant the inference of his guilt.

As to the fifth count of the indictment, charging defendant with having unlawfully and fraudulently taken Benedict's letter addressed to Martin Smith from the post-office at Beverly, to which it was directed, there seems to be no satisfactory evidence. Indeed, the only fact relied on to establish this charge is that before noticed, namely, that the defendant had the possession of a $50 Wheeling bank-note. For the reason already adverted to, the jury will no doubt hesitate in giving much weight to this fact.

The case is submitted to the jury, with the remark that it will be their duty to give the defendant the benefit of the evidence adduced by him to prove his previous good standing and character in the community in which he lived. Several respectable and intelligent witnesses have testified directly and positively to his good character, and their evidence on the point is not impeached or contradicted. It is also a fact brought to light by the evidence, that some months after this transaction, and when it was made known to the defendant that he was suspected of having stolen from the mail, though then in the distant state of Missouri, he immediately returned to his former residence in Ohio, and courted a full investigation of the charge. This, with the proof of his good character, is entitled to the consideration of the jury, unless the evidence of guilt is so clear as to leave no reasonable doubt in their minds.

The jury returned a verdict of not guilty.

UNITED STATES (CROWELL v.). See Case No. 3,447.

Case No. 14,896.

UNITED STATES v. CROZIER.

District Court, D. Tennessee. Feb. 1, 1869.

CRIMINAL LAW—PARDON.

The president had power, by the amnesty proclamation of 1868, to pardon all of a particular class of political offenders.

[Cited in 2 Brightley, Dig. 140, to the point as given above. Nowhere more fully reported; opinion not now accessible.]

Case No. 14,897.

UNITED STATES v. CRUIKSHANK et al.

[1 Woods, 308; [1] 13 Am. Law Reg. (N. S.) 630.]

Circuit Court, D. Louisiana. April Term, 1874.[2]

CIVIL RIGHTS BILL — INDICTMENT FOR VIOLATION —FOURTEENTH AND FIFTEENTH AMENDMENTS TO CONSTITUTION — RIGHT TO VOTE — INJURIES TO NEGROES—HOW COGNIZABLE.

1. An indictment, under the enforcement act or civil rights bill, for violating civil rights, should state that the offense charged was committed against the person injured by reason of his race, color or previous condition of servitude.

2. A charge that the defendants conspired to injure certain persons of African descent, being citizens of the United States, thereby to prevent them from exercising their rights as citizens, such as the right to peaceably assemble, to bear arms, etc., unless accompanied with an averment that the injury was committed by reason of the race, color, or previous condition of servitude of the person conspired against, is not sustainable in the courts of the United States.

3. Congress has power to legislate for the enforcement of any right granted by the constitution; but the power must be exercised according to the nature of the grant or guaranty. If it only be that congress or the legislature of a state shall not pass laws for abridging the right, it is a guaranty against acts of the government only, state or federal, and not against the acts of individuals; and in such case congress has not power to legislate over the subject generally; but only to provide remedies or redress in case the legislature or congress itself (as the case may be) should violate the prohibition. The fourteenth amendment of the constitution does not change the power of congress in this respect.

[Cited in Le Grand v. U. S., 12 Fed. 580; U. S. v. Harris, 106 U. S. 638, 1 Sup. Ct. 608; Logan v. U. S., 12 Sup. Ct. 624; Green v. Elbert, 11 C. C. A. 207, 63 Fed. 309.]

4. The thirteenth amendment confers upon congress full power to legislate on the subject of

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[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 92 U. S. 542.]

slavery, and to pass all laws it may deem proper for its entire eradication in every form. The civil rights act of 1866 was within this power.

[Cited in Le Grand v. U. S., 12 Fed. 581.]

5. That act was intended to give to the colored race the rights of citizenship, and to protect them, as a race, or class, from unfriendly state legislation and from lawless combinations. An injury to a colored person, therefore, is not cognizable by the United States courts under that act, unless inflicted by reason of his race, color or previous condition of servitude. An ordinary crime against a colored person, without having that characteristic, is cognizable only in the state courts.

6. The fifteenth amendment does not confer upon congress the power to regulate the right to vote generally; but only to provide against discrimination on account of race, color or previous condition of servitude. Congress, therefore, cannot legislate in reference to any interference with the right to vote, which does not proceed from that cause, unless in elections of senators or representatives. A conspiracy to prevent a colored person from voting is no more a United States offense than a conspiracy to prevent a white person from voting, unless entered into by reason of the voter's race, color or previous condition of servitude.

[Cited in Le Grand v. U. S., 12 Fed. 579; U. S. v. Harris, 106 U. S. 637, 1 Sup. Ct. 607.]

This was an indictment under the enforcement act of May 31, 1870, against [William J. Cruikshank and] nearly one hundred other persons, charging, in the first count, that on the 13th day of April, 1873, at Grant parish, in the state of Louisiana, the defendants unlawfully and feloniously did band together with the unlawful and felonious intent and purpose to injure, oppress, threaten and intimidate one Levi Nelson and one Alexander Tillman, being citizens of the United States of African descent, and persons of color, and in the peace of the state and the United States, with the unlawful and felonious intent thereby to hinder and prevent them in their free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceable and lawful purpose, the same being a right and privilege granted or secured to them in common with all other good citizens of the United States, by the constitution and laws of the United States, contrary to the form of the statute, etc. The ninth count repeated the same charge, changing only the words "band together," for the words "conspire together." The seven counts following the first (with the corresponding seven counts following the ninth) charge a conspiracy to injure, oppress, threaten and intimidate the same persons with the intent to prevent and hinder them in the exercise and enjoyment of certain other rights and privileges, namely: in the second count, the right "to keep and bear arms for a lawful purpose;" in the third, with the intent "to deprive them of their lives and liberty of person without due process of law;" in the fourth, the right "to the full and equal benefit of all laws and proceedings enacted by the state or the United States for the security of persons and property, and enjoyed by white citizens;" in the fifth, "the rights, privileges, immunities and protection granted and secured to them as citizens of the United States and of Louisiana, by reason of their race and color, and because they were of African descent, and persons of color;" in the sixth, "the right to vote at any future election, knowing them to be qualified;" in the seventh, "with intent to put them in fear of bodily harm, injure and oppress them, because they had voted at a previous election held in November, 1872;" in the eighth, "every, each, all and singular the several rights and privileges granted or secured to them in common with all good citizens of the United States." The last sixteen counts charged the murder of the same persons in executing the conspiracy. Three of the defendants being convicted on the first sixteen counts of conspiracy only, motion was made in arrest of judgment, and argued by

R. H. Marr, E. John Ellis, W. R. Whitaker, and Mr. Bryan, for defendants.

J. R. Beckwith, U. S. Atty., for the United States.

The judges not being agreed, BRADLEY, Circuit Justice, delivered the following opinion in favor of the motion, which was granted accordingly, and the case was certified to the supreme court:

The indictment in this case is founded on the 6th and 7th sections of the act of congress approved May 31, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." 16 Stat. 140. It contains two distinct series of counts, in one of which the defendants are charged with having unlawfully and feloniously banded or conspired together to intimidate certain persons of African descent (specified by name), and thereby to hinder and prevent them in, and deprive them of, the free exercise and enjoyment of certain supposed constitutional rights and privileges, respectively specified in the several counts of the indictment, such as, in one count, the right peaceably to assemble themselves together; in another, the right to keep and bear arms; in a third, the right to be protected against deprivation of life, liberty and property without due process of law; in a fourth, the right to the full and equal benefit of the laws; in another, the right to vote, etc. The second series or counts charges murder in addition to, and whilst carrying out, the conspiracies charged. Three of the defendants, Cruikshank, Hadnot and Irwin, have been convicted of conspiracy under the first series of counts, which are founded on the sixth section of the act, and now move in arrest of judgment, on the ground that the act is unconstitutional, and that the indictment does not charge any crime under it.

The main ground of objection is that the act is municipal in its character, operating di-

rectly on the conduct of individuals, and taking the place of ordinary state legislation; and that there is no constitutional authority for such an act, inasmuch as the state laws furnish adequate remedy for the alleged wrongs committed.

It cannot, of course, be denied that express power is given to congress to enforce by appropriate legislation the 13th, 14th and 15th amendments of the constitution, but it is insisted that this act does not pursue the appropriate mode of doing this. A brief examination of its provisions is necessary more fully to understand the form in which the questions arise. The first section provides that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections in any state, county, city, township, etc., without distinction of race, color or previous condition of servitude, any constitution, law, custom or usage of any state or territory to the contrary notwithstanding. This is not quite the converse of the 15th amendment. That amendment does not establish the right of any citizens to vote; it merely declares that race, color or previous condition of servitude shall not exclude them. This is an important distinction, and has a decided bearing on the questions at issue. The second section requires that equal opportunity shall be given to all citizens, without distinction of race, color or previous condition of servitude, to perform any act required as a prerequisite or qualification for voting, and makes it a penal offense for officers and others to refuse or omit to give such equal opportunity. The third section makes the offer to perform such preparatory act, if not performed by reason of such wrongful act or omission of the officers or others, equivalent to performance; and makes it the duty of inspectors or judges of election, on affidavit of such offer being made, to receive the party's vote; and makes it a penal offense to refuse to do so. These three sections relate to the right secured by the 15th amendment. The fourth section makes it a penal offense for any person, by force, bribery, threats, etc., to hinder or prevent, or to conspire with others to hinder or prevent, any citizen from performing any preparatory act requisite to qualify him to vote, or from voting, at any election. This section does not seem to be based on the 15th amendment, nor to relate to the specific right secured thereby. It extends far beyond the scope of the amendment, as will more fully appear hereafter. The fifth section makes it a penal offense for any person to prevent or attempt to prevent, hinder or intimidate any person from exercising the right of suffrage, to whom it is secured by the 15th amendment, by means of bribery, threats, or threats of depriving of occupation, or of ejecting from lands or tenements, or of refusing to renew a lease, or of violence to such person or his family. The sixth section, under which the first sixteen counts of the indictment are framed, contains two distinct clauses. The first declares that "if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another with intent (to violate any provision of this act), such persons shall be held guilty of felony." Of course this would include conspiracy to prevent any person from voting, or from performing any preparatory act requisite thereto. The next clause has a larger scope. Repeating the introductory and concluding words, it is as follows: "If two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another with intent to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony." Here it is made penal to enter into a conspiracy to injure or intimidate any citizen, with intent to prevent or hinder his exercise and enjoyment, not merely of the right to vote, but of any right or privilege granted or secured to him by the constitution or laws of the United States.

The question is at once suggested, under what clause of the constitution does the power to enact such a law arise? It is undoubtedly a sound proposition, that whenever a right is guarantied by the constitution of the United States, congress has the power to provide for its enforcement, either by implication arising from the correlative duty of government to protect, wherever a right to the citizen is conferred, or under the general power (contained in article 1, § 8, par. 18) "to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof." It was on the principle first stated that the fugitive slave law was sustained by the supreme court of the United States. Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539. The constitution guarantied the rendition of fugitives held to labor or service in any state, and it was held that congress had, by implication, the power to enforce the guaranty by legislation. "They require," says Justice Story, delivering the opinion of the majority of the court, "the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required, the means are given; and, where the duty is

enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national constitution and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The state, therefore, cannot be compelled to enforce them, etc. The natural if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution." To the objection that the power did not fall within the scope of the enumerated powers of legislation confided to congress, Justice Story answers: "Stripped of its artificial and technical structure, the argument comes to this, that, although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the constitution, they remain without any means of giving them effect by any act of congress, and they must operate solely proprio vigore, however defective may be their operation; nay, even although in a practical sense, they may become a nullity from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true interpretation of the constitution, it must, in a great measure, fail to attain many of its avowed and positive objects as a security of rights and a recognition of duties. Such a limited construction of the constitution has never yet been adopted as correct, either in theory or practice." [Prigg v. Pennsylvania] 16 Pet. [41 U. S.] 618.

It seems to be firmly established by the unanimous opinion of the judges in the above quoted case that congress has power to enforce, by appropriate legislation, every right and privilege given or guarantied by the constitution. The method of enforcement, or the legislation appropriate to that end, will depend upon the character of the right conferred. It may be by the establishment of regulations for attaining the object of the right, the imposition of penalties for its violation or the institution of judicial procedure for its vindication when assailed, or when ignored by the state courts; or it may be by all of these together. One method of enforcement may be applicable to one fundamental right, and not applicable to another. With regard to those acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular state of which he is a citizen to protect and enforce them, and to do naught to deprive him of their full enjoyment. When any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties that they shall not be impaired by the state, or the United States, as the case may be. The fulfillment of this guaranty by the United States is the only duty with which that government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the state government as a part of its residuary sovereignty. For example, when it is declared that no state shall deprive any person of life, liberty, or property without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or any other crime committed by individual malefactors, so as to give congress the power to pass laws for the punishment of such crimes in the several states generally. It is a constitutional security against arbitrary and unjust legislation by which a man may be proceeded against in a summary manner and arbitrarily arrested and condemned, without the benefit of those time-honored forms of proceeding in open court and trial by jury, which is the clear right of every freeman, both in the parent country and in this. It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses; and the power of congress, whether implied or expressed, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the states. This would be to clothe congress with power to pass laws for the general preservation of social order in every state. The enforcement of the guaranty does not require or authorize congress to perform the duty which the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform. The duty and power of enforcement take their inception from the moment that the state fails to comply with the duty enjoined, or violates the prohibition imposed. No state may pass a law impairing the obligation of contracts. Does this authorize congress to pass laws for the general enforcement of contracts in the states? Certainly not. But when the state has passed a law which violates the prohibition, congress may provide a remedy. It did so in the twenty-fifth section of the judiciary act [1 Stat. 85] by authorizing an appeal to the supreme court of

the United States of all cases where a constitutional or federal right should be denied or overruled in a state court.

Again, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." But this does not authorize congress to pass a general system of municipal law for the security of person and property, to have effect in the several states for the protection of citizens of other states to whom the fundamental right is guarantied. It only authorizes appropriate and efficient remedies to be provided in case the guaranty is violated. Where affirmative legislation is required to give the citizen the right guarantied, congress may undoubtedly adopt it, as was done in the case of the fugitive slave law and as has been done in later times, to carry into full effect the 13th amendment of the constitution by the passage of the civil rights bill, as will be more fully noted hereafter. But with regard to mere constitutional prohibitions of state interference with established or acknowledged privileges and immunities, the appropriate legislation to enforce such prohibitions is that which may be necessary or proper for furnishing suitable redress when such prohibitions are disregarded or violated. Where no violation is attempted, the interference of congress would be officious, unnecessary, and inappropriate.

The bearing of these observations on the effect of the several recent amendments of the constitution, in conferring legislative powers upon congress, is next to be noticed. The 13th amendment declares that neither slavery nor involuntary servitude, except as a punishment for crime, shall exist within the United States or any place subject to its jurisdiction, and that congress shall have power to enforce this article by appropriate legislation. This is not merely a prohibition against the passage or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that slavery shall not exist. It prohibits the thing. In the enforcement of this article, therefore, congress has to deal with the subject matter. If an amendment had been adopted that polygamy should not exist within the United States, and a similar power to enforce it had been given as in the case of slavery, congress would certainly have had the power to legislate for the suppression and punishment of polygamy. So, undoubtedly, by the 13th amendment congress has power to legislate for the entire eradication of slavery in the United States. This amendment had an affirmative operation the moment it was adopted. It enfranchised four millions of slaves, if, indeed, they had not previously been enfranchised by the operation of the Civil War. Congress, therefore, acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the civil rights bill, passed April 9, 1866 (14 Stat. 27), by which it was declared that all persons born in the United States, and not subject to a foreign power (except Indians, not taxed), should be citizens of the United States; and that such citizens, of every race and color, without any regard to any previous condition of slavery or involuntary servitude, should have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and should be subject to like punishment, pains and penalties, and to none other, any law, etc., to the contrary notwithstanding.

It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that congress had the power, under the amendment, to declare and effectuate these objects. The form of doing this, by extending the right of citizenship and equality before the law to persons of every race and color (except Indians not taxed and, of course, excepting the white race, whose privileges were adopted as the standard), although it embraced many persons, free colored people and others, who were already citizens in several of the states, was necessary for the purpose of settling a point which had been raised by eminent authority, that none but the white race were entitled to the rights of citizenship in this country. As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that congress had the power, under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race.

Conceding this to be true (which I think it is), congress then had the right to go further and to enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon him. Without having this power, congress could not enforce the amendment. It cannot be doubted, therefore, that congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the 13th amendment and the laws thus passed in pursuance thereof. But this power does not authorize congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the state courts, unless, indeed, the state should deny

to the class of persons referred to the equal protection of the laws. Then, of course, congress could provide remedies for their security and protection. But, in ordinary cases, where the laws of the state are not obnoxious to the provisions of the amendment, the duty of congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude. To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only. To constitute an offense, therefore, of which congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.

I will next consider the effect of the 15th amendment, to enforce which the law under consideration was primarily framed. The amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude," and power is given to congress to enforce the amendment by appropriate legislation. Although negative in form, and therefore, at first view, apparently to be governed by the rule that congress has no duty to perform until the state has violated its provisions, nevertheless in substance, it confers a positive right which did not exist before. The language is peculiar. It is composed of two negatives. The right shall not be denied. That is, the right shall be enjoyed; the right, namely, to be exempt from the disability of race, color, or previous condition of servitude, as respects the right to vote. In terms it has a general application to all, but the history of the events out of which the amendment grew shows that it was principally intended to confer upon colored citizens the right of suffrage. The majority of the court in the recent Slaughter-house Cases, 16 Wall. [83 U. S.] 81, say: "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause." (Speaking of that clause in the 14th amendment which prohibits the states from denying to any person within its jurisdiction, the equal protection of the laws.) "The existence of laws in the states where the newly emancipated negroes existed, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. * * * We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." Whether this suggestion of the court, that the recent amendments were intended for the benefit of the African race alone, be accepted or not, it is manifest that the 15th amendment was primarily and principally intended for their benefit, and that it does have the affirmative effect before stated of conferring upon them an equal right to vote with that enjoyed by white citizens. It was, in fact, a constitutional extension of the civil rights bill passed in 1866, conferring upon the emancipated slave (as well as all persons of his race) another specific right in addition to those enumerated in that bill; and it is to be interpreted on the same general principles. But whilst the amendment has the effect adverted to, it must be remembered that the right conferred and guarantied is not an absolute, but a relative one. It does not confer the right to vote. That is the prerogative of the state laws. It only confers a right not to be excluded from voting by reason of race, color or previous condition of servitude, and this is all the right that congress can enforce. It confers upon citizens of the African race the same right to vote as white citizens possess. It makes them equal. This is the whole scope of the amendment. The powers of congress, therefore, are confined within this scope. The amendment does not confer upon congress any power to regulate elections or the right of voting where it did not have that power before, except in the particular matter specified. It does, however, confer upon congress the right of enforcing the prohibition imposed against excluding citizens of the United States on account of race, color, or previous condition of servitude. Before the amendment congress had the power to regulate elections and the right of voting in the District of Columbia and in the territories, and to regulate (by altering any regulations made by the state) the time, place and manner of holding elections for senators and representatives in the several states. It has that power still, subject to the prohibition of the amendment. Also, be-

fore the amendment, the states had the power to regulate all state elections and the right of voting therein. They have that power still, subject to the prohibition of the amendment and the right of congress to enforce it. Congress has not acquired any additional right to regulate the latter elections, or the right of voting therein, which it did not possess before, except the power to enforce the prohibition imposed on the states, and the equal right acquired by all races and colors to vote.

The manner in which the prohibition (or the equal right to vote) may be enforced is, of course, the question of principal interest in this inquiry. When the right of citizens of the United States to vote is denied or abridged by a state on account of their race, color, or previous condition of servitude, either by withholding the right itself or the remedies which are given to other citizens to enforce it, then, undoubtedly, congress has the power to pass laws to directly enforce the right and punish individuals for its violation, because that would be the only appropriate and efficient mode of enforcing the amendment. Congress cannot, with any propriety, or to any good purpose, pass laws forbidding the state legislature to deny or abridge the right, nor declaring void any state legislation adopted for that end. The prohibition is already in the constitutional amendment, and laws in violation of it are absolutely void by virtue of that prohibition. So far as relates to rendering null and void the obnoxious law, it is done already; but that does not help the person entitled to vote. By the supposition the state law gives him no remedy and no redress. It is clear, therefore, that the only practical way in which congress can enforce the amendment is by itself giving a remedy and giving redress. If the party should be sued in the state court for attempting to exercise his right, of course the appeal to the supreme court of the United States, given by the twenty-fifth section of the judiciary act, would be all the remedy he would need; but it would be entirely inefficient in securing to him the actual exercise of his right to vote.

But suppose that the laws of the state are in harmony with the amendment, at least contain nothing repugnant thereto; has congress the power to pass laws concurrently with the state to enforce the right of every race and color, without regard to the previous condition of servitude, to an equality in the right to vote? There is no essential incongruity in the coexistence of concurrent laws, state and federal, for the punishment of the same unlawful acts as offenses both against the laws of the state and the laws of the United States. Robbery of the mails, counterfeiting the coin, assaults upon a United States marshal or other officer while in the performance of his duty, and many other cases of like nature, will readily suggest themselves. Moore v. Illinois, 14 How. [55 U. S.] 20. Mr. Justice Grier, in delivering the opinion of the supreme court in the case cited, says: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted."

The real difficulty in the present case is to determine whether the amendment has given to congress any power to legislate except to furnish redress in cases where the states violate the amendment. Considering, as before intimated, that the amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color, I am inclined to the opinion that congress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional. But the limitations which are prescribed by the amendment must not be lost sight of. It is not the right to vote which is guarantied to all citizens. Congress cannot interfere with the regulation of that right by the states except to prevent by appropriate legislation any distinction as to race, color, or previous condition of servitude. The state may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else. Congress, so far as the 15th amendment is concerned, is limited to the one subject of discrimination—on account of race, color or previous condition of servitude. It can regulate as to nothing else. No interference with a person's right to vote, unless made on account of his race, color or previous condition of servitude, is subject to congressional animadversion. There may be a conspiracy to prevent persons from voting having no reference to this discrimination. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the parties. All such conspiracies are amenable to the state laws alone. To bring them within the scope of the amendment and of the powers of congress they must have for mo-

tive the race, color or previous condition of servitude of the party whose right is assailed.

According to my view the law on the subject may be generalized in the following proposition: The war of race, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla or predatory form, or by private combinations, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States; but any outrages, atrocities, or conspiracies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the states, unless, indeed, the state, by its laws, denies to any particular race equality of rights, in which case the government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner. Unless this distinction be made we are driven to one of two extremes—either that congress can never interfere where the state laws are unobjectionable, however remiss the state authorties may be in executing them, and however much a proscribed race may be oppressed; or that congress may pass an entire body of municipal law for the protection of person and property within the states, to operate concurrently with the state laws, for the protection and benefit of a particular class of the community. This fundamental principle, I think, applies to both the 13th and 15th amendments.

After what has been said, a few observations will suffice as to the effect of the 14th amendment, upon the questions under consideration. It is claimed that, by this amendment, congress is empowered to pass laws for directly enforcing all privileges and immunities of citizens of the United States by original proceedings in the courts of the United States, because it provides, amongst other things, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and because it gives congress power to enforce its provisions by appropriate legislation. If the power to enforce the amendment were equivalent to the power to legislate generally on the subject matter of the privileges and immunities referred to, this would be a legitimate conclusion. But, as before intimated, that subject matter may consist of rights and privileges not derived from the grants of the constitution, but from those inherited privileges which belong to every citizen, as his birthright, or from that body of natural rights which are recognized and regarded as sacred in all free governments; and the only manner in which the constitution recognizes them may be in a prohibition against the government of the United States, or the state governments, interfering with them. It is obvious, therefore, that the manner of enforcing the provisions of this amendment will depend upon the character of the privilege or immunity in question. If simply prohibitory of governmental action there will be nothing to enforce until such action is undertaken. How can a prohibition, in the nature of things, be enforced until it is violated? Laws may be passed in advance to meet the contingency of a violation, but they can have no application until it occurs. On the other hand, when the provision is violated by the passage of an obnoxious law, such law is clearly void, and all acts done under it will be trespasses. The legislation required from congress, therefore, is such as will provide a preventive or compensatory remedy or due punishment for such trespasses; and appeals from the state courts to the United States courts in cases that come up for adjudication. If these views are correct, there can be no constitutional legislation of congress for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the courts of the United States, where the only constitutional guaranty of such privileges and immunities is, that no state shall pass any law to abridge them, and where the state has passed no laws adverse to them, but, on the contrary, has passed laws to sustain and enforce them.

I will now proceed to examine the several counts in the indictment, and endeavor to test their validity by the principles which have been laid down. These have been so fully enunciated and explained, that a very brief examination of the counts will suffice.

The first count is for a conspiracy to interfere with the right "to peaceably assemble together with each other, and with other citizens, for a peaceable and lawful purpose." This right is guarantied in the first amendment to the constitution, which declares that "congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances." Does this disaffirmance of the power of congress to prevent the assembling of the people amount to an affirmative power to punish individuals for disturbing assemblies? This would be a strange inference. That is the prerogative of the states. It belongs to the preservation of the public peace and the fundamental rights of the people. The people of the states do not ask congress to protect the right, but demand that it shall not interfere with it. Has anything since occurred to give congress legislative power over the subject matter? The 14th amendment declares that no state shall by law abridge the privileges or immunities of citizens of the United States. Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities, still, does it give congress power to legislate over the subject? Power to enforce the amendment is all that

is given to congress. If the amendment is not violated, it has no power over the subject.

The second count, which is for a conspiracy to interfere with certain citizens in their right to bear arms, is open to the same criticism as the first.

The third count charges a conspiracy to deprive certain citizens of African descent of their lives and liberties without due process of law. Every murderer and robber does this. Congress surely is not vested with power to legislate for the suppression and punishment of all murders, robberies, and assaults committed within the states. In none of these counts is there any averment that the state had, by its laws, interfered with any of the rights referred to, or that it had attempted to deprive the citizens of life, liberty, or property without due process of law, or that it did not afford to all the equal protection of the laws. The third count cannot be sustained.

The fourth count charges a conspiracy to deprive certain colored citizens of African descent, of the free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property which is enjoyed by the white citizens. The right and privilege to interfere with the exercise of which is here alleged to have been the object of the conspiracy is not contained in the constitution in express terms. The 14th amendment, amongst other things, declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. But the indictment does not allege that this has been done. The count manifestly refers to the rights secured by the civil rights bill of April 9, 1866, which has already been referred to. That act, as we have seen, expressly declares that all citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right in every state and territory to make and enforce contracts, etc., and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. The conspiracy charged in the fourth count is a conspiracy to interfere with the free exercise and enjoyment of this right. But the count does not contain any allegation that the defendants committed the acts complained of with a design to deprive the injured persons of their rights on account of their race, color or previous condition of servitude. This, as we have seen, is an essential ingredient in the crime to bring it within the cognizance of the United States authorities. Perhaps such a design may be inferred from the allegation that the persons injured were of the African race, and that the intent was to deprive them of the exercise and enjoyment of the rights enjoyed by white citizens. But it ought not to have been left to inference; it should have been alleged. On this ground, therefore, I think this count is defective and cannot be sustained.

It is also defective on account of the vagueness and generality of the charge—"to prevent and hinder (them) in the free exercise and enjoyment of their several and respective right and privilege to the full and equal benefit of all laws and proceedings then and there enacted," etc. It seems to me that such a general and sweeping charge, without any specification of any laws or proceedings, does not amount to the averment of a criminal act. It is not merely informal, it is insufficient.

The fifth and eighth counts are open to the same objection of vagueness and generality as the fourth, and for that reason neither of them can, in my judgment, be sustained.

The sixth count charges a conspiracy to prevent and hinder certain citizens of the United States, who were of African descent and persons of color, in the exercise and enjoyment of their right to vote at any election to be thereafter held in the state of Louisiana, or in the parish of Grant, knowing they had such right to vote. A conspiracy to hinder a person from exercising his right to vote at any election is made indictable by the fourth section of the enforcement act; also by the sixth section, read in connection with the first. Over the general subject of the right to vote in the states, and the regulation of said right, congress, as we have seen, has no power to legislate. The fifteenth amendment relates only to discriminations on account of race, color and previous condition of servitude, and, as we have before shown, is a prohibition against the making of such discriminations. The law on which this count is founded is not confined to cases of discrimination above referred to. It is general and universal in its application. Such a law is not supported by the constitution. The charge contained in the count does not describe a criminal offense known to any valid and constitutional law of the United States. It should, at least, have been shown that the conspiracy was entered into to deprive the injured persons of their right to vote by reason of their race, color or previous condition of servitude. This count I also regard as invalid.

The seventh count charges a conspiracy to injure and oppress certain colored citizens of African descent because, being duly qualified to vote, they had exercised their right to do so, and had voted at the election held in Louisiana, in November, 1872, and at other times. This count is subject to the same objection as the last, and is invalid for the same reason.

The next eight counts on which the verdict was found are literal copies, respectively, of the first eight, so far as relates to the language on which their validity depends. The

same observations apply to them which apply to the first eight.

In my opinion the motion in arrest of judgment must be granted.

[NOTE. The order arresting the judgment in conformity with the above opinion of Mr. Justice Bradley was affirmed by the supreme court, where it was carried on writ of error and certificate of division. 92 U. S. 542.]

Case No. 14,898.

UNITED STATES v. The CUBA.

[2 Hughes, 489; [1] 2 Am. Law T. Rep. U. S. Cts. 121; 10 Int. Rev. Rec. 115; 2 Balt. Law Trans. 743.]

District Court, D. Maryland. 1869.

CUSTOMS—FORFEITURE—LANDING WITHOUT PERMIT.

A vessel is liable under section 50 of act of 1799 [1 Stat. 665], relating to customs revenues, to forfeiture for the landing without permit of merchandise over the value of four hundred dollars, whether the owner is innocent or not.

[This is a libel on information for the forfeiture of the vessel and tackle under the act of 1799, on the charge of some 45,000 cigars having been landed without permit. There seemed to be no dispute as to the fact that one of the steamer's engineers, (named A. B. Hanna, who afterwards testified against the vessel,) had made an arrangement with a New York man, named Clarke, to run in cigars duty free, and that the cigars in question, valued at over $400, were being smuggled under this contract, no evidence of any complicity of the owners of the vessel appearing. The act of 1799 renders the parties knowingly offending liable to a fine, &c., and the vessel and tackle liable to forfeiture should merchandise amounting to over $400 be landed without permit from the custom house by any person on board such vessel. The act of 1866 [14 Stat. 178], provides another and different penalty for knowingly importing merchandise contrary to law against the parties actually offending, and says nothing of a forfeiture of the vessel. Thereupon the defense contend that the act of 1866 embraces the offence in question and is a substitute for that portion of the act of 1799, and repealing the same by implication, relieves the vessel in this case from the penalty therein contained.

[Considerable stress was laid upon the hardship which would be worked upon innocent ship owners by making them liable under the act of 1799, for the frauds of parties over whom they have no control and against which they cannot protect themselves.] [2]

GILES, District Judge. This is a libel upon information on the instance side of the court to forfeit the steamship Cuba, her tackle, furniture, etc. The libel was originally laid under the provisions of the 50th section of the act of 1799, and was subsequently amended by counts under the 24th and 27th sections of the same act. The district attorney, however, abandoned the amendment, and in the argument only relied on the original count. There is no evidence to sustain the allegations under the 27th section, and the 24th section is apparently superseded by the 4th section of the act of 1866, and not having been relied upon by the district attorney, will not be considered further.

The question then for the court to determine is whether a forfeiture of the vessel can be had under the allegations of the first count, based upon the 50th section of the act of 1799. This section provides that no goods or merchandise brought from foreign ports shall be landed at night, or without the authority of the proper officers of the court, and should goods be so landed in contravention of the act, the captain of the vessel, whether he has knowledge of the offence or not, is made liable to a penalty of a fine of $400, and all others knowingly assisting therein are punishable by a fine of the same sum; and should the goods so landed amount at their highest market rate to over the value of $400, the section renders the vessel, etc., liable to forfeiture. It is proved that during the year 1868 the steamship Cuba was a regular trader between the ports of Baltimore, New Orleans, and Havana. She had been built or purchased by some of the most respectable and enterprising citizens of this port, and placed upon the route for the public-spirited purpose of building up this trade. Being so engaged, between the 1st January, 1868, and the 1st of January, 1869, on some four or five trips some 45,000 cigars from Havana were secretly landed by the first engineer of the steamer, a portion of them being delivered in New Orleans and the balance here in contravention of the 50th section of the act of 1799; the captain and first officer of the steamer, her owners and directors having no knowledge of the transaction, and being perfectly innocent of any complicity therein. If this vessel is liable it is a very hard case upon them, for it is perfectly clear that no human prudence or skill can guard against the landing of merchandise as small in bulk as the value of $400 in Havana cigars. This is manifest from the circumstances of this very case. When the lynx-eyed officer of the customs boarded the vessel off Annapolis, suspecting and for the purpose of detecting this very fraud, with all his search and exertion he failed to find some four thousand cigars which the engineer then had on board, and subsequently brought out from their hiding place, landed and shipped to his confederate in New York. In the present state of the navigation, in the brief time of the rapid trips of steamers, it is impossible to prevent

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

[2] [From 10 Int. Rev. Rec. 115.]

such frauds. With the hardship of the law, however, the court has nothing to do; its duty is only to declare and enforce the law as made; the making of laws and the remission of penalties therein imposed belong to other departments of the government.

In the very able arguments of counsel for the claimants, the court understood them to contend that the 50th section of the act of 1799 was repealed by implication by the 4th section of the act of 1866. There are one or two plain rules recognized by courts for the construction of statutes which are applicable to this case. Repeals by implication are never favored, particularly as applied to statutes designed for the enforcement of the revenue laws of the government [U. S. v. 67 Packages of Dry Goods] 17 How. [58 U. S.] 85; [Sinnot v. Davenport] 22 How. [63 U. S.] 229; U. S. v. One Case of Hair Pencils [Case No. 15,924]. A statute is never repealed by implication if the prior and subsequent statutes can be so construed as to stand together [Wood v. U. S.] 16 Pet. [41 U. S.] 342. The implication must be one of necessity, and it is not sufficient that the two acts should relate to the same subject-matter, there must be a positive repugnancy between them, and even then the appeal is only pro tanto of the prior statute as cannot stand together with the subsequent act. All laws for the collection of revenue are to be construed as auxiliary and cumulative, except when otherwise expressly provided therein. [McCool v. Smith] 1 Black [66 U. S.] 459; Aspden's Estate [Case No. 589]; [Lessee of Croghan v. Nelson] 3 How. [44 U. S.] 187; Morlot v. Lawrence [Case No. 9,815]; U. S. v. Smith [Id. 16,319]. The case last cited is very similar to the one before me. The object of the law in both was to prevent smuggling, and it was there contended that the act of 1842 [5 Stat. 548] repealed by implication the act of 1832 [4 Stat. 583], but the court decided there was no repeal, the last act covering some but not all the ground of the first act.

To look at the acts, the 50th section of the act of 1799 inflicts a penalty upon the master whether he had knowledge or not, a penalty imposed by the government to secure extreme caution and vigilance upon his part, and where the goods landed should amount to $400 in value, provides for the forfeiture of the vessel. The act of 1866, section 4, upon which Mr. Brune so ably commented, like section 19 in the act of 1842, imposes a penalty upon those who knowingly import goods contrary to law, the forfeiture of the goods imported, a fine of from $50 to $5000, and imprisonment for not more than two years. A party cannot be convicted under this section unless he has knowingly and wilfully engaged in the forbidden transaction, and so this act does not cover the same ground as the act of 1799, which provides against the handling of goods by night or without the permit of the collector and naval officer of the port. The acts do not cover the same ground nor the same offence, and consequently there is no repeal by implication.

It might have been urged, though the point was not raised, that under the 8th section of the act of 1866, providing that in any case where a vessel, or the owner, master, or manager of a vessel, shall be subject to a penalty for violation of the revenue laws of the United States, such vessel shall be holden for such penalty, etc., that the steamer in this case can only be held for the penalty against the landing of the cigars (some $2000), and though the court at first thought such to be the case, upon careful examination of the section by the lights of the rules before laid down, I am of opinion that this statute can stand, and that there is double remedy given, and this section can apply where the value of the goods landed is under $400, and that when over that amount the government can elect whether to pursue one or the other remedy, and the court is bound to so construe it, though if it could have seen its way it would take pleasure in clearing the vessel under the circumstances of this case. There is, however, a provision in the act of 1866 (section 18) which has escaped the attention of the counsel on both sides, and which disposes of the whole question of repeal by implication. The 18th section enacts that "nothing in this act contained shall be taken to abridge or limit any forfeiture, penalty, fine, liability, or remedy provided for or arising under any law now in force, except as herein otherwise especially provided." This cuts out by the roots the doctrine of repeal by implication, and clears the case from all difficulty. I have, therefore, nothing left to do but to enforce the law; and as it is perfectly clear that the cigars were not on the manifest, and were landed without permit, I shall sign a decree for the condemnation of the vessel, etc. As the vessel has been taken out on stipulations, I shall order them paid within twenty days.

Case No. 14,899.

UNITED STATES v. CULLERTON et al.

[8 Biss. 166;[1] 24 Int. Rev. Rec. 68.]

Circuit Court, N. D. Illinois. Feb. 1878.

INTERNAL REVENUE — ACTION UPON BOND — SENTENCE AS A BAR — PARDON.

1. Where a distiller is indicted for violation of the internal revenue laws, his conviction and sentence for such violations is not a bar to such action, unless the sentence is actually fulfilled—if a fine by payment, and if imprisonment, by serving out the term.

2. A pardon is an effectual satisfaction of such sentence, and also operates as a complete release of the sureties on the bond from all liability for the same acts or breaches of duty charged in the indictment.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

This is an action of debt upon a bond given by the defendants [Edward F. Cullerton and others] conditioned for the faithful performance by defendant Cullerton of his duties in the office of internal revenue gauger for the First collection district of this state, to which he had been duly appointed. The bond bears date the 23d day of December, 1874. Ten breaches of this bond are assigned in the declaration:

[1. That on the 1st day of February, 1875, while Cullerton, as such gauger, was assigned to duty at the distillery of Dickinson, Leach and Co., he permitted a large quantity of spirits, produced at said distillery, to wit: ten thousand proof gallons to be removed to some place other than the distillery warehouse, without payment of the tax thereon imposed, whereby the United States was defrauded of said tax.

[2. That on the 10th day of February, 1875, while acting as such gauger and while assigned for duty at said distillery, said Cullerton did conspire with said Dickinson, Leach and others to defraud the United States of the tax on a large quantity of spirits produced at said distillery, by means of which conspiracy a large quantity of said spirits were removed from said distillery without payment of the tax, whereby the United States was defrauded of the tax imposed by law on said spirits.

[3. That on the 1st day of March, 1875, while said Cullerton was assigned to duty at said distillery as such gauger, said Dickinson and others did unlawfully remove therefrom a large quantity, to wit: ten thousand gallons of spirits, produced at said distillery, without payment of the tax thereon; and that Cullerton had knowledge of such removal, and failed and neglected to report such removal to the collector of internal revenue for said district, whereby the tax on said spirits was wholly lost to the United States.

[4. That on the 10th day of March, 1875, while Cullerton was assigned to duty as such gauger at said distillery, said Dickinson and others unlawfully removed a large quantity of spirits from said distillery without payment of tax, to wit: ten thousand gallons; and that, although Cullerton had knowledge of the intended removal and eloigning of said spirits from said distillery, he omitted to give notice thereof to the collector of said district, whereby, etc.

[5. That on the 20th day of February, 1875, while Cullerton was assigned to duty as such gauger at said distillery, a large quantity, to wit: ten thousand gallons of spirits were removed from said distillery without payment of the tax, by and with the connivance and collusion of said Cullerton, whereby the United States were defrauded, etc.

[6. That on the 1st day of April, 1875, while assigned to do duty as such gauger at the distillery of the Illinois Distilling Company, he did permit divers persons to remove from said distillery a large quantity, to wit: ten thousand gallons of spirits there produced without payment of the tax imposed thereon, whereby, etc.

[The seventh, eighth, ninth, and tenth breaches are like the second, third, fourth, and fifth, with the exception that they charge the spirits to have been removed from the distillery of the Illinois Distilling Company.] [2]

To this the defendants plead two special pleas:

First—That on the 11th of February, 1876, Cullerton was indicted by the grand jury of the district court of this district for the same identical acts of misconduct assigned in said declaration as breaches of said bond. That he was afterwards duly arraigned in said court and pleaded "Not guilty" to said indictment, and afterwards, to-wit: on the 12th day of June, 1876, he was duly tried on said indictment before said court and a jury, and by the verdict of said jury found "Guilty" on the fourth count of said indictment and "Not guilty" as to all the other counts and charges therein. On which verdict said court, afterwards, to-wit: on the 21st day of July, 1876, gave judgment and sentenced said Cullerton to pay a fine of one thousand dollars, and to be imprisoned in the jail of Cook county, Illinois, for the term of six months, and to pay the costs of said prosecution—which said judgment has not been reversed, etc.

Second—That after the trial, conviction, and sentence of said Cullerton as set forth in the first special plea, to-wit: on the 3d day of August, 1876, the president of the United States wholly pardoned and released said Cullerton from the offenses, causes of action and penalties alleged in the said several breaches in said declaration on condition that said Cullerton would pay the said fine of one thousand dollars and the costs of said prosecution. And avers that said Cullerton duly accepted said pardon, and paid said fine and costs long before the commencement of this suit.

To these two pleas the district attorney filed a general demurrer.

Mark Bangs, U. S. Dist. Atty.
C. H. Reed, for defendants.

BLODGETT, District Judge. The only question is, whether these two pleas present an answer to the action.

The first plea of indictment, trial, conviction and sentence for the same offenses under the criminal clauses of the statute prescribing the duties and punishments of officers of the internal revenue department, raises the question whether the government can have a remedy upon the officer's bond after prosecuting and convicting him criminally.

I take it that there can be no doubt but that an acquittal under a criminal proceeding would be a bar to an action on the bond for damages for the same breaches of duty charged in the indictment. So that it is only necessary to ask whether the conviction

[2] [From 24 Int. Rev. Rec. 68.]

for neglect of duty under the fourth count of the indictment is a bar to this suit for damages on the bond for the same negligence —the plea containing apt averments that the breaches for negligence assigned in this suit are the same as charged in the fourth count of the indictment.

A reference to the indictment pleaded in this case shows that it was based upon section 3169 of the Revised Statutes, and the acts of misconduct alleged in the declaration are substantially the same for which penalties are provided in this section.

The section reads as follows:

"Every officer or agent appointed and acting under the authority of any revenue law of the United States—

"First—Who is guilty of any extortion or willful oppression under color of law; or, second—Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or, third—Who willfully neglects to perform any of the duties enjoined on him by law; or, fourth—Who conspires or colludes with any other person to defraud the United States; or, fifth—Who makes opportunity for any person to defraud the United States; or, sixth—Who does or omits to do any act with intent to enable any other person to defraud the United States; or, seventh—Who negligently or designedly permits any violation of the law by any other person; or, eighth—Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate or return; or, ninth—Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States, under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the commissioner of internal revenue; or, tenth—Who demands or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than one thousand dollars, nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court."

It will be seen that under this law the court is required to render judgment against the officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution.

Every gauger is required by law (section 3156) to give bond in a penal sum not less than five thousand dollars, conditioned for the faithful performance of his duties under the law and regulations. And I am of opinion that it is not a good plea to a suit on this bond to allege an indictment, conviction and sentence under section 3169, or any other section prescribing penalties for violation of duty as such officer, unless there is an averment of satisfaction of the judgment. If a fine, by payment—if imprisonment, by serving out the term of sentence.

If the government elects in case of breach of duty to prosecute its dishonest officer by indictment instead of proceeding on the bond for damages, and obtains a conviction and satisfaction of the judgment, I think it would be barred from proceeding on the bond for the same delinquencies; but until the judgment in the criminal proceeding is satisfied, I think the intent of the law would be to reserve to the government the right of action on the bond for the damages.

It may be true, as contended in the argument, that where a statute provides a remedy by indictment and also by a civil action in behalf of the government against an officer for violation or neglect of duty, and the government proceeds by indictment, that this is a bar to the civil suit. But this statute is peculiar and I think it was the evident intention of congress that an officer violating its provisions should be liable criminally and civilly, or at least, that his civil liability should not be discharged until he had satisfied whatever judgment might be rendered against him in a criminal proceeding.

I am, therefore, of opinion that the demurrer to the first special plea is well taken.

The second plea alleges an executive pardon after conviction on the fourth count of the indictment, and the plea avers the conviction and judgment to have been for the same identical acts of misconduct charged as breaches of the bond.

"A pardon in a legal sense is a remission of guilt." 1 Bish. Cr. Law, 898.

Lord Coke says: "A pardon is a work of mercy, whereby the king either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical." 3 Inst. 233.

"A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed." Per Marshall, C. J., U. S. v. Wilson, 7 Pet. [32 U. S.] 160.

"The effect of a full pardon is to absolve the party from all the legal consequences of

his crime, and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." 1 Bish. Cr. Law, 916.

In Ex parte Garland, 4 Wall. [71 U. S.] 380, the supreme court of the United States says: "A pardon extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment."

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penalties and disabilities, and restores him to his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

So, Blackstone says: "The effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former as to give him a new credit and capacity." 4 Black. 402.

One of the "legal consequences" of the violations of duty charged in this declaration is the liability to an action on this officer's bond, which he had given for the faithful performance of his duty; and I apprehend there is hardly room for a doubt that a full pardon —and the pardon here pleaded, when accepted and its conditions complied with, is a full pardon—releases its recipient from all the penalties attached to his offense. He is legally excused, and the offense wiped out against him.

It can hardly require argument to prove that if the executive has by the pardon pleaded remitted the legal consequence of Cullerton's official derelictions, no suit can be maintained against him or his sureties for those derelictions. All the remedies of the government against him, both on his bond and by indictment, are released, and he stands purged of these offenses as fully as if the offenses had not been committed.

The law goes so far as to hold that the right of a private person to a share of a penalty by reason of his being an informer, or having instituted a prosecution under a penal law, is released by a pardon unless actually vested by judgment. Holliday v. People, 5 Gilman, 214; Cope v. Com., 4 Casey [28 Pa. St.] 297; Com. v. Denniston, 9 Watts, 142.

The case of U. S. v. McKee [Case No. 15,688], lately tried in St. Louis before the United States circuit court for the Eastern district of Missouri, Mr. Justice Miller presiding, was almost precisely parallel to this in its main facts, and there the pleas of former conviction and punishment and of pardon were held to be a complete answer to a suit for the same offenses.

In the case at bar the plea avers that the misconduct alleged in the declaration is the same as that for which the defendant Cullerton had been convicted, and for which he had been pardoned. The government may, of course, take issue on this averment, and if the offenses for which this officer was pardoned are not the same as those alleged in the declaration, perhaps this suit may be maintained. It may be that when the government has proceeded against an officer by indictment for misfeasance, malfeasance or nonfeasance in his official duty, the presumption would be that all his official derelictions up to the time of the finding of the indictment had been charged, and that it could not afterwards indict or sue for acts committed prior to the indictment when a judgment had been given adverse to the government, or when it had obtained a conviction and satisfaction; but the question does not arise and need not be decided at this time.

The demurrer is sustained as to the first plea, and overruled as to the second.

Case No. 14,900.

UNITED STATES v. CUMMINGS.

[3 Pittsb. Leg. J. 29.]

District Court, W. D. Pennsylvania. May 8, 1855.

MAIL ROBBERY — INDICTMENT—EVIDENCE—TRIAL.

[This was an indictment against Henry Cummings, charging him with robbing the mail.] The indictment being read to the prisoner, he plead "not guilty." This case was set down for the previous term, but a continuance was granted, the defendant alleging that he was not prepared to go to trial, owing to the absence of important witnesses.

The jury is composed of the gentlemen named below: (1) George Conner, (2) Alex. Mestergedd, (3) Wm. M. Barrow, (4) John Scott, (5) Levi Colvin, (6) J. A. Patterson, (7) Thos. Brownfield, (8) Hugh McKee, (9) John Long, (10) Wm. H. Blair, (11) A. S. Davis, (12) John Rogers.

Charles Shaler, for the Government.

Samuel W. Black, J. Bowman Sweitzer, and John H. Hampton, for the prisoner.

Cummings is a robust, healthy-looking man, and has a fine appearance. He is apparently about thirty-five years of age.

The charge on which he is arraigned is as follows, as stated by Judge Shaler in opening the case: About the middle of June, 1854, a gentleman named Oliver Judd, residing in the town of Monterey, Massachusetts, put a letter containing two $50 notes on the Mahaiwe Bank, same state, into the post office at that place, addressed to Nathaniel Hubbard, a rela-

tive, at Harrison, Potter county, Pennsylvania. Expecting the letter, Hubbard called at the post office at Harrison, and inquired of Cummings, who was postmaster, whether the package had arrived. The answer was that it had not. He repeated the call several times, as well as did other members of the family, and each time the answer was the same. Hubbard then wrote to Judd, that the letter had not reached its destination, and desired to know something concerning it. The clerk in the post office at Monterey, before enclosing the notes in an envelope, had taken a memorandum of them, and this was forwarded to Hubbard. He again called upon Cummings, but without gaining any information. He asked to look at the record, and Cummings answered that he had sent it to Washington City. It was afterwards found, however, in the post office at Harrison, but no entries for June were on it. Hubbard's suspicions as to the honesty of Cummings became aroused, from certain circumstances that came to his knowledge. During the month of October, Cummings had made arrangements to visit the West, in company with several of his acquaintances. Before the party started on their journey, Hubbard acquainted one of them with the facts that he was in possession of, and desired him to watch Cummings closely, to see whether he passed or had money of the description. When the travelers reached Detroit, Michigan, Cummings said that, as he had large bills, and wished to get them changed, he would pay the fare of the whole party, and then they could refund to him. The proposition was agreed to, and in the meantime the man who had the memorandum made his companions acquainted with the matter. They remained in Detroit several hours, and during the day Cummings remarked that he had a note for which he wished to get smaller ones, and that he would repair to a broker's, and get it exchanged. He walked up one street till he reached another, where he turned. His associates stepped into a clothing store, purchased some articles, and then followed after him. Just as they turned the corner, they saw him coming out of an exchange office, and when he came up to them, they told him to go to the hotel and wait for them, as they also wished to get bills exchanged. On entering the broker's they inquired whether Cummings had procured small notes for a large one, and receiving an affirmative reply, they requested to look at the large bill, and found that it answered the description precisely. They immediately had him arrested, and on going to the railroad office they discovered that the note with which he paid their fare, was exactly similar to the other one missed from the letter. Cummings was brought to this city and lodged in jail, where he has been ever since.

William Bostwick testified—Reside in Great Barrington, Massachusetts; am cashier of the Mahaiwe Bank, at that place; (one of the notes was shown to witness, and he pronounced it a genuine issue of his bank; it was No. 306, letter A, and dated August, 1853,) no duplicate numbers of that letter are issued; all $50 notes are lettered A; have no regular time of calling in and cancelling such notes; the number is the only way in which the note can be distinguished from other notes of the same denomination.

B. C. Langdon testified—Reside in Monterey, Massachusetts; am clerk in the post office at that place; Mr. Oliver Judd, on the 16th of last June, came into the office with two $50 notes, and requested me to inclose and direct them to Nathaniel Hubbard, at Harrison Valley, Potter county, Pa.; did as he wished; took a memorandum of the description and denomination of the bills; they were numbered 302 and 306; put the letter in the usual place for letters in the post office; some time after, received a letter from Mr. Hubbard, in which he stated that the letter had not reached its destination; replied to him, saying I had mailed it; also wrote to Cummings, to ask him whether he had received any letters from our office of the date of the 16th June. Cross-examined—Have a distinct recollection of directing the letter to Nathaniel Hubbard, at the request of Mr. Judd; did not take a memorandum of the denomination of the notes, as I did not consider it necessary.

The prosecution offered in evidence a leaf from the register of the post office at Monterey, on which the letter was entered. Mr. Hampton objected, contending that it was necessary to produce the register itself. Col. Black thought the objection was sound, and read an extract from the English law in support of the position. THE COURT sustained the objection.

Nathaniel Hubbard testified—Reside in Harrison, Potter county, Pa.; Henry Cummings was postmaster there in June; received a letter at his office, informing me that a letter had been sent to me; inquired of Cummings whether a letter from Monterey had been received by him; he said not; it is often the case that neighbors take letters out for me, and I asked Cummings to look at the record; he said he had sent the records away; I afterwards saw the record, examined it—during the month of July—and found no entries for June; think I informed several persons of the description of the notes, and requested them to look out for the money; informed one or two persons who were accompanying Cummings to the West; gave one of them a memorandum; John A. Tryal was the man; wanted him to see whether Cummings passed money of the description of Nos. 302 and 306 on the Mahaiwe Bank, of $50; Cummings left Harrison in October, in company with four or five gentlemen. Cross-examined—The second letter was got out of the office by a neighbor, who handed it to me; it was in July, I think, that I expected the letter containing the money; Cummings left for the

West in October; Mr. Tryal was the person to whom I made known my suspicions.

Luther W. Hubbard testified—Reside in Harrison, Potter county; Henry Cummings was postmaster there in the summer of 1854; inquired for a letter which I understood had been sent to my father; made inquiries frequently, but without gaining any information.

The examination of the witness having been concluded, the court adjourned until three o'clock in the afternoon.

Afternoon Session.

John S. Tryon, sworn—My place of residence last summer was Harrison Valley; knew Cummings there; he and myself and others went West last September; he said he had two $100 bills which he got a year before, and had kept for the purpose of traveling with. After we started he said he had fifty-dollar bills. At Hornellsville we paid the fare on the cars for the party to Chicago. When we were in Detroit, Cummings spoke about getting his money changed, and we all went with him; he passed one or two offices that were not opened; I then stopped in a clothing store, with the others; Cummings went on and got his money changed; afterwards I met him, and he told me where he got his money changed; Fletcher and myself went there; inquired of the broker what bill prisoner had (objected to); prisoner was not present; the broker showed us a fifty-dollar Mehaiwe Bank bill; I referred to my mem.; I can't tell what the number of the bill is now; went to the state's attorney's office, and had Cummings arrested.

By Defence—Were there any inducements held out to the prisoner to make any statement?

Answer—No. He said he supposed Hubbard had got the note passed at Hornellsville, telegraphed and had him arrested. The United States attorney took my memorandum. Fletcher went back for it, but could not get it; he got a copy of it; prisoner told me it I had told him of the arrest, he would have given me satisfaction about it.

Nothing of importance was elicited on the cross examination.

Fletcher, sworn.—Was one of the emigrating party. In Detroit went into the broker's office, where Cummings got his money changed, with Tryon; asked him whether he had a certain bill; he hesitated, said he had a $50 bill on Mehaiwe Bank, marked No. 306. This is the same office, where Cummings had just been; none of us got any large notes changed. Tryon had a memorandum of the bill; have here a copy of it.

This was offered in evidence, but objected to, and objection sustained.

Nicholas Payne, sworn.—Am teller in Dye's Bank, Detroit, [the note was shown him,] that note I changed last October, early in the morning; changed it for the prisoner; put my initials on the note; in the afternoon, Tryon came to me and searched for the note.

In the cross-examination, the defence endeavored to show that the witness could not identify the prisoner with certainty, and that the bill received from him was mixed up with the other bills in such a manner that its identity also became uncertain.

A. W. Sprague, sworn—Am a police officer of Detroit; the deputy marshall handed the prisoner into my charge, and I brought him here.

By the Defense—Both conversations I had with the prisoner when he was in my custody. I cautioned him against making any admission; didn't hold out any inducements to him to make any.

The defence objected to the testimony on the ground of a recent decision of the English courts, which excludes all testimony by policemen as to admissions made while the prisoners were in their custody. The point was reserved.

Examination continued—While on the way from the jail to the court house in Detroit, he said he never before believed in destiny, but he did now, and that he was destined to take that money; thought the man insane, and so did others. He showed me the portrait of his child, and said that child was the occasion of his taking the money.

The prosecution closed here.

J. C. Dunn was sworn, and testified to the manner in which the mails are made up. At the conclusion of his testimony, the court adjourned.

IRWIN, District Judge, charged the jury, after which they retired, with instructions to bring in a sealed verdict.

The jury came to a verdict on Wednesday evening, about ten o'clock. The verdict was sealed. On Thursday morning, at the opening of court, the jury were called to their boxes, and the verdict being opened read "Guilty" with a recommendation to the mercy of the court.

Col. Black, for the defence, made a motion in arrest of judgment, which was argued on Friday morning. The motion was made upon an alleged deficiency in the indictment.

[NOTE. At a subsequent hearing of the case, upon a motion for an arrest of judgment, May 26, 1855, the defendant was remanded to prison, no amount of bail being made. Case No. 14,901a. A bill was filed against the prisoner in the month of October following, upon a charge of larceny of a $50 note. The jury rendered a verdict of "Guilty in manner and form as he stands indicted," and the prisoner was remanded. Id. 14,901b. At a final hearing of the case, in April, 1856, the prisoner was released, having entered into a bond for $2,000. Id. 14,901.]

Case No. 14,901.

UNITED STATES v. CUMMINGS.

[3 Pittsb. Leg. J. 405.]

District Court, W. D. Pennsylvania. April 5, 1856.

INDICTMENT—EMBEZZLEMENT BY POSTMASTER.

[An indictment charging a postmaster with taking a note on a bank from a package in the mail, and converting it to his own use, is fatally defective, without an averment that the note was the property of some person.]

[Cited in U. S. v. Laws, Case No. 15,579; U. S. v. Haynes, 29 Fed. 698.]

Before IRWIN, District Judge.

In the case of the United States against Henry Cummings, indicted for mail robbery, which had been certified to the United States circuit court to get the opinion of his honor, Judge Grier, in reference to the motion in arrest of judgment, Judge Shaler remarked that the judge of the circuit court had decided that after a conviction the case could not be properly certified from the one court to the other. It being, therefore, improperly before that tribunal, no opinion as to the matter could be given. He then moved that the case be certified back from the circuit to the district court for further consideration and final action.

So ordered by THE COURT, and entered upon the record. [Case No. 14,900.]

Judge Shaler then stated that, inasmuch as the argument on the motion in arrest of judgment had been heard, his honor would be pleased to decide upon it.

IRWIN, District Judge, remarked that he had examined the authorities bearing on the case, and was convinced that the motion should be granted, for the reason that it was not alleged in the indictment that the note taken from the letter was the property of any person. The judgment was therefore arrested. [Cases Nos. 14,901a, 14,901b.]

The prosecuting attorney alluded to the fact that a similar point had been decided in the same way by Judge Curtis.

Col. Black, attorney for Henry Cummings, remarked, in justice to Mr. Shaler, that this question had never before been raised in either the Eastern or Western district of Pennsylvania, and that the uniform custom was to frame the indictments as drawn up by the United States district attorney.

Judge Shaler stated that he had consulted with government officers on the subject, and deemed it consistent with duty to permit the defendant to enter into recognizance in $2,000, conditioned for his appearance at the October term of that court.

Henry Cummings and his brother Calvin then entered into the required bond, and the prisoner was released.

Mr. Cummings it will be remembered, was postmaster at Harrison, Potter county, in 1854, and in June of that year it was alleged that Oliver Judd, of Monterey, Mass., addressed a letter, containing two fifty-dollar notes, on the Mahawa Bank, to a relative named Nathaniel Judd, at Harrison, which was never received. In October of the same year, Cummings went west to buy land, and was arrested at Detriot after having exchanged at a broker's office a note similar to those alleged to have been stolen. He has been in our jail ever since,—a period of about seventeen months.

Case No. 14,901a.

UNITED STATES v. CUMMINGS.

[3 Pittsb. Leg. J. 45.]

District Court, W. D. Pennsylvania. May 26, 1855.

INDICTMENT—EMBEZZLEMENT BY POSTMASTER.

[An indictment based on the second clause of the 21st section of the post-office law (of 1825; 4 Stat. 107), and charging the postmaster with taking from a letter in the mails a note on a bank, and converting the same to his own use, is fatally defective if it fails to aver that the note was a thing of value.]

Tuesday having been appointed by Judge IRWIN for delivering his opinion on the motion for an arrest of judgment in the case of Henry Cummings, convicted in the United States district court for robbing the mail at Harrison Valley post-office, Potter county, the prisoner was brought into court at 10 o'clock, to hear the result. He exhibited much anxiety. The main point argued by the defence was that the indictment did not set forth that the article stolen was a thing of intrinsic value. The question never having been raised before, the decision of Judge IRWIN will possess additional importance. The report which we give below was made up from notes taken at the delivery of the opinion [Case No. 14,900]:

The case of U. S. v. Cummings was continued until the present to enable the court to examine the authorities referred to by the counsel for the government and for the defence in their arguments on the motion in arrest of judgment. The court had looked into the many others not cited, with much care. The case of U. S. v. Mills [7 Pet. (32 U. S.) 138], cited by United States attorney, did not seem to involve the point at issue. The question there was whether the indictment contained sufficient averment of guilt to convict. It was not based upon the 21st section of the post-office law, but upon the 24th section, which provides that he who shall embezzle, destroy, or secrete, or aid or assist therein, shall be subject to the same penalty. In the case referred to, the value of the bank notes contained in the letter were to the jury unknown. No value was given. The question in the case before the court was whether the value of the bank note should have been inserted in the indictment. In the case of Mills the only question was whether it was necessary to make an averment of guilt to convict the accessory. The court replied, as an ab-

stract question, in the affirmative; but that also in the indictment it was sufficiently averred. The principal had been previously convicted, and in the case of the accessory it was only necessary to establish that fact. The case referred to had no bearing whatever on the point at issue.

The only cases brought before the United States court, reported, were [U. S. v. Nott, Case No. 15,900, and United States v. Lancaster, Id. 15,556]. In the case of U. S. v. Nott the court says, if the money taken was counterfeit, or upon a bank that never existed, or upon an insolvent institution, it would not be an offence under the statute. In that trial the case did not turn upon the value, &c., but the point was raised in argument. The decision of the court, however, sustains the position of the defence. In the case U. S. v. Lancaster the question now under consideration, though referred to in that case in argument, was not decided by the court. Referring to the value, had it been contained in the motion to quash, it would have been the strongest point in the case, but as it did not, the motion was refused on other grounds.

There is a very essential difference between the first and second clauses of the 21st section of the post-office law. In the first clause the offence was secretly embezzling and destroying a letter not containing anything of value, and the penalty was a fine of $300 and imprisonment for six months. The offence in the latter consists not only in embezzling, destroying, and secreting, but doing that, and taking from it any of the instruments contained in the letter, and for that the punishment was ten years' imprisonment. Simply prying into a letter, without intent to steal, is very often done, and is a mild offence. The crime is greatly increased if an article of value is taken out of it. The essence of the offence is the value of the instrument contained in the letter,—the question was, whether it possessed intrinsic value. Hence it was necessary to state whether the article was of value. In indictments for larceny at common law the essential part of the indictment was the statement that the article alleged to have been stolen was of value. The value must appear. In this case, in which the offence was committed for the purpose of gaining by the loss of another, the value should also be stated. At common law the indictment could not be sustained.

A large portion of the 21st section is taken from a statute of Geo. III. The very words are the same. Upon examining the forms of indictment used under the English statute, the court found the value of the article contained in the letter was always inserted, and in one case particularly, where a draft was stolen, which was invalid for want of a stamp, on which account the indictment was not sustained. In other cases, where the postmaster or clerk was charged with the offence of which Cummings was convicted, the forms of the indictment also showed the value of the article contained in the letter; and, where coin was taken, the denomination and value were mentioned. There was no reason why the value of the note should have been omitted in the indictment in the case of Cummings. Embezzling, under the act of congress, is a much more serious offence than larceny, in all cases of which the value must be set forth. It involved a breach of trust,—a violation of oath,—besides the stealing. But surely, in this country, it could not be the case that the taking of a note of no value, as is so often the case in the frequent bankruptcy of banks, should subject a defendant to the punishment contemplated in the statute. And this is decided by Judge McLean in the case of U. S. v. Nott.

There are many other articles contained in letters valuable only to the persons sending or receiving, but possessing no intrinsic value. It must have intrinsic value to be the foundation of a prosecution of this kind, and that value must be set forth in the indictment.

In this view of the subject the court were of opinion that the judgment should be arrested.

Judge Shaler remarked that there was an indictment pending against Cummings for the larceny of the note contained in the letter, for the embezzlement of which he had been tried, and he requested the court to make an order fixing the amount of bail proper to be given. His honor was not prepared at present to name the amount, and therefore remanded Cummings to prison.

Another indictment will probably be presented at the next term of court, the form of which will be laid down by Judge IRWIN in the above decision.

[NOTE. Subsequently a bill was entered against the defendant upon a charge of larceny for a $50 note. The jury rendered a verdict against the prisoner, who was then remanded. Case No. 14,901b.

[At a final hearing the next year the prisoner was released, having entered into a bond for $2,000. Case No. 14,901.]

Case No. 14,901b.

UNITED STATES v. CUMMINGS.

[3 Pittsb. Leg. J. 210.]

District Court, W. D. Pennsylvania. Oct. 20, 1855.

VIOLATION OF POSTAL LAWS—EMBEZZLEMENT BY POSTMASTER—TRIAL—VERDICT.

Before IRWIN, District Judge.

The court was occupied principally in the transaction of civil business. The grand jury found a true bill against Henry Cummings, for mail robbery. Our readers will recollect that this man was tried on the above charge, convicted, and subsequently granted a new trial at the last term of the court in this city. He now stands indicted a second time. The trial will commence on Wednesday.

The case of Henry Cummings, indicted for robbing the United States mail, was taken up. After a jury had been empanelled, Hon. Charles Shaler, United States district attorney, opened the case. The following is a statement of the circumstances upon which the charge was brought: [See Case No. 14,900.]

Cummings was tried and convicted in May last, but the verdict was set aside in consequence of some informality in the indictment. [Id. 14,901a.] The present bill charges the larceny of one particular $50 note.

The testimony was mainly the same as that published by us in May last. [Case No. 14,900.] B. C. Langdon testified to having received two $50 notes on the Mahawa Bank, Massachusetts, from Mr. Judd, at the post office in Monterey, to be forwarded to Alexander Hubbard, at Harrison Valley, Potter county, Pa. The notes were numbered 202 and 206. He took a memorandum of them. (The memorandum, one of the notes, and the post office register of Monterey, were offered in evidence.) Mr. Hubbard testified to having made repeated enquiry of Cummings for the letter, and was invariably told that no such letter had been received at Harrison Valley.

Col. Black and J. H. Hampton, for the defence.

Shaler & Flenniken, for the prosecution.

Court met at ten o'clock, to receive the verdict of the jury in the case of Henry Cummings, indicted for mail robbery. The court was informed that the jury was unable to agree, and asked to be discharged. They were were then ordered to come into court, when his honor refused to discharge them, while there was a possibility of their being able to find a verdict. They were notified that the court would meet at three o'clock in the afternoon, for their convenience.

At three o'clock the court convened, and the jurors came down. The prisoner was also brought in. The jury then returned a verdict of "Guilty in manner and form as he stands indicted." Col. Black made a motion for a new trial, and in arrest of judgment. The prisoner was remanded, and court adjourned until ten o'clock on Monday.

[Upon a final hearing, the prisoner was released after giving a bond for $2,000. Case No. 14,901.]

Case No. 14,902.

UNITED STATES v. CUMPTON et al.

[3 McLean, 163.] [1]

Circuit Court, D. Indiana. May Term, 1843.

PLEADING AT LAW—REJOINDER—DOUBLE ISSUE—NIL DEBIT.

1. A rejoinder must answer the replication.
2. It must tender an issue on a single point.
3. If double, it is demurrable.

[Cited in Elminger v. Drew, Case No. 4,416.]

[Cited in brief in Wiard v. Semken, 8 Mackey, 476.]

4. The plea of nil debit is improper, where the action is founded on a deed.
5. If the deed be only inducement to the action, that plea is proper.

[This was an action by the United States against Cumpton, and Coleman, his surety, upon the official bond of Cumpton as post master.]

The District Attorney, for plaintiffs.

Mr. Bright, for defendants.

OPINION OF THE COURT. Cumpton, the defendant, having been post master, and failing to account, &c. the above action was brought on his official bond. He pleaded that he had in all things performed his duties faithfully, and accounted for monies received, &c. The plaintiffs replied that he did not at all times after the making of the said writing obligatory and the said condition thereof, well and truly observe, perform, fulfill or keep, all and singular the conditions, &c., in the said writing, as in said plea is alleged, but that he broke the same. 1. That he did not make returns every three months. 2. Rendered no account since the 2d April, 1840; and that between the 1st April and 30th of the same month divers sums came to his hands as post master. 3. That on the 13th April, 1840, there was in his hands the sum of sixty-eight dollars. To this the defendants rejoined: 1st. That the said Cumpton did heretofore, and before the commencement of this suit, to wit, the 5th July, 1841, at said district, render accounts of his receipts and expenditures as post master, to the general post office, which were then and there received. 2d. That said Cumpton, as post master, did not, at divers times between the 1st April, 1840, and the 10th of the same month, receive divers sums amounting to sixty-eight dollars, and that he does not owe. 3. That he owes nothing, &c. To this rejoinder the plaintiffs demurred.

The demurrer must be sustained. The rejoinder does not answer the breach, to which it was intended to apply. The breach assigned is, that the said Cumpton did not once in three months faithfully render accounts of his receipts, &c. as post master. The rejoinder is, that Cumpton, on the 5th July, 1841, rendered accounts, &c. which were received, &c. The law requires quarterly accounts to be rendered. Cumpton was post master from 6th November, 1838, to 13th April, 1841. The rejoinder is, therefore, defective in this, that it does not show or aver that accounts were rendered once in three months. The post office law imposes a penalty on post masters, who neglect to make their quarterly returns. They are liable to pay double the amount of postages, ordinarily received, in each quarter, if the quarterly

[1] [Reported by Hon. John McLean, Circuit Justice.]

return be not made. The second part of the rejoinder is double, and is, therefore, demurrable. It denies certain allegations of the replication, and also avers that Cumpton owes nothing. The issue must be tendered on a single point, though it may include several facts. Here, however, two distinct issues are tendered. The third part of the rejoinder, which is nil debit, is also demurrable. This plea can never be pleaded when a specialty is the foundation of the action. It is proper in a case where the deed is mere inducement to the action. 1 Chit. Pl. 423; 1 Saund. Pl. & Ev. 406. The demurrer is sustained, and judgment.

Case No. 14,903.

UNITED STATES v. CUNNINGHAM.

[Cited in Barnes v. Billington, Case No. 1,015. Nowhere reported; opinion not now accessible.]

Case No. 14,904.

UNITED STATES v. CURTIS.

[Cited in U. S. v. Hills, Case No. 15,369. Nowhere reported; opinion not now accessible.]

Case No. 14,905.

UNITED STATES v. CURTIS.

[4 Mason, 232.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

CRIMINAL LAW — "TRIAL" — PRACTICE — COPY OF INDICTMENT.

Under the statute of 1790, c. 9, § 28 [1 Stat. 118], which requires, that in capital cases a copy of the indictment, &c. should be delivered to the prisoner two entire days before the trial, the word "trial" means the trying the cause by the jury, and not the arraignment and pleading preparatory to such trial by the jury.

[Cited in Gordon v. Scott, Case No. 5,620; McCallon v. Waterman, Id. 8,675; Lewis v. Smythe, Id. 8,333; Meyer v. Norton, 9 Fed. 437; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 630.]

[Cited in brief in Boston & P. R. Corp. v. Midland R. Co., 1 Gray, 355; Byers v. State (Ala.) 16 South. 718; McCall v. U. S., 1 Dak. 320, 46 N. W. 611. Cited in brief in Palmer v. State, 42 Ohio St. 600; U. S. v. Neverson, 1 Mackey, 161.]

Indictments [against Winslow Curtis, alias Sylvester Colston] for the murder of Edward Selfridge, on the high seas, on the 28th of August, 1826. Plea, not guilty.

After a verdict of guilty, Jarvis & Dunlap, for the prisoner, moved in arrest of judgment, and also for a new trial, because no copy of the indictment was furnished two days before the prisoner's arraignment and pleading, according to the statutes of 1790, c. 9, § 29. The motions were argued at length by them, and replied to by Mr. Blake, U. S. Dist. Atty.

[1] [Reported by William P. Mason, Esq.]

The arguments are so fully considered by the court, that it is unnecessary to repeat them.

The counsel for the prisoner cited St. 7 Wm. III. c. 3, §§ 3, 7; St. 7 Anne, c. 31, § 10; 1 Burrows, 643; Doug. 590; Fost. Crown Law, 230; 1 Chit. Cr. Law, 329, 330, 422 (404, 405); St. 1790, c. 9, § 11; Fost. Crown Law, 1; 2 Mass. 303.

The counsel for the United States cited 4 Bl. Comm. 322, 350, and 2 Mass. 303.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. If the court entertained the slightest doubt upon the present question, as it is a capital case, we should take further time for deliberation. But having carefully examined all the authorities which have been cited, and deliberately considered them, I shall now proceed to state the opinion which we have formed. The point submitted is, that the prisoner was entitled of right to a copy of the indictment, two days, at least, before his arraignment thereon; that no copy was in fact furnished him, until after his arraignment; and that this omission now entitles him to have a new trial, or to have the judgment arrested. In point of fact the prisoner was arraigned, and pleaded not guilty, before the district judge, on the 29th day of November last; and at the same time, at his request, counsel were assigned to him by the court, and he selected, on that occasion, the gentlemen who so ably defended him at the trial. From various causes the trial was postponed until the 15th day of December instant; and when the prisoner was, at that time, about to be put on trial, he objected, that he had not received a copy of the indictment until the day preceding; and, at his suggestion, the trial was then postponed until the 19th day of the month, to enable him to make more thorough preparations for the trial. No suggestion was made at that time of a desire to retract his plea; nor any hint of the objection since raised, that he ought to have received a copy of the indictment before his arraignment; nor that he desired to have a new arraignment. At the trial no such objection was raised before the jury was sworn; nor indeed was the objection stated, until all the evidence was fully gone though, and the counsel, closing for the prisoner, was about to finish his argument. He then contended, that the objection was fatal to the trial, and the prisoner was entitled to a verdict of acquittal. The court immediately suggested, both to the prsoner and to his counsel, that if the prisoner, even at that time, was desirous to retrace his steps, and withdraw the cause from the jury, and to be arraigned anew, after receiving a copy for two or more days, there would be no objection on the part of the court, whatever might be their opinion of the law of the point, to allow him that indulgence. Both the prisoner and his counsel declined the ofter, and put the prisoner upon his legal rights, without intending

to waive any of them in the present posture of the cause. Under these circumstances the court have a right to conclude, that no actual prejudice has been intended, or has in fact occurred to the prisoner; that the slip, if any, was wholly without motive; and that the point is one to be decided as of mere strict right. It has in fact been so argued at the bar; and certainly if well founded, and the prisoner is now entitled to the benefit of it, however formal or inconsequential the error may seem to the merits of the case, he may now demand from the court its full legal effect.

The argument proceeds upon the foundation of being fully sustained by the twenty-ninth section of the crimes act of 1790, c. 9. That section declares, "that any person who shall be accused and indicted of treason, shall have a copy of the indictment and a list of the jury and witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences shall have such copy of the indictment and list of the jury, two entire days at least before the trial. And that every person, so accused and indicted for any of the crimes aforesaid, shall be allowed and admitted to make his defence by counsel learned in the law; and the court, before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire," &c. This being a statute of our own government, it is doubtless the right and duty of the court to give it a sound and reasonable construction, according to the true import of its terms. But in giving such construction it is highly proper to consider what has been the construction, if any, put upon like words by other courts, and especially by the judges of England, from which country we derive our notions of the common law, and much of our jurisprudence. The question is, what is meant in this statute by the words "before he shall be tried," and "before the trial," for they are doubtless equivalent. Do they mean, that the copy shall be delivered two days before the jury is sworn to try the cause upon the issue of fact; or do they mean, before the party is arraigned on the indictment and put to plead, and before it is ascertained, whether by his plea there will be a trial by jury or not?

I will state, in the first place, what, in the opinion of the court, would be the true construction of the statute, supposing the point were, for the first time, suggested for argument; and in the next place, how far that construction is affected by any English authorities. And we are clear in opinion, that, upon the statute itself, the true meaning is, that the copy should be delivered two days before the cause is tried by the jury, and not before the party is arraigned on the indictment. The reasons, that lead us to this conclusion, are, first, that this is the natural exposition of the intent and object of the enactment; and, secondly, that it is the legal and technical meaning of the word "trial," in the sense of the common law. It is admitted, that the legislature may use technical words in an untechnical sense; and, when from the context this is ascertained, it is the duty of the court to construe the words according to the legislative intent. It is equally its duty to follow such intent, when the legislature uses untechnical words in a technical sense. In each case, indeed, the duty of the court is the same, to carry into effect the object of the legislature, so far as it is expressed, and to give a suitable exposition of the terms, according to the fair import of the language. But where the legislature uses words, which have an appropriate sense in the common law, that sense is supposed to be the one intended by the legislature, unless the context shows, that a different sense was in fact intended. Now, in the sense of the common law, the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding; and until the party has pleaded, it cannot be ascertained, whether there will be any trial or not. The elementary books are full to this purpose. Mr. Justice Blackstone, in the passage cited at the bar (which is a mere transcript from Lord Hale), says, "to arraign is nothing else, but to call the prisoner to the bar of the court to answer the matter charged upon him by the indictment." 4 Bl. Comm. 322; 2 Hale, P. C. 216, c. 28. If upon the arraignment the prisoner pleads guilty, there can be no trial at all; for there remains no fact to be tried; the whole charge of the indictment is admitted, and nothing remains but to pass the proper judgment of the law upon the premises. The same may be said as to other pleas, as a pardon, auter fois convict or acquit, which if admitted, supersede any trial. Indeed, the very forms of the proceeding upon the arraignment are so complete evidence of the legal meaning of a trial, that of themselves they are decisive. When the prisoner, upon his arraignment, pleads not guilty, he is then asked, how he will be tried, and the response, in case of a trial by jury, is, that he will be tried by God and his country. 1 Chit. Cr. Law, 416, 417. "When, therefore," says Mr. Justice Blackstone, "a prisoner, on his arraignment, has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors," &c. 4 Bl. Comm. 350. So Lord Hale says, "After the prisoner hath pleaded and put himself upon the country, the next thing, in order of proceeding, is the trial of the offender." 2 Hale, P. C. 259, c. 34. And Sir Michael Foster, in treating on the subject, in the very paragraph preceding that cited at the bar, says, he will range the proceedings under the following heads:

"What privileges the prisoner is entitled to, and what is incumbent on him previous to the trial, and what during the trial." Fost. Crown Law, 227. See, also, Hawk. P. C. bk. 2, cc. 28, 39, 40. And under the former he places all the privileges of a copy of the indictment and list of jurors, &c. allowed by the law of England in cases of high treason. And the like distinction between the arraignment and trial was taken in Layer's Case, in 1722 (4 Bl. Comm. 322; Waite's Case, 1 Leach, Crown Cas. 33, 43; 1 Chit. Cr. Law, 415, 417), and is universally recognised. The very form, too, of calling the prisoner, when he is to be put on his trial by the jury, shows the legal sense of the terms. He is then told by the clerk, in the language of the law, that he is now set at the bar to be tried, and he is to make his challenges before the jurors are sworn. 1 Chit. Cr. Law, 532.

In short, so far as authorities, or reasoning, or forms go, there can be no legal doubt, that by the term "trial," is generally intended, in the law, the actual trial of the prisoner by the jury. The constitution of the United States, too, in the sixth amendment, which provides, that the accused shall enjoy the right to a speedy and public trial by jury, manifestly uses the term in the same sense; and indeed it pervades the general structure of our laws. There is not the slightest reason, in our judgment, for presuming that congress, in this section of the act of 1790, used the term in any different or wider sense. On the contrary, every portion of its language is entirely consistent with, and supports this construction. The object of the legislature was to enable the party to make his defence in the best and most perfect manner. Not only is a copy of the indictment, but a list of the witnesses in treason, and a list of the jurors in all capital cases, to be delivered to the prisoner. But unless he has already been arraigned, and has pleaded, how can it be supposed, that witnesses or jurors can be necessary? The witnesses can only be heard upon an issue of fact; and the jury can only try an issue of fact. Until, therefore, there has been an arraignment and plea, on which a trial may be had, it would hardly seem worthy of legislative interposition to prescribe the delivery of a list of witnesses or of jurors. If, then, the natural interpretation of the clause, so far as witnesses and jurors are concerned, is, that the list should be delivered three or two days before the time of the actual trial by the jury, the same interpretation must be applied to the copy of the indictment, for the same language, in the same connexion, is applied to both.

It has been said, that a copy of the indictment may be important, in some cases, to enable the prisoner to plead. Without question it may be so; but in such cases he would, upon the ordinary principles, be entitled to a copy for that purpose. Even in England, where no copy is provided for in any capital trials, except for treason, it is not uncommon to grant the prisoner a copy at his request, where it is shown to be important to his pleading or defence. 1 Chit. Cr. Law, 404. But it is one thing for the legislature to prescribe a thing, as a matter of right, in all cases before arraignment and pleading; and quite another thing, to grant it as a matter of fair discretion, in the course of judicial proceedings, where it may further public justice. It has been further said, that a copy of the indictment can be of no use, unless for the purpose of pleading. But this is certainly a mistake. It is of great importance to ascertain, in many cases, the precise form of the charge in order to shape the evidence, so as to meet it, or to disprove the material allegations. In indictments for treason, the overt acts must be laid in the indictment, and it is, or may be, of the very highest importance to the prisoner to know the precise form of every charge of this nature, so vital to the indictment. The same thing may be said, in many cases, of homicides, as to the manner of the death, the instrument which inflicted it, and the place where done, &c. If, in a case of murder, the means of the death are not proved by the evidence, substantially, as laid in the indictment, the party is entitled to an acquittal. If, for instance, the death in the present case had been laid, in the indictment, to have been by drowning only, and not by a hatchet, and the proof had established the latter mode of death, the prisoner must have been acquitted. So where the indictment alleges the offence to be committed on the high seas, this is vital to the jurisdiction of the court in many cases; so that, if not substantially proved, the indictment fails, even though the place may be within the general admiralty jurisdiction. Some crimes by statute are only punishable when committed on the high seas, and some are punishable when committed in any other place within the admiralty jurisdiction. The distinction may often be most material to the defence at the trial. It cannot, then, be admitted for a moment, that in a capital case a copy of the indictment may not essentially aid the prisoner in his defence, both in point of merits and legal exceptions. It can rarely happen, that the want of a copy at the time of arraignment can prejudice the prisoner, because it must be presumed, that every court, solicitous for justice, will grant a copy, and delay the pleading for a reasonable time, to enable the party to avail himself of all his rights In point of fact, in criminal cases, few defences do arise, of which the prisoner has not the full benefit under the plea of not guilty; and other pleas are of rare occurrence.

Such is a summary of the reasoning, which induces the court to declare, that if the point

were entirely new, it would feel bound to decide, that the true construction of the statute, whether considered upon its obvious terms, or intent, requires that the copy of the indictment should be delivered, two days at least, not before the arraignment of the prisoner, but before his trial by the jury. But in cases of this sort, the court will listen to the opinions expressed on like occasions, by other judicial tribunals, with the most anxious attention; and if, upon similar words in any statutes having similar objects, a different construction has been maintained, and acted upon, it ought to have very great weight here. Let us see, then, how the case stands upon the statutes and authorities cited at the bar. The statutes cited are the statutes of 7 Wm. III. c. 3, § 1, and 7 Anne, c. 21, § 11, respecting trials for treason. Before I proceed to comment on them, I would state, that the latter section (eleventh of 7 Anne, c. 3), on which so much reliance has been placed, is a mere supplement to, and not a total repeal of, the former. It authorizes a list of the witnesses to be delivered, which was not provided for by the statute of 7 William III.; and requires that the list of jurors should be delivered ten days before the trial, the statute of William requiring it only two days; and also a copy of the indictment ten days before the trial, the statute of William requiring it only five days. In all other respects it left the statute of William in full force and operation; and therefore the statute of Anne, being a mere supplement, has been governed by the construction previously put upon the statute of William, substituting only the enlarged period of ten days for the prior periods. This accounts at once for the reason, why the statute of Anne has never received any judicial construction. In point of fact, it did not take effect, as indeed it was upon its own terms not to take effect, until after the death of the Pretender, which did not occur until the reign of George III. Indeed, the first trial for treason upon which the statute of Anne operated, was that of Lord George Gordon, in 1781. The case is reported in Doug. 590, and upon that occasion the attorney general moved, that a list of the jurors, intended to be returned by the sheriff for the trial of the prisoner, should be delivered to the prosecutor, that a copy might be delivered to the prisoner ten days before his arraignment, that having been the construction put upon the terms, "before the trial," in the statute of William. A rule upon the sheriff was granted accordingly; and the attorney general remarked upon the peculiarity of the statutes; and said, "as there is no issue till arraignment, there can be no jury, strictly speaking, because no jury process can be awarded, until issue joined." And the reporter in a note observes, that the statute of Anne is but an extension of that of William; and thence deduces the inference (at least by implication), that the construction of both statutes on this point must be the same. The practice, then, must be considered as regulated exclusively by the statute of William; and I will now proceed to examine the terms of that statute. Upon that examination, I think it will conclusively appear, that the construction put upon it by the English judges is perfectly correct; and that the presence of language not existing in the statute of the United States, compelled them to desert the ordinary sense of the word, "trial," in order to carry into effect an apparent and expressed object of the legislature, that the copy of the indictment should be delivered before the arraignment. It provides, that "all and every person and persons whatsoever, that shall be accused and indicted for high treason, &c., or for misprision of such treason (for other capital offences are not comprehended in the English statutes), shall have a true copy of the whole indictment, but not the names of the witnesses, delivered unto them or any of them, five days, at the least, before he or they shall be tried for the same, whereby to enable them and any of them respectively to advise with counsel thereupon, to plead and make their defence, his or their attorney &c. requiring the same, and paying the officer his reasonable fees for writing thereof, not exceeding five shillings for the copy of every such indictment." Now it is to be observed, that in this clause a copy of the indictment only (and not of the list of jurors) is provided for, and the avowed object is to enable the prisoner to advise with counsel, and to plead and make defence. According to the course of practice in England, the prisoner is obliged to plead, instanter, upon his arraignment; and therefore the very object of parliament, expressed on the face of the enactment, would be defeated, unless the copy were furnished five days before the arraignment. The courts, therefore, in construing the statute, upon its plain intendment, were driven to say, that the terms, "before he or they shall be tried," must, in this connexion, be construed to mean, before the arraignment, because in no other way could the object be effected. And this exposition is so reasonable and just, that the only surprise is, that it should ever have been made a question. Sir Michael Foster, in the passages cited at the bar (Fost. Crown Law, 228, 230), gives the reason for it, which has been already stated. See 1 East, P. C. 111, 112, 114, 115; 4 Bl. Comm. 351; Hawk. P. C. bk. 2 c. 39; 1 Chit. Cr. Law, 405. The statute proceeds, in the next sentence, to recognise the true legal difference between the arraignment and trial, for it declares, "that every such person so accused and indicted, arraigned, or tried for any such treason as aforesaid, &c. shall be received and admitted to make his and their full defence by counsel learned in the law &c." Here the arraignment and trial are distinguished, as progressive acts, and that counsel are to be permitted in each; and thus, in the former clause, the inartificial use of the words, "shall be tried," is completely established. The provision, that the prisoner

"shall have copies of the panel of the jurors, who are to try them, duly returned by the sheriff, and delivered unto them &c. two days at the least before he or they shall be tried for the same," stands in another (the seventh) section of the act. I have been curious to ascertain, whether under the act of William, it was the practice to deliver the list of jurors also before the arraignment. In Sir Michael Foster's report of the trial of the rebels in 1746, he speaks expressly, as to the delivery of the copy of the indictment before the arraignment; but says nothing as to the list of jurors. And in his subsequent discourse he alludes to the provision, as to the list of jurors, in very general terms, leaving it somewhat doubtful, whether the list of the panel was ever delivered until after the arraignment and plea, and trial assigned. Fost. Crown Law, 1, 230. But upon examination of the case of Rex v. Rookwood, 4 St. Tr. 661, 667, the very point arose, and Lord Chief Justice Holt and the other judges on that occasion held, that the list of jurors was to be given not before the arraignment, but two days before the trial by the jury. In fact, in that case the jury were not summoned until after the prisoner had been arraigned, and pleaded. The practice under the statute of Anne, from necessity, led to the delivery of all the copies before the arraignment; because it expressly requires, that the lists of the witnesses and jurors "shall be also given at the same time that the copy of the indictment is delivered to the party indicated." Doug. 591.

From this examination of the statutes of William and Anne, it is apparent, that the terms are not the same with our act of congress; and that the courts have been driven to give an exposition of the provisions different from their natural import, in consequence of explanatory phrases, which could in no other way be rationally interpreted. There is no reason to suppose, that the learned judges would have given a different exposition from that which we think the true one of the act of congress, if the language had been in all respects the same as ours. In point of authority, then, there is nothing binding on the conscience of the court, or that justifies it in abandoning the natural sense of the words used in the act of congress. But suppose the acts were the same, and required the same interpretation, and that the prisoner was entitled to a copy of the indictment and list of jurors before arraignment, the question would still remain, whether he could now avail himself of this omission. A party may have a legal right to an exception, which he cannot take in every stage of the cause. The law points out an order in its proceedings, and requires that the party should take his exceptions, and demand his privileges, at such time as general justice and convenience require; otherwise he is deemed to waive them. A party is certainly at liberty to waive any privileges introduced solely for his own benefit; and if he is satisfied with going on without them, and sustains no prejudice thereby, there seems no ground to arrest the judgment, or grant a new trial upon this account.

The law is perfectly settled upon this subject in England under the strictest construction of the statutes of William and Anne. We have seen, that the prisoner is entitled to "a true copy of the whole indictment;" and yet, if he has received an imperfect copy, or if, being entitled to a copy of the caption of the indictment, he has received a copy without the caption, and he proceeds to plead, it is too late to take the exception. Sir Michael Foster (Fost. Crown Law, 230) says, "but if the prisoner pleadeth without a copy of the caption, as some of the assassins did, he is too late to take the objection, or indeed any other objection that turneth upon a defect in the copy; for by pleading, he admitteth that he hath had a copy sufficient for the purposes intended by the act." Now a false or imperfect copy is, in intendment of law, no true copy, and therefore, as none. But the sole object of the act being to enable the party to plead, if he is willing and ready to plead without a true copy, the law supposes his defence does not turn upon any such fact; and that he is sufficiently apprised of the whole charge, and of his own defence to it. Mr. East, in his very accurate work on Crown Law (1 East, P. C. 113), lays down the rule even more broadly. He says, "but, after pleading, it is too late to object, either to the want of a copy, or to any insufficiency in it; for that admits it to be sufficient." And he is well warranted in the statement, for in the case of Rex v. Cook, reported in 4 Hargrave, St. Tr. 738, 746, 13 Howell, St. Tr. 311, and very accurately, on this point; also, in 2 Salk. 634, it was so expressly decided by the court. In that case the prisoner, after plea, but before the jury was sworn, took an exception by his counsel, that he had not had a copy of the indictment, and therefore he could not be tried. But the court said, "By the words of the act (statute of Wm. III.) he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this case he has pleaded; therefore this benefit is waived, and the prisoner has admitted he has a copy, or did not think it for his service to require it, but was able to plead without the help of it." The same doctrine is recognized by all the other elementary writers, to which we have had access. 1 Chit. Cr. Law, 405. The same point was decided in Rookwood's Case, 4 State Tr. 661, 667. It was, in fact, decided and acted upon by the circuit court, sitting in Rhode Island, on a trial for murder, in the case of U. S. v. Cornell [Case No. 14,868].

In the case now at bar, the prisoner has been held to no strictness whatsoever. After he had pleaded, after his cause was fully before the jury, the court, in tenderness to human life, was willing to allow him to withdraw the cause from the jury; not, in-

deed, as a matter of right, but of discretion. He declined it; and if ever the waiver of a benefit was intentional, and without prejudice to the party, I am justified in saying, that the present is such a case.

It remains only to remark upon some cases cited from the Massachusetts Reports. This court is entirely satisfied, that those cases were rightly decided. The case of Com. v. Andrews, 3 Mass. 126, turned upon the well known principle, that an accessary could not be tried without his own consent, unless his principal were also on trial, or had been convicted. And if he were tried by his own express consent, no judgment could pass upon him, until the principal was subsequently convicted. The court said, that they would not presume the assent of the prisoner to the trial, much less his desire to be tried, before the principal was tried and convicted, from the mere fact, that he was put on trial. It did not appear, that he knew his rights, or that he had given any consent; and that in criminal cases an express relinquishment of a right should appear, before the party should be deprived of it. The right here attempted to be presumed to be waived, was vital to the whole prosecution; and the language of the court must be interpreted to refer to such cases. In Com. v. Hardy, 2 Mass. 303, the question was a question of jurisdiction. The statute of 1805 declared, that "all indictments, which may be found for any capital offence, shall be heard, tried, and determined &c. by three or more of the said justices" of the court. The arraignment of the prisoner for a capital offence was before one judge only. The court held the arraignment was coram non judice; and that the intent of the statute was, that a prisoner capitally indicted should not be put upon his defence, unless three justices at least were present. The case is so plainly right on the very words of the statute, "heard, tried, and determined," that it is scarcely susceptible of legal doubt. This is the substance of what I have to say, as to the opinion formed by the court. Our judgment is, that the motions be overruled.

DAVIS, District Judge, expressed his concurrence in the opinion, and added some illustrative remarks.

[See Case No. 16,682.]

NOTE, added by Judge Story. Since this opinwas delivered, I have had an opportunity to examine the case of Rex v. Rookwood, 4 State Tr. 661, at large. The very distinction insisted upon by this court was admitted and insisted upon by the counsel and court in that case. Lord Chief Justice Holt, in particular, stated, that the interpretation of the first section of the statute of William, as to the time of delivering a copy of the indictment, was altogether governed by the explanatory words, "to plead and make their defence;" and that otherwise the interpretation would be the same as that of the seventh section, as to the list of jurors, viz. that the time of trial by the jury was intended, and not the time of arraignment. When it is considered, that this case was decided the very year that the statute of 7 Wm. III. first took effect, and by such eminent judges as Lord Chief Justice Holt and Lord Chief Justice Treby, its authority is absolutely irresistible, as to the true exposition of the statute of William. It confirms, in an unexpected manner, the view already suggested by the present judgment.

Case No. 14,906.

UNITED STATES v. CUSHMAN.

[1 Lowell, 414.] [1]

Circuit Court, D. Massachusetts. 1869.

INTERNAL REVENUE — DISTILLER — SPECIAL TAX — REPEAL OF STATUTES.

Section 23 of the act of July 13, 1866 (14 Stat. 153), punishing a distiller who shall carry on business without payment of a special tax, is not repealed by section 5 of the act of March 31, 1868 (15 Stat. 59), which punishes more severely every distiller who shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him, although the minimum punishment under the former law is regulated by the amount of spirits unlawfully distilled.

[This was an indictment against A. W. Cushman and others for carrying on the business of distillers of spirits without license.] In this case, and two others against other defendants, that were argued with it, the defendants had pleaded guilty to indictments framed under the act of July 13, 1866, § 23 (14 Stat. 153), and now moved in arrest of judgment.

G. A. Somerby, C. L. Woodbury, and L. S. Dabney, for the several defendants.

The statute relied on by the government has been repealed by section 5 of the act of 1868 (15 Stat. 59), for the punishment is increased by the later statute, and the offence is the same, namely, defrauding the government of the taxes on distilled spirits; for though the charge is, in form, the non-payment of the special tax or license fee, yet, in fact, the fine is regulated by the number of gallons illicitly distilled. To the point of implied repeal, see Norris v. Crocker, 13 How. [54 U. S.] 429; Com. v. McDonough, 13 Allen, 581.

H. D. Hyde, Asst. U. S. Dist. Atty.

The offence defined in the two statutes is not the same. In the one case it is the carrying on a business without license, and in the other defrauding the government of another and different tax, which may be done by a licensed as well as an unlicensed distiller.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. The mode of ascertaining the punishment established by the law of 1866, is unusual, but the offence is clearly the carrying on a business without

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

due authority. The extent of the business carried on is made the measure of the lowest fine, but the offence is complete when the business is actually begun. Congress may have taken for granted that a person who did not pay the special tax or license fee would be very likely to be a defaulter in respect to the much more onerous tax on the product, but they have not said that it is the latter fraud which they intended to punish. Under this section it is not necessary for the government to allege, and they never do allege, that the taxes on the spirits themselves have not been paid; nor would it be a good defense to an indictment to aver and prove that in fact they had been paid.

In this district it has been our practice to require that the indictment should aver, and the jury should find, the number of gallons distilled by the defendant; but our reason for adopting this practice was not that the fact formed any part of the substance of the offence, but because it is proper, and according to the best precedents, for the jury to pass upon a fact upon which the minimum of fine is made by law to depend. Without such a finding, the record would never show whether the court had obeyed the law or not. Upon careful consideration, we are not able to see that the section under review means any thing more than this, that the amount of business done without authority shall regulate the punishment. It follows that the law of 1868, in affixing a higher penalty for a failure to pay the tax on the spirits, was dealing with a different subject-matter, and that a conviction or acquittal under either law would be no defence to an indictment under the other, and that the latter does not repeal the former. The real difficulty and possible hardship arise out of the statute of 1866 taken by itself quite as much as from any conflict between the two statutes. Motions denied.

Case No. 14,907.

UNITED STATES v. CUSHMAN.

[2 Sumn. 310.] [1]

Circuit Court, D. New Hampshire. May Term, 1836.

ADMINISTRATOR—ACTION ON BOND FOR CUSTOMS DUTIES — JOINT JUDGMENT — PRINCIPAL AND SURETY — ASSENT OF SURETIES TO RELEASE — ASSENT BY HEIR.

1. Where a judgment was obtained upon a joint and several bond, for duties at the custom house, in a joint suit against all the obligors; and afterwards, one of the obligors died; it was *held*, that no action at law lay against the administrator of the deceased obligor, but only against the surviving judgment debtors.

[Cited in dissenting opinion in U. S. v. Price, 9 How. (50 U. S.) 96.]

2. The Acts N. H. 1808 and 1830, on the subject of the liability of administrators, upon joint contracts and joint demands against the estate of a deceased debtor (when the other debtor survived), do not apply to a suit on a joint judgment, whatever might be the case, as to a suit on the original contract or demand.

3. Where the secretary of the treasury releases an insolvent debtor, under the acts of congress, upon the condition of the assent of his sureties to the release, without prejudice to their liability, that assent must be by the parties, if living, and if dead, by their personal representatives. An assent by the heir of a surety is not sufficient.

Debt on judgment. The parties agreed to a statement of facts, as follows: This is an action of debt, founded upon a judgment rendered by the circuit court, for the district of New Hampshire, on 8th of October, A. D. 1829, in favor of the plaintiffs, against Willis Barnabee, John N. Sherburne, and John Abbot—for the sum of $918.53 debt, and $27.06 cost. The said judgment was rendered upon a bond, given for the security of duties upon goods imported. The defendant, Samuel Cushman, is administrator upon the estate of John Abbot. The writ in this case, together with the copies of the judgment above named, are made a part of this case. In May, A. D. 1834, the aforesaid Willis Barnabee, applied for a discharge from the above named judgment, in pursuance of the provisions of certain insolvent laws of the United States. A hearing was had before the commissioners, and the result of this investigation, was forwarded to the secretary of the treasury department. After which hearing and report, the secretary of the treasury, forwarded to said Barnabee a letter, which is made a part of this case. On the same 18th of June, the secretary of the treasury forwarded to the district attorney of New Hampshire, a discharge, which made a part of this case. The said discharge now is, and ever has been, retained by the district attorney. On 19th November, 1834, John N. Sherburne, above named, together with John E. Abbot, son and sole heir of John Abbot, who deceased after the rendition of the afore described judgment, signed a document, showing their assent to the discharge of the said Barnabee—which document was filed in the treasury department on 10th April, A. D. 1835. On 26th August, A. D. 1829, Willis Barnabee surrendered to the custom house, two debenture certificates—one for the sum of $341.40, the other for the sum of $50.66—for the benefit of the government; and endorsed on each of them, a receipt for the amount thereof, which several sums, amounting to $392.06 at the time of rendering the aforesaid judgment, were not, and have not since been allowed to said Barnabee. The above named defendant, Cushman, has filed a general demurrer. The said Sherburne has pleaded nul tiel record, and also satisfaction for the sum of $392.06—the said Barnabee has pleaded a discharge under the insolvent laws of the United States.

Upon the above case, it is agreed, that such judgment shall be rendered as pertains to law. It is further agreed, that if the court are of

[1] [Reported by Charles Sumner, Esq.]

opinion the action cannot be maintained against the three defendants, but can be against Cushman as administrator, the plaintiffs are at liberty to become nonsuit, as to the other two defendants, and may amend so as to take judgment against Cushman alone, for such sum as the court may direct. The estate of John Abbot has been represented insolvent, and is probably so in fact.

Mr. Hale, U. S. Dist. Atty.
C. B. Goodrich, for defendants.

Before STORY, Circuit Justice, and HARVEY, District Judge.

STORY, Circuit Justice. Upon this statement of facts, I have no doubt, that the suit is not maintainable against all the defendants. It is the case of a joint judgment against three; and the suit is brought against two of the judgment debtors, who survive, and the administrator of the third judgment debtor, who is dead. The general doctrine of the common law unquestionably is, that the judgment survives against the surviving debtors only, and is gone as to the deceased debtor. The administrator is sued in autre droit; but it is clear, that he is not suable in that capacity jointly with the other debtors. But the parties have agreed, that, if necessary, the writ and declaration may be amended, so as to become the case of a several suit against the administrator of the deceased debtor upon the judgment. And the question is thus presented, whether such a suit could be maintainable against him separately upon the joint judgment. I am of opinion, that it could not be so maintainable. As the judgment is joint, all the parties, who are living, and within the process of the court, must be joined in a suit upon that judgment. So the supreme court decided, in the case of Gilman v. Rives, 10 Pet. [35 U. S.] 298. But, in truth, this is not the most pressing part of the objection. The judgment survives against the living judgment debtors; and can in no mode whatsoever, known to the common law, be enforced against the administrator of the deceased debtor. As to him, in its character as a judgment, it is functus officio.

The statutes of New Hampshire have not in any manner, helped this matter. The act of 1808 (Rev. Laws 1830, p. 65), applies only to suits on joint contracts, while they remain such, and not to judgments. It does no more than the original bond has provided in the present case; that is, it makes the contract several, as well as joint; so that it is suable as a several contract against the personal representatives of each deceased joint contractor. But the present is not a suit upon the original bond, as a several contract; but upon the joint judgment. Whether, after a joint judgment upon a joint and several contract, a several suit can be maintained upon the same contract severally against one of the debtors, or his personal representative; or whether it is merged in the judgment, is a question, which we need not meddle with in this case; for it does not arise. See on this point, Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253; Lechmere v. Fletcher, 1 Cromp. & M. 634, 635. The act of 1822, § 12 (Rev. Laws 1830, p. 336), does not seem intended by its terms to go farther than the prior act of 1808. It provides, "that the estate of any person deceased, and the executor or administrator thereof, shall be liable for joint demands against the deceased, and any other person, in the same way and manner, as they would be liable, if such demands were several, as well as joint; unless it appear to have been the intention of the parties, that the demand should survive only against the longest liver." It is difficult to perceive, how this language could apply to any other cases, except cases of contract voluntarily entered into by the parties, where they had an option to make their responsibility joint and several, or otherwise; and where the right of suit is still resting upon the original contract. It cannot, without violence to the terms, be applied to judgments; for no such thing is known, at the common law, as a joint and several judgment.

This view of the nature and operation of the statutes of New Hampshire renders it wholly unnecessary to consider another point, which has been suggested by the argument; and that is, whether a contract made with the United States for the payment of duties, under the revenue laws of the United States, is, or can properly be deemed a local contract, to be governed by the state laws. Whenever that point arises directly in judgment, it may become necessary to consider the grounds and extent of the decisions of the supreme court, in Cox v. U. S., 6 Pet. [31 U. S.] 172, 203, and in Duncan v. U. S., 7 Pet. [32 U. S.] 435, 449. It is quite a different question, whether, upon a bill in equity properly framed, the United States might or might not have redress against the administrator. That would depend upon principles and facts wholly incapable of being properly considered in a court of law. In such a suit, the question would be presented, whether the debenture certificates ought not to be first deducted from the debt.

As to the other point, which, it is suggested, the case was intended to raise, whether the consent of John E. Abbot, the son and heir of the deceased, to the discharge of Barnabee, was a compliance with the condition of the discharge of Barnabee, provided for by the secretary of the treasury in his official instrument in the case; I am of opinion, that it was not. The consent must have been given by the party himself, if living; if not living, by his personal representative; for the latter only was capable of acting in the premises, so as to bind the estate of the deceased generally. The son, though heir, was in the sense of law a mere stranger, having no privity in contract or responsibility, by which he could bind the general assets of the deceased. But at most he could bind himself, only so far as real estate should descend to him from the de-

ceased. My opinion, therefore, is, that, at law, upon the statement of facts, judgment ought to be entered for the defendants, that the plaintiffs take nothing by their writ.

The district judge concurs in this opinion, and therefore let judgment pass for the defendant.

[NOTE. For a bill in equity, brought to recover the amount of the same judgment out of the assets of Abbot in the hands of the defendant, see Case No. 14,908.]

Case No. 14,908.

UNITED STATES v. CUSHMAN.

[2 Sumn. 426.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1836.

EQUITY — SUIT AGAINST ADMINISTRATOR — INSOLVENCY—BOND FOR CUSTOMS DUTIES—SURETIES —JOINT JUDGMENT—RES JUDICATA.

1. Where a joint and several bond was given for duties at the custom house, and afterwards a joint judgment was obtained against all the obligors (the principal and sureties), and then, one of the obligors (a surety) died; and the survivors became insolvent; it was *held*, that the United States were entitled to maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor, whose estate was also insolvent, in virtue of their general priority in cases of insolvency.

2. In such a case, as between the United States and the obligors on the duty bond, all of them are deemed principal debtors.

3. Where sureties bind themselves jointly and severally as principals in a bond, there is no difference, as to their liability in equity for the debt, between them and the principal debtor, for whom they are sureties.

[Cited in dissenting opinion in U. S. v. Price, 9 How. (50 U. S.) 105. Cited in Re Babcock, Case No. 696.]

4. Semble, that a joint judgment is no bar at law to a separate suit against one of the obligors on a joint and several bond, or against his personal representatives. The joint judgment only bars the joint remedy in such case, and not the several remedy.

[Cited in Trafton v. U. S., Case No. 14,135. Followed in Lawrence v. Vernon, Id. 8,146. Criticised in U. S. v. Price, 9 How. (50 U. S.) 92.]

[Questioned in Clinton Bank v. Hart, 5 Ohio St. 35. Cited in Gayer v. Parker, 24 Neb. 645, 39 N. W. 846; Kirkpatrick v. Stingley, 2 Ind. 273; Vanuxem v. Burr, 151 Mass. 389, 24 N. E. 773. Disapproved in Weil v. Guerin, 42 Ohio St. 304.]

Bill in equity, by the United States, against Samuel Cushman, administrator of John Abbott. The parties agreed to the following statement of facts: On 25th February, 1828, Willis Barnabee, with J. N. Sherburne and John Abbott as sureties, made their joint and several bond to the United States, in the sum of $2,400, conditioned to pay certain duties on or before the 25th August, 1829, due on goods imported by the said Barnabee. On 28th August, 1829, a joint suit against the said obligors was commenced, and judgment rendered thereon on the 8th October, 1829, in favor of the United States, for $918.53 debt, and $27.06 cost. In May, 1834, the aforesaid Willis Barnabee applied for a discharge from the above-named judgment, in pursuance of certain insolvent laws of the United States—a hearing was had before the commissioners appointed under the said laws for the district of New Hampshire, and the result of this investigation was forwarded to the secretary of the treasury department. After which hearing and report, the secretary of the treasury forwarded to the said Barnabee a letter in the following words: "Treasury Department, June 18th, 1834. Sir, your case has been decided, and the warrant for your release from your debt to the government will be issued, and the duplicates of the same prepared and transmitted to the attorney of the United States for your district without delay. Signed, R. B. Taney, Secretary of the Treasury." On the same 18th of June, the secretary of the treasury forwarded to the district attorney of New Hampshire, a discharge in the following words: "To all to whom these presents shall come, I, Roger B. Taney, secretary of the United States, send greeting: Whereas Willis Barnabee, of Portsmouth, in the district of New Hampshire, has presented his petition to the secretary of the treasury of the United States, to be released from certain debts due by him to the United States on the 1st day of January, 1831; and a report in writing of the circumstances of the case having been transmitted to the said secretary by the commissioners of insolvency for said district, pursuant to the provision of the statute of the United States, passed the second day of March, 1831 [4 Stat. 467], entitled, 'An act for the relief of certain insolvent debtors of the United States.' And whereas I, the said secretary of the treasury, having maturely considered the said petition and report, and it being proved to my satisfaction, that the said Willis Barnabee was, on the first day of January, 1831, a debtor to the United States, in a sum of money which he is unable to pay; that he hath done no act fraudulently to deprive the United States of their legal priority, that he has not been guilty of any fraud, nor made any conveyance of his estate, real or personal, in trust for himself, or with an interest to defraud the United States, or whereby to expect any benefit or advantage to himself or family. Now, therefore, know ye, that I, the said secretary of the treasury, in consideration of the premises, and by virtue of the power and authority vested in me by the aforesaid statute, and by an act of congress, entitled 'An act in addition to an act for the relief of certain insolvent debtors of the United States,' approved the 14th day of July, 1832 [Id. 595], and by virtue of an act of congress, to revive and amend the aforesaid acts, approved June 7th, 1834 [Id. 676], do hereby decide to release the said Willis Barnabee from his said debt, upon condition that John N. Sherburne and John Abbott, the sure-

[1] [Reported by Charles Sumner, Esq.]

ties of the said Willis Barnabee, shall file with the secretary of the treasury, their consent, in writing, that the privileges of the said acts may be extended to him, the said Willis, without any prejudice to their liability; and provided that the right of the United States to have applied to the said debt all and every debenture certificate or certificates, applicable to the same, be not hereby relinquished, but on the contrary fully saved and reserved. Given under my hand and seal of office, at the city of Washington, this 18th of June, 1834, and of the independence of the United States the fifty-eighth. (L. S.) R. B. Taney, Secretary of the Treasury." The said discharge now is, and ever has been retained by the said district attorney. On 19th November, 1834, J. N. Sherburne, above-named, together with John E. Abbott, son, and sole heir of John Abbott, who deceased after the rendition of the aforedescribed judgment, signed a document showing their assent to the discharge of said Barnabee; which document was filed in the treasury department on 10th April, 1835, and is in these words: "Whereas Willis Barnabee, as principal, John N. Sherburne and John Abbott, as sureties, all of Portsmouth, district of New Hampshire, made their certain bond to the United States of America, for the security of certain duties; upon which bond the said United States have since obtained judgment. Whereas, also, the said Willis Barnabee has proposed to avail himself of the provision of certain laws of the United States for the benefit and discharge of persons insolvent. Now, therefore, we, the said John E. Abbott, son and sole heir of the above-named John Abbott, who is now deceased, do hereby assert and approve any discharge which said United States may give to said Barnabee; also consent that the right of the United States to have applied to the said debt all and every debenture certificate or certificates applicable to the same, be not by said discharge relinquished, but on the contrary fully reserved and saved to the United States, reserving our respective rights against said Barnabee and each other as sureties." On 26th August, 1829, Willis Barnabee surrendered to the custom house at Portsmouth, to the collector, two debenture certificates; one for $341.40, the other for $50.66, for the benefit of the government, and endorsed on each of them a receipt for the amount thereof, which sums, amounting to $392.06, at the time of rendering the aforesaid judgment, were not and have not since been allowed to the said Barnabee. The estate of John Abbott is insolvent. Samuel Cushman is administrator of the said estate, and has assets more than the amount claimed in the bill.

Mr. Hale, U. S. Dist. Atty.

Mr. Goodrich, for defendant.

STORY, Circuit Justice. This case has been already before the court in an action of debt, founded upon the joint judgment (referred to in the proceedings), and brought against the present defendant; and the court were then of opinion, that, as an action founded upon the joint judgment, it was not maintainable against the defendant, as administrator of Abbott; but, that at law the judgment survived exclusively against Barnabee and Sherburne. [Case No. 14,907.] The present bill in equity is brought to recover the amount of the same judgment out of the assets of Abbott in the hands of the defendant. The defendant admits assets sufficient to pay the amount due to the United States on the judgment; but he denies, that the United States, by reason of their legal priority, or otherwise, have any right or title whatsoever to satisfaction thereof out of the assets, under the circumstances of the present case. There is no dispute between the parties as to the material facts. It is admitted, that the original bond for the payment of duties was in its form joint and several, and was given by Barnabee as principal, and by Sherburne and Abbott as his sureties; that the judgment was obtained against all the obligors on a joint suit in the lifetime of Abbott; that Barnabee and Sherburne are insolvent; and that the United States have received the sum of $392.06 in debenture certificates from Barnabee, which have not been deducted from the amount of the judgment.

The first consideration which arises, is, whether the amount of these debenture certificates ought to be deducted from the judgment debt. I have not the slightest doubt, that it ought to be deducted; for to this extent the judgment has either been satisfied, or the judgment was pro tanto originally taken for a larger amount than what was actually due. The argument for the United States seems to be, that it was properly matter of set-off in the original joint action; and not having been then insisted on, it cannot now be made of any avail. Now, whatever force there might be in the argument upon the ground of laches, if the present were a suit brought by any of the parties to the original judgment to be relieved against the same to the amount of the debenture certificate, upon which it is unnecessary to give any opinion, though I must say, that it would be difficult to convince a court of equity, that it ought not, under the circumstances, to give the relief, as the case of an omission of credit by mistake or accident; or, if treated as a set-off, in the nature of a counter demand, which might be, but was not necessary to be, set off in that suit; the argument can have no just application in the present case. The present suit is brought by the United States to enforce a claim against the defendant in equity; and it would be most extraordinary, if a court of equity should lend its aid to any party to recover any debt beyond what in conscience and truth is due to him. One of the fundamental rules in equity jurisprudence is, that he, who seeks equity, must do

equity. The debenture certificates, in truth, are to be deemed a part payment of the debt; which the United States were bound to give credit for; and it would be a fraud upon the sureties to set up a claim against them for the whole judgment debt, when it had been in part extinguished, and the United States must be presumed to have agreed to give a credit for the same pro tanto.

We come, in the next place, to the consideration of the point raised by the defendant, as to the release of Barnabee by the secretary of the treasury. I have already had occasion to express my opinion, that the release was inoperative in consequence of the conditions annexed thereto not having been complied with; for Abbott, the surety, in his lifetime never assented to it, and the assent of John E. Abbott, his son, is in no just sense the assent of his legal "representatives," if such an assent would have been a compliance with the condition. The main argument on behalf of the defendant is, that the release became, in the event, an operative discharge of Barnabee, notwithstanding it has not been delivered, and notwithstanding the condition has not been complied with; because (it is said) the secretary has required by the condition more than by law he was authorized to require; and also, because a literal compliance with it became impossible. The condition required is, that Sherburne and Abbott should consent to the discharge of Barnabee, without any prejudice to their liability. At the time of the making of the instrument, Abbott was dead; and, therefore, a literal compliance with its terms was impossible; and the secretary had no right, by law, to impose the condition. Besides; by the death of Abbott, he was discharged at law from the judgment; and it survived against the other obligors only. The assent of his legal representatives could not be required to the discharge, for by his death his legal liability was gone; and they were by law incompetent to give such an assent. Sherburne, the only surety, who is liable upon the judgment, has assented; and the condition by his assent had been complied with, as far as could be required by law. Such is the argument. The infirmity of the argument is, that it assumes, that if the condition annexed by the secretary is either impossible, or beyond what the law requires, or authorizes, the condition is void, and it leaves the release absolute. Now, that is the very matter in controversy. And my opinion is, that the release of the secretary, if it is to operate at all, must operate throughout. If he has exceeded his authority, the whole act is void, and not merely the condition. The condition is a condition precedent, and if impossible to be performed, the release does not take effect. If illegal to be required, still the release being to take effect only, when it was complied with, the whole instrument, in its original concoction, was invalid. But it does not appear to me, that the secretary has exceeded his authority in imposing the present condition. On the contrary, it was within the scope and objects of the laws, under which he acted. The act of March 2d, 1831, c. 61, § 4 [4 Stat. 467], authorized the secretary, when he was satisfied, that the debtor was insolvent, and had committed no fraud, to "compromise with the debtor upon such terms and conditions as he may think reasonable and proper, under all the circumstances of the case." A broader discretionary authority could scarcely have been given; and it has not, in any manner, been restricted by the subsequent acts, so as to touch the present condition. The amendatory act of July 14th, 1832, c. 227 [4 Stat. 595], extends the provisions to reach the present case; and further provides (section 3) that the debtor shall not be discharged "until it shall appear to the satisfaction of the secretary of the treasury, that the sureties of the debtor are unable to pay the said debt, and that they are entitled to the provisions of this act in like manner, as the said principal debtor shall be entitled to the same, or unless said sureties shall file their consent, in writing, with the secretary of the treasury, that the privileges of this act, and the act, to which this is an amendment, may be extended to their principal without any prejudice to their liability; or unless such discharge can and shall be given in such manner, as not to affect the legal liability of such sureties." It is apparent, that the secretary imposed the present condition with this directory clause immediately under his view. The act of June 7th, 1834, c. 45 [4 Stat. 676], further provides, that if any surety, or co-surety, of the debtor, shall be dead, "the consent of the legal representative or representatives of such deceased surety or co-surety shall be received, and entitle the applicant for relief in like manner as the consent of a living surety or co-surety would do, by the provisions of the 3d section" of the act of 1832. So, that the very case now in judgment has been expressly provided for, viz. that of a deceased surety. And there is no pretence to say, that if the legal representative of such surety might, or could, at law or in equity, be made liable for the debt, his assent to the discharge might not be required by the secretary, as a proper and reasonable condition of granting it.

The next question is, whether the United States are entitled to maintain the present bill, under the circumstances of the case, against the defendant, as a matter of equitable jurisdiction. I am of opinion, that they are. The estate of Abbott is insolvent; and, in a case of insolvency, the United States are, by virtue of the act of March 3d, 1797, c. 74 [1 Story's Laws, 464; 1 Stat. 512], entitled to a priority of payment out of the assets of the deceased debtor. In my judgment, there is no difference, as to the right of priority, whether the debt due to the United States is a legal debt, or an

equitable debt. Each is equally within the purview of the statute; and a bill in equity is the appropriate remedy to enforce this priority against the administrator. U. S. v. Howland, 4 Wheat. [17 U. S.] 108, 115; 1 Story, Eq. Jur. §§ 531–535.

The only real remaining question is, whether the death of Abbott operated to discharge him altogether from the original debt, both at law and in equity; for if his estate is liable in equity for the debt, it is wholly immaterial, how the matter would stand at law. The argument of the defendant is, that the present is the case of a surety, and against a surety a court of equity will take no step to enlarge his liability, or to make him liable, where he is already discharged at law. Generally speaking, this doctrine is true, and fully supported by the authorities. See 1 Story, Eq. Jur. § 164; Id. § 82. But the question is, whether it applies to the present case. This is not a case, where the plaintiff seeks to have a bond, or other contract, joint in its form, reformed, so as to make it joint and several against a surety, living, or dead. In such a case, a court of equity will not interfere, unless there is the most plenary evidence to establish the fact, that it was the intention of all the parties, that it should be several, as well as joint. But if such an intention is clearly established, courts of equity will enforce that intention, when there has been an omission to express it by accident, or mistake, or fraud, as well against sureties as against the principal debtor. Under such circumstances there is no distinction between the case of sureties and that of principals; for it is a mere specific performance of the original contract, as understood by all the parties. The true difference between principals and sureties is, that in the case of principals, courts of equity will ordinarily presume, that a contract, in form joint, was intended to be joint and several, as all are equally debtors. But in the case of sureties, courts of equity will presume nothing beyond what the positive facts substantiate; and if the contract is in form joint, they will not presume it to have been intended to be joint and several, unless upon distinct and satisfactory proofs to that effect. The cases of Devaynes v. Noble (Sleech's Case) 1 Mer. 564–568; Sumner v. Powell, 2 Mer. 36; Thomas v. Frazer, 3 Ves. 399, 402; Rawstone v. Parr, 3 Russ. 424, 539; Wiser v. Blachly, 1 Johns. Ch. 607; Berg v Radcliffe, 6 Johns. Ch. 302; Miller v. Stewart, 9 Wheat. [22 U. S.] 680; Hunt v. Rosmaniere's Adm'rs, 8 Wheat. [21 U. S.] 211, 212; Id. 1 Pet. [26 U. S.] 16; Weaver v. Shryock, 6 Serg. & R. 262, 264, 265,—fully recognize the general doctrine and the distinction, each of which indeed is so reasonable in itself, that as soon as it is enunciated, it carries with it its own intrinsic justification. But no reform whatever is required of the instrument in the present case. It is a bond joint and several in its form, as is required by the duty collection act of 1799, c. 128, § 62 [1 Story's Laws, 627; 1 Stat. 673, c. 22]; and therefore it is the several, as well as the joint contract of each of the obligors. As between the obligors themselves, Sherburne and Abbott were the sureties, and Barnabee the principal debtor. But as between them and the United States, they were all principal debtors, jointly and severally liable as such by the general principles of law, as well as in equity. The reasoning of Mr. Chancellor Kent, in Berg v. Radcliffe, 6 Johns. Ch. 302, is entirely satisfactory and conclusive upon this point, if it admitted, as I conceive it does not, of any reasonable doubt.

The argument of the defendant proceeds upon the supposition, that if a bond, joint and several in form, is sued against all the obligors, and a joint judgment is obtained thereon, that joint judgment, though unsatisfied, ipso facto, extinguishes the several, as well as the joint obligation ex contractu. No authority has been cited, which supports such a doctrine even at law; and it is somewhat difficult to ascertain the principles, by which it can be maintained. A joint judgment upon a joint contract without doubt operates at law as a merger of the joint contract; and having passed in rem judicatam no joint suit can afterwards be maintained upon the contract, but only upon the judgment. That has been the well-established law at least ever since Higgens's Case, 6 Coke, 44–46; on the ground, that a judgment, being matter of record, is of a higher nature than a mere specialty; and the law will not in point of policy allow a plaintiff to multiply suits for the same cause of action against the defendant, to his oppression and injury. See Com. Dig. "Action," K, 3, K, 4; Lechmere v. Fletcher, 1 Cromp. & M. 632, 633. If one of the judgment debtors dies, the judgment survives against the others; and no remedy at law lies upon it against the executor or administrator of the deceased debtor. If, however, the original debt was in reality the joint debt of all the parties, as partners, or as otherwise having a joint interest, and the survivors are insolvent; in such a case a court of equity will enforce the judgment, as it would have enforced the original contract, against the assets of the deceased debtor, upon the ground, that it ought, under such circumstances, to be treated as a several, as well as a joint contract. In the present case the contract is several, as well as joint; and it becomes necessary to consider, whether the joint judgment could even at law operate as a bar to a several suit brought against Abbott in his lifetime or against his legal representatives after his decease upon the several obligation created by the bond. Treated as a matter of principle it would be difficult to affirm, that a joint judgment ought to be held any bar except to the joint contract, on which it was founded. In a

several suit bought rightfully on the bond as a several contract, the bar of a former joint judgment would not seem to apply; for in a legal sense the former judgment was not between the same parties, nor upon the same contract. It would be strictly res inter alios acta. In Higgens's Case, 6 Coke, 44–46, it was held by the court, that where two are bound jointly and severally and the obligee has judgment against one of them, he may yet sue the other; for against him the nature of the bond is not changed; for notwithstanding the judgment he may plead, that it is not his deed. See Broome v. Wooton, Yel. 67, and Mr. Metcalf's note; s. c., Cro. Jac. 73, 74; s. p. stated in 1 Cromp. & M. 634, 635. That case is not directly in point to the present; for, here, the original judgment was joint; and therefore, quoad the bond, as a joint contract, it had as to both passed in rem judicatam. In Dyke v. Mercer, 2 Show. 393, two men were bound in a bond to J. S. (it is not said jointly and severally); one was sued, who pleaded, that his co-obligor had been sued to judgment and thereupon a fieri facias issued, and the sheriff levied the money. Upon demurrer it was held, that the plea was bad, it not averring any satisfaction. Here, again, the party sued was not a party to the former judgment. In Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, 265, it was held by the supreme court of the United States that a recovery in a several suit against one partner upon a partnership contract (a note) was no bar to a joint suit against both partners on the same contract, at least as to the partner, not before sued, and who set it up as a separate defence; for as to him the former judgment was no merger of the contract, he not being a party to that judgment. On that occasion the court said: "The doctrine of merger, even admitting, that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not be maintained against the others, which is not admitted, can be applied only to a case, in which the original declaration was on a joint covenant, not to a case, in which the declaration on the first suit was on a sole contract." This case also is distinguishable from the case at bar, because the defendant was not a party to the original judgment. But the remark of the court, that a judgment on a sole contract cannot be a bar to a suit on a joint contract seems to apply in principle here; for it must be equally true as to the converse case of a judgment on a joint contract, as a bar to a subsequent suit on a sole contract. They are not, and cannot be treated as the same identical cause of action between the same parties. The case of Ward v. Johnson, 13 Mass. 148, is also distinguishable. The original suit was brought against one partner upon a partnership contract; and afterwards a joint suit against both partners, in which each partner pleaded the former judgment in bar. The court held, that the former judgment was a good bar as to the partner, who was formerly sued; and that, therefore, the joint suit was not maintainable against either partner, since there was no principle of law, which could authorize separate judgments in an action on a joint contract. The court criticised the case of Sheehy v. Mandeville; but did not deem it applicable to the case before them. But the learned judge, who delivered the opinion of the court, said: "It is true, that in case of a joint and several contract an unsatisfied judgment against one of the promisors is no bar to a subsequent action against the other." The subject has been very recently discussed in England in Lechmere v. Fletcher, 1 Cromp. & M. 623; but there, again, the facts did not call for any decision of the precise point now before this court. In that case there was an original partnership debt, upon which a joint suit was brought; and in that suit (irregularly enough, as was admitted) one of the defendants had a verdict in his favor and the other a verdict and judgment against him. Afterwards the plaintiff brought a sole suit against the defendant, who had the verdict in his favor, upon a distinct promise made to him before the former suit was brought to pay his (the defendant's) proportion of the debt. One question was, whether the former judgment in his favor was a bar to the new suit; and the court of exchequer held, that it was not; for it was not for the same cause of action, or to be disposed of by the same evidence. On that occasion, however, Mr. Baron Bayley, in delivering the opinion of the court, went largely into the authorities, and especially commented on the case of Higgens, 6 Coke, 45, and Broome v. Wooton, Cro. Jac. 73, Yel. 68. After quoting the language of Lord Chief Justice Popham in the latter case, that in debt on an obligation against two, "every of them is chargeable and liable to the entire debt; and therefore a recovery against one is no bar as to the other until satisfaction," he added: "If, indeed, that were the case of a joint bond, not a joint and several bond, we have been referred to no authority, which goes that length. It may be, where you sue and recover a judgment against one debtor only, on a contract which is joint, and not several, that your right to sue on the joint contract is destroyed. That, if so, would be so merely on the ground of the difficulty, to which the form of action would give rise. If on a joint contract you have sued one, and entered judgment against him, there might be an invincible obstacle; because upon a new action against another of the parties to the contract, the defendant would have a right to plead, that he made no promise, except with the other defendant, and he could not be joined. Therefore, though we have met with no case, which establishes the position, we are inclined to think, that, in the case

of a joint bond, a judgment against one joint contractor would be a bar to an action against another. But if a defendant is liable separately, as well as jointly, the technical difficulty, to which I have referred, is removed." He afterwards added: "Where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other." Now, this reasoning though not ad idem, yet certainly in its general scope goes far to establish the conclusion, that a separate suit would be maintainable at law against Abbott's administrator, on the separate obligation of Abbott; and that the judgment on the joint action would be no bar, because in such separate suit it would not be necessary to make the other obligors parties. And upon principle, if there were no authority, it appears to me, that the same conclusion must be drawn. When a party enters into a joint and several obligation, he in effect agrees, that he will be liable to a joint action, and to a several action for the debt; and if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument is, that, it supposes, that the obligee has an election only of the one remedy, or of the other; and that by electing a joint suit, he waives his right to maintain a several suit. That I take not to be a sound legal interpretation of the contract. The remedies are concurrent. And I know of no principle of law, which would have prevented the plaintiffs from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein pari passu. It is true, that they could have but one satisfaction. But we all know, that on the same contract the plaintiff may often maintain different suits at the same time, though he can have but one satisfaction. A joint judgment is not per se a satisfaction of a joint and several contract.

I have thought it proper to say thus much upon the general question at law. But in my judgment, it is wholly immaterial in this case, whether a suit could be maintained at law, or not. The joint contracts of debtors, having a common interest, are in equity treated as joint and several, wherever the joint remedy at law fails to enable the plaintiff to obtain satisfaction. Thus, if a joint debt of partners exists, and one of them dies, and the other is insolvent, a court of equity will compel payment out of the assets of the deceased partner. In such a case, a court of equity raises, by implication the several liability. A fortiori, the same principle will be applied by a court of equity in the case of a contract, in form joint and several, where the survivors are insolvent. If the joint judgment could be treated at law (as I think it cannot be,) as a merger of the several obligation; so far from that constituting a ground in equity to refuse relief against the assets of the deceased party, it furnishes a clear ground for its interference; for it is against conscience, that a party, who has severally agreed to pay the whole debt, should, by the mere accident of his own death, deprive the creditor of all remedy against his assets. So courts of equity have always treated this matter; and the present case is but a new application of a very old and well-established doctrine. I do not go over the authorities. The principle to be deduced from them, and the authorities, by which it is supported, are sufficiently stated in the work cited at the argument. 1 Story, Eq. Jur. § 676, and note 1; Id. § 164, and note. Sir Wm. Grant, in Devaynes v. Noble (Sleech's Case) 1 Mer. 564, 565, and in Sumner v. Powell, 2 Mer. 30, 36, has given a very clear exposition of the doctrine, and of the grounds of equitable interference. It is applied to all cases, where the contract is in fact, or ought in contemplation of law to be held, joint and several; and then it is immaterial, whether all are principals, or a part are sureties. Rawstone v. Parr, 3 Russ. 424, 539, fully recognizes this doctrine, though the case was finally disposed of upon another ground, viz. that there was no sufficient proof, that a joint and general contract was intended by the parties.

Upon the whole, my opinion is, that the United States are entitled to a decree for the amount of the debt now due to the bond, after deducting therefrom, the amount of the debenture certificates, with interest upon the balance, to be paid out of the assets of Abbott now in the hands of the defendant, in virtue of their general right of priority of payment in a case of insolvency.

Case No. 14,909.

UNITED STATES v. CUSTIS.

[1 Cranch, C. C. 417.] [1]

Circuit Court, District of Columbia. July Term, 1807.

OFFICER—APPOINTMENT—NOTICE.

An overseer of a road in Virginia, who has not been notified of his appointment, is not liable for the penalty of the act of Virginia of 5th January, 1786, p. 27.

Presentment against the defendant [G. W. P. Custis], as overseer of the road, to recover the penalty of fifteen shillings, for neglect of duty, under the sixth section of act Va., Jan. 5, 1786, p. 27.

E. J. Lee, for defendant, objected that there was no evidence of notice to defendant of his appointment. The act of December 10, 1796, (page 372,) required notice in a certain way, and the sheriff's return is to be conclusive evidence, and is the only evidence which the court can regard.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT discharged the defendant on the ground of want of notice. DUCKETT, Circuit Judge, absent.

Case No. 14,910.

UNITED STATES v. CUTLER.

[1 Curt. 501.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1853.

SEAMEN — ABOLITION OF FLOGGING — INDICTMENT FOR FLOGGING SEAMAN—JUSTIFIABLE CAUSE —"VESSELS OF COMMERCE"—MALICE.

1. The act abolishing the punishment of flogging in the navy, and in vessels of commerce is not a penal law, and no indictment can be framed upon it. It applies to whaling ships, which are "vessels of commerce," within the meaning of this act.

2. It prohibits corporal punishment by stripes, inflicted with a cat, and any punishment which in substance and effect amounts thereto.

3. The degree of such punishment is not material; it is the kind of punishment which is alone to be considered.

4. It is a question of fact for the jury, whether the punishment inflicted was, in substance and effect, the punishment of flogging.

5. Under an indictment founded on the third section of the act of March 3, 1835 (4 Stat. 776), if the punishment inflicted was flogging, it was without justifiable cause.

6. But it is incumbent on the government to prove, not only that the act was without justifiable cause, but that it was malicious, that it was a wilful departure from a known duty. If the master knew that his act was illegal, it was malicious, in the sense of this act of 1835.

[Cited in The Yankee v. Gallagher, Case No. 18,124.]

This was an indictment under the third section of the act of March 3, 1835, (4 Stat. 776,) against [Charles B. Cutler] the master of the whaling bark Dolphin, for beating one of his crew. It appeared that the man had been disobedient, and in a quarrel with the boat-steerer, under whose command he was at the time, the man had wounded him severely in the head. And that the defendant had caused the man to be seized up, and inflicted on him six blows with a piece of ratlin stuff. There was evidence tending to show, that when the master was about to inflict punishment, he called all hands, and declared that he was unwilling to flog the man, but felt it was his duty to do so; and some of the witnesses testified that he also said that he knew it was against the law, but felt obliged to go through it.

Mr. Brown, U. S. Dist. Atty.

Mr. Bosworth, for defendant.

CURTIS, Circuit Justice (charging jury). The defendant is indicted under the act of 1835, for beating one of his crew with malice, and without justifiable cause. The government must prove (1) the beating; (2) the want of justifiable cause; (3) malice. The beating is not denied. The first question is; was there justifiable cause? If the punishment inflicted was the punishment of flogging, within the meaning of the act of 1850 [9 Stat. 440], there could be no justifiable cause, the authority of the master to punish by flogging being taken away. And it is for the jury to find whether what was done, amounted to the punishment of flogging abolished by that act. In order to decide this question, it is necessary for the jury to attend to what is the punishment of flogging referred to in that law; and my instruction is, that it is corporal punishment by stripes, inflicted with a cat, or any punishment which, in substance and effect, amounts thereto. The particular form of the instrument is not material; what you must look to is the effect produced. If the man was punished by stripes, inflicted with a rope, and this, in substance and effect, is the same kind of punishment as the punishment of flogging with a cat, then it is prohibited by this law. The degree of severity of the punishment is not material. It is the kind, and not the degree of punishment which is important. It may be, that one blow with a cat would inflict stripes more painful to be borne, than one blow with a piece of ratlin stuff. But this is not material, if both are corporal punishment by stripes, and both are in substance the same kind of punishment. Another question is, whether whaling ships are vessels of commerce within the meaning of this law. I am of opinion they are. I do not state the reasons which have brought me to this conclusion, for they were fully detailed in the charge given to the grand jury at the present time.

It also incumbent on the government to prove malice. This word is not to be interpreted in its popular sense. It means, a wilful departure from a known duty. If the master knew that his act was unlawful, and did it, intending to take the consequences, that was a malicious act, within the meaning of this law of 1835.

The act of 1850 is not a penal law, and no indictment can be framed on it. But it has the effect to make an important change in the powers of the master, and consequently has an important effect on the question of justifiable cause and malice, arising under indictments framed on the law of 1835.

The defendant was found guilty.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

Case No. 14,911.

UNITED STATES v. CUTTER et al.

[2 Curt. 617.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1856.

NAVY AGENTS—DISBURSEMENT OF PENSION MONEY —LIABILITY OF SURETY—PRESIDENT'S DIRECTIONS.

1. The first section of the act of January 31, 1823 (3 Stat. 723), which requires the especial

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

direction of the president, to authorize the advance of public moneys to disbursing officers, is merely directory to the officers of government, and is not a qualification of the contract of the surety for such officer; and the surety is liable for the misappropriation of public money by his principal, though it was advanced to him contrary to this act.

2. As the president speaks and acts through the heads of departments in reference to the business committed to them, if money is advanced by the direction of the head of the proper department, the direction of the president will be presumed.

[Cited in Re Neagle, 39 Fed. 860.]

3. There is no such distinct office known to the constitution and laws of the United States as "navy pension agent"; and it is competent for the secretary of the navy to require the navy agents to pay these pensions. Having done so, the sureties of the navy agent are responsible for the faithful performance of that service.

[Cited in U. S. v. Wendell, Case No. 16,666.]

4. Though the mere naked declarations of the principal, unconnected with any act or transaction to which the contract of the surety relates, are not evidence against the surety, his declarations connected with such transactions are evidence against the surety.

[Cited in brief in Bank of Brighton v. Smith, 12 Allen, 248.]

[5. Cited in Chadwick v. U. S., 3 Fed. 755, to the point that treasury transcripts are admissible as evidence when suit is brought in any case of delinquency of a revenue officer or other person accountable for public money.]

This was an action of debt on the official bond of Charles W. Cutter as navy agent. Cutter having absconded was not served; but service was made on several of his sureties, who appeared and pleaded the general issue, with leave to give any special matter in evidence. It appeared on the trial that Cutter was duly appointed navy agent for the United States naval station at Portsmouth, on the seventeenth day of April, 1850. His appointment was to continue in force for the term of four years from the sixteenth day of the same April. The terms of his commission required him "carefully and diligently to discharge the duties of navy agent, by doing and performing all manner of things thereunto appertaining; and to observe and follow the orders and directions which he may from time to time receive from the president of the United States and the secretary of the navy." The bond declared on, bears date on the twenty-third day of April, 1850; and its condition is, that Cutter "shall faithfully discharge all his duties as navy agent in the navy of the United States." At the trial, the attorney for the United States offered to read, in evidence, copies of letters from Cutter to the secretary of the navy, and from the latter to Cutter, certified under the seal of the department. The defendant's counsel objected to their being read in evidence:—1. Because not annexed to any transcript of an account. 2. Because some of them are copies of letters to Cutter, who must be presumed to have the originals, and no notice has been given to him to produce them. 3. Because on this trial, Cutter not being a party, his admissions are not evidence, as against his sureties. The court overruled the objections and admitted the evidence,—it being admitted by the defendants that Cutter had absconded, and that his place of abode was unknown to the district-attorney. The plaintiffs called John B. Sullivan, who, being examined, stated that he was a clerk in the fourth auditor's office, which was charged by law with the settlement of the accounts of Cutter. He produced an account rendered by Cutter to the department, of the date of June 30, 1851, showing a balance against Cutter of $31,813.37. The witness stated that there was no change made in this account by the auditor,—it was allowed and settled as presented. He produced also another account rendered by Cutter, covering the period of time between the date of the last-mentioned account and the 24th day of July when Cutter was removed from office. This account consisted entirely of credits claimed by Cutter, which amounted to the sum of $22,000.80. The witness stated that the whole of this was allowed to Cutter, except two sums of $2,750, for which no voucher was produced, and $20, an error in overcharging commissions. And he produced an account stated on the books of the auditor, showing, that charging Cutter with the balance of his former account, $31,812.37, and crediting him with the amount found due to him as navy agent, he was a defaulter to the amount of $12,581.57 in that capacity. The witness further stated, that by the direction of the secretary of the navy, the navy agents paid the navy pensions, and that consequently Cutter had another account as navy pension agent; and he produced an account rendered by Cutter to the department, in that capacity, and bearing date on the first day of July, 1851, showing a balance against Cutter of $1,437.52. This account had been allowed as correct by the auditor. As to the balance of Cutter's account as navy agent, the defence was, that one of the items of debit in that account amounting to the sum of $18,400 had gone into Cutter's hands contrary to one of the regulations of the navy department, and without any order from the president of the United States. And the defendants offered evidence tending to show that by a standing regulation of the navy department made on the first day of June, 1849, "The requisitions of disbursing officers through the bureaus of the navy department, must be accompanied by the triplicate of the bill to be paid, duly receipted by the storekeeper, or other proper officer authorized to receipt for supplies, and approved by the senior officer present." That during the period of time in question, a dry dock was building at the navy yard in Portsmouth by contractors; and that in reference to the payments on account of that contract, the secretary of the navy directed this regulation to be so far modified, that moneys might

be advanced to the navy agent upon certificates of the officer inspecting the work, approved by the senior officer present. That on the third day of April, 1850, Cutter forwarded to the bureau of docks and yards, a requisition for money on account of this contract, of $18,400, accompanied by the required certificate of the inspecting officer approved by the senior officer. It appeared that the course of business of the bureau of the department in case of regular requisitions, was for the bureau to draw on the secretary, who ordered the money to be remitted or not as he should see proper. On this occasion such a draft was drawn by the head of the bureau on the secretary of the navy, and by his order the required sum of $18,400 was remitted to Cutter. On the twenty-third day of the same April, Cutter made another requisition on the bureau for the same sum of $18,400, accompanied by the triplicate of the bill, approved by the senior officer, from which it appeared that this last requisition was for the same payment for which the first was made. The head of the bureau drew on the secretary for this sum, and it was by the order of the secretary sent to Cutter. It did not appear whether the first sum had been actually remitted to Cutter when the second was ordered to be paid to him, nor was it made certain, by any direct evidence, whether it was intended that Cutter should have in his hands $18,400, in anticipation of a payment, or whether it was by an oversight and mistake of the department, that he received one of these sums. The evidence was such that the jury might have come to either of these results. The court ruled, that this evidence and any inferences of fact which the jury could legitimately draw from it, would not in point of law, relieve the sureties from responsibility for this item of $18,400.

In respect to the balance due from Cutter, as navy pension agent, it was insisted by the defendants that it was not within the condition of the bond, because this was only for the faithful performance of the duties of navy agent, and a witness was called by the defendants, who testified that he held the office of navy agent at Portsmouth, after Cutter's removal, and that he received a separate appointment and gave a separate bond as navy pension agent. But the court ruled that the business of paying navy pensions did not constitute a separate office; that there was no such distinct office known to the law of the United States as "navy pension agent"; that it was competent for the secretary of the navy to assign this business to navy agents, and if he did so, it became part of the duties of their offices, for the faithful performance whereof their sureties would be liable.

It was then agreed between the counsel, with the sanction of the court, that the case should be taken from the jury and the questions of law considered by the court, and a verdict directed as the court might think the law required; it being understood that before the case should be finally committed to a jury, either party might take a bill of exceptions.

Mr. George, U. S. Dist. Atty.
G. Marston and T. W. Emery, contra.

CURTIS, Circuit Justice. I have now maturely considered the questions of law involved in this case, and will proceed to state my opinion thereon, and to give such directions to the jury as will finally dispose of the case in this court.

The first question which I have considered, arises out of the evidence respecting the circumstances under which the two sums of $18,400 came into the hands of Cutter. It is not denied, that this was public money of the United States, nor that it came into the hands of Cutter to be applied by him as navy agent, to pay for the building of the dry dock at the navy yard at Portsmouth. But the ground is, that no order of the president of the United States appears to have justified this advance of money to the disbursing officer, and that in respect to one of those sums, it was paid to him without his having produced the voucher required by the regulation of the navy department.

One argument for the defendants is, that the act of congress of January 31, 1823, § 1, prohibits an advance of public money to any disbursing officer, without the especial direction of the president, and that the government has shown no such especial direction in this case. In Williams v. U. S., 1 How. [42 U. S.] 290, the supreme court had occasion to put a construction on this section, and held, that general instructions by the president to the secretary of the treasury, to make such advances to the marshals of the United States as the secretary should deem proper, and the act of the secretary in making the advance brought the case under this law; that such duties can be performed by the president only through the agency of the appropriate department and the act of the head of that department is, in legal effect, the act of the president. That case differs from this, in so far as there was oral evidence in that case, of some former general directions of the president. No oral or written evidence has been given in this case, of any directions by the president to the secretary of the navy on this subject.

The question is, is any such evidence necessary? The act of congress which authorizes the construction of this dock (9 Stat. 170), contains this language: "That the secretary of the navy is hereby directed to cause to be constructed at each of the navy yards, at Kittery, &c., and the sum of fifty thousand dollars is hereby appropriated towards said dock at Kittery." By a subsequent act (9 Stat. 270, 271), the secretary is required to make a contract with one of two sets of contractors, therein named, for building and com-

pleting this dock. By two subsequent acts (9 Stat. 377–516), further appropriations were made for prosecuting and completing the work. There can be no doubt therefore, that the whole subject of the construction of this dock was placed by congress under the care of the secretary of the navy. In Wilcox v. Jackson, 13 Pet. [38 U. S.] 498, the question arose whether the president had reserved from sale a particular tract of land. The court say: "At the request of the secretary of war, the commissioner of the general land-office, in 1824, colored and marked upon the map this very section, as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this, too, as having been done by authority of law; for amongst other provisions in the act of 1830 (4 Stat. 420), all lands are exempted from preëmption, which are reserved from sale by order of the president. The president speaks and acts through the heads of the several departments, in relation to the subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence we consider the act of the war department in requiring this reservation to be made, as being in legal contemplation the act of the president; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the president, within the terms of the act of congress."

I am unable to distinguish the question in this case, from that arising in Wilcox v. Jackson [supra]. Here the secretary of the navy not only had committed to him generally, the subject of naval affairs, but the construction of this dock, was expressly placed under his care by the acts of congress, authorizing its erection. In reference to this subject it may be said, with even more propriety than in Wilcox v. Jackson, that whatever the president is to do, he is to do through and by the secretary. This money was advanced to Cutter in each instance, by the order of the secretary. So far as the authority of the president was necessary, I must consider him as speaking and acting through the secretary to whom the subject was committed by congress. I must presume, in the absence of all evidence, that the advances made, were with his approbation and under his direction, within the meaning of the act of congress. But if this were otherwise,—if the especial personal direction of the president were necessary to bring the advance within the act of 1823, I should have great difficulty in holding, that the absence of that direction would prevent the sureties from being responsible for public money actually received by the navy agent. It came into his hands to be applied to the uses of the government. He was bound so to apply it. His failure to do so was unfaithful conduct in his office. And for all unfaithful conduct by him, the sureties are responsible, unless it appears that a particular transaction is not within their contract. Reduced to its real substance the argument in their favor is, that though they were responsible, according to the terms of their bond, that Cutter should faithfully perform the duties of navy agent, it is not a duty of a navy agent faithfully to apply public moneys which come to his hands contrary to the command of this act of congress. Now, the second section of this act, and another act containing provisions similar to that of its third section, have been under the consideration of the supreme court; and it has been held that these provisions of law are merely directory to the officers of the government, and make no part of the contract with the surety; that they are created by the government for its own security, and to regulate the conduct of its own affairs, and that though the surety may place confidence in the agents of the government, and expect them to observe the prescribed regulations, he has the same means of judgment as to their fidelity in office, as the government itself has, and the latter does not undertake to guaranty that fidelity. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Vanzandt, 11 Wheat. [24 U. S.] 184; Smith T. v. U. S., 5 Pet. [30 U. S.] 292; Dox v. Post-Master General, 1 Pet. [26 U. S.] 318. I perceive no sound distinction in this respect between the first section of the act now under consideration, and the second and third sections which have been thus interpreted. The former relates to placing money in the hands of the officer; the latter to allowing it to remain there, and his continuance in office. Each of these regulations, would, if observed, tend to diminish the responsibility of the surety, and to save him from loss. If it be not a part of his contract that one should be observed, neither is it that the other should be. Indeed, in the case of Minor v. Mechanics Bank of Alexandria, Id. 46, the supreme court held that even if the president and directors of a bank were to conspire with the cashier to enable him to misappropriate the money of the bank, this would not save his sureties, which clearly shows that the obligee does not guaranty to the sureties, the faithful observance by others, of those precautions which, if observed, would tend materially to their security. And these views apply also to the argument grounded on the failure to observe the regulation of the department requiring the production of the triplicate bill, before remitting the money. This was a regulation made by the government for its own security, in the conduct of its business, which formed no part of the contract of the surety; it was clearly in the power of the secretary to dispense with it, if he thought it needful to do so; and the failure to observe it constitutes no defence. Nor does the fact that two sums of $18,400, instead of one, were advanced to Cutter, in any view which may be taken of the evidence, amount to a defence. If this was done inadvertently and through laches, it is settled by the cases above cited, that the laches of its officers cannot prejudice the government. Whether by

laches or design, these two sums came to the hands of Cutter, it was public money received by him in his capacity of navy agent, and which he was bound, in that capacity, to apply to the uses of the United States. His misappropriation of it, was unfaithful conduct as a navy agent, and for this, by the terms of their contract, the sureties are responsible.

The next inquiry is whether these sureties were responsible for the faithful application by Cutter of the funds intrusted to him for the payment of navy pensions. In the case of Browne v. U. S. [Case No. 2,036], I had occasion to examine the question, whether the employment to pay navy pensions constituted a distinct office, under the constitution and laws of the United States. I came to the conclusion that it did not; that this duty was assigned by the secretary of the navy to the navy agents as part of their duties as navy agents. To this conclusion I now adhere. The terms of Cutter's commission as navy agent authorize and require him "carefully and diligently to discharge the duties of navy agent, by doing and performing all manner of things thereunto appertaining; and he is to observe and follow the orders and directions which he may from time to time receive from the president of the United States and the secretary of the navy." The terms of the commission are, therefore, broad enough to include all duties which might from time to time be assigned to the officer by the orders of the secretary of the navy, provided they are among the things which by law may appertain to the office. As was observed in Browne v. U. S. [supra], no other description of the duties and powers of this office is known to me, except that contained in the act of March 3, 1809, § 3 (2 Stat. 536), to make contracts or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the navy of the United States. There can be no doubt that moneys paid to officers and seamen as pensions, are disbursed for the use of the navy of the United States, and that it is within the terms of the commission issued to Cutter, for the secretary of the navy to order him to pay them. When such an order had been made, the faithful disbursement of the public moneys intrusted to him for this purpose, became part of his duties as navy agent, and as such within the terms of the contract of his sureties that he would faithfully perform all the duties of navy agent. The cases bear a very close resemblance to Minor v. Mechanics Bank of Alexandria, 1 Pet. [26 U. S.] 72. In that case a by-law of the bank provided that "the cashier shall do and perform all other duties that may from time to time be required of him by the president or board of directors relative to the affairs of the institution." When Minor was appointed cashier, the duties of teller were also assigned to him. Though the office of teller and the distinct accounts which belonged to it were still kept up, the court held that the duties of teller thenceforth became part of the duties of cashier, and the sureties, who had undertaken for the faithful performance of the duties of cashier were responsible also for the performance of those duties which had previously belonged to the office of teller. That his bond as cashier must be construed to cover all defaults in duty annexed to the office from time to time by those authorized to make such annexation.

The remaining inquiry is, whether the copies of the correspondence were rightly admitted. Very little practical importance can be attached to this inquiry in this case, because the letters bore only on the question of Cutter's being a defaulter, and as the state of his accounts, as settled at the treasury, was fully shown, by unexceptionable evidence, the admission or rejection of the letters became immaterial. But I think they were rightly admitted. The act of congress of September 15, 1789 (1 Stat. 69, § 5), provides that the secretary of state shall cause a seal of office to be made, &c., "and all copies of records and papers in the said office, authenticated under the said seal, shall be evidence equally as the original record or paper." By the act of February 22, 1849 (9 Stat. 347, § 3), it was enacted, that "copies of books, papers, documents, and records in the war, navy, treasury, and post-office departments, and in the attorney-general's office, may be certified in the same manner, and with the same effect as those in the department of state." This correspondence, which consisted of letters to and from Cutter, was so certified. But it is objected that the copies of the letters to Cutter are not admissible, because they are only copies of copies; that if the copies which are in the navy department had been produced, they would not be admissible without accounting for the failure to produce the originals in the possession of Cutter. But when it was admitted that Cutter was an absconding defaulter, and that his place of abode was unknown to the district attorney, the failure to produce the originals is accounted for. It was further objected that Cutter's admissions are not evidence against his sureties. I am inclined to think the mere naked admissions of the principal, not made in the course of any business, or as parts of any acts with which the surety is connected by his contract, cannot be received in evidence against the surety. The laws on this subject are collected in 1 Phil. Ev. 297, 390, and in 3 Cow. & H. & Edw. Notes, pp. 241-245. There are cases which go so far as to admit the declarations of the principal as evidence against the surety, without restriction as to the time or circumstances under which they were made. There is also another class of cases, in which it is held that, a judgment against the principal is evidence against the surety, of the demand which it establishes.

Drummond v. Prestman, 12 Wheat. [25 U. S.] 515; Heard v. Lodge, 20 Pick. 53. But in this case it is only needful to say, that the letters, both of the secretary and Cutter are not mere naked declarations. They are demands on the one part for payment, and on the other part replies to that demand. They are strictly part of the res gestæ in the administration of that office, for the faithful conduct of which the sureties were bound. And such are admissible in evidence against the sureties, upon the same principle that his accounts, rendered to the department are admissible.

I have now considered all the questions raised in this case. I am of opinion that there should be a verdict rendered for the plaintiff. Upon this verdict judgment must be rendered for the amount of the penalty of the bond, to be discharged on payment of the amount actually due; that is to say, the two sums of $12,581.57, and $1,437.52, amounting to the sum of $14,019.09, with interest from the date of the writ. See Farrar v. U. S., 5 Pet. [30 U. S.] 373; Ives v. Merchants Bank, 12 How. [53 U. S.] 159.

Case No. 14,912.

UNITED STATES v. CUTTS.

[1 Sumn. 133.] [1]

Circuit Court, D. New Hampshire. May Term, 1832.

BANK STOCK—ASSIGNMENT—TRANSFER—EQUITABLE TITLE—UNITED STATES—PRIORITY OF PAYMENT—ADMINISTRATOR—ASSETS.

1. A, owning certain five per cent. stock of the United States, borrowed $1960 of B on a note payable in four months, and made an assignment of the stock, with a power of attorney to transfer it on the books of the bank, and delivered the certificate of the stock to B, who was to sell the stock, if the debt was not paid when due. A died before the note became due, insolvent and indebted to United States, who claimed a priority of payment. The stock was never transferred on the public books during A's lifetime. After his death his administrator sold the stock, and applied the proceeds to the payment of B's debt. It was *held*, that B took an equitable interest by the assignment in the stock, notwithstanding the act of 1790, c. 61 [1 Story's Laws, 109; 1 Stat. 138, c. 34], had declared, that transfers should be made only on the books of the government by the party in person, or by his attorney, and that the payment by the administrator was not a misapplication of the assets.

[Cited in Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 372; Scott v. Pequonnock Nat. Bank, 15 Fed. 499, 501.]

[Cited in Conant v. Reed, 1 Ohio St. 306; Reed v. Copeland, 50 Conn. 490; Walker v. Detroit Ry. Co., 47 Mich. 347; Weston v. Bear River & A. Water & Mining Co., 5 Cal. 186.]

2. The act of 1790, c. 61 [1 Story's Laws, 109; 1 Stat. 138, c. 34], did not intend to interfere with, or prohibit, equitable titles or claims on stock; but only to fix the legal title between the government and the holder.

3. Stock held by a trustee (and the holder after an assignment is a mere trustee) is not assets in the hands of his administrator or assignees.

This was an action of debt on an official bond, given by N. Lyde (the intestate) for the faithful performance of his duties as purser in the navy. The parties agreed to a special statement of facts, as follows: "It is agreed that the defendant's intestate was a purser in the navy of the United States, and that the bond mentioned in the plaintiff's writ was given by the said Lyde for the faithful performance of his official duties as such purser. The said Lyde died on the 7th of July, 1828, and in June, 1829, a balance was stated by the accounting officers of the treasury to be due from the said Lyde's estate to the United States, of $5522.08. The defendant immediately afterwards paid to the United States the sum of $3857.75, being the amount of assets in his hands, unless the court shall be of opinion on the facts following, that he had a further amount. On the 1st day of July, 1828, the said Lyde borrowed of Thomas Sheafe the sum of $1960, and gave his note for that sum to said Sheafe, payable in four months, and also delivered to said Sheafe a certificate of five per cent. stock of the United States, standing on the books of the Bank of the United States, at Boston, for $1960, and executed and delivered to him an instrument, of which the following is a copy: 'Know all men, by these presents, that whereas I, Nathaniel Lyde, of the United States' navy, have obtained a loan of Thomas Sheafe, of Portsmouth, N. H., Esq., on my promissory note, bearing date this first day of July, 1828, for $1960, payable in four months and grace from the date hereof, and I have agreed to pledge $1960 of United States five per cent. stock, redeemable after the year 1832, belonging to myself, the certificate whereof has been delivered to said Sheafe, previous to the execution hereof, for drawing the payment of said note. Now know ye, that, in consideration of the premises, and for value received, I do hereby assign all my interest in said stock to said Thomas Sheafe, in trust and for the purposes aforesaid; and I do authorize and empower the said Thomas Sheafe, in person or by substitute in his name, to sell, assign, and transfer, unto any person or persons, as much of said stock as may be necessary to pay whatever may be due on said note, together with the necessary expenses attending the same. In witness whereof I have hereunto set my hand and seal, the first day of July, A. D. 1828. Nathaniel Lyde. (Seal.) Sealed, &c., in the presence of Richard R. Waldron, W. B. Parker.' And the said Sheafe, at that time, made to said Lyde a receipt in the following words: 'Portsmouth, N. H., July 1st, 1828. I acknowledge to have received of Nathaniel Lyde, Esq., a certificate of United States five per cent. stock for nineteen hundred and sixty dollars, as collateral security for a note of said Lyde to me for that sum, which certifi-

[1] [Reported by Charles Sumner, Esq.]

cate is to be returned to said Lyde, also the assignment of said stock, whenever said note is paid. Thomas Sheafe.' The said Lyde died on the 7th of July, 1828. After the said note became payable, the said Sheafe applied at the office of discount and deposit of the Bank of the United States at Boston, to make a transfer of the same, which was refused at said office on account of the death of the said Lyde; and on the 15th of January, 1829, the said [Edward] Cutts, as administrator as aforesaid, on said Sheafe's giving a bond to indemnify him, transferred the said stock on the books of said office, to said Sheafe, in payment of said note and interest, and nine dollars and eighty cents, which sum constituted part of the money paid by the said Cutts to the United States. The said Sheafe allowed the current price at Boston, for stock of that denomination. The circumstances and amount of said Lyde's estate were not known at the time of the transfer. His estate has since been represented insolvent. If the court are of opinion, that the said stock, under the foregoing circumstances, constituted assets in the hands of the said Cutts, as administrator, the defendant is to be defaulted, and judgment rendered for the sum of $1664.33, debt, and costs, in common form, and execution to issue. If otherwise, judgment is to be rendered in favor of the plaintiffs for the same sum, to be levied on the goods and chattels, which were of the said Lyde, and which shall hereafter come to the hands of the said Cutts, as administrator as aforesaid, to be administered. It is understood, that the defendant is not to be prejudiced by the foregoing statement from claiming further allowances, which he claims to be equitably due from the United States to the estate of said Lyde."

The cause was argued at the last October term at Exeter, N. H., in the absence of the district judge, by Messrs. Mason and Durell for the plaintiffs, and by E. Cutts and Mr. Bartlett for the defendant.

For the plaintiffs it was contended, that there was no legal transfer to Sheafe by the instrument stated in the case, in the lifetime of Lyde. The transfer by the act of 4th of August, 1790; Story's Laws, p. 112, c. 61 [1 Stat. 140],—could be made only on the books of the treasury, by the party or his attorney; and this provision extended to all subsequent acts respecting the transfer of the public debt. The certificates of the public debt on their face purport "to be transferable only at the bank," by the party or his attorney. If this be so, then, by the death of Lyde, the transfer was extinguished; and, Lyde's estate being insolvent, the United States were entitled to the statute priority given to the government by law, and the administrator had no right, as against creditors, to make the transfer for the benefit of Sheafe. The instrument of agreement did not make any transfer of the stock, or show an intention to make any immediate transfer. The words are, that Lyde has agreed to transfer, not that he has transferred. No transfer was to be made, until after the note became due, and was unpaid. And so the receipt of Sheafe purports. If these positions are correct, then Sheafe had no lien on the stock. The delivery of the certificate would not make any difference, or give any lien on the stock; and the power given in the instrument was a mere verbal power, not coupled with any interest. There was no mistake, no fraud, and no error. The parties did exactly what they intended. The case, then, falls directly within the authority of Hunt v. Rousmanière's Administrator [Cases Nos. 6,897 and 6,898]; s. c., 8 Wheat. [21 U. S.] 174, 1 Pet. [26 U. S.] 1. Against other creditors, in a case of insolvency, a court of equity would not give any relief. So it was held in Hunt v. Rousmanière. It would not overrule the express provisions of the statute, as to the mode of transfer.

For the defendant it was argued, that the instrument was not a mere power of attorney. In the beginning, it is true, it is stated, that Lyde had agreed to pledge, &c.; but afterwards it is expressly stated, that he does thereby assign the stock. It is a power, then, coupled with an interest in the stock. It is true, that it was not a transfer at law, but it was in equity, and transferred Lyde's interest in the stock; and so the power was irrevocable, and survived the death of Lyde. A trust coupled with a power or interest survives. 4 Dane, Abr. c. 135, art. 6, §§ 4, 8. The intention was to give Sheafe a complete lien on the stock. The certificate was delivered to Sheafe, and no transfer could be made on the books of the bank without delivering it up. Hunt v. Rousmanière [supra] was a case of a mere naked power. The intestate remained in possession of the vessel. The loan officer, after Lyde's death, might properly have allowed Sheafe to transfer the stock. The administrator has done no more than his duty. The statute—August 4, 1790 [1 Story's Laws, 109, c. 61, 1 Stat. 138]—as to transfers is a mere regulation between the government and the stockholders, with regard to the legal interest, and who shall be deemed owners, as between them. It did not intend to touch any assignments or transfers between the holders and third persons. Sheafe was an assignee of a chose in action, and as such he had a power conferred with an interest. Wheeler v. Wheeler, 9 Cow. 34. The administrator might have been compelled in equity to make this transfer; and if so, there is no devastavit, or misappropriation of the funds.

STORY, Circuit Justice. This cause was argued fully at the last term; and entertaining, as I did, considerable doubts upon it, at and after the argument, it was continued for advisement until this term. In the mean time, I have bestowed no inconsiderable reflection upon the subject, and have availed myself of

all the information within my reach, as I deem the decision of great practical importance.

The question, upon the statement of facts, comes to this, whether there has been any misapplication of the assets of Lyde, the intestate, by his administrator, in the sale and appropriation of the five per cent. stock to the payment of the debt due to Sheafe, Lyde's estate being insolvent, and the United States, in such a case, having, under the statute of March 3d, 1797, c. 74, § 5 [1 Story's Laws, 464; 1 Stat. 512, c. 20], a right of priority of payment of all debts due to the government out of his assets. And that depends upon this farther question, whether the instrument under which Sheafe claims a right to the stock in controversy, and the deposit of the certificate with him, were a sufficient equitable assignment of the stock, or gave a sufficient lien thereon to defeat the priority of the United States.

In order to arrive at a just conclusion upon this point, it will be necessary, in the first place, to ascertain, what is the true interpretation of the terms of the instrument; and in the next place, what is the legal operation of those terms, when their meaning is thus ascertained. The instrument begins by reciting, that Lyde had obtained a loan of Sheafe on a note dated the 1st of July, 1828, for $1960, and payable in four months and grace; and that Lyde had "agreed to pledge" $1960 of United States five per cent stock, redeemable after the year 1832, belonging to himself, the certificate whereof had been then delivered to Sheafe, for securing the payment of the note; and it then proceeds to declare, that in consideration of the premises, he, Lyde, did thereby "assign all (his) interest in said stock" to Sheafe, in trust and for the purposes aforesaid; and he then constituted Sheafe his attorney in person, or by his substitute in his (Sheafe's) name, to sell, assign, and transfer unto any persons, so much of the stock as may be necessary to pay whatever may be due on the note, with the necessary expenses. The intention to pledge the stock, as security for the note, is unquestionable; and in execution of this intention, there is an actual delivery of the certificate, and an assignment, in appropriate words, of all his (Lyde's) interest in the stock, and an authority to sell and transfer the same. It is not, then, the case of a mere unexecuted agreement to pledge the stock; nor a mere naked delivery of the certificate, as the sole pledge; but, so far as the parties could execute the agreement of pledge, without an actual transfer of the stock on the books of the bank, they have perfected the pledge by an assignment of the interest, and a delivery of the certificate. The power of attorney is not a mere naked power, uncoupled with any interest, according to the intention of the parties; but, if such is its effect, it results from principles of law, wholly beside that intention and in opposition to it.

What, then, is the legal operation of the terms of the instrument, according to this, which is the natural, and, as I think, the only just interpretation of them? Is it utterly void, except as a mere power to sell and transfer? If so, then, upon the doctrine of the case of Hunt v. Rousmanière [Cases Nos. 6,897 and 6,898]; s. c., 8 Wheat. [21 U. S.] 174, 1 Pet. [26 U. S.] 1, though irrevocable by Lyde during his lifetime, it became extinguished by his death. Now, I am clearly of opinion, that it cannot be so considered. If it does not, in point of law or equity, assign any interest in the stock, still it does contain an agreement to pledge it, which agreement, being legal, is a subsisting contract, capable of being enforced in an action at law, or by a bill in equity for a specific performance, against Lyde's administrator, supposing the rights of other creditors not to interfere. No one can doubt, that, if Lyde's estate were solvent, the administrator might be compelled in equity to transfer the stock to Sheafe, or to a purchaser under him, on the books of the bank, or at least to have it sold, in order to discharge the debt. And, if the administrator should refuse so to do, he might, at the election of Sheafe, be sued also at law for damages for the breach of the contract. But the difficulty is not in applying the remedy; but in the nature and effect of the relief, arising from the interfering rights and equities of other creditors, in a case of insolvency. If a recovery should be had at law, Sheafe, in a case of insolvency, could only come in, pari passu, with other creditors of the same degree, and not with others possessing a priority. And in equity, if he could obtain a specific performance at all, it must be because he has a superior equity upon such a contract of pledge over other creditors. That could not be pretended, unless his contract created a lien on the very stock (see Hunt v. Rousmanière [Case No. 6,897]; s. c., 1 Pet. [26 U. S.] 1); or an assignment, which should in equity be deemed an appropriation of the fund (Lepard v. Vernon, 2 Ves. & B. 51). In regard to the lien, that seems to have been relied on at the argument, as arising from the delivery of the certificate, according to the intention of the parties, and from some supposed analogy to the lien recognised in equity, in cases of a deposit of title deeds, which is held to amount to an equitable mortgage. See 3 Cov. Pow. Mortg. c. 23, pp. 1049–1061; Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, 284. And it has been said, that no transfer of the stock would be allowed, but upon a surrender of the old certificate. That is probably true in point of practice. I am not aware, however, that it is strictly required by law. There may doubtless be a pledge of a certificate of stock, which shall operate merely as a pledge of the instrument, and not of the stock; but ordinarily the deposit of the certificate as an exposition of the intention of the parties, covers also a pledge of the stock. Formerly, indeed, upon a mere deposit of title deeds, the

party took an interest in the deeds only, and not in the estate. Ex parte Whitbread, 19 Ves. 209-211. The first case the other way, seems to have been Russel v. Russel, 1 Brown, Ch. 269. In the present case, however, there is no doubt, that the parties intended a lien, or equitable mortgage, not merely upon the certificate, but upon the stock. If the analogy of a deposit of title deeds should, therefore, hold good, it would apply with great cogency to the present case; for it has been decided, that the equitable lien by a deposit of title deeds, is good against the priority of the crown for a debt, found due by an inquisition, after the date of the deposit. Casberd v. Ward, 6 Price, 411. See, also, Ex parte Byas, 1 Atk. 124; Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, 284.

P . waiving any inquiry of this sort, let us see, how the case stands upon the ground of assignment. The statute of August 4th, 1790 [1 Story's Laws, 109, c. 61; 1 Stat. 138, c. 34], authorizing the creation and transfer of stock of the public debt, provides (section 7) "that the stock, which shall be created pursuant to this act, shall be transferable only on the books of the treasury or of the said commissioners respectively, upon which the credit for the same shall exist at the time of transfer, by the proprietor or proprietors of such stock, his, her, or their attorney." This clause has been made applicable to all other loans and stock subsequently created. And by the act of March 3d, 1817, c. 211 [3 Story's Laws, 1625; 3 Stat. 360, c. 38], the duties of commissioners of loans were transferred to the Bank of the United States; and have ever since been performed by that national institution. The argument is, that this statute contains a virtual prohibition of any transfer of stock, except on the books of the treasury or commissioners, according to the act of 1790; and that, consequently, the asserted assignment to Sheafe without such a transfer was utterly void, and inoperative, to convey any title whatsoever in the stock to him; and that a court of equity cannot create a transfer against the prohibitions of the act. If such be the true construction of the statute, there is an end of the defence; and judgment must pass in favor of the United States. That, however, is the very hinge of the controversy. That the statute is susceptible of that construction may be admitted; that it is the true or sole construction remains to be considered. Before entering upon this point, it may be proper to premise, that the United States have no lien, for any debts due to them, upon the public stock held by their debtors. To give or support any such lien, would defeat the obvious policy of the acts making the stock transferable. The claim, therefore, of the United States is merely a right of priority of payment, in cases of insolvency, out of the assets of the deceased debtor, in the hands of his administrators or executors, and not out of the stock specifically. The administrator has the sole right to sell and transfer the stock; and his present act, so far as the sale and transfer are concerned, was entirely justifiable, and within the scope of his authority. The only point is, whether he has rightly applied the proceeds in the order of payment of the debts. Now it seems to me, that the true interpretation of the statute is, that, so far as the United States and the proprietors are concerned, no transfer is to be considered as complete and perfect, so as to pass the legal ownership of the stock, and make the purchaser the legal owner, until the transfer has been entered upon the public books. No person can transfer the same as such owner, or entitle himself to receive the dividends, unless he stands as a recorded proprietor upon these books. And there is a manifest propriety and policy, in this view, in making the provision, as it would avoid, on the part of the government, all inquiries into, and examination of, any equitable or other titles, or liens set up, as acquired under a proprietor, by any third persons dealing with him. This object may well be effected, without, in the slightest degree, interfering with the validity of any equitable titles or liens acquired under any agreement between the proprietor and third persons, so far as it regards them respectively. And it would sound harsh, to hold all such agreements between the proprietor and his creditor, or between him and a purchaser, utterly void, inter sese, unless there were a very plain and direct expression in the statute to that effect, which, in this case, there certainly is not. I understand the statute to provide only for legal transfers, and to look to them, and them only; leaving the parties at liberty to create whatever equitable titles and liens they may choose, and to enforce them by the general remedies between them and their representatives, which the jurisprudence of the country recognises for such purposes. And it appears to me, that the analogies of the law, and the general current of the authorities, justify this conclusion.

First, the analogies of the law. Nothing is more common, than for the legal estate or title to be in one person, and the beneficial interest in another. A trustee of stock is the legal proprietor; but the beneficial interest belongs to his cestui que trust. Suppose, in this case, Lyde had held the stock avowedly as the trustee for Sheafe, could there be a doubt, that, upon the death of Lyde, the stock would not have been assets; but would have been transferable to the cestui que trust? Now, in what substantial respect does the case, here put, differ from that at bar? After the agreement and assignment, was not Lyde to all intents and purposes a trustee, holding the legal title for the benefit of Sheafe? The argument would admit this conclusion, if the assignment were not utterly void, as an equitable assignment. But upon what ground can it be held utterly void? The statute has not declared, that a proprietor shall not contract to hold the stock, as trustee for another. Neither has it declared

him incapable of making an equitable assignment. All that it has declared is, that there shall not be any transfer of the stock except upon the books of the bank. The certificate upon its face contains the same declaration. Its language is, "which debt is recorded in, and transferable only at, this bank, by appearance in person, or by attorney." But, subject to this regulation, the proprietor may burthen or charge it with any trusts he pleases. The statute has not prohibited trusts; and it is almost incredible, that it should intend so to do. If it does not prohibit trusts, upon what ground can it be inferred, that it means to prohibit equitable assignments, which are only a mode of creating such trusts?

There is a clear line of distinction, running through all this class of cases, between a legal and an equitable transfer and right to stock. In this respect, stock, whether of a negotiable nature or not, bears a close analogy to choses in action; closer, perhaps, than to goods and chattels. See Wildman v. Wildman, 9 Ves. 174, 177. Now, though an assignment is not permitted by the common law, of any choses in action, except negotiable instruments, and therefore a transfer of them is, at law, utterly inoperative; yet it is common learning, that such an assignment is upheld in equity, and amounts to an appropriation of the property to the assignee. Thus, a debt due by bond, or in any other manner, than upon a negotiable instrument, may be assigned; and, from the moment of the assignment, the interest of the obligee, or other assignor, is, in the view of a court of equity, completely transferred to the assignee. And if, afterwards, the assignor dies, the rights of the assignee will be respected in the course of administration; and if the money is recovered by the administrator, as the only proper party to sue, it will not be deemed assets, but be treated as the money of the assignee. See Dawes v. Boylston, 9 Mass. 337; Cutts v. Perkins, 12 Mass. 206, 210; Wheeler v. Wheeler, 9 Cow. 34; Ex parte Byas, 1 Atk. 124. So a draft, drawn by a creditor upon his debtor, for an amount due to him, if made for a valuable consideration, amounts to an equitable appropriation and assignment of the fund, and will be enforced accordingly against the debtor. See Row v. Dawson, 1 Ves. Sr. 331; Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, 285, 286; Clarke v. Adair, cited by Buller, J., in Master v. Miller, 4 Term R. 343; Cutts v. Perkins, 12 Mass. 206, 211; Ex parte Alderson, 1 Madd. 53. In the case of Lepard v. Vernon, 2 Ves. & B. 51, the whole scope of the reasoning of Sir William Grant shows, that if the debt had been assigned, the power, given to collect it, would have been deemed a power coupled with an interest, and the assignment a sufficient appropriation of the debt, so as to prevent it from becoming a part of the assets of the deceased in the hands of his administrator. There is nothing, then, in the analogies of the law, which prevents a court of equity from holding the assignment in the present case from operating as an equitable appropriation of the stock, notwithstanding the statute does not contemplate any but a legal transfer of the stock, and directs such transfer to be made, and to be made only in a particular prescribed manner. These analogies show, that a transfer, void at law, may yet be upheld as an equitable appropriation, unless there be some prohibition by positive law.

Then, as to the authorities. They are not, perhaps, all reconcilable with each other; but there is a sufficiently strong body, in support of the views already suggested, to justify the court in its present decision. In the case of U. S. v. Vaughan, 3 Bin. 394, certain shares in the Bank of the United States had been transferred by the holders in London to a purchaser there, the certificate of the stock delivered to the purchaser, and a blank power of attorney to transfer them on the books of the corporation in America. The stock was attached by a process of foreign attachment before any actual transfer had been entered upon the books of the corporation. By the charter of the bank,—Act 1791, c. 84 [1 Story's Laws, 169; 1 Stat. 191, c. 10],—it was provided, that, "the stock of the said corporation shall be assignable and transferrible according to such rules as shall be instituted in that behalf by the laws and ordinances of the same;" and by a by-law of the corporation the stock was made transferrible only at the bank on its books by the proprietor personally, or his attorney. The argument was, that under these circumstances the transfer was void, and the attachment good. But the court held, that the sale and other proceedings operated as an equitable assignment to the purchaser; and that the attachment was void. There is an elaborate opinion of Mr. Justice Yeates, from which I will quote a single passage directly in point. "In what relation, then," says he, "previous to a formal transfer, did the original contracting parties stand towards each other? As between them, it is conceded, there subsisted a certain degree of equity; and why not a trust? B. S. and B. (the holders) ceased to have a beneficial interest in the shares of the bank stock, which they had sold at a full price. It is true on the face of the books they were the nominal stockholders; and a payment of the semi-annual dividends to them would have justified the directors of the bank. But had the power to transfer been revoked by the death of the attorney before its execution, or had it been consumed by fire, a court of equity would certainly have decreed a specific execution of the contract, &c. I, therefore, view B. S. and B. for the purposes of the present argument, as mere trustees for the claimants, against whom a chancellor would enforce a specific execution of their contract, &c.; and thinking, as I do, that the United States can have no claim on bank

stock, which their debtors had sold bona fide, &c., I am of opinion," &c. Mr. Justice Brackenridge concurred, holding, that the by-law did not exclude the passing of an equitable interest. The case of Quiner v. Marblehead Ins. Co., 10 Mass. 476 (see, also, Sargent v. Franklin Ins. Co., 8 Pick. 90), is quite as strong. In that case the charter contained a clause, that no transfer of any share in said company shall be permitted, or be valid, until the whole capital stock shall be paid in. One half only had been paid in, and one of the stockholders assigned his shares to a purchaser. These shares were subsequently attached by a creditor of the stockholder; and the main question at the trial was, whether the creditor, or the purchaser, was entitled to the stock. The court held, that the prohibitory clause was not intended, as a general prohibition of transfers, but merely to prevent speculation in the scrip, and to continue the responsibility of the original subscribers, in case of loss, beyond the funds actually vested. The court said, that by this provision the transfer could not be complete, and essential to all purposes, until the full amount was paid in; but that the creditor may be substituted for the debtor, and may acquire the right, upon payment of the residue of the subscription, to have the transfer entered upon the books; and that in the case then before the court the purchaser had the equitable interest in the shares, and the company would be justified in issuing certificates to him. In the case of Union Bank of Georgetown v. Laird, 2 Wheat. [15 U. S.] 390, the charter contained a clause, that "the shares of the capital stock, at any time owned by any individual stockholder, shall be transferable only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf by the president and directors;" but all debts due to the bank must be first satisfied. The question was, whether a creditor, to whom the shares were assigned, as security, was, under the circumstances, entitled to a transfer of the stock without satisfying the debts due to the bank. That is not the point here; but the material consideration is, that the court in that case treated it as a valid equitable assignment. "No person," said the court, "can acquire a legal title to any shares, except under a regular transfer according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank under the act of incorporation." The same point was directly decided in President, etc., of Bank of Utica v. Smalley, 2 Cow. 770. There, the charter declared, that, "no transfer of stock shall be valid or effectual until such transfer shall be registered in a book or books kept for that purpose by the directors," and unless the person making the same shall previously discharge all debts due by him or her to the corporation. The holder made an assignment of shares in Paris, which was not registered; the question was, whether it passed, as between vendor and vendee, the interest in the stock. The court held, that the transfer was valid between the parties without registration, though the purchaser must take, subject to the rights of the bank. The doctrine in Sargent v. Franklin Ins. Co., 8 Pick. 90, leads to the same result.

I am aware, that there are cases, in which a doctrine, apparently different, has been maintained. See Marlborough Manuf'g Co. v. Smith, 2 Conn. 579; Northrop v. Newtown & Bridgport Turnpike Co., 3 Conn. 544; Northrop v. Curtis, 5 Conn. 246; Oxford Turnpike Co. v. Bunnel, 6 Conn. 552. Those cases are susceptible of this explanation, that the terms of the acts of incorporation were construed to mean, that the registration of the transfers was the origination of the new title, and not merely a legal completion of a previous inchoate title. Several of those cases turned upon the right of attachment of creditors according to the local laws, which operated upon the legal title; and the only other case (Marlborough Manuf'g Co. v. Smith, 2 Conn. 579) involved the sole question, whether an equitable assignee was liable for instalments as a legal stockholder; and it was held that he was not. It might be sufficient to say, that the case at bar involves no point as to the priority of any attaching creditor, nor any question as to the legal ownership of the stock. The whole argument turns upon an equitable interest, and a lien consequent thereon. If these cases are not to be explained in this manner, but turn upon the more general principle already stated, with all possible deference to the learned judges, who decided them, they do not appear to me founded on as solid grounds as those which maintain a different doctrine. In a conflict of authority, my judgment goes with the latter. The case of administrators is not distinguishable from that of assignees in bankruptcy. In each case the assets are bound by the same equities, which would affect the vendors; and the administrators and assignees cannot place themselves in a better situation than the principal; but are bound by the same equities, which bind him. See Mitford v. Mitford, 9 Ves. 86, 100; Jewson v. Moulson, 2 Atk. 417, 420; Row v. Dawson, 1 Ves. Sr. 331; Tyrrell v. Hope, 2 Atk. 558; Ex parte Byas, 1 Atk. 124. It is true, that where the equities of all the creditors are equal, a purchaser cannot entitle himself to a priority of satisfaction; but that cannot be, where one has already acquired a lien or equitable title.

Upon the whole, my judgment is, that there has been no misappropriation of the assets by the administrator; but that the equitable interest in the stock was vested in Sheafe; and he had a right to have it sold to discharge the debt due to him. Judgment is, therefore, to be rendered against the defendant, pursuant to the agreement of the parties, only for future assets, quando acciderint.

UNITED STATES (CUTTS v.). See Case No. 3,522.

Case No. 14,913.

UNITED STATES v. DAIR et al.

[4 Biss. 280.] [1]

District Court, D. Indiana. Jan., 1869.

PLEADING AT LAW—TRAVERSE—PLEA—NON EST FACTUM—ESCROW.

1. A breach of the condition of a penal bond is not sufficiently traversed by a plea averring that the obligors have not violated the condition to the extent charged in the declaration. It should deny any breach of the condition as charged in the declaration.

2. A special plea of non est factum, averring that the supposed bond sued on is a mere escrow, is bad, unless it avers that the instrument in question was delivered to some third person on a condition that has not been performed. But with such an averment, the plea may be a good special non est factum.

At law.

A. Kilgore, U. S. Dist. Atty., and J. W. Gordon, for the United States.

Milligan, McDonald, Roach & McDonald, for defendants.

McDONALD, District Judge. Debt on a penal bond, against the principal and his sureties. The condition of the bond is that Jonathan M. Dair, the principal, a distiller, should in all respects comply with the requirements of the law in relation to distilled spirits. The breach laid is that Dair unlawfully removed from his distillery eight thousand two hundred and fifty gallons of distilled spirits, otherwise than into a bonded warehouse.

Dair and his sureties, William F. Davison and Abraham Briggs, all plead separately. And the government demurs to all the pleas except two pleas of general non est factum filed by the sureties.

Dair files but one plea. It seems to be intended as a traverse of the breach of the condition of the bond charged in the declaration. It is substantially as follows: that it is untrue that he removed eight thousand two hundred and fifty gallons of distilled spirits from his distillery, otherwise than into a bonded warehouse; that it is untrue, as is alleged in the declaration, that there is due to the plaintiff sixteen thousand five hundred dollars for taxes unpaid upon spirits distilled by Dair; but that, on the contrary, the number of gallons of distilled spirits unlawfully removed by him is less than is stated in the declaration, and the amount of taxes unpaid on spirits unlawfully removed by him is less than that stated in the declaration.

This plea is so obviously and outrageously bad, that it deserves no consideration by the court. It looks very much like a sham plea. The demurrer to it is sustained; and an interlocutory judgment on it against Dair will be rendered.

Davison, one of the sureties, has filed three pleas—a general plea of non est factum, and two special pleas of non est factum. To the two last there are demurrers.

The first of these special pleas of non est factum, avers that Davison signed the bond when it was in blank as to the names of the other obligors; that he signed it at the request of one William F. Sanks, on his assurance that it should be executed by one James Dair before it should be delivered to the obligee; that said James Dair never executed it; and that Davison never would have signed it, but on condition that said James Dair should also sign it.

This plea is an attempt to show that, as to Davison, the instrument is a mere escrow. But this it fails to do. To make the instrument such, the plea ought to have averred that the supposed bond was delivered to some third person to be delivered to the obligee only on the performance of the condition pleaded. For want of such averment, the plea is bad, and the demurrer to it is sustained.

The second special plea of non est factum filed by Davison is like the first, except that it adds that "said supposed writing," after he signed it, "was left with said William F. Sanks as an escrow, to be delivered by him to the plaintiff's agent in case the same was so afterwards executed by James Dair, and not otherwise."

This is a good plea to show that, as to Davison, the supposed bond is a mere escrow, and not his deed. It shows a signing and delivery to a stranger to be delivered to the obligee only on the performance of a condition precedent, which it avers was never performed. If the facts thus pleaded are true, it is certain that the instrument sued on is not the deed of the defendant Davison. Demurrer overruled.

The defendant Briggs has filed four pleas, to the second, third, and fourth of which there are demurrers.

The second of these pleas is substantially the same as the plea of the principal obligor, Jonathan M. Dair, which we have already considered. And for the same reason on which that plea is held bad, the demurrer to this is sustained.

The third and fourth pleas of Briggs are copies of the second and third pleas of Davison, already discussed; and the ruling on them must be the same. The demurrer to the third plea of Briggs is therefore sustained; and the demurrer to his fourth plea is overruled.

[NOTE. Judgment having been given against the principals on the bond, and in favor of sureties, the plaintiffs carried the case by writ of error to the circuit court, where judgment was obtained against all of the defendants. Case unreported. The cause was then carried to the supreme court, where the judgment of the circuit court was affirmed. 16 Wall. (83 U. S.) 1.]

If there be anything specific or particular in

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated. 3 Chit. Pl. 985, note a; 1 Chit. Pl. 429. For authorities holding that under the plea of non est factum evidence is admissible that the deed was delivered to a third person as an escrow, see 1 Chit. Pl. 424; Puter. Pl. & Prac. (3d Ed.) 391; 2 Greenl. Ev. § 300, and cases cited. Consult also U. S. v. Hammond [Case No. 15,292].

UNITED STATES (DALEY v.). See Case No. 3,542.

Case No. 14,914.

UNITED STATES v. DAMIANI et al.

[See Case No. 14,915.]

Case No. 14,915.

UNITED STATES v. DAMIANI et al.

District Court, N. D. Florida. 1869.

INTERNAL REVENUE—TOBACCO—DEALER—DEBT FOR PENALTY—BURDEN OF PROOF—ACT JULY 20, 1868.

Held, that any person who keeps leaf tobacco for sale is a dealer, and a single sale is sufficient to fix his character as such: that if such dealer does not keep a book and make returns of his purchases and sales, as required by the 76th section of the act of July 20, 1868 [15 Stat. 158], he becomes liable to the penalty of five hundred dollars prescribed by that section; that in an action of debt for the penalty under that section the jury cannot find a greater sum than five hundred dollars, although the act fixes the penalty at not less than that sum. The plaintiff having proved sales of leaf tobacco by the defendants, and that said defendants had not paid the special tax as dealers in leaf tobacco, and had not procured or kept a book, as required by the act, so far as was known to the assessor of internal revenue, the burden of proof was, by such prima facie case, shifted upon the defendants to show that they had kept such book, and had made the proper returns therein; and, having failed so to do, the jury might infer that no such book was kept by them.

[Decided by FRASER, District Judge. Nowhere reported; opinion not now accessible. The above statement of the decision was taken from 11 Int. Rev. Rec. 5.]

UNITED STATES (DANA v.). See Case No. 3,555.

Case No. 14,916.

UNITED STATES v. DANIELS.

[20 Int. Rev. Rec. 136.]

District Court, N. D. Ohio. 1874.

INTERNAL REVENUE—WHOLESALE LIQUOR DEALERS—TAX—DEATH OF PARTNER.

On motion for a new trial.

The firm of Daniels and Son on the 1st day of May, 1873, paid a special tax for the business of wholesale dealers in liquor at Sandusky. The firm consisted of Eve Daniels, the mother, and George Daniels, the son. In August, 1873, Eve died, leaving George her only heir and representative, and also surviving partner, who continued the business at the same place for the remainder of the year in the name of Daniels and Son. Held, that having paid the tax for the whole year, George Daniels was not required to do so again under the law, on the death of his mother and partner, and having been convicted a new trial is granted herein.

Geo. Willey, U. S. Atty.

Homer Godwin, for defendant.

Case No. 14,917.

UNITED STATES v. DANTZLER.

[3 Woods, 719.] [1]

Circuit Court, S. D. Mississippi. Nov. Term, 1877.

REPLEVIN—SEIZURE—FORTHCOMING BOND—SUBSEQUENT SEIZURE.

When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to the defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and not subject to seizure by the marshal, under a writ of replevin subsequently issued out of a United States court, at the suit of the United States.

In this case a rule was taken upon the United States marshal, requiring him to show cause why he should not discharge from seizure certain logs and lumber taken by him under a writ of replevin sued out of the United States court, in a suit brought by the United States against the defendant [L. N. Dantzler].

J. Z. George and T. W. Price, for the rule.

Luke Lea, U. S. Atty., contra.

HILL, District Judge. The grounds upon which the rule is based are, that before the seizure was made by the marshal, the state of Mississippi had sued out of the circuit court of the county of Jackson, in this state, a writ of replevin against the said defendant, by virtue of which the same logs and lumber were seized by the sheriff, and that under the provisions of the replevin law of the state, the defendant had executed a forthcoming bond, with sureties conditioned for the forthcoming of said property, to abide the judgment of the court in said suit, and that the property was so in his possession, under said bond, at the time of the seizure by the marshal, under the process from this court. There is no controversy as to the facts stated, the only question being whether or not the property so held by the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

defendant was subject to seizure by the marshal, under the writ of replevin in his hands, the validity of both replevin writs being admitted. It has been a well settled rule, since the foundation of the federal government, that when property is legally in possession of the officers of the state courts it will not be disturbed by the officers of the federal courts, and that when legally in possession of the officers of the federal courts, it will not be interfered with by officers of the state courts. Any other rule would lead to conflicts, and mar the much desired harmonious action of our complex system of government.

The important question to be considered is, whether or not the property, after it was released to the defendant upon his forthcoming bond, was still in the custody of the circuit court of Jackson county. The bond is conditioned that the property shall be forthcoming to abide the judgment of the court, if adjudged to belong to the plaintiff, and if default is made therein, to pay its value and the damages sustained by the plaintiff, and costs of suit. Section 1535 of the Code of Mississippi provides that if the property is in possession of the losing party, the execution shall command the sheriff to take the property in controversy, if the same may be had, and deliver the same to the successful party; and, if not to be had, that he make the value thereof, together with the damages and costs, of the goods, chattels, lands and tenements of the party, and his sureties against whom the judgment is rendered, or the successful party may have his distringas to compel the delivery of the property, together with a fieri facias for the damages and costs.

There are several adjudicated cases by the supreme court of this state recognizing the right of a claimant to personal property to institute his action of replevin, and have the property seized and taken out of the possession of a levying officer under writs of attachment or fieri facias, though issuing out of different state courts. But no case is found where it has been taken out of the possession of an officer holding under a writ of replevin. The reason given for permitting the seizure of the property in the possession of an officer holding under a writ of attachment or fieri facias, is that the officer levying the process is directed to levy only on the defendant's property, and the writ constitutes the officer the judge of what property belongs to the defendant; and if he seizes property belonging to any one else, his process is no protection to him, and he becomes liable, as a wrong-doer, like anyone else. The same doctrine is held by the supreme court of the United States, in the case of Buck v. Colbath, 3 Wall. [70 U. S.] 334. In that case, Mr. Justice Miller, in delivering the opinion of the court, draws very clearly the distinction between the two classes of process, and holds that the officer levying the writ of attachment or fieri facias, being constituted the judge of what property belongs to the defendant, must act at his own peril, and, if he makes a mistake, must answer for it without the protection of the court from which the process issues; but when he seizes the property specified in his process he is not so liable, and will be protected by the court; he, however, must know that it is specified in the process, for if he makes a mistake and seizes that not specified, he is liable as other persons. In this opinion the case of Hagan v. Lucas, 10 Pet. [35 U. S.] 400, is referred to and approved. In the latter case the facts were substantially these: Hagan obtained judgment against Bynum & McDade, in the federal court for Alabama, upon which execution was issued and levied upon certain slaves in the possession of Lucas, as the property of the defendants. Lucas claimed the property, and gave bond for the trial of his right to the property, as provided by the laws of Alabama. Upon the trial of this issue, it was proved that the same slaves had been levied upon by execution issued upon judgments in the circuit court of Montgomery county, Alabama, in favor of different persons, and Lucas claiming them, gave bond as provided by statute, for their delivery to the sheriff to answer the judgment of the court, should the right be decided adversely as to him, upon the trial of the right of property in that court. This case being removed by writ of error to the supreme court, the judgment of the court below was affirmed, the court holding that the slaves, when in the possession of Lucas, under his forthcoming bonds, were not liable to seizure by the marshal, and that his levy was void; holding, further, that when seized by the marshal they were still in the custody of the state court; that the possession of Lucas was the possession of the sheriff, and that property in possession of one court cannot be disturbed by an officer, under process, from another court, and especially by one holding his authority from a different source. The same rule is held in Taylor v. Carryl, 20 How. [61 U. S.] 583, and in Freeman v. Howe, 24 How. [65 U. S.] 450; the rule laid down in Hagan v. Lucas [supra], being referred to and approved in both cases as the settled doctrine of the supreme court on this question. The rule thus laid down by the supreme court is binding upon this court, and under it the levy made by the marshal in this case must be held as without authority and void, unless the position taken by the district attorney, and ably and ingeniously pressed, be correct, which is, that admitting the rule as stated, it does not apply to a case where the United States are plaintiffs, in a suit in one of their own courts; that in such case the federal court is not one of concurrent jurisdiction with the state court, but of paramount jurisdiction, and that the United States have a right to resort to their own

courts to enforce their rights. That they do possess this right is uncontroverted, but I am of opinion that when the United States bring suit against a citizen for the enforcement of any real or supposed right they can claim nothing which is not equally the right of the citizen against whom the suit is prosecuted, and that where a state is a party the same rule will be applied.

There is scarcely a conceivable case in which the United States have not ample redress in their own courts for the enforcement of any right, legal or equitable, without interfering with the jurisdiction of the state courts. The writ of replevin, provided by the law of this state, was not in force in this court until recently adopted by rule of this court. Before then, the United States were only entitled to an action of trover or trespass, and could not have seized this property until after judgment. These actions are still afforded to the United States, and may be prosecuted without any interference with the state court, or its possession of the property in controversy. If the person holding the property under such bond, or a purchaser under him, is about to remove the same from the jurisdiction of this court, upon bill filed alleging the right of the United States to the property, the pendency of the suit and the insolvency of the defendant, an injunction will be granted to prevent the removal of the property beyond the jurisdiction of the court. So soon as the litigation is ended in the state court, the property may be seized if the defendant is successful, or if the plaintiff succeed, it may still be pursued by the writ of replevin, or other remedy. Any risk which the United States may run by reason of not getting immediate possession, would not equal the injury that would result from the conflict of jurisdiction to which the doctrine contended for by the district attorney would lead. For it must be remembered that it would authorize the seizure of the property in the possession of the sheriff, as well as any one else.

It must be admitted that there are cases in which the ends of justice would be promoted by allowing property seized under one writ of replevin to be taken out of the possession of the seizing officer by virtue of another writ of replevin, as in case of attachment and fieri facias, especially as our act of replevin does not allow third parties, claiming the property, to interfere. To enable this to be done, in one or more states it is allowed by statute; but that it requires an enabling statute to permit it to be done, is a strong argument that without it it cannot be done, and none such exists in this state.

A very careful consideration of all the arguments and authorities adduced satisfies me that this seizure was unauthorized and void; therefore, the marshal will release the property and deliver it to the defendant, and it is so ordered.

Case No. 14,918.

UNITED STATES v. DARNAUD.

[3 Wall. Jr. 143.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1855.

SLAVE TRADE — ELECTION OF FELONIES — OWNERSHIP OF VESSEL — CITIZENSHIP — DISCHARGE OF SWORN JUROR — PRIVILEGE OF WITNESS — CUSTOM HOUSE REGISTRY — COMPARISON OF HANDWRITING.

1. In a prosecution under the act of May 15, 1820 [3 Stat. 600], for suppressing the slave trade, the act of receiving negroes on the coast of Africa, and of confining and detaining them on ship-board, and the aiding and abetting in confining, form one transaction, and may therefore be joined together in the indictment and prosecution, under different counts; but the selling and delivery of the negroes at the termination of the voyage, as on the coast of Cuba, seems to be a distinct transaction; and if this felony is charged in the same indictment with the other, the prosecution will be made to elect on what counts it will proceed.

2. Ownership of the vessel by a citizen of the United States, if the accused be not, himself, a citizen; or citizenship of the accused, if the ownership be not by such citizen, is an essential ingredient in maintaining a prosecution under the fourth and fifth sections of the act above named.

3. Citizenship, within the meaning of this act, is not what may be called citizenship of domicile, nor is it such citizenship as has been claimed by diplomatic assertion under our naturalization laws, for one who has formally declared his intention to become a citizen, without having proceeded further. But it is that citizenship which has a plain, simple, every-day meaning; that unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection.

4. The custom house registry of a vessel, under the acts of congress, as a vessel of the United States, prior to which registry an oath must be taken by the person in whose favor it is made, that he is true and only owner, and a citizen of the United States, is evidence of her national character within the meaning of the acts of congress; and of the character under which she publicly appeared and acted; but in a criminal prosecution against a third person, it is very slight evidence indeed—if it be evidence at all—of the real fact of ownership, and whether or not the ownership be in a citizen of the United States. The case of U. S. v. Brune [Case No. 14,677], very slightly qualified, perhaps, but substantially confirmed and its correctness enforced. In such a prosecution the ownership must be proved distinctly, and as other facts are proved, by common law testimony. Purchasing the vessel, paying for her, repairing her and fitting her for sea, bargaining and paying for her ship stores, procuring her pilot, and shipping her crew, all these are proper evidence of ownership, as they also are, if ownership is disproved, that the vessel was navigated for or on behalf of the person doing these acts. But if in direct connection with these acts and alongside of them, it is proved as a fact that the funds which this person was using belonged to a third party, not a citizen; that he had no funds of his own, that he spoke of himself as an agent and was recognized as such by the banker who put him in funds, and by the third person whose funds they were—all this, which is proper evidence—is evidence to show that the ownership was not in a citizen but in a foreigner; and so far to defeat the prosecution.

[1] [Reported by John William Wallace, Esq.]

5. It is irregular for the court to instruct the witnesses generally, or even a single witness generally, that they were not bound, in answer to questions which might be put to them, to make any answers which would criminate themselves. The proper way is to wait until a question is asked, which, if answered in one way may criminate the witness, and for the court then to interfere.

6. Whether two or more signatures, which purport to be the signatures of different persons, are or are not written by the same person, is a proper subject of proof by an expert; though the testimony of an expert on such a subject is a dangerous kind of evidence.

A law of congress (Act of May 15, 1820, c. 113, §§ 4, 5 [3 Stat. 600]), designed for the suppression of the slave trade, enacts by one section, "that if any citizen of the United States, being of the crew or ship's company of any foreign vessel, engaged in the slave trade, or any other person whatever, being of the crew or ship's company of any vessel, owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such vessel, and on any foreign shore, seize any negro or mulatto, with intent to make such negro or mulatto a slave, or shall receive such negro or mulatto on board any such vessel with intent as aforesaid, such citizen or person shall be adjudged a pirate; and suffer death." And by another, enacts that if any such person shall forcibly confine or detain, or aid and abet in forcibly confining or detaining on board such vessel, any negro or mulatto, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto as a slave, such citizen or person shall be adjudged a pirate; and sufier death. Under this law, Darnaud, the prisoner, who had been engaged in a slaving voyage on the Grey Eagle, was indicted. The indictment contained thirty-nine counts. The defendant's citizenship and the national character of the vessel were properly alleged. And five distinct charges were made in the bill: (1) Receiving negroes on board the vessel on the coast of Africa; (2) confining and detaining on board the vessel; (3) aiding and abetting in confining and detaining on board the vessel; (4) delivering on shore at Cuba from on board the vessel, having previously sold; (5) delivering on shore there from on board the vessel, with the intention of selling.[2]

One Marsden, of New York, a principal character in the case, and about whose American citizenship there was no doubt, was alleged in the indictment to be the person who owned the vessel when she was thus engaged, or if not the owner, then the person on whose account and for whose benefit she was navigated.

The prisoner having pleaded not guilty, and Mr. Vandyke, the district attorney, having opened his case, C. Guillou and R. P. Kane, counsel of the prisoner, referring to several authorities,[3] moved that the prosecution should be made to elect on which of the counts

[2] Slave vessels sail with two or three, or four captains. One captain clears her in a United States port, and swears he is an American citizen. Another, belonging to a different country, in connection with the first, when she arrives at the coast of Africa receives the slaves on board. Another, after the slaves are received, takes charge of them and commands the vessel, and makes one of the former captains the doctor, mate, steward, or something else. Another delivers the slaves on shore. This is done in order to enable the vessels to seek the protection of a flag which the cruiser hailing them will, under the treaties between different governments, respect and regard. If a vessel of this nature happens to be chased by a British cruiser, the practice is to run up the American flag; the American captain shows himself with his American papers, and the cruiser goes off without boarding. When an American cruiser comes in sight, the Portuguese or Spanish flag is run up, and the false Portuguese or Spanish papers are produced. In the present instance, when a British cruiser hove in sight, the American flag was run aloft and the American papers were ready to be shown, and when that flag was seen the cruiser went off. It was on these accounts that the indictment charged the prisoner in this separated way, (1) with receiving; (2) with confining and detaining on board, &c. The counts were essentially as follows:

Eleven counts, from first to eleventh, inclusive, charged the defendant with receiving on the coast of Africa on board a vessel called the Grey Eagle, negroes not held to service or labor, with intent to make slaves of them. The counts were drawn in various forms. Twelve counts, from twelfth to twenty-third, inclusive, with confining and detaining negroes on board the vessel Grey Eagle, etc., in various forms. Three, from twenty-fourth to twenty-sixth, inclusive, with "aiding and abetting" in confining and detaining in various forms. Six, from twenty-seventh to thirty-second, inclusive, with delivering on shore from on board vessel, with the following variations: Twenty-seventh charged vessel as owned, wholly and in part, by a citizen and citizens unknown, and also charges the intent of defendant to sell said negroes as slaves. Twenty-eighth charged vessel as owned by a citizen, with intent to sell. Twenty-ninth charged defendant as master of vessel owned by a citizen unknown, intent being to sell. Thirtieth charged defendant, as one of ship's company, with delivering at the Island of Cuba, negroes from vessel owned wholly and in part by a citizen and citizens, having previously sold such negroes as slaves. Thirty-first charged vessel as navigated for a citizen and citizens, and that negroes had previously been sold. Thirty-second charged vessel owned wholly and in part by a citizen and citizens unknown, did on high seas deliver, &c., having previously sold. Thirty-third charged that defendant was a citizen, one of ship's company, of a foreign vessel and did receive on board five hundred negroes, said negroes having been seized on a foreign shore, with intent to make slaves of said negroes. Thirty-fourth, that defendant on high seas, being master of vessel owned, in whole and in part, by citizen and citizens, did receive on board, a number of negroes, who had been seized on a foreign shore. Thirty-fifth, that defendant was a citizen, and one of ship's company, of foreign vessel and did confine and detain a number of negroes, with intent to make them slaves.

[3] 1 Chit. Cr. Law, 253; Whart. Cr. Law, 150; Com. v. Hope, 22 Pick. 1; Young v. Rex, 3 Term R. 98; Weinzorpflin v. State, 7 Blackf. 186; Wright v. State, 4 Humph. 195; People v. Baker, 3 Hill, 159; Harman v. Com., 12 Serg. & R. 71; Com. v. Gillespie, 7 Serg. & R. 476; State v. Nelson, 29 Me. 329.

it would proceed; arguing that now was the proper time for this application, which if not allowed here could not be allowed hereafter in the shape of error, or in arrest of judgment. They contended that the indictment contained at least four distinct felonies: (1) Receiving the negroes on board the vessel; (2) confining and detaining them on board; (3) aiding and abetting in confining and detaining; (4) delivering on shore from on board the vessel. They were not part of the same transaction, nor were they distinct misdemeanors, merely part of one felony. Each was a distinct felony, alike punishable with death, nor was one an ingredient of the others.

Mr. Vandyke. The application is out of time. If the indictment charged distinct felonies, a motion should have been made to quash before plea pleaded. Having pleaded, the defendant should wait till the prosecution has closed its case. A joinder is allowed even by the common law in regard to all parts of the same transaction. But if it were otherwise, the act of congress of February 26, 1863, provides that "whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in several counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." The words "which may be properly joined" do not refer to all the clauses that precede them, but only to the clause "two or more transactions of the same class." This is a statutory felony; and all the acts charged, even if each one is a felony, are parts of the same transaction, or acts or transactions connected together, and are properly joined.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. The transaction on the coast of Africa is one matter which may be charged in all the forms it will bear. The receiving of the negroes there, the confining and detaining of them, and the aiding and abetting in confining and detaining, form one transaction, though they are different offences. They may therefore be joined together. It might also in the same connection be charged that the act was done by a foreign citizen in an American vessel, or an American in a foreign vessel. Besides, the vessel might be charged as belonging to A. or B., or persons unknown. These are all parts of the transaction. The indictment, however, goes further, and charges the selling and delivering of negroes on the coast of Cuba, which forms a separate and distinct transaction. I am unwilling to say that the receiving, detaining, aiding and abetting in these acts, the man being an American, or being not an American; the vessel being an American vessel, or being not an American vessel, belonging to A., B., or C., or to people unknown, may not be allegations of the same transaction. But I think, as at present advised, that the selling and delivering of slaves on the Cuban coast is a distinct transaction. If the defence asks me to say more than this, I am not at present disposed to do so. But whatever may be the election of the prosecuting officer, he has a right to bring out the whole history of the matter as part of the res gestæ.

Mr. Vandyke, under this expression of opinion, then elected to try on those counts which charged with receiving on board and confining and detaining, and aiding and abetting in confining and detaining, striking out all which charged with crime on the coast of Cuba.

The Grey Eagle was an American built vessel; and had been owned by seven or eight American merchants engaged as partners in the pearl fishery. One Hollingsworth, of Philadelphia, a reputable merchant, was managing owner, and to him alone, as such, the vessel had been transferred by bill of sale, he taking an oath at the custom house that he was "true and only owner;" an oath required by law to be taken by a person when he is true and only owner; but not the proper oath where others are in any way interested with him. The pearl fishery proving unsuccessful, Hollingsworth gave orders to a house in New York to sell the vessel. Marsden called on them and inquired as to the terms of sale. The price fixed was $10,000. Marsden did not wish to give that amount for her, and he was told that he might go to Philadelphia and deal with the owners. He came to Philadelphia, saw Mr. Hollingsworth, and concluded a purchase of the vessel for $9,100, and took her to New York. The bill of sale from Hollingsworth to Marsden was dated March 4th, 1854. Marsden of course with that bill of sale took the register, which had been issued at the port of Philadelphia to Mr. Hollingsworth. A pilot took her to New York and delivered her to Marsden.

Previous to the arrival of the vessel at New York, Marsden employed a rigger to rig out the vessel She arrived there, of course, some time after the 4th; the register and bill of sale were not deposited in the New York custom house until the 20th of March, but in the meantime the vessel arrived there, and Marsden, with two or three others, commenced the active preparation of the vessel for a voyage. Marsden employed the rigger, the carpenter, and sailmaker; bought the coppers which were put on board the vessel for cooking purposes; purchased 28,000 pounds, upwards of 10 tons, of rice; 12 or 14 barrels of beef, and half the number of pork; 24,000 gallons of water; in

short he, and he alone, had the vessel prepared for the voyage. He engaged the shipping master to ship the crew, in part by himself and in part in connection with the defendant. And thus on the 20th of March had the vessel partially prepared. He then deposited in the custom house the bill of sale from Mr. Hollingsworth to him, and surrendered the register.

Things remained in this way until the vessel was ready for clearing, which was not until the 25th of March. A majority of the bills which were incurred had not up to the time of clearing been paid by anybody. After she cleared, two or three of the parties having bills, went to the office of one Oaksmith, where Marsden had a desk for the purpose of conducting his business, and there received their pay. Some of them were paid by one Machado, hereafter mentioned.

The vessel, by the agency of Marsden, and by the assistance of Darnaud, who took part in receiving the stores on board, was ready on the 25th of March to be put afloat. At this juncture Marsden employed a broker to make a bill of sale to a person called Samuel S. Gray, and it was done. The register bond in the custom house is regularly signed by some person representing himself as Samuel S. Gray, in which signature the prisoner joined as master of the vessel. The law requires the master to make oath that he also is a citizen of the United States; and all the custom house proceedings and papers assume that he has done so, and that he is one. But for some reasons not properly explained, it appeared that at about this time the officers of the New York custom house violated their duty in this respect; not exacting this oath from masters. In the bond, which was signed by Darnaud, as master, Gray alleged himself to be a citizen of the United States. The broker procured a respectable man as surety, who did not know who Samuel S. Gray was, but went security simply because Marsden requested it, through his agent.

The vessel cleared with those papers, which the prisoner, as captain, was by law bound to take with him; but previous to the clearing, it went through another usual transaction—the shipping of the crew. A crew is shipped in this way: A shipping master is generally the agent of the owner, as well as the agent of certain boarding house keepers who have crews to ship. He opens a shipping office, and sailors go to him and sign the shipping articles, a large printed document prepared in accordance with an act of congress. Some of the sailors make their marks, and some write their names in such a way as to be illegible. This paper is not taken with the ship. It is sent to the custom house and is there deposited. This crew list has appended to it the oath of a notary public that he has received sufficient proof of the American character of the vessel and of the crew named on the shipping list. The law also requires that the owner or master shall deposit a copy, under oath, of these shipping articles, which shall be sworn to by the master before a notary public, as a true and exact copy of the original paper. Of this paper, which is deposited in the custom house, the master takes a copy certified under the seal of the collector. That copy goes with the vessel and forms the paper which is contemplated in the crew bond, and in relation to which the bond is given. All this was complied with. One Pentz, was employed by Marsden to ship the crew for this vessel. After the vessel had sailed, Marsden called and paid Pentz for the shipping of the crew.

Who the Samuel S. Gray was did not at all appear. Marsden was not forthcoming. Nobody identified Gray; nobody knew him. The position of the prosecution was that the transfer from Marsden was a mere fraud; a device to get Marsden's name as owner from off the custom house registry. And the position therefore taken was that Marsden was still owner in whole; or in part with Machado.

On the other hand there was verbal evidence of people's belief that Marsden was a man of no property when he made the purchase and outfit, and evidence of the fact that all the funds came to him from one Machado, of New York, a Spaniard, naturalized here, as the prosecution proved by the production of his papers, and who in this matter, was, as appeared by his own oath, merely the agent of another Spaniard not naturalized, one Rivero, who he said had placed the funds in his hands. Who this Rivero was did not appear at all; nor was he shown to be a man of property. He had been on board the vessel during her voyage to Africa, as one of her two or three captains; but beyond this (see supra, note 2), nothing whatever appeared, Rivero had no written evidence of ownership, so far as appeared; nor was his ownership shown in any way but by the mere fact that Marsden and Rivero had told this Machado (so he swore), that he, Rivero, was owner of the vessel, and the fact that Machado received and paid the funds as Rivero's; doing it sometimes in a pretty loose way. How Marsden was paid for any of his services was not shown by anybody. That most if not all the funds which Marsden used in the matter passed through Machado's hands, was plain enough; but Machado's books were relied on by the prosecution to show that all this was but a form; and that, in part at least, the funds belonged to Marsden, or to Machado, or to both.

So far as concerned the citizenship of the prisoner—a matter important only in case the vessel was really not owned by an American—it appeared that this person was a native of France, and came to this country twelve or fourteen years before this voyage; that he then represented himself as a French-

man, as he also did when arrested under the warrant in this case; that he could speak little or no English, when he came here; that he lodged at French boarding houses, associated with French people; and when applying for a place on an American vessel was asked how he expected to get the place when he could speak nothing but French. On the other hand, he appeared to have in fact renounced his own country; had hailed for twelve or fourteen years as from the United States; had never used an American protection when shipping for foreign ports; had represented himself in fact, if not positively sworn, at the custom-house, that he was a citizen of the United States; and had acted as captain of a vessel which he knew was registered as American; a privilege allowed by law to American citizens only.

Mr. Vandyke, for United States, to the jury:

The owners of vessels about to engage in the slave trade being certain of prosecution as pirates if discovered, and of the penalty of execution if convicted, make, invariably, and from the origin of their enterprise, arrangements as complete as possible, to defeat all prosecution. The highest efforts of their ingenuity, sharpened by experience of criminal courts, as to what is needed, are brought into action for this purpose. The arrangements consist in a substratum of agents and of foreigners and of men ready to swear to anything; all at first invisible; but in case of a prosecution to be projected upon the scene. The real actors are Americans; and so long as they are not overtaken by the justice of the Nation, we hear of no other actors in the enterprise. No foreigners, no false custom house oaths are necessary. But when a criminal is seen, then the stalking horse comes into view to hide him. The false fabric is raised to shut out from view the true one. All that was pre-arranged for the rear ground—agencies, foreigners, perjury—comes forth complete in every part.

In an indictment for slave stealing, the jury ought to look at facts rather than any testimony not clearly pure. That perjury will be committed by witnesses of the defence is certain. Pre-arrangements are made for perjury in all slave voyages. Unless this slave voyage is unlike every other, and an exceptional case merely, a matter not to be presumed, there will be, as of course, witnesses at hand from the start to show that the ownership is a different one from that which appears, had been sworn to and universally believed.

When, therefore, the jury sees an American citizen acting from beginning to end as owner; with all the muniments and indicia in his own name—treating, buying, rigging, equipping, shipping crew and sending out of the harbor a vessel which he swears is his alone; when in a most dangerous enterprise he declares himself from the beginning to the end of the enterprise to be owner; when the man who is now set forth as owner—a foreigner—a man confessedly engaged in cheating our government and in carrying on under false pretences an illegal and infamous traffic—cannot show that he ever had one written evidence of ownership, even of the most secret kind against an American, a stranger to him, a man of worse character even than himself; when the whole evidence of the Spanish ownership rests not upon even a secret written agreement, but rests on one Spaniard's or his clerk's testimony of what these two infamous characters once told him; and upon the simple fact that the money with which the ship was bought passed through his hands as the money of a foreigner—in such a case, on an indictment where that exact kind of evidence is almost certain to come forth, no matter what the truth may be, then, in such a case, the jury should look at facts, as much more likely evidence of truth than oral testimony. I mean of course than such oral testimony. Had Marsden died, to whom would this ship have belonged? Living or dead, what evidence had Rivero of ownership against Marsden, or against anybody? This is not the way in which merchants—Spanish slave merchants—deal, and is irresistible to show a lie, ex post facto. Marsden is said to have had no property. One witness believes so; knowing little about him. What evidence is there that Rivero had property either? Who is Rivero? He was no merchant. He was one of the captains of this voyage. Where did his property come from? Concede that he put money in point of fact into Machado's hands, and had the semblance of property. Marsden, as apparent owner of the vessel, had much better semblance of property. Who put the money into Rivero's hands? Let them show that. Was it American or was it Spanish capital? Let them show that. Rivero was a mere figure in the case; and used because he was a Spanish figure. How was Marsden paid? Let that be shown. Did he receive commissions? Or had he an interest as part-owner in the voyage? If he was a mere agent he received some compensation in money. Has an attempt been made to show that he received anything in that way? The inference is irresistible that if not owner by original purchase, he was paid by an interest of some kind in the voyage; and that the vessel in part was navigated in his behalf. That is enough. It is a matter of no importance how small may have been the interest which Marsden, or Machado, or any other American citizen may have had in the vessel; if one farthing, it is sufficient, because it is a part of an interest in the vessel. If from all the circumstances of the case as brought before us, as to the parol and paper title and the circumstances under which the vessel sailed, we should believe that any person belonging to this Nation had an interest in the vessel,

we are relieved from all difficulty, so far as the point of jurisdiction is concerned. Nor does it matter whether that interest be a legal or equitable one, whether it appear upon the face of the paper title, or has been covered up in fraud, to be inferred from the circumstances of the transaction, with the view of avoiding the responsibilities imposed by congress on those engaged in this unnatural and wicked traffic. If any person was so prominent in the management of the business connected with this vessel as to lead one to suppose that he owned it wholly or in part, it is enough for the purposes of this cause, even though his interest may have been attempted to be covered up and secreted, so that he might screen himself behind the responsibility which rested on the shoulders of all those engaged, and which now rests upon the shoulders of this unfortunate defendant, a fact which may be proved directly or indirectly, or which may be inferred from all the circumstances surrounding the transaction, just as we would infer any other conclusion to which our minds may be led upon a subject of fact involved in any cause. And all that is said in regard to the question of ownership, is applicable to the other question raised by the act of congress, whether—the ownership being foreign—the vessel was navigated for or in behalf of a citizen of the United States.

Then finally, supposing the Spaniard, Rivero, was owner, and that the vessel was not navigated in any way in behalf of any citizen of the United States, was the prisoner a citizen? The term citizen is capable of more meanings than one. Darnaud has renounced his country: he hails from here as a citizen. He is captain of a vessel registered as American; which under our laws presupposes citizenship in him. He has, no doubt, sworn that he was a citizen. The notary public certifies him as such: His domicile is here: Letters of naturalization are not necessary to convert a foreigner into a citizen in all meanings of the term. In the well known case of Martin Koszta, our government interposed and protected as its subject and citizen, against European monarchs, a man who had merely declared an intention of becoming a citizen. The word citizen has therefore other meanings than the one which it has under our naturalization laws. A man may be a citizen who is neither born here nor naturalized. The court will instruct you on this subject. But when a man enjoys peculiar privileges of citizenship, and renouncing in fact—much better than renouncing in form—his own country, adopts another as his home, it seems but natural that he should be deemed a citizen of that other, so far at least as to make him amenable to its laws, when they punish its "citizens" who engage in a traffic denounced by the voice of nearly every Christian nation of the earth.

C. Guillou and R. P. Kane having replied, the charge of the court—Judge GRIER, who had been present during most of the trial, being now absent—was thus delivered by—

KANE, District Judge. The thirty-nine counts of this indictment are included in two general propositions. The first, that the accused, being one of the ship's company, of a vessel which was at the time owned or employed by a citizen or citizens of the United States, did receive or did detain on board one or more negroes, with intent to make slaves of them; or that he did aid and abet others in doing so. The second, that the accused did some one or more of the acts, which are charged and as I have recited them, on board of a vessel; no matter by whom owned or employed; he being a citizen of the United States.

The first class, regarding his own national character as of no consequence; but making the character of the vessel, the national ownership of the vessel, the national character of the owners of the vessel, an indispensable criterion; the second, disregarding the nationality of the owners and employers, but fixing itself upon the national character of the captain, or member of the ship's company, represented by the defendant.

I have to say to you, in the first place, that every one of the elements of the charge, as I have recited them before you, must be proved by the United States before they can claim a verdict of guilty. That is to say: the United States must prove, that this accused prisoner was one of the ship's company of a vessel, which was at the time owned or employed by a citizen or citizens of the United States, and that he then and there received and detained on board one or more negroes with intent to make slaves of them; or did aid and abet others in doing so. Or else, the United States must satisfy you, that the defendant, being himself a citizen of the United States, did one or the other of these acts on board a vessel, without regard to her ownership, upon the high seas.

Among the elements which alternatively constitute the crime, is the citizenship of the accused, or that of the ship's owner. It is not merely a question of jurisdiction in the view of the court, according to the ordinary use of the term. It is a question of the essential elements of the crime. The offence is a statutory one. It not only describes the place where the offence may be committed, and the circumstances which shall go to make the offence, but it defines the persons who alone are capable of committing it. And the statute is as inapplicable to other persons as it is to other places or to other acts.

There is good reason for this, a reason sufficiently obvious. Every nation has absolute jurisdiction of crimes committed within its own territory; and may make whatever laws it chooses, declaring what acts shall be crimes if committed there. But no nation can legislate for others. And as the high seas are the common territory of nations, those laws only

which all nations recognize are the laws of that common territory by which all men are bound. No state can any more legislate for the high seas, than a corporator can legislate for the corporation of which he is a member, or an individual citizen for the county or state in which he lives. No nation can make or enforce special laws for the high seas, without infringing upon the rights of other nations. It was an effort on the part of England, like this, to declare what should be the law affecting neutrals, third persons, individuals of other nations, which led to our war of 1812. It was an effort on the part of France, to prescribe what should be the muniments of title borne by American vessels on the high seas, which embroiled us in hostilities with that country in the early part of the present century. It was an attempt of the same sort, or in the same spirit, by Spain, by Denmark, and by other foreign powers, which at different periods led to reclamations, stern and in the end successful, on the part of the American government, for the damage sustained by American citizens by reason of acts of unauthorized jurisdiction.

In a word, no state can make a general law applicable to all upon the high seas. Where an act has been denounced as crime by the universal law of nations, where the evil to be guarded against is one which all mankind recognize as an evil, where the offence is one that all mankind concur in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts. Thus the robber on the high seas, the murderer on the high seas, the ravisher on the high seas, pirates all of them, recognizing no allegiance to any country, because the very act violates their allegiance to all their fellow men, if caught, may be punished by the first taker. And so too, if the nations of the so-called civilized world, who are fond of calling themselves the whole world, and of arrogating to themselves somewhat too readily all the rights that belong to the whole world, could for once unite in defining that some one act should be regarded as a crime by all, it may be that after such an agreement by all the world, the courts of any one nation might without reference to the nationality of the individual undertake to punish the offence he had committed.

But so soon as we leave these crimes of universal recognition, the jurisdiction of a state over the acts of men upon the high seas becomes circumscribed. It is no longer an exponent of the law of individual or international morals. The owner of a farm cannot legislate for the highway, however conscientious or wise he may be. All the jurisdiction which any nation exerts, or can properly affect to exert upon the high seas, except as the representative of the general sense of mankind, declared in the general law of nations, is founded on the control which every nation has over its own citizens, and their conduct wherever they may be found, or over the acts of others who for the time have subjected themselves to our jurisdiction by accepting the protection of our flag. If you or myself, entitled to the protection of our country, and with our country pledged to defend us wherever we go, not having yet passed within the territory of a foreign sovereign, but being on the common highway of nations, violate the laws of our government, we may be punished for violating them. And if we, being citizens owning vessels under the American flag, entitled, therefore, to protection as American vessels, engage others, whether foreigners or citizens, to be our voluntary associates in violating the laws of our country, and they are caught violating them upon the common highway of nations, they may be brought here and punished.

But it is only in the two cases, where the individual accused is himself a citizen, whose allegiance to his government continued while he was upon the common highway of nations, or where the property upon which the individual was found perpetrating a wrong was property recognized as American, owned by Americans, it is only in these two cases that the United States can make a law which would be binding upon all citizens or which could be enforced by courts of justice; and I do not hesitate to say, after something of mature consideration, that if the congress of the United States, in its honorable zeal for the repression of a grievous crime against mankind, were to call upon courts of justice to extend the jurisdiction of the United States beyond the limits I have indicated, it would be the duty of courts of justice to decline the jurisdiction so conferred. It is for this reason, then, that our government, in denouncing guilt, and punishment against acts like those charged upon this prisoner, denounces acts done by American citizens and by persons sailing under the sanction and auspices of American citizens on vessels owned by American citizens or in their employ.

That the offence is called in our particular statute piracy, does not vary the legal position and consequences of the case. Piracy is essentially an offence against the universal law of the sea. It assumes that the individual has thrown off his allegiance to mankind. He is the enemy of all who meet him. The slave trade, however horrible it may be, is not within that category. It has been recognized as lawful for many centuries by all the nations of the world. It is only within a few years, within the memory perhaps of every one whom I am addressing on the jury, that the first declaration was made by national authority that it was a crime. And up to the present moment there are nations professing to be civilized, Christian nations, that have refused peremptorily to unite in so recognizing it. It is not, therefore, piracy—such a piracy, no matter whether so called in our acts of congress or not—not such a piracy as constitutes a man the enemy of his race, and con-

fers upon every court of justice in every land the right to try and punish him for his acts. It is no further unlawful in the estimation of courts, it is no further unlawful in the estimation of jurors, considered as jurors, whatever it may be in the estimation of all of us as men and as Christians, than as it is distinctly declared by the laws of our own country to be prohibited to you and myself.

The element, therefore, of citizenship in the description of the crime, on the part of the ship's owner and of the master or member of the ship's company, is an essential condition and element of the crime with which this prisoner is charged; and it must be proved as such, or the accused cannot be convicted here.

Having said this, I have nearly got through with the legal propositions that have a bearing upon the case. I come to the consideration of questions of fact—questions peculiarly for you to decide; and in regard to which I desire to go no further than to gather together from my memory those portions of the evidence which bear upon particular points.

First, then, was this vessel owned by an American citizen, or navigated for or in behalf of an American citizen or citizens, at the time of the acts charged in this indictment? In the first place she was American built, and her American character remained unchanged, of course, until in some way or other, she was divorced from it. It remained unchanged, when Mr. Hollingsworth, acting on behalf of a company of gentlemen, but acting in his own name, purchased her, and took out her register in his own name—all those gentlemen being American citizens. She was at that time a vessel owned by American citizens. Those citizens, through the instrumentality of Mr. Hollingsworth, sold her to Marsden, for the time being of New York, and a citizen of the United States, who paid for her and took title in his own name; whether as sole owner, or whether like Mr. Hollingsworth, owner with others, or whether as agent or representative of others, without personal interest on his part, does not appear.

It is to be lamented, and it may be a subject of lamentation not only among moralists, that the preliminaries of title which are prescribed by our laws, and which exact the solemn oath of the party as to the nature of his title, the extent of it, and the number and names of his associates in the purchase, and that the consequent records of title to American ships, are so often irregular and erroneous. You have had a single instance of it, in the case of a gentleman of unimpeached honor in our commercial circles, who makes or rather signs at the custom house a formal oath, that he is the sole and exclusive owner of the vessel, when, in point of fact, it was altogether otherwise; when he was neither the sole nor exclusive owner, but only one of six or seven or eight owners.

The title, the paper title, as between the persons who have themselves taken part in its fabrication, may be regarded as conclusive against them; that is to say, that if you, sir, have executed a bill of sale in my favor, and permitted me to take the register in my name, you shall not be permitted to deny afterwards that you had sold the vessel; and if I accept from you a bill of sale, and go and take out the register, and hold it in possession, I shall not hereafter deny that you sold me the vessel. So far the register may with safety be received as evidence of the transaction. But to say that the execution of a bill of sale by you to me, the surrender of the register by you, and the issuing of a new register in my name, is to be given as evidence against our learned friends who have argued this case before us, who neither could have known nor prevented what we were doing, who had no opportunity of interfering with us, who, if they knew that the whole transaction was a spurious one, an imaginary sale, intended merely as a disguise, and had gone into the custom house to protest against it, would not have been even listened to; to say that they should be bound by what we had done, would be to say that their rights would be at the mercy of our discretion, integrity and honor.

Still, the title, the apparent title, passed from Hollingsworth to Marsden, and it had something more of strength than would properly attach to its paper character, inasmuch as Marsden paid his money before he took it. And thus, at first glance, and till something was shown to the contrary, we should have reason to believe that he was the owner; and he being an American citizen, the vessel continued the property of an American citizen, after passing into his hands. Had, then, the case rested here, it would have been proper for us to require some directness of proof from the parties who should undertake to deny the American ownership of the vessel.

But the United States do not stop here. After showing the title of Marsden, they go on to show that the title, the paper title, the bill of sale title, the register title, passed afterwards to Gray. He, also, is alleged to be a citizen of the United States on the face of the papers. And thus the paper title, upon which, so far as it was worth anything, Marsden's ownership rested, passed altogether by the transfer of that same paper title to another man, described in like terms as a citizen of the United States.

But it is asserted on the part of the United States, that although some one in the name of Gray went through all the formalities at the custom house in the authentication and record of the bill of sale and in procuring the register, yet that this Gray was never the owner at all; and in thus asserting that Gray was never the owner, the United States denounce the truth and efficiency of that title to ownership which is disclosed by the papers of the custom house.

Passing, then, outside of the paper title, the title according to the custom house, whose records have only conducted us into a difficulty from which they fail to relieve

us, how stands the fact of ownership? Who was it that did own this vessel? The defendant says Marsden never owned it, just as the United States say Gray never owned it; and both of the paper titles being thus impeached, we must seek for the real ownership in the other evidence that is before us. How stands that evidence?

We had the cotemporary declarations of Marsden, that he bought the vessel and was fitting it out not for himself, but for a Spaniard named Rivero. We had also the declarations of Rivero, that Marsden had bought for him. We had the evidence of a witness called by the United States, Mr. Oaksmith, that Marsden had no means of his own, wherewith to buy the vessel; and we have the evidence of Mr. Machado, and of his clerks, one of them, if not both, that the funds disbursed by Marsden in the purchase of this vessel belonged to Rivero. I am not aware that there is any other direct evidence going to show whose funds purchased that vessel.

If you are satisfied from what the witnesses have said here, that in truth and in fact Marsden was not a man of adequate means to purchase this vessel; that he bought the vessel for a Spaniard, with funds obtained from that Spaniard; that Spaniard declared that the vessel had been bought for him; that he accompanied and controlled Marsden while the vessel was getting fitted out, and directed his correspondent and banker to make advances to Marsden from time to time for the payment of bills, the court says to you, that in the absence of some proof to the contrary, you are called to believe that Marsden was not really the owner of the vessel, but only the agent for the purchase. It is unnecessary for the court to say to you, conversant as some of you are with the everyday transactions of a business community, that the largest mercantile dealings are conducted and concluded in the names of brokers and agents, without declaring the names of their principals; and that large funds are every day in the year put in the hands of agents to negotiate the purchase of ships and cargoes, without an indication that there are third parties interested in the purchase.

On the other hand, to contradict these assertions you have the examination of books of account of Mr. Machado and of Marsden, the collation of entry with entry, and the argument ingeniously and very powerfully pressed by the district attorney, that the books show these stories to be false; that Marsden was really a man of adequate wealth; that Rivero never did buy the vessel; that the purchase was never made for him; that the funds which Marsden got from Machado were not Rivero's funds, but were Marsden's own, or Machado's own, or that at least they were not Rivero's.

You are to judge then, gentlemen, upon all the evidence; I make no further comment upon it, so far as regards this point of the case; whether the funds and ownership in point of fact—not according to the paper title, for that paper title fixes it on Gray—but whether the ownership in point of fact was in Marsden, or Rivero, or Machado, or any body else. You are to say whether Marsden's disbursements were of his own funds; whether he was in whole or in part the real beneficial owner of this ship; or whether it was Rivero or some one else who bought and owned her. If it was Rivero for whom Marsden acted, whose funds he disbursed, for whom he bought and held, then this vessel was not a vessel belonging to an American citizen, or navigated for or on behalf of an American citizen.

I feel the more confidence in putting this point to you strongly and clearly, because I see that were a different doctrine to be held by our courts, there would be scarcely any protection whatever against the arts of slave traders. If the paper title, the formalities of the custom house, the record of the bill of sale, and the issuing of the register, indicated what was the ownership of the vessel, no one American, base enough to engage in the slave trade, would ever be found on board a vessel with an American register, or an American bill of sale. However American her ownership in fact, she would be sold to some Rivero, or some anonymous Portuguese; the Portuguese flag would be hoisted, and the American owner stepping on board would exult under the protecting fraud of an alien flag, and a fabricated bill of sale.

I instruct you, gentlemen, that the law does not regard the semblance, but the fact. Was this vessel in truth, owned by American citizens? If there was a mask, tear it off, and look at the reality. Did this vessel belong to the man who was on board, the Spanish captain as he was called, or did she belong to an American citizen?

Passing then from this point, I come to the other category under which the different counts of the indictment arrange themselves; merely reminding you that unless you are satisfied beyond a reasonable doubt, that this vessel at the time belonged to an American citizen in whole or in part, or was navigated for or on behalf of an American citizen, then all those counts of the indictment in which the charge is made, that the vessel was so owned, are not proved, and your verdict as to them must be not guilty.

Of all the charges in this second class, it is an essential element, that the accused was a citizen of the United States at the time of the acts. You have heard some discussion as to the meaning of this term, citizenship of the United States. It has a plain, simple, everyday meaning; and that meaning you may safely take without a definition. It is that unequivocal relation between every American and his country which binds him to allegiance and pledges

to him protection,—that goes with him wherever he goes, stamping him a traitor if he be found in the ranks of an enemy, as a criminal if violating her laws; but watching over him, and covering him with the shield of her power, though he traverses the sea under a stranger flag, or sojourns on a foreign shore. It is not the citizenship of domicile; the citizenship, if you may call it so, of the man who comes to be a guest upon your shores, and who is entitled to protection, just as the stranger becomes a member of your household when you invite him to stay for the night. That is not the citizenship the act refers to; for that subjects to no liability whatever, beyond the territorial limits of the country in which the domicile is. Nor is it what some law books have called judicial citizenship; for that has no relation to a subject like this, but applies only to the question whether the party can sue or be sued in the courts of the United States, or whether their litigation must go over to the state courts. Nor, gentlemen of the jury, is it what some might call diplomatic citizenship, for want of a better term; that grade of inchoate citizenship which may be claimed by one who has declared his intention to become a citizen hereafter; prospective in its allegiance, actual in its asserted rights; about which diplomatists have disputed somewhat, but which I believe our courts have not yet recognized; such is not the citizenship meant by the act of congress. It is citizenship, such as yours and mine—that citizenship which makes us constituent members of this country, and that binds us everywhere to obey its laws, because it protects us everywhere. The right and the duty are inseparable. They begin and end together.

How then stands the question as to this prisoner? In the first place, it appears that he was a Frenchman by birth and language. Such were his own declarations if you believe the witnesses who have been examined before you. The declarations of a man after he is arrested for a crime, or when he is about to commit a crime, may be of very little value; and the man who, to prepare himself for going on a slaving voyage, had taken care to announce to the world that he was not an American, would gain very little advantage from his cautionary declarations. But if, at a time when he was not interested in disguising or denying his true national character, he had declared himself either a Frenchman or an American, having no object in falsifying the truth—not meditating the violation of a law which might subject him to punishment in case he were a citizen of one nation rather than of the other—if by common reputation, in the ordinary converse of his fellowmen, his nationality was recognized as in accordance with his declarations—presenting thus the same sort of evidence of his national character that I have of yours, that you have of mine, that we both have of the gentlemen who surround us in this court—then surely his uncontradicted declarations are entitled to some credit. Just as in a question of pedigree; we speak of parentage and birthplace, on the authority of generally accepted opinion, which resolves itself at last into very little if anything else than the assertions of the party, or his household, or his neighbors. Seafaring men rarely travel with the family bible in their pockets.

If then, it be true, that this man did some fourteen or fifteen years ago arrive here, a Frenchman, apparently unable to speak English, that he did represent himself as born in France, that he did go to a French boarding house, that his associates were French, as this witness testified, that when he applied to one of them to get him a place on board a vessel, he was told it was useless for him to expect to get a place when he could not speak a word of English—having all this before us, and uncontradicted, we are to take him to have been a Frenchman or a foreigner fourteen years ago. If so, when or how did he become an American citizen? When was it? Where was it? We have had in the case of Mr. Machado, the proper proof by which the individual, foreigner by birth, is shown to be an American citizen now. The production of his letters of naturalization, and proof of his identity with the party named in them. We have had no such proof in regard to this man.

What then have we as a substitute? His assertion or admission that he had become one? Doubtful evidence, gentlemen, I may say to you. I should fear very much in a grave cause like this to determine upon the guilt of the prisoner, simply because he had said at a former time, that he was such a citizen as was amenable to our laws of the sea. I have seen too many of the oaths even, that pass through the custom house; I have seen too many good names signed to the papers that were received in that office as proofs of citizenship, and ownership, and identity of invoiced, with actual values, to be very anxious to begin the game of punishing capitally for a misrepresentation of fact at the custom house. Yet if a man has gravely asserted that he was an American citizen, still more if he swore that he was an American citizen, he cannot complain if we so far vindicate the principles of morality as to accept his oath for truth, until he gives us some better reason for believing that he lied. But in this case, did this defendant ever assert or admit that he was an American citizen? That he never carried a protection as an American citizen, as the district attorney has very truly observed, matters little; for very few American citizens carry protections now, and I trust the time may be very distant when they shall again be thought necessary.

But it is argued, that the custom house papers declare or rather assume the citizenship of this prisoner. If so, they would be of value just so far as he had been party to them, or

had recognized their correctness; and no further. Look then through all these documents, and say whether you find in them any assertion or recognition by the prisoner, of his being an American citizen. So far as I remember them, those papers from the custom house contained no proof at all as to the citizenship of the accused. In fact, the oath which the act of congress had required to be made, and which would have decided the question of his citizenship, so far as a custom house oath can attest anything, that oath prescribed by the act of congress, was for some years before this transaction, pretermitted as obsolete by the custom house at New York; and thus it happens there is no such oath taken by this accused, by which you can test the question whether he claimed to be a citizen or not. Then you have the crew list. So far as I remember that instrument, it is certified by a notary public that he received sufficient proof of the American character of the vessel, and of the crew named in the list itself. I may say to you gentlemen, that this certificate of that notary public, that he received sufficient proof, and his oath superadded to the instrument that he received such proof, are of little avail to the prosecution. It is this court, which has to judge of the legal relevancy of the proof; you are to judge of its sufficiency. But that crew list upon examining it, unless my recollection deceives me, does not contain any name by which it is alleged this prisoner has passed himself. There is, therefore, no admission, even supposing that he himself had made oath to the accuracy of the crew list, the oath being as to the American character of the vessel, and of the crew named in it. All these, however, like the other facts and circumstances which have been presented to you by the United States, are for you to consider of.

I have gone over two of the points; there is a third. If you are satisfied that the vessel belonged in whole or in part to American citizens, or that the prisoner was an American citizen; if you are satisfied that this prisoner was engaged on board as one of the ship's company, no matter whether as master or as mate, or as interpreter, or as doctor, if he was engaged on board in the prosecution of these acts, there remains still a point you are to be satisfied upon, of the intent on his part to reduce these people to slavery. I do not mean that it is a question whether this was really a slaving voyage or not; it seems to have been settled all around that it was a slaving voyage; but the character of the prisoner's intent as to the individuals who were on board is an essential topic of consideration by the jury. The seamen who shipped for the island of San Thomas, as probably supposing they were going to St. Thomas, in the West Indies, and who found out they were going to a little island on the coast of Africa, after they were on the high seas, bound to obedience by the maritime code, and exposed to peril and outrage if they refused; such seamen cannot be said to have sailed with the intent to make or sell slaves.

We had a case of piracy before this court some years ago, which was presided over by my Brother GRIER, during the whole trial, and in which he made the charge. The evidence in some respects, not in a great many, but in some respects resembled that which has been before you. And I feel, that I shall do well to close the remarks I have to make upon this case by quoting some of the language of my eminent colleague. I adopt it entirely as my own; but I know that I shall secure for my own opinion greater weight by a reference to his. He said as follows:

"The United States can assume jurisdiction and a right to punish this offence committed on the high seas, only in consequence of the allegiance or citizenship of the offender, or because the act was done on board or by the crew or ship's company of a ship or vessel owned in whole or in part or navigated for or in behalf of a citizen or citizens of the United States. Hence it lies at the very foundation of this case, that the prosecution establish to your satisfaction the fact, either that the defendant is a citizen and owing allegiance to the United States and bound by her laws; or that not being such, the ship or vessel was owned in part or in whole by citizens. That the vessel assumed an American character abroad, is in evidence, that she was sent by the consul to an American port, that at Rio she applied to the American consul and held herself forth to the world as American; this affords a strong presumption of her American character, her national character. But it is not a necessary consequence therefrom that her owners were American citizens. Denizens or resident foreigners might have owned her. But then again, she sailed from New London as an American vessel. The testimony affords a strong probability that she was owned by Americans;—and as the testimony is wholly for your consideration, the court will not say that it is insufficient, if it be satisfactory to your minds.

"But the court think it their duty to observe, in a case of such awful and solemn consequences to the defendant, that the jury should be cautious how they deal with mere probabilities. What hindered the government from sending to New London, and bringing here the register, and the very owners themselves, to establish this fact beyond a doubt? Have they a right to call on you to convict on doubtful or probable testimony, when they had it in their power to have removed the doubt and furnished certainty instead of probability? Without wishing to interfere with your prerogative as to the facts, I venture to say that you would not be unreasonable if you required it at their hands."

In a word, gentlemen, I ask you to take the spirit of these remarks, and apply them to this case. When the United States call upon a jury to give a verdict of guilty, they are bound to prove the defendant's guilt of the

charge set forth in the indictment. Not. of course, by direct, irrefragable evidence—such evidence, where intent is an element of the crime, is rarely if ever possible—but by evidence which may satisfy the judgment and conscience beyond a reasonable doubt. You will not convict because you suspect; on the other hand, you will not refuse to convict, because you have doubts of legal policy, or sympathies that are to be shocked by a capital execution. You will answer upon the evidence before you, just as you would in a case that called for your cautious because responsible action, in the concerns of daily life, fearlessly, honestly, as men who have sworn to do justly between him and the state.

Mr. Vandyke asked the court to charge, that if the jury believe Marsden exercised the ordinary, usual acts of ownership in the fitting out of this vessel, these acts of his, being part of the res gestæ should be taken into consideration in determining the question whether the vessel was navigated for or on his account.

KANE, District Judge. They are so no doubt. Yet these acts on his part may be colored and explained by attendant circumstances. If Mr. Marsden acted as owner of this vessel in purchasing her, paying for her, repairing her, fitting her for sea, bargaining and paying for her ship's stores, procuring her pilot, all these are acts of ownership, and would certainly show that if he was not the owner, she was at least navigated on his behalf. But then if in direct connection with these acts of his, and running alongside of them, it be proved as fact, that the funds which he was using were the funds of a third person not a citizen, that he had no funds of his own, that he spoke of himself as a mere broker or agent, and was recognized as such by the banker who put him in funds, and by the third person whose funds they were; then, if all these be deemed true and not merely devices to disguise the truth, they would establish the fact of ownership in another, just as in a different aspect, they would be proof he was the owner of the vessel.

Verdict, not guilty.

Incidental Points.

In the course of this trial, the following points, aside from the main case, occurred and were decided:

First Point.

After the prisoner had pleaded not guilty, and a jury had been called, one of the jurors who was in delicate health, stated to the court, that certainly he would be unable to go through the cause without an attack of illness. The prisoner having exhausted his twenty challenges, the court, stating that it had no power to discharge a juror after he was once sworn, unless by consent of parties, suggested to the counsel that in view of the great inconvenience likely to arise, the record by consent might be so far falsified as to strike out the juror's name, and so as not to show that he had ever been called or sworn at all; and that the defendant should have the privilege of another challenge. That in this way both parties would be estopped from alleging the irregularity as matter of error. Being so recommended by the court, this course was agreed to by the counsel on both sides.

Second Point.

When the prosecution had opened its case, and being about to go on with its evidence, had sworn a witness, the prisoner's counsel asked the court to instruct the witness and the other witnesses generally, before any of them were examined, and with a view to their own protection, that they were not bound to make any statements criminating themselves.

GRIER, Circuit Justice. We cannot do this. It would put it in the power of a witness by a mental reservation to tell only what he pleased, and to be the judge of what would criminate him, and the crimination might be moral, political or criminal. The court will interfere when necessary.

Third Point.

To prove the reputed American character of the vessel on which the piracy alleged in the principal case was charged to have been committed, and the public declaration of her ownership by a citizen of the United States—such character and ownership being essential facts to sustain the indictment—the prosecution offered in evidence the vessel's original registry at the custom house in New York; promising to follow this proof up with other evidence of ownership. This registry, as is generally known, is made under an act of congress (Act of December 31, 1792 [1 Stat. 287]), declaring what vessels shall be "denominated and deemed vessels of the United States, entitled to the benefits and privileges appertaining to such vessels." It prescribes that before the registry can be made, the owners or one of them must swear or affirm that according to the best of his or their knowledge and belief, the vessel is owned wholly or in part by a citizen of the United States.

Objection being made by Mr. Guillou and Mr. Kane, who relied on U. S. v. Brune [Case No. 14,677], that case was distinguished by Mr. Vandyke, district attorney, for the United States, from this, because there the evidence was neither preceded nor to be followed up by any other evidence. It was the only evidence the prosecution relied on; and though offered as prima facie, was in truth relied on as conclusive. Here we shall follow the matter up by direct evidence of actual ownership. We wish to prove the history of this vessel from her build to the present day,

and these papers are offered as part of the history of the vessel, and as part of the record and title of the vessel. What they are worth will be hereafter a question. As part of the paper title of the vessel, and as showing through whose hands she has passed, and in whose hands she now is, they are at least competent.

GRIER, Circuit Justice. You can prove that these are the original custom house papers; and they may go to the jury as part of the case generally, and to show under what public character the vessel appeared and acted. What they are worth in law as evidence of actual ownership by a citizen of the United States, is matter to be considered hereafter.

Fourth Point.

The custom house registry of ownership of the vessel, which was now in evidence, being found to be in the name of one Gray, who on those books thus appeared to be owner, and the prosecution alleging that the name of Gray was a simulated one, which had been fraudulently assumed by some person in order to get the apparent ownership out of Marsden, a former registered, and still the real owner—the prosecution in order to prove the fraud, and that the name was thus simulated, now offered to prove by an expert that two different signatures on the registry, to wit, the signature to a bond, a crew bond, and a manifest which purported to be made, one by one person, and one by another, were in fact made by the same person under different names. But the prosecution had not proved, nor was it admitted by the defence, who had made either signature. The question put to the expert was, "Look at the signatures to the bond, to the crew bond, and to the manifest, and say whether they are, to the best of your knowledge and belief, by the same person?"

Mr. Guillou objected to the question. Unless you have an acknowledged signature, or one proved by one who saw it signed, for comparison, you cannot bring in the evidence of a mere expert.

Mr. Vandyke. That is true in the case of a forgery. I know that there must then be a test paper by which the other signatures are to be proved. But I wish to show that the same man, whoever he be, signed the manifest, the oath, the crew bond and the register bond; that they are all signed by one and the same person. If I offered this testimony for the purpose of showing that a certain A. B. signed those papers, then it would be necessary for me to have an admitted signature of A. B., in order to prove that he did sign them; my object now is only to prove the fact that the signatures on all the papers are by the same person.

Mr. Guillou, in reply. In a capital case any doubtful or dangerous evidence ought to be wholly excluded. It does not do to let evidence in to the jury, expecting that an antidote will come from the charge of the court. An effect in a criminal case is produced by the mere admission of evidence, and the charge cannot destroy this effect. How uncertain is the evidence of an expert on a question of this kind! If you would bring every expert from Maine to Louisiana, you would find one half of them would decide directly contrary to this witness on the stand. Nor has the counsel on the other side any right to open so wide a field for controversy; he is able to produce any number of witnesses he may want on the subject, but the defendant who is a stranger here and a foreigner, has not the same means to do so.

GRIER, Circuit Justice. If the evidence were offered to prove that the prisoner had made both these signatures, it would be incompetent unless you had first an acknowledged or proven signature of the prisoner as a datum for a standard of comparison. Perhaps, indeed, it is only in cases of forgery where there is a similitude of handwriting, that such evidence is admitted at all. But here Mr. Vandyke is trying to prove external facts unconnected with the defendant. He has to show that the defendant did certain acts, that he went to Africa. He has not only to do that, but he must show more—he must show the national character of this vessel, her history, and a hundred other matters; and then her name painted on her stern. So, also, he gives the public register connected with her, showing the public character the vessel acted under. He then shows that a man by the name of Marsden is connected with her, and is the owner; that he paid her bills and fitted her out to go upon this voyage; that he had a bill of sale to her, and that he is a citizen; that under suspicious circumstances, there was a transfer made to a separate party, who, he alleges, is a man of straw—nobody at all—and in order to prove it so, wants to show that the signature of the captain and that of this party appear to be the same, done by the same hand. Now if that be a fact, would there not be some evidence in the case to show that it is so? He has put himself upon showing that this man is not the true owner; that there is a bill of sale made to him which is a mere sham; that it is made to nobody, and this is legitimate evidence in the case; not that it fixes this man as Darnaud, but that the transfer upon the record shows upon its face these two signatures were done by the same hand. Whether the signatures appear to be done by the same hand, that, I think, is a question you can put to an expert. Though the testimony is of rather a dangerous character, and not much to be relied on.

Case No. 14,919.

UNITED STATES v. DARTON.

[6 McLean, 46.] [1]

Circuit Court, D. Michigan. June Term, 1853.

ILLEGAL CUTTING OF TIMBER—PROOF—INTENT—REASONABLE DOUBT—MISTAKE.

1. Under the act of 1831 [4 Stat. 472], for the punishment of offenses in cutting and removing timber from the United States lands, the rule of proof is fixed by the statute. The government must prove the cutting on the lands specified: the defendant may rebut the same, by showing circumstances of ignorance as to the section lines or mistake.

[Cited in U. S. v. Murphy, 32 Fed. 383.]

2. The proof must correspond with the charge—cutting oak is not cutting pine timber.

3. The proof of the act places the burden of explanation on the defendant. From an unlawful act an unlawful intent will be inferred.

4. A reasonable doubt is that which relates either to the character or the force of the testimony, and not a mere conjecture.

[This was an indictment against Peter Darton for cutting timber on public lands.]

The District Attorney and Frazer & Hand, for the United States.

Gray & Van Arman, for defendant.

Before WILKINS, District Judge.

The defendant was tried on an indictment charging him with removing and cutting timber on government lands. The testimony showed that his father owned a mill seat and various tracts of land, in the vicinage of the lands described in the indictment; that he resided at the mill, as the agent of his father, who lived in Chicago, and was under instructions to avoid cutting on the government lands; that a number of trees were cut by mistake across the lines, which were subsequently ascertained by actual survey, the defendant accompanying the surveyor, and showing the corner posts; and when he ascertained that he had cut over his lines, he wrote to his father, and caused the quarter section on which the timber was cut to be entered at the land-office, the certificate of which was given in evidence. It was contended on the part of the government: 1st. That circumstances showing ignorance and mistake, if believed by the jury, constituted no defense. 2d. That a subsequent entry of the lands was no defense.

CHARGE OF THE COURT. The prisoner at the bar, Peter Darton, whose true deliverance between him and the United States, you are obligated by your solemn oaths to make, according to the evidence given you in court, is charged with timber cutting and timber removing on and from the lands of the United States. The particular offense is created by, and defined and described in, the statutes of the United States. The act of March 2, 1831, by its second section, constitutes three general classes of offenses, with their respective accessorial subdivisions. The court will enumerate them in their order, that you may be better enabled to understand the particular offense now under consideration. The first is—The cutting and removing naval timber, specifically named red cedar and live oak, on lands specially selected and reserved by the government, or aiding in such acts, or wantonly destroying on such lands, such naval timber.

By a previous enactment of congress, of the first of March, 1817 [3 Stat. 347], entitled "An act," making reservation of certain public lands "to supply timber for naval purposes," it was made the duty of the secretary of the navy, under the direction of the president of the United States, to cause such vacant and unappropriated public lands, as produced the live oak and red cedar timbers, to be explored, and to select such tracts as, according to his judgment, were necessary to furnish the navy of the United States, a sufficient supply of naval timber. It was then declared an offense, punishable by fine and imprisonment, for any person to cut any timber on such reserved tracts, without authority to do so by order of a competent officer. At the same time it was declared criminal to cut, or remove or be employed in removing, the naval timber specified, with intent to dispose of the same for transportation, from the same description of the public lands. Such, with other measures of a penal character, and with the avowed design of preserving a supply of timber for the United States navy, were the salutary provisions of the statute of 1817. But the government was the proprietor of other lands, on which grew other timber, valuable in a great degree for other purposes than ship building. Much of these lands were surveyed by and under national authority, and by various statutory enactments were opened to settlements, and offered at a fixed price, which could neither be augmented nor lessened by demand.

The policy of these statutes was two-fold:—1st. The speedy settlement of the public domain; and thereby converting the wilderness into a garden, and by the acquisition of a revenue from the public sales. In furtherance of both objects, it was desirable, that the lands should be so far protected from spoliation, as to encourage immigration, and induce settlement and sale. Moreover, it was discovered that the protection afforded by the act of 1817, was not sufficiently extensive as to naval timber growing elsewhere, than on the reservations; and the public lands in the north and south-west, being repeatedly stripped of valuable house timber, by lawless trespassers, the national legislature was moved to amend and enlarge the provisions of the act of 1817, by those of 1831, embracing other lands, than the reserved lands, naval timber on other lands, and other timber than naval timber on the

[1] [Reported by Hon. John McLean, Circuit Justice.]

unreserved public lands of the United States. Thus originated the other two classes as designated in the 1st section of the last act, —namely: 2d. The offense of cutting naval timber on other lands, &c. 3d. The offense of cutting or removing, &c., other timber than naval timber on other lands than naval lands, with the intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States. This last, comprehends the charges set forth in this indictment, which contains four counts. The 1st is for cutting 3,000 pine trees, at township 12, north of range 17 west, and township 12, north of range 16 west, on section 13 of township 12, north of range 17 west, and on section 13 of township 12, north of range 16 west, in the county of Oceana and state of Michigan. The second count, is for aiding and assisting in the trespass specified in the first. The 3d, is for removing 5,000 timber logs from the premises described, and with the intent stated. And the 4th count, is for aiding in the last act described, or being employed in the same. To these charges, the defendant has plead not guilty—denying the cutting and the removing in every form and shape, in which the same is charged. Before any application of the law to the facts of this case—the court will briefly detain your attention on two prominent propositions involved: 1st. What must be proved by the government, in order to sustain the prosecution. 2d. What must be proved by the defendant, in case the government has made a case to warrant a conviction, as matter of complete exculpation. What must be proved by the government? The rule of proof is fixed by the statute. The offense is cutting or removing timber from government lands, with the evil intent described. The fact then, must be fully established by conclusive proof, that timber of the kind described was cut by the defendant, or by his procurement: and that the same was cut on the township, and section, and range, specially set forth. Cutting other timber, than that charged, will not suffice. If pine trees, or pine logs are charged, proof of oak or hickory will not do. And so also, if the cutting is on other lands, the proof will not do. The defendant must be acquitted.

But, gentlemen, if the specific act of cutting or removing is proved, the guilty—the unlawful—intent will be presumed. From an unlawful act an unlawful intent will be inferred. The statute declares the act criminal. Proof of the commission of the act, raises the presumption of a guilty knowledge and a guilty intention. If poison be given, the malicious intent will be inferred, and need not be proved. But this presumption may be rebutted, by the evidence of circumstances, showing a lawful intention. This applies to all crimes. To felony and to misdemeanor. An evil intent is an essential ingredient of every crime. And the statute does not contemplate the punishment of the innocent. An unlawful act with a lawful intention, is not criminal.

With this view, the law declares one intent which exculpates in express terms, viz.; the intent to appropriate the timber cut to the use of the navy of the United States. Nevertheless this does not exclude a defense based upon circumstances, clearly showing that no trespass was designed by the defendant. Understand this—the government must prove two prominent facts. The cutting, and the premises where cut. If such proof corresponds with the allegations of the indictment, and there is no explanatory proof rebutting an unlawful intention, your verdict must be guilty. But otherwise, after such proof on the part of the government, if the defendant clearly shows that a mistake was committed by the defendant himself, or, by the hands under his direction, in regard to the lines of survey, if proof be furnished, satisfactory to the jury, that the defendant owned timber lands in the vicinage, or, was the agent of the owner, and that the section corners and quarter posts, as designative of the public survey, were such, that a mistake might be committed, as to the lines separating the private entry, from the unsold lands, and that the trespass charged was thus committed, without the design of cutting on the government lands. If such be the conclusive character of the defendant's evidence, the inference of a guilty intention is removed, and an acquittal is his right under the benign provisions of the criminal law. For it is a blessed and an unquestionable truth—a maxim not to be controverted —that the government of the United States seeks not the conviction or punishment of an innocent man. Conviction, not recovery, is the important word; punishment, not recompense, the great object sought by the prosecution. Damages are recoverable by civil action. Reparation for injury, relief, and not a penalty.

Now, the United States, as a great land proprietor, is not inhibited the usual civil remedy allowed to and provided for all, for any loss or injury sustained. The courts of justice are opened to the civil actions of the government as to those of an individual. But there is a vast difference in the rule of judgment between the civil action and the criminal verdict. In the former, the proof of the injury and its extent, calls justly for the rendition of appropriate damages; and the plea of ignorance or mistake, or an innocent intention, availeth not. The injury is done, the ignorant trespasser must repair the loss. So with the government. Its landed dominion is under the protection of the general law, independent of the statute of 1831. The action of trespass is an action to which the government may resort, and under which it may recover damages to the full extent of the injury sustained. And, a conviction and punishment of a defendant, for a trespass, un-

der the act of 1831, would not protect under a civil action for the injury sustained. Neither would a judgment, on the latter remedy, be a sufficient plea of defense under the indictment. Wherefore, then, exclude from consideration in this species of criminal prosecution, the proof which negates an unlawful intention, or shows a clear mistake, or such ignorance as establishes beyond all doubt an intention other than that of cutting or removing the government timber?

The court, then, has no hesitation in giving you this instruction: That if you believe, from the evidence given you in court, that the defendant cut timber on the lands in question, through a misapprehension at the time as to the lines which separated the government lands from those of his father, whose agent he was, and that he then acted under a mistake, believing that the premises where the timber was cut, were those of his father, and not the public lands, your duty is to acquit. What, then, has been proved upon this issue? This is for your exclusive deliberation. It is your province, your sole province, to settle what facts have been proved. The court cannot, with judicial propriety, interfere with you in the discharge of this duty. Your opinion as to the facts, is that which must compose your verdict. The opinion of the judge is not your opinion, and should not be made the foundation of your opinion. And, furthermore, your verdict is the opinion of each and every one of you. Such is the peculiar and emphatic injunction of a juror's oath. Your conscience cannot repose with ease either upon what your fellow-juror or the judge may think, as to the facts, no more than the judge can safely rely, at all times, upon the doctrines urged by able, learned and upright counsel. The inquiry, then, comes back to yourselves —what has been proved? Much difficulty, honestly felt by jurors in endeavoring to bring their minds into accord, arises from their omission to ascertain, in the first place, the facts upon which they are all agreed. On retiring, it is usually propounded, Is the party guilty, or is he not guilty?—a question of a general character, including a response to many particulars which together make up guilt; but upon which a vote is taken, without any antecedent settlement of material facts. Whereas, if these are in the first place made the subject of careful deliberation, comparison and determination, no inconvenient protraction or disagreement would, in many cases, occur. It is your duty to examine, and weigh, and sift the testimony. It is your duty so to inquire, as to be ready to give a reason to your own consciences of the faith that is in you. You cannot jump satisfactorily at conclusions in so important a matter as a verdict in a criminal case. Enquire, then, in your own minds, now, even now, what facts are conceded, or what are proved, and what are the subject of conflict? Did the defendant cut pine trees on the government land specified? Is this so, there is no contest about the title to the premises. They are the government lands acquired from the Indians, by the treaty of Washington.

There is no contest about the ownership and occupancy of the lands in the immediate vicinage. The father of the defendant was their owner, and of a mill seat for the manufacture of lumber, on an adjoining section. There is no contest about the residence of the defendant, and the relation he bore to the management of the mill and the lands. He was his father's servant, clothed with a special power, and under direction to cut no timber from the government lands. There is no question as to the roads leading to and from the mill, and the purpose for which those roads were used—bringing timber to the mills. There is no question but what timber, to a great extent, was cut by some persons on sections 13 and 18. There is no question but what the 40 acre lots on S. W. quarter of section 18, and N. E. quarter of section 13, were used for the purpose of supplying the mill; and that the timber cut by the defendant's direction, was not only cut upon these 40 acres, but also across the lines, and on the lands of the government adjacent.

Reaching this point, then, you have got to the remaining inquiry, mainly affecting the guilt or innocence of the defendant: Was this cutting done by him, and the hands under him, under a mistake, and a well-grounded ignorance of the lines which separated his father's land from that of the government? The principal witness for the government is Mr. Bean, who visited, observed and surveyed the premises, by direction of the government agent, entrusted with the care of the government timber in this district. The defendant showed him the quarter post on the township line, or section line, and accompanied him the whole day in running the section lines. No controversy in relation to these facts, and none, of course, in relation to what the witness observed, that much timber appeared to be cut on parts of sections 13 and 18. During this survey, the defendant admitted that he had cut some of the timber, but claimed the proprietory intercession of the witness, because he had shown him the post, and aided him in ascertaining the lines. Such is the alleged admission of the defendant, and its force and extent rests upon the credit you give to the witness, by whom it is established, and all that defendant said at the time must be taken together as one and an entire admission. There is, in addition to the charge of cutting, a count for the removal. If the defendant admitted he cut the timber, and you are satisfied that he had the management of the mill, and that the timber was removed to the mill, his admission will cover both charges.

In every criminal accusation reasonable doubt should materially sway the mind, in favor of the accused. This principle is of

higher origin than human laws. It should govern in social life. It must control in judicial tribunals. Wherefore condemn—if the mind hesitates as to guilt? But the suggestion of merciful conjecture, is not the reasonable doubt, contemplated by the law. The doubt of the juror, consistent with his reason, is that which relates either to the character or the force of the testimony. The test is, is or is not such a fact fully proved? If yea, are the witnesses by which it is established, worthy of belief? If yea, all doubt vanishes, and there remains no basis on which the reason can rest. Sometimes a witness may be unimpeached as to general character, and may be uncontradicted either by others, or be perfectly consistent in his statement; and yet, from his deportment on the witness' stand, render himself unworthy of credit. A hesitating or confused manner, or a studied narrative of which a jury may judge from all that accompanies the delivery of the testimony, will justly cast a shade of doubt upon it all. Of this, however, the jury alone, unaided either by the court or the counsel, must decide for themselves. And certainly where two witnesses contradict each other as to a particular fact, and one exhibits a frank and unbiased manner; and the other is confused, hesitating, and evidently biassed,—the reliance of the jury can with more safety be given to the first, while they reject entirely the last. It is another matter altogether, where discrepancies are fairly established in the narrative of the witness. Where he states in his examination in chief, a fact, which he contradicts in his cross-examination; or where he conceals the whole of a matter, which is afterwards extracted by cross-interrogation, such discrepancy, or such conduct, if clearly apparent to the jury, should lead to the rejection of the testimony.

The jury found a verdict of guilty; and the court sentenced the defendant to one day's imprisonment, and fifty dollars fine.

Case No. 14,919a.

UNITED STATES v. DASHIELL.

[Nowhere reported; opinion not now accessible.]

Case No. 14,920.

UNITED STATES v. DAVENPORT.

[Deady, 264.] [1]

District Court, D. Oregon. May 17, 1867.

INDICTMENT — VERDICT — COUNTS — DISCHARGE OF JURY.

1. An indictment, in which there is a joinder of offences or offenders, so far as the jury are concerned, is to be considered as a several one as to each of such offences or offenders.

2. When an indictment contains two or more counts upon distinct offences or upon different statements of the same offence, the jury may find a verdict of guilty or not guilty upon any or all of such counts, and if there is any count upon which they are not agreed, they may be discharged without giving a verdict thereon; and such count will stand for re-trial.

[Cited in Ex parte Hibbs, 26 Fed. 427.]

[This was an indictment against Isaac A. Davenport, for perjury.]

Joseph N. Dolph, for plaintiff.

William W. Page, for defendant.

DEADY, District Judge. The defendant in this action was indicted for the crime of perjury, committed in swearing to his income returns for the years 1864 and 1865 respectively. The indictment contained two counts—the first upon the affidavit to the return for 1864, and the second upon the affidavit to that of 1865. Upon the trial the jury returned a verdict of "not guilty" as to the first count, and then and there stated to the court that they were unable to agree as to the second one. The court received the verdict and discharged the jury.

The defendant now moves for judgment of acquittal generally upon this verdict, and that he be discharged. No direct authority is cited in support of the motion, but counsel for defendant claim that a verdict of not guilty upon one count in an indictment, is in legal effect, equivalent to a verdict of not guilty upon all the counts therein. In support of this position the case at bar is likened to one where the jury convict on some counts and are silent as to others. In such cases it is said that the weight of modern authority is, that the verdict is equivalent to not guilty as to the counts concerning which the jury are silent. But the authorities are not uniform on this point, and the rule appears to have been "that if distinct offences are charged in separate counts of the same indictment, the verdict must expressly find the defendant either guilty or not guilty upon each count, or no judgment can be rendered." 2 Lead. Cr. Cas. 503. But in the case under consideration the jury are not silent as to the other counts, but state expressly, that as to such count they cannot agree to a verdict either way. The case of Campbell v. State, 9 Yerg. 333, is cited and relied upon by counsel for defendant. But there is no analogy between that case and this. There the indictment contained three counts. The crime charged was the larceny of a bank note. The jury found the defendant guilty as to the second count, and not guilty as to the first and second ones. On motion of the defendant, the verdict was set aside and a new trial granted. Whether the order of the court setting the whole verdict aside, went beyond the motion of the defendant, does not appear. On the second trial, the defendant was found not guilty as to the first and second counts, and guilty as to the third one. Judgment was given accordingly. On review, the court held, that

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

the defendant having been found not guilty as to the third count on the first trial, could not be tried on that count again, and reversed the judgment. All that this case decides is, that a verdict in favor of a defendant cannot be set aside, even upon his own motion, and that if it is, and he is subsequently convicted on the same count upon which the verdict set aside was found, it is erroneous. In Morris v. State, 1 Blackf. 37, the defendant being found guilty on one count of an indictment, and not guilty as to the other, moved for a new trial. The motion being allowed, the whole verdict was set aside and the defendant put upon trial on both counts.

The defendant, Davenport, is charged with two distinct offences. Being "of the same class" they are properly joined in the same indictment. 10 Stat. 162. The jury have found a verdict upon one count—as to one offence—and disagreed as to the other. It is believed that no authority can be found for holding such a verdict to be equivalent to an acquittal on both counts. There can be no pretence that justice to the defendant requires that it should. The general rule seems to be, that for all the purposes of a verdict, an indictment, in which there is a joinder of offences or offenders, is to be considered as a several and separate one, as to each of such offences or offenders. The jury may therefore find a verdict of guilty or not guilty as to some, and no verdict as to others, because they cannot agree thereon. In Com. v. Wood, 12 Mass. 313, two persons were jointly indicted and tried for larceny. The jury came into court and suggested that they had agreed upon a verdict as to one of the defendants, but were unable to agree as to the other. Objection was made by the attorney general, to receiving a verdict unless upon the whole matter. But the court polled the jury, and they answered that they found Wood not guilty, but could not agree as to the other. The verdict was received and Wood discharged, but as to the other defendant the indictment was continued for re-trial. In that case there was a joinder of offenders, while here there is a joinder of offences. But in my judgment this difference in the facts makes no difference in the principle. The analogy between the two cases is complete. In the note to Campbell's Case, 2 Lead. Cr. Cas. 502, the subject of separate counts in an indictment is discussed. It is there maintained, that the separate counts in an indictment are to be treated as separate indictments, whether they are upon distinct offences in fact, or upon different statements in the same offence. Speaking of an indictment containing two counts, the note says: "The jury may be discharged from the consideration of a count upon which they are not agreed, returning a verdict only upon the other." This rule appears both just and practical, and it meets this case exactly. The defendant has been tried for two similar offences. The jury have found him not guilty as to one, but as to the other they were unable to agree. To have refused to receive this verdict would have been unjust to the defendant who was thereby acquitted of one of the charges, but to receive it and then treat it as a verdict of not guilty as to both counts, would be equally unjust to the prosecution.

As to the second count there is no verdict. The jury were unable to agree concerning the guilt or innocence of the defendant as to the crime therein charged. The indictment as to this count stands for trial as if a jury had never been impaneled in the action.

Judgment for defendant upon the first count of the indictment, and motion denied as to second one.

Case No. 14,921.

UNITED STATES ex rel. DE LOYNE v. DAVIDSON.

[1 Biss. 433; [1] 2 Chi. Leg. News, 385.]

Circuit Court, N. D. Illinois. Jan., 1864.

MARSHAL'S BOND—CITIZENHSIP—FEDERAL JURISDICTION—PARTIES.

1. The United States courts have jurisdiction in all cases of marshal's bonds, irrespective of the citizenship of the parties, and this jurisdiction rests on the ground that within the meaning of the constitution they are cases under the laws of the United States.

[Cited in Pierson v. Philips, 36 Fed. 837.]

2. Although the courts had no authority to maintain actions in this class of cases, until congress exercised the power to give jurisdiction, the act of April 10th, 1806 [2 Stat. 372], having provided for suits on marshal's bonds, this jurisdiction is established.

[See Adler v. Newcomb, Case No. 83.]

3. Under this act it is optional with the injured party to bring the suit on the bond in his own name, or in the name of the United States, and the United States is not substantially a party to the record.

[Cited in Hagood v. Blythe, 37 Fed. 251.]

Motion to dismiss a suit upon a marshal's bond, on the ground that the court has no jurisdiction, the allegations in the declaration concerning the citizenship of the parties not bringing the case within the 12th section of the judiciary act [1 Stat. 79].

C. A. Gregory, for plaintiff.

William C. Goudy, for defendant.

DRUMMOND, District Judge. This is a suit on the bond of J. W. Davidson, formerly marshal of this district, and his sureties, in the name of the United States, for the benefit of George De Loyne, whose interest alone is affected. It is averred in the declaration that De Loyne is a citizen of the state of Illinois, and also that Davidson and his co-defendants are citizens of the same state.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

This is a question of great nicety, and I have come to the conclusion that the action can be maintained. I will state, very briefly, the grounds of my opinion. I assume that the party really in interest here is the person for whose use the suit is brought; that he is to all intents and purposes the plaintiff in the suit. By the terms of the judiciary act of 1789 the marshal, before he enters upon the duties of his office, must give bonds in the sum of twenty thousand dollars for the faithful performance of his duties, with securities satisfactory to the judge. The original act makes no provision as to suit upon the bond. The act of 1806 makes such provision.

It is necessary to advert to the language of the constitution as to the power existing in courts of the United States to maintain actions. The second section of the third article of the constitution declares: "The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States and treaties made, or which shall be made under their authority." The language of the constitution is that judicial power extends, among other cases, to cases arising in law and equity under the laws of the United States.

It has been maintained with a good deal of force that this was a self executing provision; that when the courts of the United States were established by act of congress, this provision of the constitution operated directly to vest jurisdiction in courts of the United States. That has not been the construction which has been given to this section of the constitution, but the construction has been that it was necessary that there should be an act of congress to vest in the courts authority to maintain actions in a particular case, and that, unless congress did give jurisdiction, no jurisdiction actually existed; accordingly, congress has, from time to time, vested in the courts of the United States jurisdiction in this class of cases, as it is a dormant power that springs into life only by virtue of an act of congress.

The law of April 10th, 1806 (2 Stat. 372), provides that "the bond heretofore given, or which may hereafter be given, by the marshal of any district, for the faithful performance of the duties of his office, shall be filed and recorded in the office of the clerk of the district court, or circuit court, sitting within the district for which such marshal shall have been appointed." The second section provides that "it shall be lawful, in case of the breach of the condition of any such bond, for any person, persons, or body politic, thereby injured, to constitute a suit upon such bond, in the name and for the sole use of such party, and, thereupon to recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for such party in due form; and, in case such party shall fail to recover in the suit, judgment shall be rendered and execution may issue for costs in favor of the defendant or defendants, against the party who shall have instituted the suit, and the United States shall in no case be liable for the same."

This court has held in cases which have been formerly considered, that this was, to all intents and purposes, a suit for the sole use and in the name of the party whose interest is affected—in this particular case for the sole use and in the name of George De Loyne; and that it was competent to use, nominally, the name of the United States in instituting the action. It is not compulsory to institute the suit in the name of the person who has been damnified, without the name of the United States—but that the common law right still exists to use the name of the United States for the use of the party.

It is impossible to avoid the conclusion, enforced in the several decisions, that the United States are not substantially the parties upon this record. In the case of McNutt v. Bland, 2 How. [43 U. S.] 9, the supreme court of the United States held that McNutt was not, within the meaning of the law of congress, the party upon the record. But that was a suit upon a sheriff's bond given to the governor of Mississippi, and the party really on the record was the party who was damnified, and for whose benefit the suit was brought. The court maintained the jurisdiction. This being so, it would follow that, in this case, the United States are only nominally a party.

It resolves itself into this: Whether it was the intention of congress, by the second section of the act of 1806, to vest in the courts of the United States jurisdiction where suits were brought on marshals' bonds, on the ground that within the meaning of the language of the constitution, it is a case under the laws of the United States. It is clear that the laws of the United States determine absolutely as to the responsibility of the marshal and his securities. I have come to the conclusion that it was the intention of this act of congress to vest jurisdiction in the United States courts in all cases of marshals' bonds, irrespective of the citizenship of the parties. It will be observed congress does not use the language it sometimes uses—that suit may be instituted on such bond in any court having jurisdiction of the same, state or national, but the language is "to institute the suit upon such bond in the name and for the sole use of the party." Is it presumable that congress, in using this language, intended to apply it to the courts of the states? Is it not, on the contrary, a natural presumption that it was to apply to the courts of the United States over which they had supreme control? Was congress speaking of state courts, where it declared that judgment shall be rendered and execution may issue for such party in due form? Was it not intended to apply to courts of the United States? I think it was, and that congress was giving

directions to the courts of the United States, and that it was the intention of this act of congress to vest in United States courts jurisdiction in this class of cases.

The third section strengthens this view of the case. It provides that "the said bonds shall after any judgment or judgments rendered thereon, remain as a security for the benefit of any person, persons, or body politic injured by breach of the condition of the same until the whole penalty shall have been recovered, and the proceedings shall be always in the same manner and as hereinbefore directed." Then comes in the declaration in relation to the limitation of actions.

This is the conclusion I have arrived at on this subject. The argument from inconvenience is very strong in favor of this construction of the act of 1806. If it was the intention of the act of congress that suit could be brought in the state courts only, on these bonds, it is easy to see it would give rise to conflicts of jurisdiction and questions as to the right of priority of claims. It is true that the language might have been more precise and distinct. It might have specified the courts in which suits were to be instituted; but it has not done so, and the only question is whether it was contemplated by the framers of this law that suits should be instituted in the courts of the United States. I think that is a fair inference from the various provisions of the act.

The motion will be overruled.

Case No. 14,922.

UNITED STATES v. DAVIDSON et al.

[4 Cranch, C. C. 576.] [1]

Circuit Court, District of Columbia. March Term, 1835.

CRIMINAL LAW—JOINT INDICTMENT—TRIAL—WITNESS.

Upon a joint indictment against two, for assault and battery, it is not a matter of right that they should be tried separately, at their request; and neither can be examined as a witness for the other unless there be no evidence against one; in which case the jury may acquit him, and then he may be examined for the other defendant.

Indictment [against Lewis G. Davidson and I. W. Stratton] for assault and battery on a negro, a servant at Fuller's Hotel.

Mr. Brent, for defendants, asked that they might be tried separately, as he wished to examine each as a witness for the other.

THE COURT said that it was perhaps in the discretion of the court to allow it, but that the defendants could not claim it as a matter of right; and that neither can be examined as a witness for the other unless it should appear that there was no evidence against one; in which case the jury may acquit him, and then he may be examined for the other; but if there be any evidence against him he cannot be examined. 1 Chit. Cr. Law, 626, 627.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,923.

UNITED STATES v. DAVIS.

[6 Blatchf. 464.] [1]

Circuit Court, S. D. New York. June 18, 1869.

DISTRICT ATTORNEY—DIRECTIONS FROM ATTORNEY GENERAL—TRIAL—REMOVAL OF PRISONER DURING TRIAL—NEW TRIAL.

1. Whether the attorney general has power to give a direction to a district attorney, in respect to his official action in regard to an indictment found by a grand jury, and presented by such grand jury to the court, for its action thereon, quere.

2. Such a direction, if given, is for the district attorney alone, and does not control the court.

3. Where the court refused to allow a prisoner, indicted for perjury, to read, in opposition to the motion of the district attorney to proceed with the trial of the indictment against him, a letter from the attorney general to the district attorney, directing the latter to allow the prisoner an opportunity to place himself beyond the jurisdiction of the court, and also refused to allow the prisoner to show that he had not been afforded such opportunity, and the trial was proceeded with, and the prisoner was convicted: *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed.

4. Where a prisoner, indicted for perjury, was put upon his trial, and was present, with his counsel, during the empanelling of the jury, and during a portion of the opening of the case to the jury by the district attorney, and was then removed from the court-room, by order of the court, to an adjoining room, with liberty of access for his counsel, because he persisted in interrupting the district attorney, in a loud voice, although admonished by the court to refrain, and the opening by the district attorney proceeded and was concluded during the prisoner's absence, and the prisoner was present during the rest of the trial, and was convicted: *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed.

[Cited in Gore v. State (Ark.) 12 S. W. 565. Cited in brief in Sahlinger v. People, 102 Ill. 243. Cited in Shular v. State, 105 Ind. 300, 4 N. E. 870; State v. Hope (Mo.) 13 S. W. 494.]

This was a motion [by George B. Davis] in arrest of judgment, and for a new trial.

BENEDICT, District Judge. The defendant, who was indicted for having committed perjury in an affidavit made to procure the arrest of Joshua F. Bailey, collector of internal revenue, having been found guilty by the jury, now moves in arrest of judgment, and for a new trial.

The first position taken on his behalf is, that the court erred in granting the motion of the district attorney to put the defendant upon his trial, and in refusing to allow the defendant to read, in opposition to that motion, the directions of Attorney General Evarts, contained in a letter dated February 11th, 1869.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

addressed to Mr. Courtney, then district attorney, and to show that the defendant had not been afforded such an opportunity to leave the country as the attorney general had, in such letter, directed he should have. This ruling, it is insisted, was erroneous, and it is claimed that the court was bound judicially to recognize the instructions of the attorney general, and, consequently, not to put the defendant on trial. I see no reason to doubt the correctness of the ruling complained of. If the attorney general has power to give any directions whatever to a district attorney, in respect to his official action, in regard to indictments found by a grand jury, and presented by such grand jury to the court, for its action thereon, and if, assuming that the attorney general has that power, such a direction as that claimed to have been given by the attorney general in regard to this defendant, can be said to be fairly within its scope, it is certain that such a direction is for the district attorney alone, and that it does not control the court. The court is not bound to construe or consider the official communications made to the district attorney. That responsibility belongs to the district attorney himself, who must act upon his own views of their validity and effect, and who, alone, is known to the court as representing the United States in a criminal case. Accordingly, when the district attorney moves the trial of a criminal case, he is, in the absence of any suggestion of collusion, entitled to have his motion granted, unless legal reasons to the contrary be shown. Neither the wishes nor the instructions of the attorney general furnish, of themselves, such reasons, nor do his communications to the district attorney afford evidence of the facts stated therein, upon which a court can render a decision; while the fact that the defendant was sought to be put upon his trial without having been afforded an opportunity to place himself beyond the jurisdiction of the court, although accompanied with the further fact that instructions to give him such opportunity were issued by the attorney general, would not justify the court in denying the motion of the district attorney to proceed with the trial.

The next point urged in behalf of the defendant is, that he was not personally present during a portion of his trial. This point arises out of the following facts: The defendant was brought into court in custody, and was present, with his counsel, during the empanelling of the jury, and during a portion of the opening of the case by the district attorney. During the opening, he commenced interrupting the district attorney, and persisted in denying his statements, in a loud voice, although admonished by the court to refrain from interrupting. The action of the prisoner continuing to be such as to make it impossible to proceed in the trial with due decorum, he was ordered to be removed from the court-room by the marshal, and to be detained in an adjoining room, with liberty of access for his counsel. The trial then proceeded, under the objection of the prisoner's counsel, so far as to conclude the opening. The trial was then postponed to the next day, when, the defendant having become composed, it was continued and concluded without further disturbance. This statement seems sufficient to dispose of the point in question. The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. The defendant had the opportunity to be present at the whole of his trial. He was, in fact, present while the jury were being empanelled and the evidence was being introduced. He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance.

In addition to the two positions I have thus noticed, several objections to the rulings of the court upon questions of evidence, and to a portion of the charge, have been taken, but none of them are tenable, and they do not appear to be of sufficient importance or novelty to require a discussion here.

The motion is, accordingly, denied.

Case No. 14,924.

UNITED STATES v. DAVIS.

[4 Cranch, C. C. 333.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

INDICTMENT — ASSAULT AND BATTERY — "PERSON UNKNOWN."

Quære, whether an indictment will lie for assault and battery upon "a person unknown," not "unknown to the jurors."

Indictment [against William Davis] for assault and battery, "upon a person unknown," (not "to the jurors unknown,")

Mr. Neale, for defendant, moved in arrest of judgment, that the indictment was too uncertain.

THE COURT, however, overruled the motion; CRANCH, Chief Judge, doubting, because the only reason which can be admitted for not inserting the name of the person assaulted, is, that the person was unknown to the jurors; which is not averred; for the person might be unknown to the attorney of the United States, who sent up the indictment, and might have been known to the jurors. The indictment might be true if the person assaulted was unknown by any person.

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[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,925.

UNITED STATES v. DAVIS.

[4 Cranch, C. C. 606.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

WITNESS—MULATTO BORN OF WHITE WOMAN.

A mulatto born of a white woman, and not in a state of servitude by law, is a competent witness for a white man.

The defendant [Richard Davis] was indicted for an assault and battery with intent to kill one ——— Shorter, a colored man. Upon the trial, a mulatto man named Collins, born of a white woman, and not in a state of servitude by law, was admitted by the court to testify for the defendant, who was a white man.

See Act Md. 1717, c. 13, § 2.

Case No. 14,926.

UNITED STATES v. DAVIS.

[5 Cranch, C. C. 622.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.

CONTEMPT—RETURN TO WRIT OF HABEAS CORPUS—SLAVES—PETITION FOR FREEDOM—SECURITY FOR FORTHCOMING OF PETITIONERS.

1. If the return to a writ of habeas corpus be evasive and insufficient, the party refusing to produce the bodies of the prisoners, if present in court, will be committed until he produce them, or be otherwise discharged.

[Disapproved in Re Jackson, 15 Mich. 430–441. Cited in Rivers v. Mitchell, 57 Iowa, 196, 10 N. W. 628.]

2. If, when produced, the prisoners appear to be held as slaves, and claim to be free, and file their petitions for freedom, the person claiming them as slaves will be required by the court to give security for their forthcoming to prosecute their claim for freedom; and if he fail to give such security, the court will order them to be taken into custody of the marshal for safe-keeping until their trial, or the further order of the court.

Habeas corpus ad subjiciendum, (issued on the 14th of January, 1840,) directed to Thomas N. Davis, commanding him to have before the court the bodies of Israel Brinkley, Emanuel Price, and Maria Course, persons of color, with the cause of their detention. The return of the writ by Davis stated upon oath, that he purchased the three negroes publicly, in the bar-room of Thomas Lloyd's tavern, in the city of Washington, as slaves for life, from one Joseph Woodall, on the 31st December, 1839, and took from him a bill of sale, warranting the title to the negroes, and that they were slaves for life, which bill of sale he produces as part of his return; that he paid for them the sum of $1,200, which he avers to be a reasonable price for them; that he had never any reason to doubt that they were slaves for life, as they were warranted to be. The undersigned avers that the said individuals were removed, as he believes, beyond the District of Columbia, before the service of the said writs of habeas corpus, and before the undersigned heard of the existence of such process; and that the said individuals are now beyond the control and out of the custody of the undersigned, and, as he believes, beyond the District of Columbia. A number of witnesses were sworn and examined, whose testimony tended to show that Davis had removed the negroes, because he suspected that they would apply for a writ of habeas corpus.

Mr. Key, for the prisoners, contended that the answer was insufficient and evasive. It does not deny that the prisoners are in his power; or that he is unable to produce them.

Mr. Key, therefore, moved the court for an attachment against him, and cited Rex v. Winton, 5 Term R. 89. The sending the prisoners away with intent to avoid the expected process of this court, is of itself an obstruction of justice, and a contempt of court.

Mr. Hoban, contra, contended, that the return was a sufficient excuse for not bringing in the bodies of the prisoners, and cited Ex parte Stacy, 10 Johns. 328.

THE COURT (THRUSTON, Circuit Judge, absent), after stating the writs of habeas corpus and return, made the following order: "The court, having examined and considered the return of the said Thomas N. Davis, to the writs of habeas corpus aforesaid, and having heard counsel thereupon do adjudge the said answer to be evasive and insufficient, and that the said Davis is bound to produce the bodies of the said negroes, mentioned in the said writs, before the court; and the said Davis being now present in court, and refusing to produce the said negroes, it is therefore, this 16th day of January, 1840, ordered that the said Davis be committed to the custody of the marshal, until he shall produce the said negroes, or be otherwise discharged in due course of law."

On the 18th of January, 1840, it was further ordered by THE COURT, that, "in case the said Emanuel Price and Maria Course shall be surrendered by the said Thomas N. Davis, or by any other person for him, to the marshal, he shall take the said negroes into his custody, subject to the further order of the court, and that he then discharge the said Davis from jail."

The negro Israel Brinkley had run away, and had been taken up and lodged in jail in Baltimore. On the 20th of January, 1840, being the last day of the term, the said Davis having brought into court the negroes Emanuel Price, and Maria Course, THE COURT made the following order: "Emanuel Price and Maria Course being in court, and having filed their petition for freedom against a certain Thomas N. Davis, to March term next, and the said Davis being present in court,

[1] [Reported by Hon. William Cranch, Chief Judge.]

and the court having required the said Davis to enter into recognizance, in the sum of $1,000, that he would not remove the said negroes out of the jurisdiction of this court, until their right to freedom shall be tried, and a decision thereon had, and the said Davis having refused to give such recognizance; it is therefore ordered that the said negroes be committed to the marshal of this district for safe-keeping, until the further order of the court in the premises." See Laws Md. 1796, c. 67, and Id. c. 43, § 5.

These negroes afterwards established their right to freedom, and were discharged; their jail fees being charged to the United States, and settled in the marshal's accounts.

Case No. 14,927.

UNITED STATES v. DAVIS et al.

[1 Deady, 294.] [1]

Circuit Court, D. Oregon. Oct. 1, 1867.

POSTMASTER—ACTION UPON BOND—COUNTERCLAIM—EXTRA ALLOWANCE—PLEA.

1. In an action by the United States on a postmaster's bond, the defendant may plead a counter claim, if it appear from such plea that the items thereof have been duly presented to the proper department for allowance, and rejected.

2. The act of June 22, 1854 (10 Stat. 293, 299), authorizes the postmaster general in his discretion to make an extra allowance to postmasters for extra labor and expense in certain cases: *Held*, that no postmaster has a right to such allowance until it is made him by the postmaster general—and that the action of the latter in the premises is final, and not subject to judicial review.

3. A plea of counter claim for certain extra services and expenses incurred by a postmaster under the act aforesaid, or the one of July 1, 1864 (13 Stat. 335), should show that the office kept by the defendant was within the act authorizing an allowance on such accounts.

4. The provision of the act of July 1, 1864 (13 Stat. 335, § 5), which enacts, that "the postmaster general, shall allow to the postmaster, a just and reasonable sum for the necessary cost in whole or in part of rent, fuel," etc., is in effect, permissive and not mandatory, and no postmaster has any legal right to such allowance until it is awarded him by the postmaster general.

This action was brought by the United States against the defendant Herman W. Davis, and his sureties—Robert Pentland and James B. Stephens—in his official bond as deputy post-master at the city of Portland, to recover certain moneys alleged to have been received and wrongfully detained by said Davis, while acting as such postmaster.

A. C. Gibbs, for plaintiff.

W. T. Trimble, for defendants.

DEADY, District Judge. The complaint alleges the making of the bond, and that between November 1, 1861, and November 4, 1865, Davis received as postmaster, the sum of $9,032.40, and accounted for $6,006.56 of the same, leaving a balance due the United States of $3,025.84, for which it prays judgment against the defendants.

The answer of the defendants substantially admits the statement of the account as set forth in the complaint, and sets up a counter claim amounting in the aggregate to $4,582.50. The first item in this counter claim is $307, for postoffice stamps delivered to the successor of Davis. The rest of the items are for office rent, clerk hire, gas, fuel and stationery. The plaintiff demurs to the counter claim except the first item. This raises the question as to whether the defendant, Davis, was by law entitled to these allowances for these purposes. The answer avers that the items of the counter claim have been duly presented to the proper department for allowance and rejected. This being the case, if Davis was entitled as a matter of right to incur these expenses and pay them out of the proceeds of the office, he is entitled to have them allowed in this action, notwithstanding the decision of the department.

On the argument of the demurrer, the following acts of congress have been cited by counsel for plaintiff, regulating the compensation and allowances of deputy postmasters, during the period Davis was in office. No other has been cited by counsel for the defendants, and I take it for granted, without further examination, that these are all that exist, touching this subject. Act June 22, 1854 (10 Stat. 293, 299); Act March 3, 1863, §§ 5, 6 (10 Stat. 702); Act July 1, 1864 (13 Stat. 335); and Act March 3, 1865, § 3 (13 Stat. 505).

The act of 1854, regulated the compensation and allowances of Davis, until the act of July 1, 1864, went into effect. This act gave deputy postmasters a certain commission "on the postage collected at their respective offices in each quarter of the year." This act also authorizes the postmaster general to make certain allowances to postmasters at distributing and separating offices, for extra labor and necessary expenses incurred by them in the discharge of these special duties of distributing and separating the mails. But the statute is not imperative and gives the postmaster general authority to make this allowance when in his judgment it is proper to do so. The statute commits the matter to the discretion of the postmaster general, and the subordinate cannot claim the allowance as a matter of right. In this case it appears from the answer, that the postmaster general has exercised his authority—his discretion—and refused to make the allowance. When the defendant, Davis, entered upon the office at Portland, he virtually agreed to perform the duties of the position for the commission allowed by law, and such further allowances for extra labor and expenses as the postmaster general in his discretion might deem

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

proper to allow him. It seems the postmaster general has not seen proper to make him any allowance. So far as this statute is concerned, this is the end of the case. The extra allowance was to depend upon the award of the postmaster general, and not of a court or jury. The defendant never could have any legal right to an allowance, until it was given him by the judgment of his superior officer, and that officer having directly refused to make the allowance, I cannot see on what ground this counter claim can be sustained.

But this is not all. It does not appear from the answer that the office at Portland is or was, either a distributing or separating office. Even if the statute was absolute and gave these allowances as a matter of right, still the answer must show that the defendant was within its provisions — in other words that the office at Portland was a distributing or separating office. As a matter of fact, it is not pretended that the defendant's office was a distributing office, while I suppose it was a separating office. Now the allowance which the postmaster general may make to a separating office, is a sum sufficient to compensate for "the extra labor necessary to a prompt and efficient performance of the duties of separating and dispatching the mails passing through his office." The allowance is for the extra labor in separating and handling the mail bags and dispatching them to the various offices to which they are directed from the distributing office. Nothing is to be allowed by this act to a separating office for gas, fuel, stationery or office rent.

I find nothing in the act of March 3, 1863, which sustains the counter claim of the defendants. Section 5 requires the postmaster general to make an allowance for clerical service, when "by reason of the presence of a military or naval force near any postoffice, unusual business accrues thereat." The answer does not bring the case of the defendants within this provision. Section 6 provides that "no postmaster shall hereafter, under any pretence whatever, have, or receive, or retain for himself, in the aggregate, more than the amount of his salary." Whether this provision applies to such postmasters, commonly called deputy postmasters, as received a commission upon postage, rather than a fixed salary, I am not prepared to say. But it matters not so far as this case is concerned.

By the act of July 1, 1864, the compensation of postmasters was changed. They were divided into five classes, and to receive salaries in proportion to the compensation received during the two prior years.

Sections 5 and 6 of this act relate to allowances for expenses. The first of these two sections provides, "That at the postoffice of New York, and at offices of the first and second classes, the postmaster-general shall allow to the postmaster a just and reasonable sum for the necessary cost, in whole or in part, of rent, fuel, lights and clerks, to be adjusted upon a satisfactory exhibit of the facts. And at offices of the third, fourth, and fifth classes, such expenses shall be paid by the postmaster, except as in the sixth section provided." Section 6 authorizes the postmaster-general to designate distributing and separating offices at the intersection of mail routes, "and where any such office is of the third, fourth or fifth class of postoffices, he may make a reasonable allowance to such postmaster for the necessary cost, in whole or in part, of clerical services arising from such duties."

To bring this case within either of these sections, I think the answer should contain averments, either that the office kept by Davis was of the first or second class, or had been designated as a distributing or separating office. The court cannot presume that the office at Portland came within either of these categories—it must be averred.

But as this is a question of pleading rather than right, and may be avoided by amendment, if the facts will warrant, I will assume that the office at Portland, since July 1, 1864, was of the first or second class, or that it had been designated as a separating office. It is admitted, I believe, by counsel, that it was never a distributing office. The first assumption would bring the case within the provision of section 5. The language of this section is peculiar—"the postmaster-general shall allow," etc. It might be said, that even where the language of the statute was imperative, and absolutely required the postmaster-general in a given case or contingency, to allow a postmaster certain expenses; yet, still, until the allowance was made, the postmaster would have no legal right to the sum expended, which he could assert in a court in an action against him by the United States. Many reasons of public policy and convenience might be adduced in support of this construction of the statute. But notwithstanding these considerations, I think the contrary conclusion would be more consonant with justice and correct legal principles. When the statute peremptorily requires that the allowance be made, the officer makes the expenditure on the faith of the government, pledged as it were by the words of the statute, and in such case, it seems to me the safer course to hold that such an expenditure constitutes a legal claim against the United States.

But this imperative language "shall allow," is, I think, qualified by what follows—"in whole or in part":—to "require" the postmaster-general to allow an expenditure "in whole or in part," is, in effect, equivalent to authorizing him to allow it or not in his discretion. The amendment to this section contained in section 3 of the act of March 3, 1863, uses the phrase, "authorized to allow, at his discretion." Taken in connection with what appears to have been the uniform policy of

congress in regard to the extra allowances to postmasters, namely, to enable the postmaster-general to allow but not to enable the postmaster to demand as a legal right, I am satisfied the language of section 5 ought to be construed as permissive and not mandatory to the postmaster-general. As to section 6, the language is only permissive; "he may make a reasonable allowance."

Section 3 of the act of March 3, 1865, is amendatory of section 5 of the act of July 1, 1864. It enlarges the items of expenditure for which allowances may be made to postmasters, and includes offices of the third and fourth class as well as the first and third, but leaves it in the discretion of the postmaster-general whether any allowance shall be made or not.

This disposes of the counter-claim of the defendant, so far as demurred to. The demurrer is sustained.

Case No. 14,928.

UNITED STATES v. DAVIS.

[15 Int. Rev. Rec. 10.]

District Court, N. D. Mississippi. Dec. Term, 1871.

VIOLATION OF INTERNAL REVENUE LAWS—ILLICIT DISTILLERY—INDICTMENT—ENTRY ON MINUTES.

[1. If one is engaged in running a distillery upon which the special tax has not been paid, it is immaterial whether he is the owner or has any interest in it, or whether he knows that the special tax has not been paid. If he is acting merely as the agent of another, it is his duty to ascertain whether the law had been complied with.]

[2. It is no ground for arresting a verdict in Mississippi that the minutes of the court do not show that the grand jury returned into court the indictment indorsed and signed by the foreman as a true bill, stating the name of the defendant and the offence with which he is charged. Under the Code of that state, the clerk is required to indorse on the indictment the word "Filed," with the date and his signature as clerk; but no entry is made showing the finding of the indictment unless the party be under arrest or on recognizance.]

[This was an indictment against M. A. Davis upon the charge of keeping an illicit distillery.]

G. Wiley Wells, U. S. Atty.

H. A. Barr and Samuel Ghoulson, for the defence.

HILL, District Judge. The indictment against the defendant contains three counts, based upon the 44th, 7th, and 4th sections or the act of July 20, 1868 [15 Stat. 125]: (1) That the defendant, with one George Davis, carried on the business of a distiller without having paid the special tax therefor as required by law, and with intent to defraud the United States of the tax on the spirits distilled by him. (2) That the defendant and said George Davis carried on the business of distilling spiritous liquors without having given the bond therefor, as required by law. (3) That the defendant and said George Davis did make mash, wort, and wash in a building other than a distillery duly authorized according to law.

The testimony of the seizing officer was, that when he seized said distillery it was in operation and was under the management of the defendant, who then said that he was not the owner, but was employed to carry on the distillery by his brother George Davis, who was then in North Carolina. He found there was nothing about the distillery meeting the requirements of the law to constitute it a lawful distillery; that no special tax had been paid, or any bond given, nor was it insisted by defendant that any attempt had been made to comply with the law, or that it was in any way a legally authorized distillery. The defendant then proved by a witness that George Davis said to defendant that he would pay him (the defendant) twenty dollars per month, and hire a colored man to work on his farm, if he would carry on his distillery for him; that he afterwards saw him at work in the distillery; said witness also proved that the distillery was situated on the land of the defendant, in a building that had been built for that purpose some years since.

THE COURT (charging jury). The indictment charges the defendant, with one George Davis, who is not on trial, in three separate counts, for violations of the revenue laws of the United States. The first count charges that said parties carried on the business of distillers without having paid the special tax therefor, as required by law, and with intent to defraud the United States of the tax on the spirits distilled by them. The second count charges them with having carried on said business without having given the bond therefor, as required by law. The third count charges them with having made wort and wash in a building other than a legally authorized distillery.

All men are presumed to be innocent until the contrary is shown by sufficient proof. That proof should satisfy your minds so that you can rest easy upon the conclusion of guilt, and if it does not so satisfy the mind, you should acquit the defendant. It is incumbent upon the United States to produce such proof, either by their own evidence, or it should arise out of the evidence of the defendant.

To authorize a verdict of guilty under the first count, it is necessary that the proof should satisfy you, as already stated, that the defendant did carry on the business of a distiller, either for himself, or for himself and another, or for another, without having paid the special tax as required by law, and with intent to defraud the United States of the revenue arising from the same. If you shall be satisfied that the business was so carried on, then it is incumbent upon the defendant to show that the special tax was paid; this being required of him, or of the owner; also,

that he was not the owner; it devolves upon the person charged, to show a compliance with the requirement of the law, and that not having been shown by the evidence, the presumption of law is that it has not been done. To carry on the business without having paid the special tax, has the effect to defraud the government of the tax, and the legal presumption is that such was the intention of those who carried it on. If the defendant was not interested in the distillery or its proceeds, yet if he was engaged in running it, or carried it on as the agent of the owner, it was incumbent upon him to know that the special tax was paid, and if he did not do so, then all the presumptions of the law arise against him that do against the owner. The proof shows that the defendant was the owner of the land upon which the still was situate, and that he was the party actually engaged in running it; these facts raise the presumption that he was the owner, and it is incumbent upon him to show by sufficient evidence that he was not such owner.

To justify you in finding a verdict of guilty against the defendant upon the second count you must be satisfied from the proof that he did engage in carrying on the business of a distiller without having given the bond therefor as required by law. It is immaterial whether he was the owner, partner, or agent of the owners; if he was engaged in carrying on the business it was incumbent upon him to ascertain and know that the bond was given as required by law, and if he neglected to do so, and the bond was not given, you will find the defendant guilty as charged under this count; an intention to defraud need not be alleged, or proved; the act makes it an offence to carry on the business without first giving the bond.

To justify you in finding a verdict of guilty against the defendant in the third count, the evidence should satisfy you that the defendant did make mash, wort, or wash in a building other than in a legally authorized distillery; if the proof satisfies you that he did make mash, wort, or wash fit for distillation in the building stated in the proof, you will find the defendant guilty under this count, as he has not shown or offered to show that it was a legally authorized distillery.

If the proof satisfies you of the guilt of the defendant in all the counts in the indictment, you will find a verdict of guilty; if it fails to satisfy you of his guilt in any of said counts, you will find a verdict of not guilty; but if you find him guilty in any one or two of the counts, you will find a verdict of guilty in such count or counts, specifying them, and not guilty in the other or others.

The jury returned a verdict of guilty as to the two first counts, and not guilty as to the third.

The defendant moved the court for a new trial upon the allegation that the court misdirected the jury both as to the first and second counts, and by his counsel insisted that the court should have directed the jury that they should return a verdict of not guilty upon the first count unless the proof satisfied them that the defendant was the owner of the distillery, or had an interest in it, or that he knew that the special tax had not been paid. And that the court should have instructed the jury that unless the proof satisfied them that the defendant was interested in the distillery as owner, or part owner, or that he carried it on with intent to defraud the government of the special tax, or that he knew it had not been paid and that he carried it on with the intent to defraud the government of its revenue. Also that the presumption was that the bond had been given and it was incumbent on the prosecution to show that defendant knew or had good cause to believe that it had not been so given.

After full argument had by the defendant's counsel and the district attorney, it was ordered by THE COURT that said motion be overruled. The defendant then moved the court in arrest of the judgment on said verdict on the grounds that the record did not show the finding and return of the indictment by the grand jury.

The record shows that on the 4th day of July, 1871, the grand jury returned into court in a body and returned a bill of indictment, No. 489, against the persons therein named, and for the offences therein named, indorsed by the foreman a true bill, signed by him as such foreman, and returned to consider further of presentments. The indictment has upon it the following number and indorsement: "No. 489. Filed July 4, 1871. 2 copies issued. G. R. Hill, Clerk."

It was contended by defendant's counsel that by the common law as well as by the statutes of every state, the minutes of the court must show that the grand jury returned into court the indictment indorsed and signed by the foreman a true bill, stating the name of the defendant and the offence with which he is charged. Otherwise no conviction and judgment can be legally had upon such indictment.

After argument by counsel, THE COURT held that, while the rule contended for might have prevailed at common law, and might prevail in some other states, such was not the case in this state, the provisions of the Code being that the clerk shall indorse on the indictment "Filed" with the date, and sign his name, as clerk; but that no entry shall be made showing the finding of the indictment on the minutes of the court, unless the party shall be under arrest or on recognizance, and that the fact of the return of the indictment shall not be made known to any but the court and its officers until after the arrest of the parties charged. This is the law, not only in this state, but in many other states, and is for the purpose of preventing escapes. This court, conforming as nearly as possible to the

state laws, has since its organization adopted the same rule, with this addition, that the minutes do show the return of the bill by its number, which number, under the inspection of the court and the entry on the minutes of the return with the number, is also done under the inspection of the judge, so that almost if not quite as much certainty is obtained for the protection of the defendant as under the practice insisted upon, and that the reasons offered in support of the motion are insufficient, and the motion is thereupon overruled.

The facts showed that the defendant is a man in very moderate circumstances, with a large family and feeble wife dependent upon him for support; that the distillery was a very small concern, situate in a remote neighborhood; and that the probabilities are that he was ignorant as to the revenue laws, and, in consideration of which, the court imposed a fine of one thousand dollars, and six months' imprisonment, and expressed the hope that the executive clemency may grant him and his dependent family relief.

Case No. 14,929.

UNITED STATES v. DAVIS.

[3 McLean, 483.] [1]

Circuit Court, D. Michigan. Oct. Term, 1844.

BANKRUPTCY—DISCHARGE—GOVERNMENT CLAIM—SURETY FOR POSTMASTER—DEFAULTER—LIMITATIONS.

1. The surety of a postmaster is entitled to a discharge under the bankrupt law [of 1841 (5 Stat. 440)].

[Cited in Saunders v. Com., 10 Grat. 495, 496.]

2. In England a general statute does not embrace the king, unless specially named. And this doctrine has been adopted to a considerable extent in this country.

[Cited in Dollar Savings Bank v. U. S., 19 Wall. (86 U. S.) 239.]

3. The statute of limitations does not bind the government, unless it be specially named.

[Cited in U. S. v. The Rob Roy, Case No. 16,179.]

[Cited in brief in Re Fox's Will, 52 N. Y. 531. Cited in Mayrhofer v. Board of Education, 89 Cal. 112, 26 Pac. 646.]

4. In the post office act, government is bound to sue a surety of a postmaster, in two years after the defalcation, or it is barred.

5. A public defaulter is excluded from the benefit of the bankrupt law.

[Cited in U. S. v. Herron, 20 Wall. (87 U. S.) 255.]

6. This is personal, because he has been unfaithful in his public duties.

7. But a surety is not excluded from the benefit of the act. And being discharged, he may plead it in bar of a suit by the government.

[Cited in U. S. v. Throckmorton, Case No. 16,516; U. S. v. Herron, 20 Wall. (87 U. S.) 255.]

At law.

Mr. Bates, U. S. Dist. Atty.

Mr. Emmons, for defendant.

OPINION OF THE COURT. This action is brought against the defendant as surety on the bond of a postmaster. The defendant pleaded a discharge under the bankrupt law. To this plea the plaintiffs demurred, joinder, &c. The question for decision is, whether the defendant as a surety to the government, is discharged under the bankrupt law.

It is a general principle in England, that the king is not bound by a general statutory provision. It must be made to apply to the sovereignty specially to bind it. The same principle has been recognised, to some extent at least, in this country. On this ground it has been uniformly held, that the statute of limitations does not bar a claim of the government, unless the provision be express that it shall be a bar. In the post office act, unless suit be brought against the surety of a postmaster, within two years after the defalcation occurs, the government is barred. In many other cases, the prosecution for certain penalties incurred is limited. But under the general statute, no court has held that the government was barred.

I have always considered this rule of doubtful policy, as against sureties, as it encourages negligence in public officers, and often proves ruinous to individuals. Reposing in the vigilance of the government, a surety of a postmaster, or other public agent, is not apprised of a defalcation, until it is too late to save himself. In these cases, it is especially necessary to apprise the surety of the defalcation at the earliest practicable moment, that he may take the proper steps for his indemnity. Suits have often been commenced from ten to twenty years after the failure of the principal.

The fourth section of the bankrupt law provides, "and such discharge and certificate when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are proveable under this act, and shall and may be pleaded as a full and complete bar," &c.

In the first section of the act, it is declared not to extend to debts which shall have been created in consequence of a defalcation as a public officer, &c. And it is insisted that the debt now claimed did accrue by reason of the defalcation of the postmaster, and, consequently, is not within the act.

This argument is admitted as regards the postmaster, but does the act embrace his surety? The exception against a public defaulter is personal, and is intended to withhold from him a benefit given to others, because he is a defaulter. He has not discharged his duty faithfully to the public, and he is, therefore, excluded from a discharge for a debt thus incurred. But from this special provision, an inference may be drawn that, without such a provision, the law would have embraced the case of a defaulter.

As regards the surety, who is under no

[1] [Reported by Hon. John McLean, Circuit Justice.]

default, and is in no respect censurable for the responsibility incurred, we see no reason why he should not be discharged under the law, from such an indictment. He is literally within the act, and we see nothing in its policy which should exclude him from its benefits. The demurrer is overruled.

Case No. 14,930

UNITED STATES v. DAVIS.

[5 Mason, 356.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1829.

FEDERAL CRIMINAL JURISDICTION—GRANT TO UNITED STATES—LARCENY—CHOSES IN ACTION—"PERSONAL GOODS."

1. The offence of larceny is not punishable under the act of 1790, c. 9 [1 Stat. 112; 1 Story's Laws, p. 80, c. 36], unless committed in a place under the sole and exclusive jurisdiction of the United States; and to bring the case within the statute there must be an averment of such sole and exclusive jurisdiction in the indictment.

[Cited in U. S. v. Andrews, Case No. 14,455; U. S. v. Tierney, Id. 16,517.]

2. "Personal goods," in that statute, do not include choses in action, the latter not being the subject of larceny at the common law.

[Cited in U. S. v. Moulton, Case No. 15,827; U. S. v. Stone, 8 Fed. 251.]

3. Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the United States, it may yet be punishable under the third section of the act of 1825, c. 276 [3 Story's Laws, 2000; 4 Stat. 115, c. 65.]

[Cited in U. S. v. Barney, Case No. 14,524.]

4. Offences are punishable under that section according to the state laws, where they are committed, under circumstances, or in places, in which, before that act, no court of the United States had authority to punish them.

[Cited in Re O'Connor, 37 Wis. 384.]

5. It seems that a reservation on a cession of "concurrent jurisdiction," to serve state process, civil and criminal, in the ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the United States over the ceded place. It merely operates as a condition of the grant.

[Cited in Lasher v. State, 30 Tex. App. 387, 17 S. W. 1065; Sinks v. Reese, 19 Ohio St. 318.]

Indictment against the defendant [Edmund Davis] for larceny. The indictment charged, that the defendant, on the 15th of May, 1829, in the Marine Hospital at Chelsea, in the district of Massachusetts, a needful building belonging to the United States, the site whereof has been and is ceded by the state of Massachusetts to the United States, with force and arms, one trunk of the value, &c., one bank bill of the North Bank, of the value, &c., one bank bill of the Bank of the United States, of the value, &c. (describing also sundry other articles, and gold and silver coins,) and one promissory note, being then unsatisfied &c. of the goods, chattels, monies, and property of Charles Turner, steward and overseer of the said Marine Hospital, then and there in the said Marine Hospital, being found, did then and there feloniously steal, take, and carry away, against the peace and dignity of the said United States, and contrary to the form of the statute of the United States in such case made and provided. Plea, not guilty.

Upon the trial the jury disagreed as to the facts, and were, by consent of the parties discharged from giving any verdict. And thereupon F. Dexter, for the defendant, moved the court to quash the indictment upon an objection, which he had taken at the trial. It was as follows: The present indictment is founded on the act of 1825 (chapter 276, § 3). That section applies only to offences, which have not been previously provided for by the crimes act of 1790, c. 9 [1 Story's Laws, p. 83, c. 36] § 16. The offence described in that section is larceny; and so is that in the present indictment. The offence too is committed in a place within the exclusive jurisdiction of the United States. And if not so, still as the specific offence is provided for, although not when committed in such a place as the Marine Hospital under the cession, it is out of the purview of the act of 1825. The words of that act (section 3) are "that if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall receive the punishment provided by the laws of the state in which the ceded territory is situate. The terms of the statute do not apply to the place, but to the description of the offence. If not punishable when committed in the particular place, still, if the offence is provided for, and punishable when committed in any other place, the statute does not authorize the court to entertain jurisdiction.

Mr. Dunlap, U. S. Dist. Atty., for the United States.

The motion to quash the indictment rests upon two grounds; first, that the indictment is not supported by the statute of 1825 (chapter 276, § 4); secondly, that it is not supported by the statute of 1790 (chapter 36, § 16). It is said, that it is not within the statute of 1825, because the offence is "specially provided for" by the statute of 1790; and not within the statute of 1790, because the indictment does not aver, that the place where the larceny was committed was within the "sole and exclusive" jurisdiction of the United States. The answers offered to these objections to the indictment are these. The offence, charged in the indictment,—stealing a trunk, containing money, bank bills, and a promissory note,—was not provided for by the statute of 1790, for the Marine Hospital at Chelsea was not a place within the "sole and exclusive jurisdiction" of the United States, within the words and meaning of that statute. It was a place where congress must necessarily, by the constitution of the United States (article 1, § 8), exercise "exclusive legislation;" but the act of cession, by the state of Massachusetts, expressly pro-

[1] [Reported by William P. Mason, Esq.]

vides, that the state of Massachusetts shall retain "concurrent jurisdiction," so far as that all criminal and civil processes of the state may be executed within the ceded tract of land, and persons residing there are to be considered inhabitants of the town of Chelsea.

If the cession of the tract to the United States necessarily vested the "sole and exclusive jurisdiction" in the United States, upon the ground, that "jurisdiction" must be "sole and exclusive," then alleging the place, as is alleged in the indictment, to be "under the jurisdiction of the United States," is alleging it to be under the "sole and exclusive jurisdiction;" and, consequently, the indictment, if not supported by the statute of 1825, is, clearly, by that of 1790. It was the opinion of the supreme judicial court of Massachusetts, delivered by Chief Justice Parsons, in relation to offences in the Springfield Armory, in Clary's Case, 8 Mass. 72, that the cession by the state of Massachusetts vested in the United States the sole and exclusive jurisdiction in relation to offences there committed. The word "jurisdiction," in the first section of the statute of 1825, being in relation to the forts, dock-yards, arsenals, and magazines, in the statute of 1790, is evidently there used in the sense of "sole and exclusive jurisdiction."

On the other hand, if the mere possession of "jurisdiction" is not the possession of "sole and exclusive jurisdiction," then the Marine Hospital at Chelsea is not under the "sole and exclusive jurisdiction" of the United States, because of the "concurrent jurisdiction" of Massachusetts, reserved in the cession; and, therefore, it is not a place described in the statute of 1790, and the case falls within the statute of 1825.

The sixteenth section of the statute of 1790 contains the word, "places," but it evidently refers to the third section of that law, in which is contained the following enumeration; "fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States." It is contended, that the word "place," is here used as synonymous with "district of country," and was never intended to apply to a "needful building," like the hospital, as such buildings were not then possessed. This, probably was one of the reasons which induced congress to make the very provision in the statute of 1825.

The statute of 1790 did not provide for this case, for it prohibited, if it prohibited a technical larceny, (which, from the language used, is doubtful,) the stealing of "personal goods" merely. Mr. Dane, in his Abridgment of American Law (volume 7, p. 176), observes, upon this law, that the act does not say, "feloniously stole." In the present case, the only "personal goods" stolen were the trunk. Its contents were monies, bank bills, and a promissory note. Perhaps the monies may be included under the term, "personal goods," but the bank bills and the promissory note, being choses in action, cannot; and, as the larceny was committed at one time and place, it could not be split into two offences. Consequently, the case was not provided for in the statute of 1790, and fell within that of 1825. Goods and chattels are synonymous words. The law dictionaries refer, for a definition of goods, to the word "chattels." Jac. Law Dict. "Goods."

In Com. Dig. tit. "Biens," is an enumeration of what are included in the term, "goods"; neither money nor choses in action are enumerated. Lord Coke, also, makes a similar enumeration; but although he mentions such things as "bows," does not enumerate money nor choses in action. Co. Litt. 118. Jacob's Law Dictionary, word "chattels," contains a similar definition. Money and choses in action, so far from being mentioned as chattels, are expressly stated not to be so. Had choses in action been "personal goods," there would have been no necessity for the various statutes passed to render property of this nature the subject of larceny; for there never was a time in the history of the common law when a felonious taking and carrying away the "personal goods" of another, with intent to steal, was not larceny. These statutes were passed expressly upon the ground, that choses in action were not "personal goods." The words, "personal goods," in the 16th section of the statute of 1790, are evidently used in a common law sense, instead of the word, "chattels," and being in a penal statute, are to receive a strict construction. Because money and choses in action are "assets," it does not follow that they, particularly choses in action, are "personal goods;" for mortgages, leases for years, stocks, &c. are assets in the hands of executors and administrators, though certainly not goods and chattels.

STORY, Circuit Justice. We have considered the motion, and are of opinion, that the objection taken at the bar cannot be maintained in point of law, and the motion ought therefore to be overruled. The crimes act of 1790, c. 9 [1 Story's Laws, p. 83, c. 36] § 16, provides, "that if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin, the personal goods of another," &c. he shall, on conviction, be liable to a certain punishment prescribed by the act. It is clear, that no person is punishable under this act, unless his case falls within the descriptive terms used in the act. If he should take and carry away, with intent to steal or purloin, any thing, not the "personal goods" of another, or should commit the offence in a place not "under the sole and exclusive jurisdiction of the United States," he would not be liable to punishment under the act. And an indictment, which did not contain all the material statements to bring the case within the statute, would be bad, and judgment might, even after verdict, be arrested for the defect. And an indictment, to be properly framed, must follow, if not the

very words, at least the substance of the statute. Now, it is clear, that the present indictment could not be supported for a moment on the act of 1790, for it does not state, that the place is "under the sole and exclusive jurisdiction of the United States," nor does it use the words of the statute, "take and carry away with intent to steal or purloin;" both which defects would be fatal. For in criminal cases, courts of law are not at liberty to make intendments and inferences to support indictments, in the same manner as they may do to support civil actions. How, then, can the court say, upon this motion, that the offence described in this indictment is the same offence provided for in the act of 1790? If the words of the act of 1790 describe the offence of larceny or theft at the common law, still the indictment must use the words of the statute, for it is punishable as a statute offence; and it would not be sufficient to allege, that the party was guilty of larceny or theft. And for the same reason it would not be sufficient to use any other words, not being those of the statute, although in the sense of the common law they may be descriptive of the same offence. Whether the words, "take and carry away with intent to steal," are exactly in all cases of the same legal import with "feloniously steal, take, and carry away," it is unnecessary to consider.

Farther; an indictment on the act of 1790 lies only, where the offence is committed in respect to the "personal goods" of another. To ascertain what is the meaning of these words we must resort to the common law, for that furnishes the proper rule of interpretation. Now, in the strict sense of the common law, personal goods are goods, which are moveable, belonging to, or the property of, some person, and which have an intrinsic value. Bonds, bills, and notes, which are choses in action, are not esteemed, by the common law, goods, whereof larceny may be committed, being of no intrinsic value, and not importing any property in possession of the person, from whom they are stolen, but only evidence of property. See 2 Bl. Comm. 383, 387, 394, 396, 397; 4 Bl. Comm. 232, 233, 234; 2 East, P. C. 587; 2 Russ. Crimes, 1095; 1 Hawk. P. C. bk. 1, c. 33, §§ 34, 35. It is true, that the words "goods" or "chattels," may, in the construction of wills, include bonds, notes, bank-bills, &c.; but this is upon the presumed intention of the testator, where a liberal exposition of his words is allowable, and upon principles derived from the civil and canon law. 2 Rop. Leg. c. 16. But in penal statutes a more strict construction is adopted; and the analogy of the common law in respect to larceny may well furnish the proper rule for decision. We think, then, that "personal goods," in the sense of the act of 1790, do not embrace choses in action. And the present indictment is, in part, founded on a larceny of choses in action.

But the decisive objection against the motion is, that to bring the case within the act of 1790 the offence must be committed in a place within "the sole and exclusive jurisdiction of the United States." The allegation, in the present indictment, is, that the site of the Marine Hospital "has been and is ceded by the state of Massachusetts to the United States;" which allegation is quite consistent with its not being a sole or exclusive jurisdiction. At least the court cannot intend otherwise upon a motion of this nature. It cannot judicially say, that a cession of jurisdiction is, ipso facto, equivalent to, and necessarily a sole and exclusive jurisdiction. If we are at liberty to look into the statute of Massachusetts (March 4, 1826, St. 1825–28, c. 181), ceding jurisdiction of a place for a Marine Hospital in Chelsea, which, as a public statute, we may take notice of, (though we cannot judicially know, that the place described in the indictment was purchased under the authority of that statute,) we shall find, from the terms of that statute, that there was not an unconditional consent to the cession. The words are, "that the consent of this commonwealth be and hereby is granted to the United States to purchase a tract of land, not exceeding ten acres, which shall be found necessary for the Marine Hospital to be built at Chelsea in the county of Suffolk, and may hold the same during the continuance of the use and appropriation aforesaid. Provided, that this commonwealth shall retain, and does hereby retain concurrent jurisdiction with the United States in and over said land so far, that all civil and criminal process, issued under the authority of this commonwealth or any officer thereof, may be executed on any part of said land, or in any building, which may be erected thereon, in the same way and manner, as though this consent had not been granted as aforesaid." And then follows another proviso, "that persons removing upon the tract of land shall be deemed to be inhabitants of Chelsea, and enjoy rights and privileges, and perform duties as such, except serving on juries, or doing military duty." The constitution of the United States has authorized congress "to exercise exclusive legislation over all places purchased by consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." And there is nothing in this act of cession which excludes the exercise of exclusive legislation in this tract of land by congress, for no power to punish offences committed there is retained by the state. If, therefore, by the terms "sole and exclusive jurisdiction," in the act of 1790, no more is meant, than "exclusive legislation," an indictment founded on that act, so far as this objection goes might be maintained. In the case of Com. v. Clary, 8 Mass. 72, the supreme court of Massachusetts considered the mere reservation, in a cession, of a right to execute such civil and criminal process, as

not inconsistent with an exclusive jurisdiction in the United States. And that decision was adopted and followed by the circuit court in U. S. v. Cornell [Case No. 14,867]. In the cession referred to in U. S. v. Cornell, the words, "concurrent jurisdiction" are not to be found in the proviso. But in the cession by the statute of Massachusetts (statute 25th of June, 1798,) referred to in Com. v. Clary, 8 Mass. 72, the words, "concurrent jurisdiction" are found in the same connexion. And indeed the clause of the present cession appears to be borrowed, in substance, from that of the statute of 1798. So that the authority is directly in point. The act of congress of March 2, 1795, c. 105 [1 Story's Laws, 391; 1 Stat. 426, c. 40], seems incidentally to justify the same construction; for it declares cessions for light-houses, &c. made with such reservations, shall be deemed sufficient; and further provides, that where such reservations have not been made, the state process may nevertheless be executed there. But it is not necessary absolutely to decide this point in the present case, since the present indictment does not allege, that the offence was committed in a place under the sole and exclusive jurisdiction of the United States; so that it does not judicially appear to be an offence punishable under that act. If there was a concurrent jurisdiction, the offence is clearly not punishable by the act of 1790; if there was an exclusive jurisdiction, that is not shown on the face of the indictment. Either way, therefore, we cannot say, that the offence is provided for in the place, where it was committed, so as to be punishable by this court, if the party had pleaded guilty under the act of 1790.

But it is said, that it is not necessary, that the offence should be so punishable, to except it out of the operation of the third section of the crimes act of 1825; all that is required is, that the offence should have been provided for by some prior act, as a substantive offence in some place, as in a fort or on the high seas, &c. although not in a hospital. We cannot yield to this argument. The object of the act of 1825 was to provide for the punishment of offences committed in places under the jurisdiction of the United States, where the offence was not before punishable by the courts of the United States under the actual circumstances of its commission. The language of the act is, "that if any offence shall be committed in any of the places aforesaid, (that is, forts, dock-yards, &c. or the site of any other needful buildings,) the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States, &c., be liable to, and receive, the same punishment, as the laws of the state, in which such fort, &c. is situate, provide for the like offence, &c." Now, it is plain, that no law of the United States punished this offence, if the place was not within its sole and exclusive jurisdiction. It was, therefore, within the very words of the section, an offence, "the punishment of which was not specially provided for by any law of the United States." The purposes of the section would be wholly defeated by any other construction of the words; and we can really perceive no solid objection to that, which we have given to it. It appears to us to be a rational and obvious construction of it.

The motion to quash the indictment is therefore overruled.

Case No. 14,931.

UNITED STATES v. DAVIS et al.

[2 N. Y. Leg. Obs. 35.]

Circuit Court, S. D. New York. Aug. 5, 1841.

LARCENY ON HIGH SEAS — CIRCUIT COURT JURISDICTION—INDICTMENT—WITNESS—TRIAL —PRESUMPTION.

1. Where prisoners were jointly indicted under the act of congress of 1790 (section 16), for grand larceny upon the high seas, it was *held* that the taking originally must be upon the high seas to convict the prisoners. [1 Stat. 116.]

2. If the jury believed that the taking was on board of the vessel while lying in the port of Savannah, in the state of Georgia, being one of the United States, the circuit courts of the United States of oyer and terminer, sitting in admiralty, had not jurisdiction of the offence.

3. Bringing the property stolen away from the port of Savannah to the port of New York, did not give the court jurisdiction, although brought on board of an American vessel and on the high seas.

4. The court, on motion of the prisoner's counsel, permitted the case of one of the prisoners to be submitted to the jury separate, so that he could be used as a witness in case he was found not guilty.

5. The prisoner was called after his acquittal, as to the point where the goods were originally taken,—whether on the high seas, or while the vessel lay at Savannah, in Georgia.

6. The court *held* that at the trial they would not stop the proceedings on the ground that the proof did not show a case clearly within the indictment, but that in case the prisoners were convicted, they might move in arrest of judgment for the variance.

7. The court also *held*, that an indictment charging the prisoners with stealing goods, the property of persons unknown, was sufficient, and that where proof was offered that goods had been stolen on board of a vessel on the high seas, consigned to a mercantile firm at the port where the vessel was bound, the proof would be sufficient to convict the prisoners.

8. If there was a reasonable presumption that the taking of the property was felonious and against the will of the true owner, though such owner were unknown, there were sufficient grounds to convict the prisoners.

This was an indictment [against Joshua Davis and John Hanlon] for grand larceny on the high seas, on board of the American brig Excel, belonging to the port of New York, under the act of congress of the United States, passed April 30, 1790 (section 16).

The indictment charged, that the prisoners, on the high seas, on board of said brig, took and carried away 3 pieces of kerseymere cloth, 14 pairs of boots, 22 silver spoons, 10 pieces of table linen, and other articles, of

the value of $300, the personal goods of the master of said vessel, or the owners thereof, or belonging to some person or persons to the jurors unknown. Plea, "not guilty."

The prisoners were jointly indicted and tried together.

The district attorney called William Wendell, who testified that the brig Excel sailed from the port of New York for Savannah, in Georgia, and thence back to the port of New York. That the prisoners and another man by the name of Hobby, were seamen on board of said vessel. The goods stolen were consigned to Prince & Wylder, merchants in Savannah, Georgia. The witness further testified, that he did not know to whom the goods belonged, but they were a part of the cargo of the vessel. He saw Hobby, who was a seaman on board the brig, with a quantity of kerseymere, and also a number of silver table spoons, on shore at Savannah, trying to sell them. On the return voyage of the vessel, Davis told witness that he had been sadly cheated by Hanlon and Hobby, that they had broken open together the forehatch of the vessel, took a parcel containing three pieces of kerseymere, broke open a package and took out 14 pairs of boots, and from another box 22 silver spoons, a quantity of table linen, sheets and diapers, four knives, &c., and that they had only given him $10 for his share, when it was worth 2 or 300. Witness advised Davis to tell the captain, but he answered that he was afraid that Hanlon and Hobby would kill him if he did. Davis further told Wendell that part of the goods were now on board the vessel, in a box, and stated where they were placed. Previous to the arrival of the vessel at quarantine, New York, Wendell told the captain. The secreted goods were then drawn from their hiding place, and the two men arrested on their arrival here.

The master of the vessel for the voyage was next called as a witness, and testified that he had not been aware that any other goods than the kerseymere had been stolen, previous to Wendell's giving him the information. A bill for this had been presented at Savannah, amounting to $98. The packages from which the rest had been taken probably belonged to the country, and sufficient time had not elapsed to hear from them. He also stated, that the men were more likely to have stolen the goods while lying at Savannah than at sea. He further testified that the fact of the robbery having been committed was corroborated by the finding of a box in a house over the forehatch of the vessel, which box contained part of the stolen property, which had been brought back from Savannah to the port of New York, and was not discovered until the vessel arrived at quarantine, in New York, on her return voyage. The captain of the vessel testified that he knew nothing of the robbery by the prisoners until the witness Wendell, to whom the alleged confession was made, informed him of it on the return voyage, about three days before the vessel arrived at quarantine, and that he had not until then known there was such a box on board the vessel.

At this stage of the case the prisoner's counsel contended that the confession of Davis should not be considered as evidence against him. It was given under circumstances of promise which were not good in law, and cited the case of People v. Thorn, reported in 4 City H. Rec. 81. Thorn, Livingston and Tracy, were indicted for a conspiracy to defraud the Merchants' Bank in the city of New York out of $100,000, when the government witness testified that he believed the confession of Thorn was made under the influence of the promise of making him a state's evidence.

The counsel for the prisoners also took another objection,—that it did not appear to whom the goods belonged by the evidence. The district attorney stated that he had no further evidence in the cause. The counsel for the prisoners insisted that they could not be convicted, as it was necessary to prove that the goods taken belonged to some person who had a real existence, and whose name should be correctly set forth in the indictment, and cited 2 Russ. Crimes, p. 162; Archb. Cr. Pl. 176. The counsel stated the indictment did not agree with the statute. The latter states that the goods taken must be personal property of another, whereas the indictment says that they belonged to some person or persons unknown, and "what evidence have we," said the counsel, "that the goods did not belong to the prisoners themselves?" The objections to the confessions of Davis were overruled by the court. The judge stated that in case the prisoners were convicted they could move in arrest of judgment on a case made for want of sufficient proof, should they be advised so to do; but was inclined to hold in the present stage of the case that the proof and the indictment charging the prisoners with stealing goods, the property of persons unknown, was sufficient, and declined to stop the trial.

The prisoners' counsel then stated that they wished to call Hanlon, one of the prisoners, as a witness in the cause, and moved that the case, so far as Hanlon, one of the prisoners, was concerned, might go to the jury separate. His honor, the judge, then permitted the counsel of the prisoner to submit his case on the evidence to the jury, who returned a verdict of not guilty. Hanlon was then put upon the stand, and was asked where it was that Davis took the goods, whether it was on the high seas or in the port of Savannah. The witness stated that he could not tell, for he knew nothing about it.

The prisoner's counsel then summed up to the jury, and argued that the weight of proof went to show that the robbery had

been committed at the town of Savannah, in Georgia, and that therefore this court had no jurisdiction in the premises, as the act of congress required that it should be proved the defendants had "taken and carried away the personal property of another person on the high seas," and that therefore the prisoner must be acquitted, even had he been morally guilty of the robbery, and asked the court to charge the jury that if they believed that the goods were originally taken while the vessel was in the port of Savannah, in Georgia, that this court had not jurisdiction to try the offence, and the prisoner must be acquitted on this ground. They urged that the act of congress of 1790 (section 16), under which the prisoner was indicted, did not confer jurisdiction upon this court for larcenies on board of vessels while they lay within the municipal jurisdiction of any state in the United States, or within the municipal jurisdiction of a foreign state.

THE COURT thereupon, after the summing up of the respective counsel, charged the jury: (1) That it must be proved to their satisfaction that a larceny had been committed, and if they believed the testimony in this cause, there could be no doubt on this point. (2) That it must have been committed on the high seas and on board of an American vessel; and it was a question of fact for them to determine from the evidence whether the property stolen had been taken while the vessel lay at the port of Savannah or upon the high seas. If they found that the goods were stolen while the vessel was on the high seas, they would be bound to convict the prisoners; but if the goods were taken while the vessel lay at the port of Savannah, in the state of Georgia, although the prisoner morally was guilty of the larceny, he could not be punished by this court, under the act of congress, as the statute had not conferred jurisdiction upon this court, and the jury would be bound under the latter hypothesis to acquit the prisoner.

The cause was then submitted to the jury, who retired and returned a verdict of "Not guilty," whereupon the prisoner was discharged.

Ogden Hoffman and F. Marbury, for the United States.

Nash, Noble, Price & Greasley, for prisoners.

Case No. 14,932.

UNITED STATES v. DAVIS.

[2 Sumn. 482.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

COURTS—CRIMINAL JURISDICTION—CRIMES ACT—HIGH SEAS—INTERNATIONAL LAW.

1. A gun was fired from an American ship, lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbor, was killed. *Held*, that the act was, in contemplation of law, done on board the foreign schooner, where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States under the crimes act of 1790, c. 36, § 12 [1 Story's Laws, 85; 1 Stat. 115, c. 9].

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Palliser v. U. S., 136 U. S. 266, 10 Sup. Ct. 1036; Ball v. U. S., 140 U. S. 135, 11 Sup. Ct. 767. Distinguished in Re Dana, 68 Fed. 888.]

[Cited in Re Carr, 28 Kan. 14; Com. v. Macloon, 101 Mass. 21; Johns v. State, 19 Ind. 425; Lindsey v. State, 38 Ohio St. 512; People v. Adams, 3 Denio, 207; People v. Tyler, 7 Mich. 215; Ex parte Rogers, 10 Tex. App. 655; State v. Chapin, 17 Ark. 561; State v. Hall (N. C.) 19 S. E. 603; Thulemeyer v. State (Tex. Cr. App.) 31 S. W. 661.]

2. Quære, if the waters of the harbor of the island of Raiatea are to be deemed the high seas.

3. Semble, that, upon principles of international law, and independent of some statutable provisions or treaty stipulations, courts of justice are neither bound or authorized to remand prisoners for trial to a foreign government, whose laws they are supposed to have violated.

[Cited in Re Sheazle, Case No. 12,734; Re Metzger, Id. 9,511.]

[Cited in Re Fetter, 23 N. J. Law, 315.]

Indictment [against James Davis] for manslaughter of a person, whose name was unknown, against the act of 1790, c. 36, § 12 (1 Story's Laws, 84 [1 Stat. 115, c. 9]). There were two counts, one stating the offence to be committed on the high seas; the other containing a special statement of all the circumstances as to locality, &c. Plea, not guilty.

At the trial, it appeared in evidence from the testimony of the mate, that the defendant (Davis), was master of the ship Rose, an American whale ship. The ship sailed on the voyage in August, 1833. In the course of the voyage, the ship arrived at the island of Raiatea, one of the Society Islands, where she lay for ten or twelve days to recruit, and to cooper her oil. While lying there, a schooner came alongside, which belonged to some persons, who were residents of one of the islands, and was tied to the ship. The deceased was one of the crew of that schooner. Some difficulty having occurred with an Irishman who did not belong to the ship, but was employed on board; and the defendant (Davis) ordered him to be tied up and flogged, which was accordingly done by the mate. The deceased at that time came on board of the ship, and said to the defendant, Captain Davis, do not strike the man across the loins. The defendant told him to go out of the ship, and he immediately left the ship and went on board of the schooner. The Irishman was then put in irons. Sometime after, the boat's crew of the ship Rose came on board and refused to do duty, while the Irishman remained in irons. The defendant told them to go to

[1] [Reported by Charles Sumner, Esq.]

work. They still refused, and one of them (a blackman) took up a handspike. The defendant had previously sent for his gun below, and then had it in his hands; and the blackman having the handspike, said to him; "Shoot straight, if you do not shoot me I will kill you." The defendant then ordered the mate to put the blackman in irons; and while the mate was doing it, the gun, then in the captain's hands, went off, and the mate, upon looking up, saw the deceased was shot, and fall instantly dead on the deck of the schooner. How the gun went off, whether purposely or not, did not appear. The defendant then went below. The deceased had not taken any part in this affray, and was all the time on board of the schooner until he was shot. An examination was afterwards had before the American consul at the island, and the defendant was sent home for trial. From the testimony it further appeared, that the deceased was not an American but was a foreigner, and was believed to be an Englishman. From the testimony and other evidence, it farther appeared, that the island of Raiatea is surrounded or in a great part surrounded by a coral reef, which forms a fine harbor, a half mile wide from the reef to the island. At high water the coral reef is not out of water or visible; but at low water it is, as the natives may then be seen walking on the reef. At high water, the sea of course washes entirely over the reef. There are small islets about the reef, and two places only where vessels can enter. The entrances are narrow, not above twenty rods wide. Pilots are there required at both entrances, and pilotage and port duties are paid. There is no better harbor in the South Seas; and it is not an open roadstead. The ship and schooner, at the time of the occurrence, lay within the reef about one hundred and fifty yards from the shore of the island, about two miles from one of the entrances. The place was commonly called a harbor or port.

Upon this evidence obtained from the witness for the government; Choate for the defendant, without going into any evidence on his side, cited 3 Murray, Enc. Geography, art. Raiatea, p. 159, and 2 Malte Brun, Geography, p. 294, and contended, that upon the government's own evidence, the court had no jurisdiction of the case. He said, that he was prepared to show, that no offence had been committed; but that the defendant had good reason to suppose, that his gun was not loaded, and only pointed it for intimidation; and that he had been tried before the king of the Society Islands, and had been acquitted. But, as he thought, the offence, if any, was not within the jurisdiction of the court. He cited U. S. v. McGill, 4 Dall. [4 U. S.] 426.

Mr. Mills, Dist. Atty., said he was willing to submit the case upon the evidence, to the court and jury.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. We are of opinion, that under the circumstances established in evidence, there is no jurisdiction in this cause. The crimes act of 1790 (chapter 36, § 12), on which this indictment is founded, gives to this court jurisdiction of the crime of manslaughter only when committed "on the high seas." We do not absolutely decide, whether the place where this offence, if any, was committed, was the high seas or not; because that might be affected by considerations of a very delicate and difficult nature, as whether it was high or low tide; for a place may at high water be the high seas, and yet at low water be strictly a part of the land, as is the case on our seashore, according to the well known doctrine in Constable's Case, 5 Coke, 106a. In the present case at high water, the tide of the ocean had full sweep over the place in question; and it may be matter of grave consideration, whether, if the whole reef was at the time covered with water, the whole, including the place where the schooner lay, ought not to be deemed the high seas. But on this we give no opinion.

What we found ourselves upon in this case, is, that the offence, if any, was committed, not on board of the American ship Rose; but on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course, under the territorial government of the king of the Society Islands, with which kingdom we have trade, and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for although the gun was fired from the ship Rose, the shot took effect and the death happened on board of the schooner; and the act was, in contemplation of law, done where the shot took effect. So the law was settled in the case of Rex v. Coombes, 1 Leach, 388, where a person on the high seas was killed by a shot fired by a person on shore, and the offence was held to be committed on the high seas, and to be within the admiralty jurisdiction. Of offences committed on the high seas on board of foreign vessels (not being a piratical vessel,) but belonging to persons under the acknowledged government of a foreign country, this court has no jurisdiction under the act of 1790 (chapter 36, § 12). That was the doctrine of the supreme court in U. S. v. Palmer, 3 Wheat. [16 U. S.] 610, and U. S. v. Klintock, 5 Wheat. [18 U. S.] 144, and U. S. v. Holmes, Id. 412; applied, it is true, to another class of cases, but in its scope embracing the present. We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same, if he had been an Ameri-

can citizen. We decide the case wholly on the ground, that the schooner was a foreign vessel, belonging to foreigners, and at the time under the acknowledged jurisdiction of a foreign government. We think, that under such circumstances, the jurisdiction over the offence belonged to the foreign government, and not to the courts of the United States under the act of congress.

The jury immediately returned a verdict of not guilty.

NOTE. The district judge, immediately on this acquittal, suggested for consideration, whether, under such circumstances, it was not the duty of the court to remand the prisoner to the foreign government for trial. Mr. Justice Story said, that he had never known any such authority exercised by our courts, except where the case was provided for by the stipulations of some treaty. He had great doubts, whether, upon principles of international law, and independent of any statutable provisions, or treaty stipulations, any court of justice was either bound in duty, or authorized in its discretion, to send back any offender to a foreign government whose laws he was supposed to have violated. The district judge acquiesced in this view of the matter; and the prisoner was discharged.

UNITED STATES v. DAVIS. See Cases Nos. 3,621a and 14,820.

Case No. 14,933.

UNITED STATES v. DAWSON et al.

[Hempst. 643.] [1]

Circuit Court, D. Arkansas. April 28, 1853.

COURTS—DISTRICT OF ARKANSAS—INDIAN COUNTRY—STATUTE—CRIMINAL JURISDICTION—INDICTMENT PENDING.

1. Persons indicted in 1845 in the circuit court of the United States for the district of Arkansas, for a felony committed in the Indian country west of Arkansas, and which territory was transferred to the Western district of Arkansas by the act of 3d March, 1851 (9 Stat. 594), are subject to be tried in the court where the indictment was found, and the court in the Western district has no jurisdiction.

2. That act did not deprive the court where an indictment was pending, of the right to try and determine the same.

Indictment for murder.

The indictment was as follows, namely:—

"The United States of America, District of Arkansas, ss.: In the circuit court of the United States, begun and holden within and for the district of Arkansas aforesaid, at the April term thereof, A. D. 1845. The grand-jurors of the United States of America duly elected, impanelled, sworn, and charged to inqure within and for the body of the district of Arkansas aforesaid, upon their oath, present, that James L. Dawson, who is a white man, and not an Indian, late of said district, on the 8th day of July, in the year of Christ, eighteen hundred and forty-four, with force and arms, in that part and portion of the Indian country west of the Mississippi river that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri, west by the Mexican possessions, south by Red river, and east by the west line of the now states of Arkansas and Missouri (the same being territory annexed to the district of Arkansas, for the purposes in the act in that behalf made and provided,) namely, in the district of Arkansas aforesaid, and within the jurisdiction of this honorable court, in and upon one Seaborn Hill, who was a white man and not an Indian, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said James L. Dawson, a certain pistol of the value of five dollars, then and there loaded and charged with gunpowder and one leaden bullet, which pistol the said James L. Dawson, in his right hand, then and there had and held at, to, against, and upon the said Seaborn Hill, then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said James L. Dawson, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder and shot sent forth as aforesaid, the said Seaborn Hill in and upon the left breast of him the said Seaborn Hill, a little below the left pap of him the said Seaborn Hill, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Seaborn Hill then and there with the leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid by the said James L. Dawson, in and upon the left breast of him the said Seaborn Hill, a little below the left pap of him the said Seaborn Hill, one mortal wound of the depth of six inches, and of the breadth of half an inch, of which mortal wound the said Seaborn Hill then and there instantly died. And the jurors aforesaid, upon their oaths aforesaid, do further present, that John R. Baylor, yeoman, who is a white man, and not an Indian, late of said district, on the day and year aforesaid, with force and arms, in the Indian country west of Arkansas, that is to say, in the Indian country bounded and described as aforesaid, and within the jurisdiction of this court, namely, in the district aforesaid, feloniously and wilfully, and of his malice aforethought, was present, aiding, abetting, and assisting the said James L. Dawson, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, and so the jurors aforesaid, upon their oath aforesaid, do say that the said James L. Dawson and John R. Baylor, the said Seaborn Hill, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in that behalf made and provided, and against the peace and dignity of the United States of America aforesaid, and this indictment is founded on the testimony of

[1] [Reported by Samuel H. Hempstead, Esq.]

witnesses sworn to testify before the grand-jury. S. H. Hempstead, Attorney of the U. States, for the Dist. of Arkansas.

"A true bill. P. T. Crutchfield, foreman of the grand-jury.

"Filed April 16th, 1845. Wm. Field, Clerk, by A. H. Rutherford, D. C."

Dawson was arrested on the 8th day of November, 1852, in Texas, by the marshal thereof, on process issued on the indictment, and was delivered to Luther Chase, the marshal of the Eastern district of Arkansas, on the 24th of November, 1852, and was from thenceforward confined in the jail of Pulaski county. John R. Baylor was never arrested.

On the 23d day of December, 1852, Dawson presented to the Hon. DANIEL RINGO, district judge at chambers, a petition for a habeas corpus, setting out the indictment, and his commitment under it, and insisting that all jurisdiction over the case totally ceased after the passage of the act of the 3d of March, 1851, creating a Western district of Arkansas and attaching the Indian country, where this offence was alleged to have been committed to the court of that district; and praying to be discharged from imprisonment.

Joseph Stilwell, U. S. Dist. Atty.

Albert Pike, E. Cummins, and E. H. English, for Dawson.

Before DANIEL, Circuit Justice, and RINGO, District Judge.

RINGO, District Judge. On hearing the petition of James L. Dawson, praying a writ of habeas corpus and discharge from imprisonment, and upon hearing the argument of counsel thereupon, as well on behalf of the prisoner as of the United States, it appears by the showing of petitioner that he stands charged by indictment in the circuit court of the United States for the district of Arkansas with the crime of murder, committed in the Indian country, on a white person, on the 8th day of July, A. D. 1844, within the limits of that part of the Indian country then attached to that district;—that this indictment was in due form found by the grand-jury impanelled and sworn in the circuit court, at the April term thereof, A. D. 1845, and by the jury returned and delivered into court as a true bill, on the 16th day of April, A. D. 1845, and then filed; that writs of capias founded thereupon, for his arrest to answer the United States on said charge have been from time to time by order of court issued thereout, and that the prosecution is still pending: that on and by virtue of one of the writs of capias, issued in due form, bearing date the 20th day of May, A. D. 1852, addressed to the marshal of the district of Texas, and returnable to said court at the April term thereof, 1853, petitioner was on the 8th day of November, 1852, arrested in the state and district of Texas, by a deputy of the marshal of the district of Texas, by whom he was thence conveyed to the district of Arkansas, and on the 24th day of November, turned over and delivered into the custody of Luther Chase, "marshal of the United States for the Eastern district of Arkansas, and by him committed to the jail of Pulaski county in the last-named district, where he has ever since remained and still is imprisoned, to answer to said indictment, and that no cause, other than said charge, indictment, capias, and proceedings exists, or ever did exist for his imprisonment and detention in custody. He therefore claims the benefit of the writ of habeas corpus, and that upon the hearing he may be discharged from imprisonment and custody, on the ground that this court is not possessed of jurisdiction of the crime, because the same if committed, was committed at a place not now within its jurisdiction, the place where said crime is charged to have been committed, being in that part of the Indian country, which by act of congress of March 3, 1851, dividing the district of Arkansas, is attached to the Western district of Arkansas for which a separate district court was by said act created and vested with all the jurisdiction and powers of a circuit court, without any reservation to said circuit court of jurisdiction of any crimes previously committed within the limits of said Western district, or the Indian country attached thereto, or any transfer of any prosecution, or case, then pending in the circuit court, to any other court, and without any provision for the trial of such crimes in the district court for the Western district. Wherefore he insists he is legally discharged from any prosecution for said crime, no court possessing the power to punish offences committed in the Indian country now attached to said Western district committed prior to the creation thereof by the division of said Arkansas district, and is now illegally imprisoned and held in custody to answer the said indictment.

I am not satisfied that by the division of the district, and the attaching of the place and Indian country where the crime is charged to have been committed, to the Western district of Arkansas, the jurisdiction of the circuit court over the crime, and the prosecution thereof were divested, or that this court notwithstanding does not possess ample jurisdiction thereof, and may lawfully proceed to try and punish in such case although the place where the crime was committed, if committed at all, is not now within, or attached to, the Eastern district of Arkansas and within which the place, where by law the circuit court is required to hold its sessions, is situated, and inasmuch as the crime charged against the petitioner is a felony, and no sufficient ground for his discharge from imprisonment is shown, admitting all of the facts to be true, as stated in his petition, (with which is exhibited a duly certi-

ed copy of the indictment and writ of capias, with the return thereto of the marshal above mentioned,) the prayer of the petition is denied.

At the April term, 1853, a motion was made by Dawson, to quash the indictment on the same ground set out in the petition, namely, that the act of 3d March, 1851, creating a court in the Western district of Arkansas, had the effect of destroying the jurisdiction of this court over the case.

This motion was argued, before DANIEL, Circuit Justice, and RINGO, District Judge. Joseph Stilwell, U. S. Dist. Atty. A. Pike, E. Cummins, and E. H. English, for Dawson. Upon this motion the judges differed in opinion and certified two questions to the supreme court, which are stated in the decision of that court, hereafter introduced.

Dawson applied for bail, but the court on hearing the testimony refused his application.

NOTE. The case in the supreme court was argued at the December term, 1853, Mr. Cushing, Atty. Gen., for the United States; and Mr. Lawrence and Mr. Pike, for Dawson; and will be found reported in 15 How. [56 U. S.] 467–494.

Mr. Justice NELSON delivered the opinion of the supreme court:

The defendant was indicted in the circuit court of the United States for the district of Arkansas, for the alleged murder of one Seaborn Hill, in the Indian country west of the state of Arkansas. The defendant is a white man and so was Hill, the deceased.

At a circuit court held at the city of Little Rock, on the 28th of April, 1853, the indictment came on for trial before the judges of that court; whereupon a motion was made on behalf of the defendant, to quash the indictment for want of jurisdiction of the court to try the same. And upon the argument, the judges being divided in opinion, the following question was certified to this court for its decision:—

1. Did the act of congress, entitled "An act to divide the district of Arkansas into two judicial districts," approved the 3d of March, 1851, by which the Western district of Arkansas was created, take away the power and jurisdiction of the circuit court of the United States for the Eastern district of Arkansas, to try the indictment pending against the prisoner, James L. Dawson, a white man, found in the circuit court of the United States for the district of Arkansas, by a grand-jury impanelled on the 16th of April, 1845, for feloniously killing Seaborn Hill, a white man, on the 8th of July, 1844, in the country belonging to the Creek Nation of Indians west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas by the act of congress, approved on the 17th of June, 1844 [5 Stat. 680], entitled "An act supplementary to the act entitled 'An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers,'" passed 30th June, 1834 [4 Stat. 729].

To state the question presented for our decision in a more simple form, it is this: At the time the state of Arkansas composed but one judicial district in which the federal courts were held, the Indian country lying west of the state was annexed to it for the trial of crimes committed therein by persons other than Indians. In this condition of the jurisdiction of these courts, the crime in question was committed in the Indian country, and the indictment found in the circuit court at the April term, 1845, while sitting at the city of Little Rock, the place of holding the court.

Subsequent to this the state was divided into two judicial districts, the one called the Eastern and the other the Western district of Arkansas. The Indian country was attached to, and has since belonged to the Western district. The question presented for our decision is, whether or not the circuit court for the Eastern district is competent to try this indictment, since the change in the arrangements of the districts.

By the 24th section of the act of congress, June 30, 1834 (4 Stat. 733), it was provided that all that part of the Indian country west of the Mississippi river, bounded north by the northern boundary of lands assigned to the Osage tribe of Indians, west by the Mexican possessions, south by Red river, and east by the west line of the territory of Arkansas and state of Missouri, should be annexed to the territorial government of Arkansas for the sole purpose of carrying the several provisions of the act into effect. And the 25th section enacted, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian. The act of congress of June 7th, 1844 (5 Stat. 680), which was enacted after the territory of Arkansas became a state, provided that the courts of the United States for the district of Arkansas should be vested with the same power and jurisdiction to punish crimes committed within the Indian country, designated in the 24th section of the act of 1834, and therein annexed to the territory of Arkansas, as were vested in the courts of the United States for said territory before the same became a state; and that for the sole purpose of carrying the act into effect, all that Indian country theretofore annexed by said 24th section to the said territory, should be annexed to the state of Arkansas.

As we have already stated, the crime in question was committed in this Indian country, after it was annexed for the purposes stated, to the state of Arkansas; and the indictment was found in the circuit court of the United States for the district of Arkansas, which we have seen was coextensive with the state. And if no change had taken place in the arrangement of the district before the trial, there could of course have been no question as to the jurisdiction of the court. But by the act of congress 3d March, 1851, it was provided that the counties of Benton and eight others enumerated, and all that part of the Indian country annexed to the state of Arkansas for the purposes stated, should constitute a new judicial district, to be styled "The Western district of Arkansas," and the residue of said state shall remain a judicial district, to be styled "The Eastern district of Arkansas." The 2d section provides, that the judge of the district court shall hold two terms of his court in this Western district in each year at Van Buren, the county seat in Crawford county. And the third confers upon him, in addition to the ordinary powers of a district court, jurisdiction within the district of all causes, civil or criminal, except appeals and writs of error which are cognizable before a circuit court of the United States. The fourth provides for the appointment of a district attorney and marshal for the district, and also for a clerk of the court.

It will be seen, on a careful perusal of this act, that it simply erects a new judicial district out of nine of the western counties in the state, together with the Indian country, and confers on the district judge, besides the jurisdiction already possessed, circuit court powers within the district, subject to the limitation as to appeals and writs of error; leaving the powers and jurisdiction of the circuit and district courts, as they existed in the remaining portion of the state,

untouched. These remain and continue within the district after the change, the same as before; the only effect being to restrict the territory over which the jurisdiction extends. Hence no provision is made as to the time or place of holding the circuit or district courts in the district, or in respect to the officers of the courts, such as district attorney, marshal, or clerk, or for organizing the courts for the despatch of their business. These are all provided for under the old organization. 5 Stat. 50, 51, 176, 177, 178.

We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it in our judgment necessarily operated to deprive them of it.

It has been supposed that a provision in the sixth amendment of the constitution of the United States has a bearing upon this question, which provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The argument is. that since the erection of the new district out of the nine western counties in the state, together with the Indian country, it is not competent for the circuit court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires that the district within which the offence is committed, and the trial to be had, shall be ascertained and fixed previous to the commission of the offence. But it will be seen from the words of this amendment, that it applies only to the case of offences committed within the limits of a state; and whatever might be our conclusion, if this offence had been committed within the state of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offence was committed out of its limits, and within the Indian country. The language of the amendment is too particular and specific to leave any doubt about it. "The accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall be committed, which district shall have been previously ascertained by law."

The only regulation in the constitution, as it respects crimes committed out of the limits of a state, is to be found in article 3, § 2 of the constitution, as follows:—"The trial of crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed." Accordingly, in the first crimes act, passed April 30, 1790, § 8 (1 Stat. 114), it was provided, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought." A crime, therefore, committed against the laws of the United States, out of the limits of a state, is not local, but may be tried at such place as congress shall designate by law. This furnishes an answer to the argument against the jurisdiction of the court, as it respects venue, trial in the county, and jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offence. These considerations have no application or bearing upon the question.

In this case, by the annexation of the Indian country to the state of Arkansas, in pursuance of the act of 1844 for the punishment of crimes committed in that country, the place of indictment and trial was in the circuit court of the United States for that state in which the indictment has been found and was pending in 1851, when the Western district was set off; and as that change did not affect the jurisdiction of the court as it respected pending cases, but remained the same after the alteration of the district as before, it follows that the trial of the indictment in this court will be at the place and in the court as prescribed by law, which is all that is required in the case of an offence committed out of the limits of a state.

We shall direct, therefore, an answer in the negative to be certified to the court below to the first question sent up for our decision, as we are of opinion the court possesses jurisdiction to hear and give judgment on the indictment.

The second question sent up in the division of opinion is as follows:—Can the district court of the United States for the Western district of Arkansas take jurisdiction of the case aforesaid, so found in the year 1845, in said circuit court for the district of Arkansas?

As our conclusion upon the first question supersedes the necessity of passing upon the second, it will be unnecessary to examine it, and we shall therefore confine our answer and certificate to the court below to the first.

Mr. Justice McLEAN, dissenting.

The facts and law of this case, as I understand them, have led me to a different conclusion from that of a majority of the court. The 24th section of the act of the 30th June, 1834, after making various provisions defining the limits of the Indian country, and imposing penalties for several offences by white persons, provides, "that for the sole purpose of carrying this act into effect, the Indian country bounded east by Arkansas and Missouri, west by Mexico, north by the Osage country, and south by Red river, shall be, and hereby is, annexed to the territory of Arkansas." On the 8th of July, 1844, a murder was committed at the Creek agency, in the Creek country west of Arkansas, for which the grand-jury found a bill of indictment in the circuit court of Arkansas at April term, 1845. By an act of March 3, 1851, it is provided, "that from and after the passage of this act the counties of Benton, Washington, Crawford, Scott, Polk, Franklin, Johnson, Madison, and Carroll, and all that part of the Indian country lying within the present judicial district of Arkansas, shall constitute a new judicial district, to be styled the Western district of Arkansas; and the residue of said state shall be and remain a judicial district, to be styled the Eastern district of Arkansas."

After the division of the district, Dawson the defendant was arrested for the alleged murder; and the question whether the circuit court of the United States sitting within the Eastern district has jurisdiction to try the case, has been referred to this court. When the offence was committed and the indictment was found, the district of Arkansas included the state and the Indian country described; but when the defendant was arrested and the case was called for trial, the district had been divided; and the question is raised in the Eastern district, the murder having been committed in the Western. In the act dividing the district, congress had power to provide that all offences committed in the district before the division should be tried in the Eastern district. But no such provision being made, the question is, whether the jurisdiction may be exercised in that district without it. Since the division of the district, capital punishments have been inflicted in the Western district for offences committed before the division. This deprived the accused of no rights which they could claim under the constitution of the United States or the laws of the Union. The sixth article of the amendment to the constitution declares, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." As the state and district are connected by the copulative conjunction in this provision,

the case before us is not technically within it. The crime is alleged to have been committed within the Indian country which the district includes; but it is not within the state. But the case appears to me to be within the policy of the provision. Nine counties of the state of Arkansas are within the district, and from which the jury to try the defendant might be summoned. This brings the case substantially within the above provision. Had the place of the murder been within one of the above counties, the constitutional provisions must have governed the case. All the rights guaranteed by the constitution would have been secured to the criminal by a trial in the Western district; but those rights are not realized by him on a trial in the Eastern district. And that is made the place of trial because the alleged murder was not committed within the state.

In the 2d section of the 3d article of the constitution it is declared that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as congress may by law have directed." The latter clause of this provision covers the case now before us. The crime charged was not committed within any state; but it was committed within a district, within which such offences are to be tried as "directed by congress." And there seems to me to be no authority to try such an offender in any other district or at any other place. The act of 1834 provides that an offender under the act, when arrested, shall be sent for trial to the district where jurisdiction may be exercised. The punishments inflicted in the Western district of Arkansas for crimes committed before the division of the district, were in accordance with the above provision of the constitution and the principles of the common law, both of which are opposed to a trial of the same offences in the Eastern district. The tribunal is the same in both districts, except the circuit judge may not be bound to attend the Western district; but the Western district includes the place of the crime, which by the laws of England and of this country is the criterion of jurisdiction in criminal cases. This is never departed from where the limits of the jurisdiction are prescribed.

On what ground can jurisdiction be exercised in the Eastern district? Not, I presume, on the ground that the crime was committed before the district was divided. If this be assumed and sustained, the capital punishments which have been inflicted in the Western district for similar offences have been without authority. The offenders have been tried and they have had substantially the benefits secured by the constitution. They have had a jury from the district and as near the vicinage as practicable. These privileges they would not have realized had they been tried in the Eastern district. If tried in the Eastern district the jury must have been summoned from that district, and not from the district in which the offence was committed. The considerations in favor of the Western district as the legal place of trial, greatly outweigh, it seems to me, any that can arise in favor of the Eastern district.

There is, however, a fact which may be supposed of great weight in deciding the question; and that is, the indictment was found before the division of the district. I will examine this. It is admitted the jurisdiction was in the circuit court for the entire district when the indictment was found. This gave jurisdiction; but every step taker in the cause subsequent to the finding of the bill, is as much the exercise of jurisdiction as the finding of the bill. The establishment of the Western district in effect repealed the jurisdiction of the Eastern district as to causes of action arising in the Western district as fully as if the law had declared "no jurisdiction shall hereafter be taken in any case, civil or criminal, which is of a local character and arises in the Western district." Offences committed in that district are made local by the acts of congress. This is not a case where, if jurisdiction once attaches, the court may finally determine the matter. There seems to me to be no reason for such a rule in a criminal case, especially when it is opposed to the policy of the constitution and to the principles of the common law.

A case lately decided in this court may have some bearing on this question. Under the fugitive slave law of 1793 [1 Stat. 302], certain penalties were inflicted for aiding a fugitive from labor to escape. A number of actions were brought in several of the states—in Ohio, Indiana, and Michigan—for the recovery of this penalty; but it was set up in defence that this penalty was repealed by repugnant provisions in the law of 1850 [9 Stat. 462], on the same subject, and this court so held. The actions which had been pending for years were stricken from the docket. But it may be said the repeal in the case stated operated on the right of action. This is admitted. And so it may be said the Western district was repugnant to the Eastern, so far as causes of local actions arise in the Western district; and is not this repugnancy as fatal to the trial, as the repeal of the penalty in the act of 1793? All this difficulty arises from an omission of congress to make in the law dividing the district, the necessary provision; and it appears to me we have no power by construction or otherwise to supply the omission. This could not be done in an action of ejectment. A writ of possession in such a case could not be issued to the Western district on a judgment entered in the Eastern. And if such jurisdiction could not be sustained in a civil action, much less can it be sustained in a criminal case.

If a person guilty of a crime in the Indian country before the division, could not be indicted and tried in the Eastern district, it follows that the fact of the crime having been committed in the Indian country can afford no ground of jurisdiction in the present case. It must rest alone then, it would seem, for jurisdiction on the ground that the indictment having been found in the Eastern district, the same jurisdiction may try the defendants, and if found guilty sentence them to be executed. This view must overcome the locality of the crime, and the right which the defendants may claim to have, a jury as near the vicinage as practicable, at least a jury from the district where the crime was committed. These appear to me to be objections entitled to great consideration. A jurisdiction in so important a case should not be maintained under reasonable doubts of its legality.

The cases referred to in the argument to retain the jurisdiction, do not, as it appears to me, overcome the objections. Numerous instances are cited where the territory of a judicial district has been changed, provision being made in the act that the jurisdiction should be continued where suits had been commenced. This shows the necessity of such a provision, and is an argument against the exercise of the jurisdiction where no provision has been made. And in those cases like the present, where a district has been changed without any provision as to jurisdiction, there is no exercise of it shown in a criminal case, especially where the punishment is death. Where jurisdiction attaches from citizenship of the parties, a change of residence does not affect the jurisdiction. The case of Tyrell v. Roundtree, 7 Pet. [32 U. S.] 464, seems to have no bearing upon this question. That action was commenced by an attachment, which was laid upon the land before the division of the county; and this court said the land remained in the custody of the officer subject to the judgment of the court. An interest was vested in him for the purposes of that judgment. The judgment was not a general lien on it, but was a specific appropriation of the property itself. And they say a division of the county could not divert this vested interest, or deprive the officer of power to

finish a process which was rightly begun. There may be cases where counties have been divided after jurisdiction was taken in a local action, and the suit has been carried into judgment; but such cases afford no authority in the present case.

In the case relied upon as in point, Rhoades v. Selin [Case No. 11,740], the court said: "At the first or second session of this court, which succeeded the passage of the act of 1824, which added this and other counties to the Western judicial district, we were called upon to decide whether the present action, together with some others then on our docket for trial, together with the papers belonging to them, should be sent to the Western district or retained here. After hearing counsel on the question the opinion of the court was that those cases were not embraced either by word or the obvious intention and policy of the act." This does not appear to be a well considered case. The counties were annexed to another jurisdiction, and yet the court speak of "the obvious intention and policy of the act;" and on that ground entertain jurisdiction over cases pending in the former district. This was right in regard to transitory actions; but not where the actions were of a local character.

Ordered to be certified that the circuit court of the United States for the Eastern district of Arkansas had jurisdiction to hear, try, and determine the indictment. [15 How. (56 U. S.) 467.]

At the April term, 1855, the case was tried before the Hon. DANIEL RINGO, district judge, holding the circuit court; absent the Hon. PETER V. DANIEL, associate justice of the supreme court of the United States.

J. W. McConaughey, Dist. Atty., and M. Quail, for the United States.

Albert Pike and S. W. Williams, for the prisoner.

The jury returned a verdict of guilty of manslaughter, and recommended Dawson to the mercy of the court. And the court subsequently pronounced sentence, which was, that the said Dawson should be imprisoned for the space of two years in the common jail of Pulaski county in the state of Arkansas. The case as to John R. Baylor was continued. Upon a petition very numerously signed, Dawson was pardoned by President Pierce, in the summer of 1855.

Case No. 14,934.

UNITED STATES v. DAY.

[6 Am. Law Reg. 632.]

Circuit Court, D. New Jersey. 1858.

CONTEMPT — VIOLATION OF INJUNCTION — SUBSEQUENT DECREE.

1. A contempt of court in the United States courts must arise from disobedience of or resistance to some decree or order in existence. Hence where A., on the 17th day of September, 1852, sold a certain patent while a suit was pending in relation to it, and on the 28th of September, 1852, an injunction was issued, *held*, that the sale was no contempt.

2. The history of the law of contempt in the United States courts traced and discussed.

Report, per GREEN, Master:

This honorable court, by its order dated 23d day of March, 1853, directed the subscriber, one of the masters of the court, to continue the examination of the defendant in this proceeding on interrogatories to be propounded and answered in such form as he should direct, and he hereby reports, that the said defendant attended before him, from time to time, and answered in writing, under oath, the several interrogatories to him propounded, which said interrogatories and answers are returned to this court with this report.

The subscriber would also report, that in pursuance of the order of the court, he examined William H. Rogers, Amos D. Wyckoff and John Helm, witnesses produced before him at the instance of the relator, in reference to the contempt charged in this proceeding, and he hereby returns to this court, with his report, the examination of the said witnesses.

And it is further ordered, that the said master report to the court in writing, whether or not the said defendant is in contempt for having violated an injunction tested on the 28th of September, 1852, and which, directed to Horace H. Day, and his agents, etc., commands them from thenceforth to desist and refrain from making, using, or vending to others to be used, any manufactures, goods, articles or materials, composed of India-rubber, prepared in the manner specified in the patent granted to Nathaniel Hayward, as assigned to Charles Goodyear, or in the manner specified in the patent reissued to the said Charles Goodyear, and from infringing upon and violating the said patent in any way whatsoever. [Case No. 5,569.] The injunction is not to prevent the defendant from manufacturing shirred or corrugated goods, and such other articles as the said defendant is authorized to make under certain articles of agreement made and entered into between him and the complainant.

It appears from the evidence that the writ of injunction was served on Day and Rogers and Wyckoff on the same day it was issued or the day after, and that orders were sent to the factory at New Brunswick, on that day, directed to Mr. Rollo, who was in charge of the establishment, to desist from further manufacturing any articles which would or could be considered a violation of the injunction, and Day, Rogers, Wyckoff and Helm, the witnesses examined before the master, all unite in saying that they believe that the instructions were observed and carried out. But it is insisted on the part of the relator, that Day's conduct before and after the 28th of September, amounts to a violation of the injunction, and that he ought to be adjudged to be in contempt, and most of the evidence taken has had reference to this point.

It appears from the examinations taken before me, that on the 17th of September, 1852, Horace H. Day executed to Rogers & Wyckoff an absolute bill of sale, in consideration of $225,000, for all the stock of goods, fixtures and materials, at 23 Courtland street, New York, and the machinery, and every thing else, except water wheels, in the factories at New Brunswick, at Piscataway, and at Great Barrington; all India-rubber goods on consignment, and a full li-

cense to use in their own business, all the patents or patent rights belonging to Day, and took in payment the promissory notes of Rogers and Wyckoff jointly, twenty-eight in number, from sixty days to thirty-four months, secured by mortgages on the property included in the bill of sale, except the property at Courtland street store; that the sum of fifty dollars was paid by Rogers & Wyckoff to bind the bargain; that Day also executed leases for the factories, &c., at New Brunswick, Piscataway, and Great Barrington, and 23 Courtland street, with conditions that he, Day, should have an office, in which to conduct any other than an India-rubber business, and the privilege of keeping a sign at the door, and over the entrance to his office. A rent is reserved in each of the leases, and the term fixed is seven months and thirteen days.

Rogers & Wyckoff were the clerks of Day, and had property to no very large amount; no inventory was made or appraisement had. Rogers & Wyckoff took possession and opened a new set of books, and bought and sold, and made the usual entries in the books of the firm of Rogers & Wyckoff, and matters continued in this way till the 19th of October, little more than a month, when the parties under their hands and seals, rescinded the bill of sale, leases, mortgages and licenses, and agreed to cancel the notes and mortgages, and Rogers & Wyckoff were to account to Day for the amount sold by them of the purchased goods, and Day agreed to allow Rogers & Wyckoff for all cash paid by them on the purchase of goods then mixed up with the others in the store, and to assume and pay their credit obligations for the same.

It is insisted by the counsel for the relator, that this sale, including some vulcanized rubber, made while the suit was pending, and with a full knowledge of the matter in dispute, is a violation of the injunction. Several cases are cited from the English chancery books in support of their position, and it may be well briefly to examine these cases to ascertain how the law of contempt has been settled in England. The first case cited is from 14 Ves. 136, Osborne v. Tenant. In this case, Lord Eldon, the chancellor, ruled, that as the party, by his attendance in court, was apprised of what the decision of the court would be, and that an injunction would be ordered, and left the court at the moment the decision was pronounced, and did an act to defeat such decision, the court would hold the party to the same consequences, as if the order had been actually made. So, also, in the case of Skip v. Harwood, from 3 Atk. 564, Lord Hardwicke committed the defendant to the Fleet, for contempt, on the ground that he attended in court the whole time that the argument was going on; was present when the opinion was delivered, and left the court just as the decree for an injunction was given, and removed in a fraudulent and collusive manner a part of the partnership effects, which, by the decree, he was restrained from doing. But these cases are distinguishable from this case in several particulars. This case was argued in March, 1852, and no decision was made till the 28th of September, some six months afterwards. The merits had been discussed by able counsel on both sides, upon a very large amount of evidence, not without some doubt as to its weight. No intimation had fallen from the court as to their opinion, and the case was held under advisement till the 28th of September, 1852. Lord Eldon, in a subsequent case of James v. Downes, 18 Ves. 521, revives this subject, and holds this language: "a party cannot be committed for the breach of an injunction, that express species of contempt, unless there is an injunction. There is no instance, previous to the case of Osborne v. Tenant, that the court ventured to consider the act of contempt, unless the party being present in court, heard the order for an injunction made." That if the party was in court while the motion for an injunction was proceeding, he should not escape the process by turning his back before the court pronounced the order "Let the injunction go," for this would be considered a mere contrivance. The judges appear to have laid down no general principle in these cases; each case seems to regulate itself, and depends much upon the temper and peculiar mind of the judge.

To place the suitor within the entire control of the court, is not in harmony with the free institutions of our country, and when the matter was first debated before the master, he felt confident that some legislative enactment would be found, which would define the power of the court, defend its dignity, preserve its order, enforce its decrees, and at the same time protect the liberty of the citizen. What is the legislation on this subject?

In the act of congress to establish the judicial courts of the United States, approved September 24, 1789 [1 Stat. 73], it is provided in the seventeenth section, that all the courts in the United States should have the power to punish by fine and imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before them, and then by the ninetieth rule regulating the practice of the courts of equity of the United States, the practice of the circuit court, unless provided for by rule, should be regulated by the practice of the high court of chancery in England, so far as the same could be reasonably applied. The courts have therefore taken the English cases as their guide, and continued to do so until the year 1831, when congress passed an act entitled an act declaratory of the law concerning contempts of court. See 4 Stat. 487. By this law it is enacted, that the power of the courts of the United States to issue

attachments and inflict summary punishment for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person in the presence of the court, or so near as to obstruct the administration of justice, the misbehavior of any officer in his official transactions, and the disobedience or resistance by officer, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of the court.

As this is an important act, and seems to settle the case before the court, some pains have been taken to ascertain its origin. We find that Hon. James H. Peck, judge of the district court of the United States for the district of Missouri, was impeached by the house of representatives, under the following circumstances: He had delivered an opinion, and given judgment in accordance therewith, in an action pending in his court, in favor of the United States affecting the title to a large tract of land. The losing party appealed from the decision, and before the determination of the case, Judge Peck published in one of the public newspapers, his opinion. The counsel for the applicant published an article, in another newspaper, purporting to expose the errors of doctrine and fact alleged to exist in the opinion of the judge. There is nothing offensive in the language or manner of the article. A few days after the appearance of the article, the judge directed proceedings to be instituted, as for a contempt; in a summary manner, an attachment was issued against the attorney, and he was brought before the judge, but declined submitting to interrogatories, as he wished to recall nothing that he had written. He was, by the order of the judge, committed to prison for twenty-four hours, and suspended from practicing as an attorney in that court for eighteen months. This order was in the spirit and letter of the English cases, and considered as a legitimate exercise of the power vested in the court. But the attorney protested, and the case ultimately reached Washington, and Judge Peck was impeached by the house, and tried before the senate, and escaped conviction by a single vote. The subject of contempt was discussed before the court of impeachment, by the first legal minds of the country—by Wirt and Meredith, by Buchanan and Story, and Spencer and Wickliffe. A few days after this decision, a member of the house of representatives offered a resolution that the committee on the judiciary should be directed to inquire into the expediency of defining by statute all offences which may be punishable as contempt of the courts of the United States, and also to limit the punishment of the same; and Mr. Buchanan, the chairman of that committee, reported the act of the 2d of March, 1831. The action of Judge Peck was considered, by those who voted for his conviction, as a great disparagement of public justice, as an abuse of judicial authority, and as a subversion of the liberties of the people of the United States.

The law passed was beyond doubt intended as a guide for the courts, and to forbid in future all constructive contempts; and that the courts should make use of the writ of attachment for the protection of themselves, and not for the benefit of the party complaining. By this act, to constitute a contempt, there must be a decree or order in existence, and a disobedience or resistance to such decree or order. Applying this reasoning to the sale of the 17th of September, 1852. How can this sale be said to be a disobedience of a decree not entered up till the 28th of September, some ten days afterwards. Besides, Day, and Rogers, and Wyckoff all unite in swearing that they had no intention to defeat the decree of the court, for they one and all say they thought Day would be the successful party. We find in the case of U. S. v. Dodge [Case No. 14,975], the law on this point thus expressed: "If the party against whom an attachment has issued for a contempt, by his affidavit and answers to interrogatories discharge himself of the contempt, no further proceedings can be had against him in the attachment; but if perjury appear, he will be recognized to answer," &c.

But is there anything in this extraordinary sale, and in what took place between its execution and rescission, which can be considered a disobedience to the injunction? There can be no doubt, that a part of the goods sold by Day to Rogers and Wyckoff, consisted of vulcanized rubber, manufactured prior to the 17th of September, and an infringement of Goodyear's patent; and, also, that a part of these goods were sold by Rogers and Wyckoff, before the decision. Did the testimony fix with certainty, that the vending of the vulcanized rubber goods after the service of the injunction was made, under the direction of Mr. Day, I should be inclined to report him in contempt, for I hold the law to be, that as soon as the decree was entered, confirming the right of Mr. Goodyear, all goods manufactured in infringement of that right, were contraband, and any sale or intermeddling with them, would be a using in disobedience of the injunction. But the testimony does not show that after the 28th of September, 1852, Mr. Day manufactured or sold any prohibited article, and his liability, if any, must rest upon his consent and knowledge of what Rogers & Wyckoff did. The law upon this point appears to be, that one may be guilty of a breach of an injunction, by aiding and abetting those who are committing an act inconsistent with it, although he should not actually take part in such act.

Did Rogers & Wyckoff, after the 28th of September, 1852, do any act inconsistent with the injunction? If they did, it must have been by vending the prohibited articles. Now, in the language of one of the cases cited, Magennis v. Parkhurst, 3 Green, Ch. [4 N. J. Eq.] 434, "the party alleging a contempt of

court by breach of an injunction, must make it out clearly to the satisfaction of the court." The defendant has denied the contempt under oath. Does the testimony of Rogers & Wyckoff, and Helm prove it? Helm in his answer, says, that after the 28th of September he mixed rubber compound for heating, for the purpose of making shirred cloth, and nothing else, and there were shoes made up out of the compound, which was prepared, or partially prepared before the decision; nothing but shoes. William H. Rogers estimated the sales at 23 Courtland street, between the 17th of September and the 19th of October, at from $15,000 to $20,000, and to the question, of that sum, about how much was vulcanized India-rubber goods? he answers that if the webbing or shirred cloth be considered vulcanized, then two-thirds of the sales were vulcanized, and he does not recollect that during that period, Day made himself responsible for any debt contracted by Rogers & Wyckoff. He further says that Rogers & Wyckoff continued after the decision, to sell vulcanized rubber goods, including over-shoes, but that Day did not induce him or Wyckoff to sell vulcanized rubber goods to any person; the persons having goods on consignment made returns of their sales to Rogers & Wyckoff, but Mr. Day did not receive any moneys from them; that there was not ever at any time any understanding that Day should have any interest in the business or property after the sale of the 17th of September, or that Rogers & Wyckoff should act as agents for Day, or that the business should be conducted for Day's benefit. Amos D. Wyckoff, who was the principal bookeeper, and was constantly at the store, 23 Courtland street, says that Rogers & Wyckoff did sell vulcanized rubber goods, which had been manufactured by Day before the 17th of September, and included in the sale, but the quantity he cannot tell, and that what remained were retransferred to Day, and remain in the store, No. 23 Courtland street. The testimony of this witness does not show any participation of Day in the sales, or that he aided therein.

It was insisted by the counsel of relator, that the sale of the 17th of September was fraudulent and void, but however unusual the terms of payment may be, and however insufficient the security, still it is not perceived that these are unmistakable marks of fraud. The sale was good between the parties, and passed the title from Day to Rogers and Wyckoff, and however void as against Goodyear, if it had not been rescinded, it is valid between the parties. It cannot be concealed that the sale of the 17th of September, and its rescission, are marked with some extraordinary features, but they do not, in my opinion, make the acts of Rogers & Wyckoff those of Day, and bring him within the severe consequences of having disobeyed the injunction, and thus subject him to fine and imprisonment. Besides any damage which Goodyear may have sustained, can be ascertained and liquidated by the master, who is yet to take an account of all the rubber goods manufactured and sold by the defendant, in violation of the patent of the complainant. Much time has been spent in the investigation of this subject, but the master does not think that it has been misspent, for it was right that this whole transaction should be disclosed. Though the examination in the case was continued for several days, it was not a case of oppression on the part of the complainant.

All these suggestions are respectfully submitted to the court, and the master reports on this branch of the case that, in his opinion, under the true construction of the act of congress, of March, 1831, and the testimony taken, the defendant, Horace H. Day, is not in contempt.

THE COURT subsequently confirmed the master's report. [Unreported.]

UNITED STATES v. DAY. See Case No. 1,581.

Case No. 14,935.

UNITED STATES v. DE BARE.

[6 Biss. 358;[1] 7 Chi. Leg. News, 321; 21 Int. Rev. Rec. 213; 7 Leg. Gaz. 210.]

District Court, E. D. Wisconsin. June, 1875.

INDICTMENT—VARIANCE—RECEIVING STOLEN PROPERTY—CHARACTER OF PROPERTY.

1. Where an indictment for receiving stolen goods charges that the accused received the goods from the principal felon, and the proofs show that they were received from a person to whom the thief had delivered them, the variance is fatal.

2. In a prosecution for receiving stolen postage stamps, the proof was that the thief deposited them in an express office directed to the defendant, and after arrest gave a written order for the property to a postmaster, who took them, and subsequently, by order of the postoffice department, re-deposited them in the express office and they were forwarded to the defendant, who received them. *Held*, that the character of the stamps as stolen property ceased in the hands of the postmaster, and that there could be no conviction.

The indictment charged that on the 19th of November, 1874, the defendant [Reuben E. De Bare] with intent to defraud the United States, wilfully and feloniously received from one Crawford a quantity of postage stamps, the said stamps having been stolen from a post-office of the United States, and the defendant, at the time he received the same, knowing them to have been stolen.

At the trial the testimony disclosed the following facts: In the night of November 12th, 1874, the post-office at Unionville, Missouri, was robbed by Crawford, and postage stamps to the amount of about $156 were stolen. The robber was detected and arrested at

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Quincy, Ill. Previous to his arrest, he had deposited the stamps in the form of an enclosed package in the express office at Quincy, directed to the defendant at Milwaukee, Wis. After his arrest, he surrendered other property stolen from the Unionville post-office, and on request of the Quincy postmaster, gave the latter a written order on the agent of the express company, for the package of stamps. Upon presentation of this order at the express office the stamps were delivered to the Quincy postmaster, who testified that he took the package to his office, opened it, counted the stamps and placed them in the postoffice vault. He thus retained possession of the stamps until subsequently ordered by the post-office department to let them go forward to the consignee. Using the external wrapper and fastenings, he found upon the package when it came to his possession he re-inclosed the stamps and re-deposited them in the express office to be forwarded, the package bearing the identical directions placed upon it by the original consignor.

Testimony was given on the trial to show that the stamps after being thus forwarded, came to the hands of the defendant. The jury were instructed, that in order to convict, it must be proven as charged in the indictment, that the defendant received the stamps from Crawford, and that if the jury should find from the evidence that the Quincy postmaster, as his individual act, or for and in behalf of the post-office department, forwarded the stamps to the defendant, and that the defendant received them from the postmaster and not from Crawford, there must be a verdict of acquittal, even though the stamps were originally stolen by Crawford. The verdict was against the accused. His counsel moved for a new trial on two grounds: (1) That the verdict was against the evidence and the instructions of the court, and moreover, upon the facts proved, that the jury should have been directed to render a verdict of acquittal. (2) That when the stamps came into the hands of the Quincy postmaster, their character was that of stolen property recovered by the owner; that they thereafter ceased to have that character, and that when received by the defendant, they were not, as to the person from whom they came, stolen stamps, and therefore there could be no conviction in this case.

Levi Hubbell, U. S. Dist. Atty.
N. S. Murphey, for defendant.

DYER, District Judge. Careful consideration of the question has confirmed me in the opinion that the instruction given to the jury was right. Undoubtedly it is not, in all cases, essential that an indictment against a receiver should allege by whom the property was stolen. A party may be indicted for receiving goods stolen by persons unknown. In a case where an indictment was objected to because it did not ascertain the principal thief, and did not, therefore, state to whom in particular the prisoner was accessory, it was neld good [Thomas' Case, O. B. 1766];[2] but "where the principal, however, is known, it seems proper to state it according to the truth." 2 East, P. C. 781. It is laid down in the books as a settled principle, that if an indictment allege that the goods were received from the thief, it must be proved that they were received from the thief, and if it appear that the thief gave them to a person from whom the accused received them, it is a fatal variance. In support of this principle, Arundel's Case, 1 Lewis, 115, cited by defendant's counsel, on this motion, is the leading authority. The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that this person was a certain ill-disposed person to the jurors unknown. It was proved that the person who stole the property handed it to J S., and that J. S. delivered it to the prisoner; and Parke, J., held, that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether or not the person from whom he was proved to have received it was an innocent agent of the thier.

Now, in the case at bar, the indictment charges that the defendant received the postage stamps from Crawford. To convict, the proof should conform to the charge. If the proof is that the defendant received the stamps from the Quincy postmaster and not from Crawford, the variance is fatal. Crawford was the principal felon. After arrest, as we have seen, the stamps passed into the possession of the Quincy postmaster, who took them from the express office, and subsequently, by direction of the department, forwarded them to the consignee. There was no relation of principal and agent between Crawford and the postmaster. The former had originally authorized the express company to carry and deliver the stamps to the defendant. By his order in writing, given to the postmaster, he withdrew that authority, ceased to be a party to the contract of transportation, and surrendered the stamps to the postmaster. The subsequent re-deposit of the stamps in the express office, was the act of the postmaster under direction of the department, and I think the case is directly within the principle of Arundel's Case before cited.

I am convinced, therefore, that it would not have been error to have instructed the jury that the variance between the allegation in the indictment and the proof, is fatal to a conviction.

If there be any doubt upon the point thus far discussed, there can be none, I think,

[2] [From 7 Chi. Leg. News, 321.]

concerning the second ground urged in support of this motion. The ownership of these stamps was in the United States. The Quincy postmaster was the agent of the owner. When Crawford surrendered them to this agent they were reclaimed property that had been stolen, but their character as stolen property ceased in the hands of the postmaster, so far as the subsequent receiver was concerned. The moral turpitude of a receiver under such circumstances may be as great as in case the property comes directly from the hands of the thief, because the criminal intent on his part exists equally in both cases. But to create the offense which the law punishes, the property, when received, must, in fact, and in a legal sense, be stolen property. If these stamps were received by the defendant, they did not, when received, upon the proof made, bear this character. They had been captured from the thief by the owner, and the act of forwarding them to the alleged receiver was the act of the owner.

I regard this point conclusively settled upon authority In State v. Ives, 13 Ired. 338, it was held that an indictment for receiving stolen goods must aver from whom the goods were received, so as to show that the person charged received them from the principal felon. If received from any other person the statute does not apply. In Reg. v. Schmidt, L. R. 1 Crown Cas. 15, the case was this: Four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered, and, on the arrival of the parcel at the station for its delivery, a policeman, in the employ of the company, opened it and then returned it to the porter, whose duty it was to deliver it with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, where it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company. Held, that the goods had got back into the possession of the owner so as to be no longer stolen goods, and that the conviction was wrong. The case of Reg. v. Lyons, 41 E. C. L. 122, was cited by counsel for the prosecution in support of a conviction in this case. The report of the case is meager, but it appears that a brass weight had been stolen by a lad in the employ of the prosecutors; and it having been taken from him by another servant in the presence of one of the prosecutors, it was restored to the lad again, in order that he might take it for sale to the house of the prisoner, where he had been in the habit of selling similar articles before. The lad took it and sold it for 6½d. The point was made that as the property had been restored to the possession of the owner it could not afterwards be considered as stolen property. Coleridge, J., said that for the purposes of the day, he should consider the evidence sufficient to sustain the indictment, but would take a note of the objection. The prisoner was convicted and sentenced to transportation, and no change was subsequently made in the judgment of the court. But this case of Reg. v. Lyons is expressly overruled in the case of Reg. v. Dolan, 29 Eng. Law & Eq. 533, Lord Campbell, C. J., delivering a judgment in which Justices Coleridge, Cresswell, Platt and Williams concur. Lord Campbell says: "With regard to the Reg. v. Lyons, I think that the facts cannot be accurately stated. But if they be, I must say that I cannot concur with that decision, and I think that it ought not to be acted upon." Of his previous decision in that case, Coleridge, J., says: "Having no recollection of the case of Reg. v. Lyons, I cannot take upon myself to say it is wrongly reported. But if it is not, I am bound to say that I think I made a great mistake."

Motion for a new trial granted.

UNITED STATES (DE FITCH v.). See Case No. 3,741.

Case No. 14,935a.

UNITED STATES v. DE GRIEFF.

[10 Reporter, 258.] [1]

Circuit Court, S. D. New York. July 29, 1880.

CRIMINAL PROCEDURE—RECOGNIZANCE—RECITING OFFENCE.

Where defendants are arrested and held to bail before a commissioner to appear in a federal court, it is not necessary that the recognizance shall show upon its face that the offence is one embraced within a statute of the United States.

Defendants [Anthony De Grieff and others] were indicted for unlawfully conspiring together to commit an offence against the United States, which is specified in section 5443 of the Revised Statutes. [A motion made to quash the indictment was denied. Case No. 14,936.] They did not appear, and their bail was forfeited.

C. P. L. Butler, Jr., Asst. U. S. Dist. Atty.

Robert S. Green and Benjamin B. Foster, for defendants.

SHIPMAN, District Judge. This is an action at law upon a recognizance. The defendants having been arrested, the recognizance was taken before a United States commissioner for their appearance in court. The defendants insist that the recognizance is invalid; their position is that the commissioner has no power to commit or hold to bail except for offences against the United States; that the recognizance must show upon its face that the officer had jurisdiction; that the act

[1] [Reprinted by permission.]

which is stated in the recognizance is not an offence by any act of congress, and therefore the recognizance is void. The defendants contend that the recognizance must necessarily describe the particular offence which is charged in the indictment. I do not decide this part of the proposition, but I do not by any means concede its truth. U. S. v. George, [Case No. 15,199]; People v. Kane, 4 Denio, 530. The proposition also asserts that the particular offence must be so described that it shall appear upon the face of the recognizance to be an offence which is embraced within a statute of the United States, and that a partial or imperfect description cannot be supplemented by reference in the recognizance to the indictment where the offence is correctly described. In this part of the proposition I do not concur. The general principle in respect to the manner in which offences should be described in recognizances is laid down by Chief Justice Nelson, in People v. Blankman, 17 Wend. 252, as follows: "It is not necessary to set forth the offence in the warrant, mittimus, or recognizance with all the particularity or detail required in an indictment." 1 Chit. Cr. Law, 33. The decision in U. S. v. Hand [Case No. 15,296], which is relied upon by the defendants, is not in point. Judgment for the plaintiff.

Case No. 14,936.

UNITED STATES v. DE GRIEFF et al.

[16 Blatchf. 20.] [1]

Circuit Court, S. D. New York. Feb. 15, 1879.

CUSTOMS DUTIES — INDICTMENT FOR CONCEALING AND DESTROYING PAPERS—COMMISSION OF FRAUD.

1. An indictment for a violation of section 5440 of the Revised Statutes of the United States, charged that the defendants conspired to commit an offence against the United States, that is, to wilfully conceal and destroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States, and the port of New York, from a foreign port, by A., for the purpose of suppressing certain evidence of fraud therein contained, describing the papers and averring that they contained statements from the consignors of A., addressed to and received by him in the due course of his business, showing that said merchandise had been knowingly and fraudulently entered and passed through the custom house at New York, on a false classification thereof as to value, and by the payment of less than the duty legally due to the United States, and which papers were material and important evidence for the United States in any proceedings because of said fraudulent entry, and alleging various acts charged to have been done to effect the object of the conspiracy. On a motion to quash the indictment, it was objected, that it was bad for uncertainty, because it omitted to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise, and because the contents of the papers were not so stated as to enable the court to see that they contained evidence of that fraud: *Held*, that the indictment was sufficient.

2. By section 5443 of the Revised Statutes, it is made an offence to conceal or destroy papers of the description given in said indictment. What it would be necessary to aver and prove on an indictment under section 5443, quere.

3. The case of U. S. v. Cruikshank, 92 U. S. 542, commented on and distinguished.

4. The defendants, though indictable under section 5443, not having been indicted thereunder, may be indicted under section 5440.

[This was an indictment against Anthony De Grieff and others for concealing and destroying papers relating to certain merchandise, liable to duty, for the purpose of concealing evidences of fraud against the United States.]

William P. Fiero, U. S. Asst. Dist. Atty.

Robert S. Green and Aaron J. Vanderpoel, for defendants.

BENEDICT, District Judge. This case comes before the court on a motion to quash the indictment. The provision of law under which the indictment is framed is to be found in section 5440 of the Revised Statutes, where it is provided, that, "if two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." Under this section, it is sought, by the present indictment, to charge the defendants with having conspired to commit one of the offences against the United States which are created by section 5443 of the Revised Statutes. The language of that section is as follows: "Every person who wilfully conceals or destroys any invoice, book or paper relating to any merchandise liable to duty, which has been or may be imported into the United States from any foreign port or country, after an inspection thereof has been demanded by the collector of any collection district, or at any time conceals or destroys any such invoice, book or paper, for the purpose of suppressing any evidence of fraud therein contained, shall be punished by a fine of not more than five thousand dollars, or by imprisonment not more than two years, or both."

The first count charges, that, at a certain time and place, the defendants conspired to commit an offence against the United States, that is to say, to wilfully conceal and destroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States and the port and collection district of New York, from a foreign port, by the firm of A. De Grieff & Co., for the purpose of suppressing certain evidence of fraud against the United States, therein contained. Then follows a description

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

of the papers referred to, coupled with the averment, that said papers contained statements from the correspondents, consignors, and purchasing agents of the said firm of A. De Grieff & Co., addressed to and received by said firm in the due course of their business, showing and tending to show that said merchandise had been knowingly and fraudulently entered and passed through the custom-house, the office of the collector of the port and collection district of New York, upon a false classification thereof as to value, and by the payment of less than the amount of duty legally due to the United States, and which said papers were material and important evidence for the United States in any proceedings because of said fraudulent entry. Then follows a statement of various acts charged to have been done to effect the object of the conspiracy.

The second count begins with reciting the pendency of a suit in rem for the forfeiture and condemnation, to the use of the United States, of certain trimmings which had been imported as stated in the first count, for a violation of the laws of the United States, in the importation of said merchandise, and, also, of a suit against the defendants De Grieff and Triacca, for the recovery of damages for a violation of the laws of the United States, in the said importation. It then charges a conspiracy, as in the first count, describing the papers as in the first count, and avers that said papers contained statements from the correspondents, consignors, and purchasing agents of De Grieff & Co., addressed to and received by said firm in the due course of their business, showing and tending to show fraud and violation of the laws of the United States, in the said importation, which papers were evidence for the United States in the prosecution of the suits aforesaid, and in any proceeding by the United States because of the violation of the laws of the United States, in the importation of said merchandise. Then follows a statement of acts done to effect the object of the said conspiracy, as in the first count.

The third count charges a conspiracy to commit an offence against the United States, that is to say, to wilfully conceal and destroy certain papers relating to certain merchandise, a full description of which is unknown, liable to duty, which had been theretofore imported, for the purpose of suppressing certain evidence of fraud against the United States, therein contained, following with a description of the papers, and a statement of acts done, as in the first count.

The fourth count, after reciting, in the language of the second count, the pendency of suits, charges a conspiracy to commit an offence against the United States, that is to say, to wilfully conceal and destroy certain invoices and papers relating to said dress trimmings, liable to duty, which had been theretofore imported, as stated in the first count, for the purpose of suppressing certain evidence of fraud upon the United States in said importation, following with a list of the said papers described, and averring that said invoices and papers contained statements from the correspondents, consignors, and purchasing agents of De Grieff & Co., addressed to and received by them in the due course of their business, showing and tending to show fraud against the United States, in the importation of said merchandise, and which said papers were important and material evidence for the United States in the prosecution of the said suits, and in any proceedings by the United States because of the violation of the laws of the United States, in the importation of said merchandise. A statement of acts done to effect the object of the conspiracy is then given, as in the first count.

The indictment concludes with the averment, that, by the means aforesaid and in the manner aforesaid, according to the conspiracy, combination and agreement aforesaid, the defendants committed an offence against the United States.

To this indictment it is objected, that it is bad for uncertainty, because it omits to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise described, and because the contents of the papers are not so stated as to enable the court to see that they contained evidence of that fraud.

In support of the objection that the indictment contains no facts showing the commission of a fraud, the argument made is this: Unless there was a fraud upon the United States in connection with the importation of the merchandise described, the papers described could not have contained evidence of such a fraud, and there could be no conspiracy to destroy what did not exist. The foundation of the charge, therefore, is a fraud upon the United States in connection with the importation in question, and facts must be stated to show the commission of such a fraud. The difficulty with this argument, when applied to a case like the present—for a similar argument has been made without avail in regard to indictments for receiving stolen goods and the like (Rosc. Cr. Ev. 867; Archb. Cr. Prac. 939; Rex v. Jervis, 6 Car. & P. 156. See, also, forms, Archb. Cr. Prac. 441, 869)—is, that it proceeds upon the assumption, that the substance of the offence charged is the fraud upon the United States in the importation of the merchandise described. But, the indictment is for a conspiracy to commit an offence against the United States, not for a fraud upon the United States. The rule applicable to indictments of this character has been thus stated: "When looking at a charge of conspiracy to commit an offence, we do not require it (the offence) to be set forth with all the precision requisite in describing the offence itself." Latham v. Reg., 5 Best & S. 635. The result of the cases upon the subject in this country is thus stated in State v. Keach, 40 Vt. 113, 117: "The adjudged ca-

ses uniformly recognize the rule, that a general allegation that two or more persons conspired to effect an object criminal in itself, as to commit a misdemeanor or felony, is sufficient, even though the indictment omits all charges of the particular means to be used." In State v. Parker, 43 N. H. 83, 84, it is said: "If it (the object of the conspiracy) is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such manner as to show that it is within the terms of the statute." Judged by these rules, the present indictment is sufficient. It shows that the defendants conspired to commit an offence against the United States, by averring that the object of the conspiracy was to conceal and destroy certain described papers relating to certain described merchandise liable to duty, and theretofore imported into the United States at the port of New York, from Paris, by the firm of De Grieff & Co., for the purpose of suppressing evidence of fraud against the United States, therein contained. The facts which are here stated consist of an act and an intent, i. e., that the defendants agreed together to do a certain act, namely, to conceal and destroy certain papers, for a purpose designated; and, by section 5443, the concealment or destruction of papers of the description given, for the purpose stated, is made an offence against the United States. The indictment, therefore, sets forth the purpose of the conspiracy in such manner as to show that it is within the terms of the statute, and, accordingly, is within the requirement of the law, as stated in the cases above cited.

What it would be necessary to aver and prove if this were an indictment for the offence created by section 5443, it is unnecessary to determine on this occasion, but, it may be remarked, that a construction of the section that would require proof of a fraud as to which the papers destroyed contained evidence, would nullify the statute in many cases, such, for instance, as where the papers destroyed contain the only evidence of a necessary link in the proof of the fraud. It could hardly have been intended that the successful result of the prohibited act should render its punishment impossible. But, however this may be in the case of a prosecution for the offence created by section 5443, in a case like this, where the substance of the charge is an unlawful agreement made for the purpose of effecting a certain result, to require the circumstances attending the fraud to be set forth, would be to require a statement of the evidence intended to be adduced to prove the facts averred. An objection which, in some cases of conspiracy, may be made, that, owing to the circumstances of the case, the indictment, although sufficient in law, fails to inform the particular defendant of the act intended to be proved against him, is, in such cases, met by the tender of particulars. That objection cannot be here made, for the reason, that this indictment, in addition to stating the conspiracy with due particularity of time and place, gives a description of the papers sufficient to identify them, and as full as the circumstances will permit, and, with as much particularity as can be asked where, from the nature of the case, the papers are not under the control of the prosecution, points out the matter in the papers which it was the object of the conspirators to suppress, and thus fully informs the defendant of the charge upon which he is to be tried.

It is further objected, that the indictment fails to show to the court that the matter in the papers would be evidence of a fraud upon the United States. There is no occasion to question the necessity, which this indictment assumes, of proving, in a case like this, that the result sought to be attained by the agreement to destroy these papers was the suppression of evidence of fraud contained in the papers. But, that is a fact to be shown by evidence as to the terms of the agreement and the surrounding circumstances. Whether those facts and circumstances will warrant the jury in saying that the result which the defendants sought to attain by this conspiracy was that charged in the indictment, is to be determined when the evidence has been given at the trial. It cannot now be determined by the court. Plainly, it would be impossible for the indictment to show to the court that the matter contained in the letters destroyed tended to show that a fraud had been committed, unless it contained the evidence going to explain the statements in the letters, and their significance as bearing upon the question of fraud; and there is no ground to contend that such should be the contents of an indictment of this character. What has, in cases similar, been deemed sufficient for an indictment, may be seen by referring to the form of an indictment for conspiring to suppress evidence, given in 5 Cox, Cr. Cas. Append. No. 3, p. 9.

The decision of the supreme court of the United States in U. S. v. Cruikshank, 92 U. S. 542, has been pressed upon my attention, as a controlling authority adverse to the conclusion above indicated. But, the indictment in Cruikshank Case was not for a conspiracy to commit an offence, and the determination in respect thereto cannot, therefore, be authority in a case like this. That indictment was under the 6th section of the enforcement act of May 30, 1870 (16 Stat. 141), now found, in a modified form, in section 5508 of the Revised Statutes, which makes it an offence against the United States to conspire to do certain described acts with a certain described intent. The ingredients of the offence are found in the provision creating it, and the court held that all those ingredients must be stated in the indictment, with such specification of detail as to enable the court to see that the offence created by the enforcement act had been committed. The present indictment is for a conspiracy of a

different character, made an offence by a different statute, and having different ingredients. By the section under which this indictment is drawn, a crime is committed when the agreement is to commit any offence against the United States, without regard to the result sought to be attained by making the agreement. It is true, that the opinion of the supreme court in the Case of Cruikshank deals, to a certain extent, with the general requisites of an indictment; but I fail to find there any indication of an intention to lay down a rule in regard to the requirements of an indictment like the present, or to state any rule at variance with the law declared in the cases from which I have above quoted. On the contrary, two of those cases are cited with apparent approval, in the opinion of the court. The opinion, indeed, supports the present indictment, for, by way of illustration, it refers to a statute of Maine similar in character to the statute upon which this indictment is drawn, where it is made an offence to conspire to commit any crime punishable by imprisonment in the state prison; but it points out, that an indictment under the statute of Maine, to be good, must specify the crime charged as the object of the conspiracy, so as to enable the court to see whether it be one punishable by imprisonment in the state prison. The present indictment, so judged, is sufficient, for, the charge made is not general, that the defendants conspired to commit an offence against the United States, but it descends to particulars and particularizes the act as being an agreement between the defendants to conceal and destroy certain described papers relating to the importation of certain merchandise, entered into by the defendants for the purpose of suppressing evidence of fraud in connection with that importation, contained therein. The act thus particularized is made by statute an offence against the United States, and it thus appears, that, if proved, it will support a conviction under section 5440. While, therefore, the determination in Cruikshank's Case, cannot control the determination in any case like this, the opinion there delivered is in harmony with the conclusion that the present indictment is sufficient in law to put the defendants upon their trial.

The remaining objection to be considered is, that, upon the showing of the indictment, the defendants should have been charged under section 5443 and cannot be charged under section 5440. This objection is not pressed upon the ground of merger. Clearly, it could not be pressed on that ground, for, there is no merger in crimes of equal rank, such as misdemeanors. U. S. v. McKee [Case No. 15,688]. But, it is supposed that a different ground is taken, by claiming that the facts stated in the indictment show that the conspiracy complained of forms part of an accomplished crime, made punishable by section 5443, and cannot, therefore, be made the subject of a prosecution under section 5440. But, if there be no merger, there is no force in this suggestion. It may well be, that one who has been once tried upon a charge of an offence under section 5443 cannot be again tried under section 5440, for a conspiracy that formed an element of the offence already tried. No such question is here raised. Here, the question is, whether it is competent for the government to put the defendants upon trial for having done what by section 5440, is made an offence against the United States, they never having been before called in question for that act. That offence not having been merged in any other offence, there is no possible ground on which to decide that it cannot be prosecuted. The Case of McKee, above cited, is an authority adverse to such a contention.

The motion to quash is, for these reasons, denied.

[Defendants did not appear, and their bail was forfeited. For an action at law upon the recognizance, see Case No. 14,935a.]

Case No. 14,937.

UNITED STATES v. DE HARO.

[1 Cal. Law J. 195.]

District Court, N. D. California. 1862.

MEXICAN LAND GRANTS—LOCATION OF BOUNDARIES—DECREE FOUNDED ON PAROL EVIDENCE—INTERPRETATION.

[The location of a lot of 100 varas, the claim for which was confirmed by the court, was made solely upon the testimony of a witness who described one of its boundaries as adjoining the "Casa Principal," of an old mission. This language was carried verbatim into the decree. On objections to a survey made under the decree, it appeared that certain outhouses belonging to the mission had been situated on that side of it, and that the words "Casa Principal" might have been used to indicate either that the lot extended to the ruins of these buildings, or beyond them (and including them) to the mission church. In fact, the lot actually occupied by the grantee and built upon by him extended only to the ruins of the outbuildings. *Held*, that the decree would be construed so as to require the boundary to be located at the latter place.]

Survey of grant at Mission Dolores. Rejected [by the board] December 12, 1862. [Upon appeal to the district court, the decree was reversed, and the grant confirmed. Case unreported. This last decision was affirmed by the supreme court. 22 How. (63 U. S.) 293. It is now heard upon the question of the location of the grant.]

HOFFMAN, District Judge. The claim in this case, which is for a 100-vara lot at the Mission Dolores, was rejected by the board for want of any description of the premises, either in the petition or grant, whereby they could be identified. The cause having been appealed to this court, a witness was produced who testified to the location of the lot granted to De Haro. He describes it as situate on Dolores street and adjoining the "Casa Prin-

cipal" of the old mission, on the north side of said house, and on the west side of Dolores street. There is nothing intervening between said lot and the "Casa Principal." De Haro built a house on it, and fenced it in. On this testimony the claim was confirmed. In the decree the description given by the witness is verbatim adopted, and this decree has been affirmed by the supreme court. [22 How. (63 U. S.) 293.]

As to the general location of the lot there is no dispute. In his petition De Haro asks for a lot 100 varas square "in that occupied by the ruins of the houses which formerly belonged to the escolta of the mission." The site of these houses is admitted, and that built by De Haro still exists. It is objected, however, that the southern boundary line of the lot has been run some 75 feet too far to the south, while the claimants contend that this location is necessarily required by the call in the decree for the "Casa Principal." It is to be observed that this call is derived neither from the petition nor the grant, but solely from the description of the lot given by a single witness.

Much testimony has been taken to show what was, at the time of the grant, known as the "Casa Principal" of the mission. It appears that, immediately adjoining the church, a long building extended along the plaza or Dolores street, which contained the kitchen, the rooms occupied by the priests, and those reserved for guests. Beyond this was a small alley way, and immediately adjoining a building called "Trojé," used as a lumber or store room. North of this was an adobe wall, which formed the front of an inclosure containing several houses, in one of which wool was kept. Another was a mill, and a third a house where soap was made. I cannot exactly determine whether the front wall of the mill came to the street, or whether it was situated in the rear of the inclosure, bounded on the street by the adobe wall. To these buildings succeeded the houses occupied by the escolta or guard. The lot has been surveyed so that its southern boundary is the northern end of the building occupied by the priests, and used for the entertainment of guests. It is contended that it should not extend further than the wall of the mill which has been referred to.

The various buildings above described evidently formed part of the establishment. The labors performed were conducted by Indians, under the supervision of the fathers, and the houses themselves were erected by them, and intended and used for supplying the mission with flour, soap, blankets, etc., necessary to its maintenance. Several witnesses swear that all these houses were included under the general name of "Casa Principal," though that term, probably, in strictness, applied only to the building occupied by the priests. But the testimony is clear and uncontradicted that the lot claimed and occupied by De Haro did not extend further south than the wall of the mill. The officer who, as he swears, gave him judicial possession of the land, fixes its southern boundary at that line, and numerous other witnesses testify that he never claimed the land which lay between the mill and the "Casa Principal," proper. Had this testimony been before the court at the time the decree was made, there could have been no question as to the boundary of the lot.

It is claimed, however, that that boundary has been finally determined by the call in the decree for the "Casa Principal." But it has already been observed that this call was taken from, and merely repeats, the language of the only witness who testified to the location of the lot. As the evidence leaves no doubt as to the true southern line of the premises, we are bound to presume that the witness, by the term "Casa Principal," intended to refer to the whole group of buildings, including the "Trojé," the "Savoneria," and the mill, which some of the witnesses declare were included under that name. We have no reason to suppose that he used the term more accurately than they, especially when we know that, if he intended to state that the lot adjoined the "Casa Principal," proper, he stated what was untrue. The "Casa Principal" of the decree must clearly be taken to be the "Casa Principal" referred to by the witness, and what that must have been, if he intended to testify truly, the evidence of the actual occupation, inclosure, and claim of De Haro discloses.

I think, therefore, that the 100-vara lot, confirmed, should be located as it was granted and occupied by De Haro; that is, bounded on the south by the wall of the old mill, and running 100 varas north along the line of Dolores street.

[NOTE. Subsequently the decree in this case, in so far as it seemed to confirm a 100-vara lot, was annulled, and the grant held as covering only a 50-vara lot. Case No. 14,938. For other of the De Haro grants, see Cases Nos. 14,939–14,941.]

Case No. 14,938.

UNITED STATES v. DE HARO.

[1 Cal. Law J. 199.]

District Court, N. D. California. Dec. 17, 1862.

MEXICAN LAND GRANTS — AMBIGUOUS DECREE OF CONFIRMATION—REJECTION OF SURVEY.

[In a clear case of mistake in a decree of confirmation, whereby the claimants might be given more land than they are entitled to, or have claimed, it is the duty of the court, on objections to a survey, to lay hold of any ambiguity or discrepancies in the language of the decree, which will enable it to restrict the claimant to the land actually granted, occupied, and claimed.]

Survey of lot at Mission Dolores. Rejected [by the board] December 17, 1862. [Confirmed by the district court. Case unreported. Affirmed upon appeal by the supreme court. 22 How. (63 U. S.) 293. The question of the survey was considered and an opinion ren-

dered, which held the grant as covering a 100-vara lot along Dolores street. Case No. 14,937. The case is now heard to correct what is claimed to be an error as to the size of the lot.]

OPINION OF THE COURT. It appears, from De Haro's petition to the board, that, previously to the year 1843, he had been put in possession by the prefect, José Ramon Estrada, of certain houses in the mission of Dolores, known as those of the major domos. He therefore asked the governor to legitimate his right of property in them, and to add 50 varas square to the eastward of them. In conformity with this petition, the governor, on the 16th August, 1843, ratified and confirmed the concession of the prefect, "together with—'juntamente con'—fifty varas to the eastward of the said houses, as solicited." In the petition of the claimants to the board, and in the opinion delivered by the latter, the land is described as a single lot of the extent of 50 varas square. It is also stated in the petition that the concession by Estrada was for the same lot, and this concession was ratified by the governor. But this is evidently an erroneous construction of the petition and grant, for those papers show, very unequivocally, that De Haro merely obtained from the prefect the houses, and that he asked the governor to ratify that concession, and for an augmento, or addition, of 50 varas square to the east of them.

The decree of this court, which has been affirmed by the supreme court [22 How. (63 U. S.) 293], describes the land as a "fifty-vara lot, situate in the Mission Dolores, on which lot there is a house which formerly formed part of the establishment of the Mission Dolores, occupied by the major domos thereof, fronting on the plaza, etc., together with and adding thereto, fifty varas to the eastward of, and immediately adjoining, said houses." Under this decree, a survey has been made of two 50-vara lots,—one including the houses, and another, to the eastward and immediately adjoining, not the houses, but the first 50-vara lot. It would seem clear, from the terms of the petition and grant, that the land solicited was a 50-vara lot, including the houses in which De Haro then resided. It can hardly be supposed that he intended to ask for the houses and the land covered by them, and a lot lying wholly to the east of them; for, in that case, he would have no land in the rear of his house, and his lot would have been situated to the east of and wholly detached from it. That such was the understanding of the claimants appears from their own petition to the board, which only asks for a single 50-vara lot.

The decree entered in this court is obscure, and, to a certain degree, repugnant. In the first part it confirms to the claimant a lot on the northeast corner of Center and Dolores streets, fronting on the plaza, etc. The last clause is as follows: "Together with and adding 50 varas to the eastward and immediately adjoining said houses." As the houses stood upon the corner, it is evident that the 50-vara lot situated on the corner must embrace the site of the houses and a considerable piece of land to the eastward of them, for it is not pretended that the houses covered the whole of a 50-vara lot. The second clause of the decree, if it means by the words "50 varas," a lot 50 varas square adjoining the houses on the east, describes land already in a great part included in the first description. The 50 varas last spoken of could not, therefore, have been in addition to the first 50-vara lot; for it was for the same land, except that the first lot began at Dolores street,—that is, was on the corner,—while the second began at the easterly end of the houses, the only difference being a strip of land equal in breadth to the front of the houses.

But to construe the decree as intended to give two 50-vara lots, the second, in great part located on the ground included in the first, is not only to attribute to it an absurdity, but the effect would be to give to the claimants what they have not and could not have claimed under any construction of their grant. It is plain that either they are entitled to the exact site of the houses and a lot 50 varas square to the eastward of them, or else, as they themselves represented to the board, to a single 50-vara lot, including the houses. They cannot, in any event, be entitled to a lot 50 varas deep, on the corner, and another lot 50 varas deep adjoining the houses on the east; for this would be to give them, not the houses and a 50-vara lot in addition, but a lot on the corner with a front equal to the front of the houses, and a depth of 50 varas, and a 50-vara lot in addition.

The attempt, under this grant and decree, to survey two separate 50-vara lots is wholly inadmissible. It is not warranted by the terms of the decree, and is repugnant to the language and obvious meaning of the grant, as well as the claimants' own petition to the board. The claim for a single 50-vara lot, presented to the board, was rejected. It was not suggested to this court, on appeal, that any larger tract was claimed. The notice of appeal, signed by the attorneys for the claimant, is indorsed, "Claim for 50 varas square at the mission." In the petition for a review of the decision of the board, filed in this court, the land is again described as a lot 50 varas square at the Mission Dolores. And the witness produced by the claimants, on the faith of whose testimony the claim was confirmed, only speaks of a single lot, on which the house inhabited by De Haro was situated, and which was of the extent of 50 varas square. It is nowhere pretended that the claimants were entitled to the land covered by the houses and a 50-vara lot in addition; still less, to two 50-vara lots,—one on the corner, including the houses, and a second to the eastward of it.

The decree of the court was evidently intended to follow the language of the grant by confirming the claim to the houses and to a 50-vara lot to the eastward of them. Had this description been adopted, the question as to the true meaning of the grant would have been presented by the decree precisely as by the original papers; and what that meaning is, as understood by the claimant himself, is abundantly clear. But the decree, unfortunately, does not conform to the language of the grant, for it confirms to the claimants, not the houses, and a 50-vara lot to the eastward of it, but a 50-vara lot on the corner, including the houses, and "50 varas to the eastward of said houses." This discrepancy in the decree appears for the first time to have suggested the idea of obtaining two 50-vara lots, instead of the one lot granted; and the record shows that a notice was filed of a motion to reform the decree by adding to the description of the property contained in said decree the words, "together with a parcel of land, 50 varas square, to the eastward thereof." This motion does not appear to have been made, for no order granting or refusing it is found. The decree was subsequently set aside on the discovery, by the district attorney, that the grant bore date when Alvarado was not in office; but, on the production of the original papers, it appeared that the date of the papers had been altered, that they were originally dated during Alvarado's official term, and that the alteration had been made against the interests of the claimants, and was not to be imputed to them. The original decree was therefore reinstated, without amendment. If the language of the decree were explicit and unequivocal, it might be too late now to disturb it, notwithstanding that it might give to the claimants more than they asked for, or any of their witnesses pretended they were entitled to. But in so clear a case of mistake I consider it my duty to lay hold of any ambiguity or discrepancy in its language to enable me to restrict the confirmation to the land actually granted and occupied and claimed. The decree does not say that a parcel of land, 50 varas square, adjoining the houses, shall be added, but "50 varas," which is a line, and not a piece of ground. It says, too, that it shall be in addition to the 50-vara lot on the corner; but this it cannot be, for we have seen that the lot on the corner will include the greater part of a second lot, adjoining the houses on the east.

I think that, in a case like the present, where the decree, prepared by counsel, has evidently been signed by the circuit judge improvidently, and under the idea that it described the land mentioned in the grant, where the claimants have never pretended to have obtained but one lot 50 varas square, where their petition to the board and to this court was for a lot of those dimensions only, and all their testimony referred to a single 50-vara lot, it would be absurd and unjust to allow them, under a decree such as this, to obtain any more land than they were justly entitled to. The survey must therefore be set aside, and a new survey made of a 50-vara lot, beginning at the southwest corner of the old house of the major domos of the mission; running thence easterly, with the line of said house, 50 varas; thence, at right angles, 50 varas; thence, at right angles, parallel with the first line, 50 varas; and thence to the point of beginning.

[For other of the De Haro grants, see Cases Nos. 14,939–14,941.]

Case No. 14,939.

UNITED STATES v. DE HARO.

[Hoff. Dec. 53.]

District Court, N. D. California. 1862.[1]

MEXICAN LAND GRANT — LICENSE TO OCCUPY — EFFECT.

[On a petition for the grant of land for pasturage, the secretary reported that the land was vacant, but suggested that, as the ejidos of the neighboring pueblo had not been designated, the petitioner might "in the meantime" occupy the land under "a provisional license"; and the governor accordingly executed a document permitting the petitioners to occupy the land subject to the measurement which might be made of the ejidos of the pueblo, and providing that they should lose their rights "to this provisional concession" if they violated the conditions thereof. *Held*, that such document gave the petitioners no rights to the absolute fee which should be respected by the United States.]

HOFFMAN, District Judge. On the 12th of April, 1844, Ramon and Francisco de Haro presented a petition to the governor in which they alleged that, being compelled to remove the cattle of their deceased mother from the rancho of José Antonio Sanchez, they desired the grant of a small piece of land called the Potrero de San Francisco, in extent from north to south 2,288 varas, and from east to west 2,508 varas. They further stated that the land could be enclosed, and that they intended to place in it tame cattle, as their father's land was insufficient, and as they had obtained, being minors, his permission to make their petition. This petition was, on the 29th April, referred to the secretary, who, on the same day, reported that the land was vacant, as the mission of San Francisco, within the lands of which it was included, had no property whatever. But he suggests that inasmuch as the ejidos of the pueblo had not been designated, the petitioners might in the meantime occupy the land under a provisional license. In pursuance of this report, a document was signed and issued by the governor, in which he declares that, in conformity with the laws and regulations governing the matter, he has resolved to permit the petitioners to occupy the land, subjecting them to the measurement which may

[1] [Affirmed in 5 Wall. (72 U. S.) 599.]

be made of the ejidos of the establishment of San Francisco, and subject to the following conditions, etc., etc. The 3d condition is as follows: "The land of which mention is made is one-half a square league, and if they violate these conditions they will lose their rights to this provisional concession, which is delivered to the parties for their security and for these ends."

The expediente containing these various documents is found in the archives. The concession is noted on Jimeno's Index and the Toma de Razon for 1844. No doubt of their genuineness can, therefore, be entertained. But on the sheet containing the copy of the provisional license delivered to the party interested, and now produced by the claimants, is found a grant dated May 24, 1844, purporting to be signed by the governor, and reciting that, having ascertained, on proper inquiry, that the grant will neither interfere with the limits of the new town of Yerba Buena nor be injurious to the mission, he (the governor,) "has determined, in accordance with the opinion of the departmental assembly expressed in their decree of this date, to grant the land in full property to Ramon and Francisco de Haro, that they may do what they please with it." The claimants also produced before the board a second grant, dated Sept. 18th, 1844, purporting to have been made by Governor Micheltorena, in which the land is described as of the breadth of 3,000 varas and of the same number of varas in length, and the De Haros are declared the owners of it in full property, in consideration of the services rendered by, and the indebtedness of the public treasury to, their father, Don Francisco de Haro. The first of these two grants, viz. that written on the same sheet of paper as the provisional license and purporting to ratify and make absolute the latter, was clearly proven before the board to be a forgery. It was virtually abandoned by the claimants, by filing, on the 2d March, 1854, the second grant dated Sept. 18th, 1844. On the faith of this title paper the claim was confirmed by the board, though not without grave doubts as to its genuineness. The cause having been appealed to this court, further proof was taken, and on the hearing the second grant, also, with the series of perjuries by which it had been attempted to be supported, was formally abandoned by the counsel for the claimant, and the claim to a confirmation based solely on the provisional license above mentioned and the proofs showing an occupation under it. It is apparent from the terms of this document, that the governor refused to accede to the petition of the De Haros for a grant of the land. But inasmuch as they required a piece of land whereon to place the cattle of their mother, which could no longer remain on the rancho of Sanchez, the governor determined to allow them to occupy temporarily the tract solicited, as it was not then used by the mission. The language of Jimeno indicates with entire precision the nature of the rights intended to be conceded. He speaks of it not as a provisional grant, but a "provisional license" to occupy land. In the document issued by the governor, he declares that "he has determined to permit them to occupy the land"; and in the third condition, the usual phrase which declares that the party shall lose his right to the land (al terreno), in case he violates the conditions, is altered to "he shall lose his right to this provisional concession." That this change of phraseology was not accidental, is apparent on examination of the copy of the permit retained in the archives. This document is in the handwriting of Jimeno. In writing the last condition, he had evidently pursued the usual form, and written "perdera su derecho al terreno y sera," etc.; but recollecting that the instrument was not a grant, and conferred no rights "to the land," he has erased those words, and substituted the phrase above quoted, "perdera su derecho a esta concession provisional," etc. A similar alteration in phraseology appears in the note by Jimeno, of the recording of the grant. Instead of the usual form, "Queda tomada razon de este titulo en el libro correspondiente," the phrase, "Queda tomada razon de esta licencia provisional en el libro correspondiente," is substituted, indicating the clear discrimination in Jimeno's mind between a grant, whether absolute or provisional, and the mere license to occupy, which he was signing. As observed by the counsel for the United States, "These acts of Jimeno give character to the document signed by Micheltorena, and fix its meaning with a certainty."

It is urged on the part of the claimant, that this provisional license carried with it the promise of the absolute fee, or that it was in fact a grant defeasible only in the event that the land was included within the ejidos to be measured, and, as that event has become impossible, that the grant is now single and absolute. But we have already seen by the terms of the document itself, as well as by the language of Jimeno with regard to it, that the right conferred was a mere license to occupy, and that not permanently, but "in the meanwhile," until the ejidos should be measured. The instrument contains no words of grant, either provisional or otherwise, of the land; and it must have been known to the governor and Jimeno that the lands must eventually be included within the four leagues which was ordinarily assigned to pueblos as ejidos. The petition of the De Haros showed, not only that they wished for a grant of the land, but that they were then in want of some place on which to put their mother's cattle. The governor, though he refused to grant the land, very naturally consented to its temporary use for the purpose designated. And the document issued to the parties is precisely such as would effectuate such an intention. I think it

very clear that this instrument cannot be regarded as a conditional grant, defeasible only on the measurement of the ejidos, but that it is a concession, not of any land, but merely of the right to occupy land.

But it is urged that under the Mexican system a concession, even of this nature, implied a promise that the full title should be given, and, when followed by possession and occupation, that an equity arises which the United States are bound to respect. In support of this view the cases of U. S. v. Alviso [23 How. (64 U. S.) 318], decided by the supreme court, and U. S. v. Chaboya [Case No. 14,770], and U. S. v. Bidwell [Id. 14,592], decided by the board and this court, are relied on. In the Case of Alviso the claimant had petitioned the governor for a grant of the land and permission to occupy while the proceedings for the perfection of the title were pending. This petition was granted, and the administrator of the ex-mission of San Francisco directed to report. In 1839 this order was exhibited to the prefect, who agreed to reserve the land for the claimant, and that he might occupy it, referring him to the governor for a complete title. In 1840 the administrator reported that the land was vacant, and did not belong to the mission or any private person. The testimony showed that the occupation of the claimant commenced in 1840, and had continued for fourteen years, that he had improved and cultivated the land, and that his family resided on it. No objection was suggested why the claimant should not have have been a colonist of the portion of the public domain solicited by him, and of which he had been recognized as proprietor since 1840. The court, under these circumstances, refused to disturb his ancient possession. It will be perceived that this case differs from that under consideration in several important particulars. The land solicited was situated on the shores of the ocean, at a distance of from twenty to thirty miles from the mission of San Francisco de Asis. It was vacant, and was not recognized as the property of the mission or any private individual. The propriety of granting it was recognized by the prefect, who permitted the claimants to occupy it, and shown by the report to the administrator to whom the governor referred the petition. There could, therefore, as observed by the supreme court, have existed no objection to making the grant. The right of occupation conceded to the claimant was thus clearly in expectation of the full title, and was in terms solicited by him, and granted by the governor, "while the proceedings for the perfection of the title were pending." When, therefore, after having taken possession of the land, improved, cultivated and built a house on it, in which he had resided as the recognized owner for fourteen years, Alviso presented his claim to the board, it was manifestly unjust to disturb him, because his title had not been perfected. But in the case at bar the land solicited would evidently fall within the ejidos of the pueblo whereon they should be measured. It had even before the date of the petition been enclosed by a wall built by the fathers of the mission. The grant solicited was refused, but a permission to occupy temporarily was given, not, as in Alviso's Case, "while further proceedings for the perfection of the title were pending," but merely until the ejidos should be measured. We look in vain in the expediente for any evidence not only of a promise but even of an intention or expectation, on the part of the governor, to grant the land in full property. But admitting that such an intention or expectation could be inferred from the mere fact that the right to occupy the tract in question temporarily with their mother's cattle was conceded to the petitioners, the case in other respects is far weaker than of Alviso.

It is, I think, conclusively established by the proofs, notwithstanding some evidence to the contrary, that the petitioner neither resided on nor cultivated the land. After the grant, as before, they continued to live with their father at the mission, or at his rancho of San Bruno. They no doubt repaired the old wall which had been erected by the priests, and which, as the land was enclosed on three sides by water, served to enclose it. On this tract they placed their cattle and horses, which were readily attended to by themselves or their vaqueros residing at the mission. It may well be doubted whether this use, under these circumstances, of a valuable and convenient piece of land immediately adjoining the mission, and not more than a league distant from the present city of San Francisco, and which had even been enclosed by the fathers, could be considered such an occupation and cultivation of vacant land as under the colonization laws would raise an equity which the Mexican or this government is bound to respect. It would seem that the petitioners rather received a benefit from than conferred one on the government. It is to be observed that the supreme court did not, in the Case of Alviso, nor have they in any other, decided that a mere permission to occupy, followed by actual occupation, is sufficient to entitle the claimant to confirmation. The contrary doctrine is clearly announced in the case of U. S. v. Garcia, 22 How. [63 U. S.] 282. It is evident that each case must depend on its own circumstances. Where, as in Alviso's Case, the permission was evidently given in contemplation of the future title to be issued; where the reports are favorable and recommend a grant; where no objection is suggested why the claimant should not have been a colonist of that portion of the public domain; where the land is vacant, and has been occupied, and dwelt upon by the claimant for fourteen years,—the claim will be confirmed. But even in such a case it is evident that the confirmation is based upon the equity arising from the ancient possession, under a notorious and recognized claim of

title, rather than upon any promise to make a grant implied from the mere fact of a permission to occupy.

With respect to the case of U. S. v. Chaboya [supra], decided by this court, it is sufficient to say that the permission was given to occupy "while the suitable procedure was going on," that the report of the prefect was not only favorable to the issuance of the grant, but informed the governor, that "the opposition made to it by the residents of the pueblo had no other design than to remove Chaboya from the land he had occupied for many years, and was absolutely destitute of justice." And what is more important, that it appeared by the proofs that in 1837 Chaboya built a house upon the land, fenced in a considerable portion of it, and had, at the date of the confirmation, been residing on it with his wife and numerous family for twenty-two years. The case of U. S. v. Bidwell [supra], was confirmed by the board; but the confirmation was based on the general title of Micheltorena, at that time supposed, when followed by occupation and cultivation, to have confirmed incontestable rights. The claimant, it is true, presented two provisional grants. These, it appeared were issued by the governor in that form, not from any objection to making the full title, but on the advice of Jimeno, who after reporting favorably to the petition, suggested "that on account of the governor's contemplated visit to that part of the country, the land should be granted provisionally, subject to the ulterior disposition which his excellency might see fit to make of the matter." Under this grant the land was occupied and cultivated, and a house and corral erected upon it.

It will be observed that, in this case, the concession was not of a mere license to occupy, but a grant (the provisional) of the land. In their opinion, the board say: "From the language of the provisional title paper in this case, in connection with the circumstances under which it issued, it may be fairly understood to have been the intention of the governor to make a grant of the land in fee to Dickey and his heirs, subject only to be defeated by some subsequent act of the governor, and no such act having taken place, it may perhaps be considered as absolute." It is precisely in these particulars that the grant to Dickey differs from the permission to occupy given to the De Haros. The intention of the governor referred to by the board was not an intention to make a grant at some future period, but an intention to make a present grant, or rather that the title issued by him should operate as a grant unless defeated by some subsequent act of his own. But no such effect can be attributed to the license given in the case at bar. The most that the ingenuity of counsel has been able to discover in it is an implied contract that if the petitioner complied with the conditions he should have a title, unless the land should be embraced within the ejidos of the pueblo. It is evident, therefore, that even if the decision in U. S. v. Bidwell [supra], had turned upon the point we have been considering, and that decision were binding on this court, it would have no application to the case at bar.

The only ground on which a confirmation of this claim can plausibly be urged is that just referred to, viz., that the document issued by the governor amounted to a declaration that the party might go into possession, with the implied promise that if he fulfilled the law, and the land was not required for ejidos, he should have a title. But neither the terms of the concession, nor the circumstances under which it issued, can, in my judgment, admit of such a construction. If the permission to occupy had been given "while the proceedings to subject the title were pending"; if the governor had indicated a willingness to grant; if the reports had been favorable, and no obstacle were suggested why the grant should not have been made; if the claimant had gone into possession as owner, and had lived with his family on the land for fourteen years, as in Alviso's Case, or twenty-two years, as in the Case of Chaboya,—the claim should, in analogy to those cases, be confirmed. But in this case the permission is given to occupy only until an assignment of the land to the pueblo is effected. The governor not only indicates no willingness or intention to grant, but, in obedience to Jimeno's suggestion, he refuses to grant, and, ex industria, limits the concession to the permission to occupy land not then used by the mission. The objections to making the grant appear from the report of the officer to whom it was referred; and, finally, the land, at the conquest of the country, though it had been used by the claimants for a little more than two years, had never been inhabited or built upon, nor had any act been done with reference to it which, like the long residence, occupation, and cultivation of Chaboya and Alviso, might have raised an equity in favor of the claimants. It is, perhaps, not unfair to add that the forgeries and perjuries which have been so freely resorted to, to impart additional validity to this title, may justly be considered as admission on the part of the claimants of the infirmity of the only title paper they in fact received.

My opinion is that the claim should be rejected.

[NOTE. The decree entered in this case was, upon appeal by the claimants, affirmed by the supreme court. 5 Wall. (72 U. S.) 599. For other of the De Haro grants, see Cases Nos. 14,937 and 14,940.]

Case No. 14,940.

UNITED STATES v. DE HARO.

[Hoff. Dec. 75.]

District Court, N. D. California. June 13, 1862.

MEXICAN LAND GRANT — SURVEY — CONFLICTING CLAIMS—SHAPE OF TRACT.

[This was a claim by the heirs of Francisco de Haro to the Rancho Laguna de las Mercedes.]

HOFFMAN, District Judge. I do not deem it necessary to consider at any length the argument presented on behalf of the claimants, by which it is sought to prove that the whole tract delineated on the diseño should have been confirmed, and not merely half a league, to which their claim was restricted. The point was considered and decided by the board, and that decree has become final; nor have any objections to the survey been filed by the claimants on the ground that it embraces only half a league, as required by the decree, and not the much larger quantity delineated on the desiño. That the decree of the board was correct cannot be for a moment doubted. The original petition of Galindo describes the land as one league in length by half a league in breadth. The witnesses whose testimony was taken by order of the governor variously estimate it as of the extent of "one league in length by half a league in breadth;" "three-quarters of a league in length by one-quarter of a league in breadth;" and "one league in length by half a league in breadth in some places, and a quarter of a league in others." And in the fourth condition describes it as of a length equivalent to half a league, directs it to be measured, and reserves the surplus. In the deed from Galindo to De Haro, the ancestor of the claimants, the land is described as "one league in longitude, and one-half a league in latitude;" and the wife of De Haro, in a subsequent petition to the governor for an augmento, or extension, expressly states to him that the land purchased by her husband from Galindo was only half a league in extent, and was therefore too small, etc. As this petition was never acted upon, and the only title of the claimants is derived from the grant to Galindo, it is plain that their pretension to any larger extent than half a league is wholly inadmissible.

The only question in the case is as to the location within the exterior limits of the half league confirmed to the claimants. It appeared that when the case was pending before the board, a preliminary survey was made at the suggestion of the claimants, by John C. Hays, Esq., surveyor general. On this survey the whole tract delineated on the diseño was run out; and the plat was then furnished by the surveyor to the administrator of the estate of the deceased, De Haro, who seems to have been conducting the litigation, with a request that the parties would designate the particular half league which they claimed under the grant. The administrator referred the matter to Brown and Denniston, who had married heirs of De Haro, who marked out the half league on the plat, returned it to the surveyor, and then went with him on the ground, and the lines were run out and laid down on the plat. The plat survey and field notes were filed in the cause by the surveyor general, at the request, as he states in his communication to the board, of the attorneys for the claimants. Immediately after these proceedings, Brown and Denniston openly proclaimed that the lands outside of the half league so selected were public lands. They took up and recorded a claim to a portion of those lands, and advised others who are now settled on the lands to do the like. Brown, as guardian for one of the heirs, leased some hundreds of acres of land embraced within the half league, and, having subsequently mortgaged the same land, a foreclosure was had, and it is now held under that title. It appears also that Denniston and wife conveyed the same land to one Andrews, whose interest is now said to be vested in Mahoney, the present claimant of the whole tract within the exterior boundaries. It also appears that in 1853, the surveyor general, considering the designation of the half league referred to as an election by the claimants, caused outside lands to be surveyed and sectionized as public land; and numerous settlers relying upon these circumstances, have entered upon the land in good faith; taken up preemption claims, paid their money, received certificates, and have erected improvements said to be worth more than $75,000. It further appears that at the time the half league was selected it was considered the most valuable portion of the land; any subsequent change in value being chiefly due to the improvements made by the settlers. It is now enough to change the location of the one-half league, and, abandoning the land previously selected and in part sold and mortgaged by Brown and Denniston, to locate anew, so as to include the lands occupied and improved as above stated. The survey made in accordance with the recent wishes of the present claimant of the whole title has been objected to on the part of the United States.

It is objected on the part of the claimants that the settlers as such, have no right to intervene in this proceeding, and an elaborate argument has been made to show that they had no right, until after the quantity granted was segregated by competent authority, to enter upon any lands embraced within the exterior limits of the grant. But it is sufficient to observe in reply that the exceptions to this survey are filed by the United States, and not by the settlers. The United States have certainly the right to be heard in opposition to any survey or location which the district attorney may deem un-

just; and this, whether it be desired to protect the interests of present or future claimants under the preemption laws, or merely the rights and interests of the government itself. The very terms of the act of 1860 [12 Stat. 34], require that "all persons claiming interests under preemption settlement, or other right or title derived from the United States, shall be represented by the district attorney, intervening in the name of the United States." It cannot be denied that the persons in whose behalf the district attorney has intervened in this instance claim "a right derived or title from the United States." But, as before intimated, even if there were no settlers on the land, or any private interests concerned to correct the location, the United States, through the district attorney, have clearly the right to protect the public interests, and to prevent injustice, by procuring a proper location of the grant.

The more important question remains: Can the claimants now be permitted to abandon the location selected as above stated, and float the grant to such portion of the land as may suit their present convenience or interests? Had the grant belonged to a single individual by whom an election was made, as above described, the point would have been too clear for argument. It is said, however, that some of the heirs of De Haro were minors, and, therefore, could not have assented to the election. It appears that for some time after the death of De Haro his title papers were in the hands of Julius R. Rose, Esq., who, probably, had the general management of the estate. On the 30th July an informal paper was executed by the heirs of De Haro, by which the administration of the estate was confided to Ramon De Saldo. This paper was signed by Josefa De Haro, the widow, Rosalia Brown, (by her husband, C. Brown,) Prudencia De Haro, and Candelavia and Carlota De Haro. De Saldo was also appointed the guardian of Candelavia and Carlota De Haro, while Charles Brown was guardian of the boy Alonzo. In the exercise of the trust thus confided to him, De Saldo employed counsel to present the case to the board, and at their suggestion the survey was made, and the land designated by Brown and Denniston, who had married the daughters of De Haro.

De Saldo testifies that he had no reason to suppose that the heirs of De Haro were dissatisfied with the survey, and assigns three reasons for supposing that they were, in fact, satisfied with it: (1) Their having pointed out the lines. (2) Their preempting lands outside of the boundaries. (3) That he had in his possession a document sworn to by their father, describing the identical land as his own. There is necessarily some difficulty in cases where a rancho is owned by a large number of persons, in obtaining the consent of all to the election of any particular tract. As the land must ordinarily be surveyed in a compact form and in one entire tract, the choice of majority in interest, it would seem, ought to govern. And where, as in this case, the designation has been made and acted upon by the representatives of two of the principal heirs, one of whom was also guardian for another heir, and with the full knowledge and acquiescence of the administrator of the estate, who was also guardian for two of the heirs, and by whom the attorneys to prosecute the claim were employed, and when the land outside the portion selected has been sectionized by the United States, and taken up by settlers in good faith, without objection or remonstrance on the part of any of the claimants, and when the election appears to have been fairly made and in the interests of all concerned, it appears to me that the United States have a right to insist that it shall be final and conclusive; and that settlers who have in good faith acquired inceptive titles to other portions of the tract, should not be deprived of their titles and their improvements by a change in the location of the grant.

I think, therefore, that the official survey should be set aside, and a new one made, in conformity with the survey by Leander Ransom, filed before the board of land commissioners.

[See Case No. 14,941.]

Case No. 14,941.

UNITED STATES v. DE HARO et al.

[Hoff. Dec. 77.]

District Court, N. D. California. July 27, 1862.[1]

MEXICAN LAND GRANTS—OBJECTIONS TO SURVEY.

[1. Under the ordinances of the former government it seems that all grants of public land were required to be measured in a square or rectangular form, and the only deviation allowed was in cases where some natural obstacle prevented such a measurement, and then the parallelogram was transformed into a trapezium; that is, two of the sides were measured parallel to each other, but, if a natural obstacle prevented the production of one of them far enough to include the entire quantity within a rectangular figure, the other was produced, and their ends united by an oblique line.]

[2. The court has no authority to deflect and modify lines so as to exclude particular parcels, even where they have been settled upon by others in good faith. The only proper method is to make the location as described in the decree of confirmation, and, when the decree fails to give specific directions, to measure the land as required by the ordinances.]

[Objections to the official survey of the rancho of the Laguna de las Mercedes, claimed by Josefa de Haro.]

HOFFMAN, District Judge. In the opinion heretofore delivered in this case [Case No. 14,938] it was considered that, by the final

[1] [Reversed in 154 U. S. 544, 14 Sup. Ct. 1161.]

decree of confirmation, the quantity of land confirmed to the claimant was the half of one square league, and no more; and that it was to be located in a tract running from north to south one league, and from east to west one-half a league, to be measured according to the ordinances, and so as to include the site of the houses of De Haro, and of Galindo, the original grantee. An order having been entered in conformity with this opinion, a new survey has been made and returned into court for its approval.

With the exception of a very slight curve, introduced so as to conform to the surveyed line of an adjoining rancho, the east and west lines run due north and south, as required by the ordinances. The northerly line also runs east and west; but the southerly line has been surveyed from southwest to northeast, thus giving to the tract the figure of a trapezium. By the ordinance, it would seem that all grants of public land were required to be measured in a square or rectangular form. If, however, any natural obstacle prevented such a measurement, the parallelograms were transformed into trapeziums; that is, two of the sides were measured parallel to each other and running north and south or east and west; but if a natural obstacle prevented the production of one of them far enough to include the required quantity within a rectangular figure, the other was produced, and their ends united by an oblique line, thus giving to the tract the form of a trapezium. On page 77 of the "Ordenanzas de Tierras y Aguas" will be found the diagram of a survey almost identical in figure with the official survey returned into court. Conceding that the land is to be measured in a tract one league long from north to south, and half a league wide from east to west, or as nearly in that form as is possible, without passing the exterior limits of the grant, I confess myself unable to see how the survey can be attained so as to conform more nearly to these requirements, or to the provisions of the ordenanzas.

I am aware that there are some circumstances in this case which make it one of peculiar hardship. It is quite possible that many persons have, in good faith, believed that the half league solicited and desired by the claimants was the tract surveyed by Ransom at the instigation of De Saldo, as explained in the former opinions of this court. Under this idea they have settled upon and erected valuable improvements on the lands not included in that survey, of which they will be dispossessed if the survey now before the court shall be finally approved. But, for the reasons heretofore given, I have not felt at liberty to disregard the explicit language of the final decree of the board and of this court, in which both the United States and the claimants have acquiesced, and which not only omits to adopt the Ransom survey, but directs a different location of the tract to be made. Under that decree, taken in connection with the ordenanzas, I am unable to perceive how any alteration, except one purely arbitrary, in the survey can be made. But even if such alteration were attempted, with a view of excluding settlers now included, others not now embraced within the survey would be included, who would urge their objections, and ask for a further modification of the lines. I do not consider that I have the power or the right thus arbitrarily to cause ranchos to be surveyed so as to subserve private interests. An attempt to deflect and modify lines so as to exclude particular parcels of lands would not only give rise to suspicions of favoritism and partiality, but might do injustice to other parties whose small holdings, perhaps of inferior comparative value, but of great importance to their possessors, might thus be included. The only practicable method in any case is to adopt a general rule, and I know of none that I can follow, in a case like the present, but to make the location as described in the decree of confirmation, and, when the decree fails to give specific directions, to measure the land as required in the ordenanzas. I am aware that in this case large interests are involved, and that this, or any other decision I might make, must necessarily create disappointment and discontent.

It affords me much satisfaction to feel that my decision is subject to a review by a higher tribunal, where any errors into which I have fallen will be corrected. The official survey is approved.

[The case was taken on an appeal to the supreme court, where the order of this court was set aside. 154 U. S. 544, 14 Sup. Ct. 1161.]

Case No. 14,942.

UNITED STATES v. DELAWARE INS. CO.

[4 Wash. C. C. 418.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

UNITED STATES—INSOLVENCY—PRIORITY OF PAYMENT—TRANSFER OF PERSONAL PROPERTY—POSSESSION—CONSIGNEE FOR VALUE.

1. If before the right of preference of the United States to be first paid out of the estate of the insolvent has accrued, by the act of insolvency being committed, the debtor has made a bona fide conveyance of property to a third person, or has mortgaged it, or it has been taken in execution, such property is not liable for the debt due to the United States. A respondentia bond, in form, does not pass the right of property in the goods; nor does a mere consignment or indorsement of the bill of lading. They are mere personal contracts. But it is otherwise, if these instruments are given or made for value, or are given to a creditor, as a security.

[Distinguished in Atlantic Ins. Co. v. Conard, Case No. 627. Cited in Greely v. Smith, Id. 5,750.]

2. Actual possession is not necessary to a transfer of personal property; nor is the want

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

of it even an indicium of fraud, where from circumstances it cannot be obtained. Possession of goods at sea, by the master, is the possession of whosoever is or may become the owner of them.

[Cited in Keene v. Wheatley, Case No. 7,644.]

3. It is no objection to the vesting of the right of property in the consignee for value, or whose debt it is to secure, that the goods are by agreement to be at the risk and for account of the consignor.

This is a action for money had and received, to recover the sum of $6,141, on the following case: On the 7th of May, 1822, H. D. Watkins and Michael Doran borrowed from the defendants, the sum of $10,000, at respondentia, upon the specie, goods, &c. laden or to be laden on board the ship Adriana, whereof Thomas Dixey was master, bound on a voyage from Philadelphia to Canton, and at and from Canton back to Philadelphia, at a premium of fourteen per cent. The bond is in the common form; but upon it is indorsed a memorandum, signed by H. D. Watkins and Michael Doran, reciting an agreement that the bills of lading for the specie, goods, &c. mentioned in the within obligation, shall be indorsed to the Delaware Insurance Company, as a collateral security for the loan mentioned in it; and further, that the property to be shipped on the homeward passage, (as a collateral security) being the proceeds of the said loan, shall be for the account and risk of the said H. D. Watkins and Michael Doran, but consigned by invoices and bills of lading, under cover, addressed to the president and directors of the Delaware Insurance Company. It is then expressly declared, that such indorsement, or consignment, shall not be held to exonerate the persons of the borrowers, nor compel the Delaware Insurance Company to accept the specie or merchandise which may arrive under such bills of lading, or consignment, in discharge of the debt; but it shall be lawful for the Delaware Insurance Company to secure and hold the said specie and merchandise for sixty days after their arrival at Philadelphia, and if the principal and premium shall not be paid within said sixty days, to dispose of the merchandise at public auction, and to charge the borrowers with the balance that may remain due after crediting the specie so received, and the proceeds of the sales of the merchandise; the freight, duties, and other proper charges, being first deducted.

On the same day that the respondentia bond was given, the borrowers, Watkins and Doran, executed a separate paper, signed by them, stating that the Delaware Insurance Company, having lent them $10,000 on respondentia, at a premium of fourteen per cent. for the voyage of the Adriana, from Philadelphia to Canton and back, "it is further agreed, that the bill of lading of the outward shipment to be made in specie, with the returns thereof, are to be assigned to the Delaware Insurance Company, and that the consignee, or supercargo, shall be directed to consign the said returns to the Delaware Insurance Company, as a collateral security for the bond (being paid) now given by us." The bill of lading for the outward cargo shipped by Watkins, viz. two kegs, containing 10,000 Spanish dollars, to be delivered at Canton, to B. Etting or his assigns, is indorsed and signed by Watkins in the following words: "For value received, the receipt whereof is hereby acknowledged, I do hereby assign and transfer the within bill of lading, and sum of money therein mentioned, and also the goods, &c. to be invested therewith at Canton, or elsewhere, and shipped in return for the same, unto the Delaware Insurance Company, as a collateral security, according to the memorandum duly executed and indorsed on a respondentia bond given to the said Delaware Insurance Company." This indorsement is dated the 23d of May, 1822, which is also the date of the bill of lading. The bill of lading at Canton, is dated the 23d of December, 1822, and the goods mentioned in it are stated to be shipped by B. Etting, for account and risk of H. D. Watkins, and consigned to the Delaware Insurance Company, and to be delivered to them. The invoice corresponds with the bill of lading, and is addressed to the president of the Delaware Insurance Company.

The Adriana returned to this port on the 24th of April, 1823, and on the 26th of June following, the defendants stated an account with H. D. Watkins, making a small balance against him, after debiting the sum loaned, premium, interest and charges, and crediting the goods, &c. On the 9th of June, 1823, Watkins executed a deed of assignment to the district attorney of all his property, in trust to pay certain duty bonds (the amount now sued for) due to the United States, and the residue for the use of his other creditors. The schedule which accompanied this deed mentions Canton goods by the Adriana, in the hands of the Delaware Insurance Company, by virtue of a consignment to them. These goods, being, on their arrival, taken into the stores of the custom house, the district attorney addressed a letter to the collector, stating the above assignment by Watkins to him, and desiring him not to deliver the goods to the defendants. By a subsequent arrangement between the parties, the goods were delivered to the defendants without prejudice, under an agreement that this action should be brought to try the question of property in them. On the side of the United States it was contended, that on the 9th of June, 1823, when the legal insolvency of Watkins happened, by his assignment of all his effects to the use of the United States, the property in the Canton goods was in him, and not in the defendants. Neither the respondentia bond, the assignment of the outward bill of lading, nor the consignment by bill of lading and invoice of the homeward cargo to the defendants, amounted, per se, to a transfer of the property in these goods

to them. They were shipped for the account, and at the risk of Watkins, which, together with the possession of them by his agent, constituted him the unquestionable owner of them. The defendants never had either actual or constructive possession of them, which is essential to the transfer of personal property. If the defendants were not the owners, neither had they a lease, because they had not possession. In short, the sole object of the agreement between Watkins and the defendants, was to give a preference to the latter, which must yield to that claimed by the United States. [U. S. v. Hove] 3 Cranch [7 U. S.] 73, 90; [Prince v. Bartlett] 8 Cranch [12 U. S.] 431; U. S. v. King [Case No. 15,536]; 3 Johns. 369; [U. S. v. Fisher] 2 Cranch [6 U. S.] 358; 1 Serg. & R. 326; Holt, Shipp. 420; Abb. Shipp. (Story's Ed.) 167; 2 Bl. Comm. 458; 4 East, 319, 324; 8 Term R. 330; 2 Holt, N. P. 72; 18 Vin. Abr. 67; 12 Mod. 136; 1 Johns. 215; 1 Camp. 369; 17 Mass. 110; 3 Term R. 119; Paley, Prin. & Ag. 117; [The Francis] 8 Cranch [12 U. S.] 418; [Moreau v. United States Ins. Co.] 1 Wheat. [14 U. S.] 231.

On the other side, it was insisted, that the preference claimed by the United States, is not in the nature of a lien to overreach an absolute transfer of property by the insolvent, or a security given on it; and this whether the property be real or personal. Although a respondentia bond, assignment of a bill of lading, or a consignment of goods, does not per se transfer the property; yet if it appear that it was the intention of the parties, by these means, to grant a security to the indorsee or consignee for a debt due, or if the indorsement or consignment be for a valuable consideration, the right of property passes. Actual possession is not essential to the transfer where it cannot be taken, which is always the case where the goods are at sea, or beyond sea. To avoid a charge of fraud, it should be taken as soon as it can be obtained. Neither is the transfer prevented by the circumstance that the goods are shipped for account and at the risk of the shipper, if it be part of the original agreement that they should be so shipped, as it was in this case, and if the intention of the parties manifestly appears to have been that the consignment should be made for the purpose of securing a debt. [U. S. v. Hove] 3 Cranch [7 U. S.] 73, 90; [Thelusson v. Smith] 2 Wheat. [15 U. S.] 426; 2 Holt, N. P. 74; 6 East, 20; 1 Bos. & P. 563; 2 Term R. 485.

C. J. Ingersoll, Dist. Atty., and J. R. Ingersoll, for the United States.

Mr. Binney and John Sergeant, for defendants.

WASHINGTON, Circuit Justice (charging jury). The question is, whether the preference to which the United States are entitled over the other creditors of Watkins, will overreach the right claimed by the defendants to the goods imported from Canton and consigned to them?

The leading principle stated in the case of Thelusson v. Smith, 2 Wheat. [15 U. S.] 426, is that which must in a great measure decide this cause. It is, that although in a case of insolvency, the debts due to the United States are first to be satisfied, without regarding the superior dignity of those due by the insolvent to others, still they must be satisfied out of the debtor's estate. And therefore, if before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of property to a third person, or has mortgaged it to secure a debt, or if his property has been seized under an execution; in all these cases, the property is divested out of the debtor, and cannot be made liable to the debts due to the United States. It has also been decided by the supreme court, that the right of preference given to the United States does not arise until the act of insolvency has been committed, and that this right is not in the nature of a lien. [U. S. v. Fisher] 2 Cranch [6 U. S.] 358.

Attending to these principles, we have now to inquire whether, upon general principles of law, the property in the Canton goods consigned to the defendants, was divested out of Watkins, and vested in the defendants, prior to the 9th of June, 1823, when the act of insolvency was committed? It must be conceded that in England, as well as in this country, a respondentia bond in common form, is considered as amounting to no more than a personal security. It is equally clear, that a mere consignment or indorsement of a bill of lading, or filling up a bill of lading to the consignee, does not per se pass the right of property in the goods to the consignee or indorsee. They only give to the consignee a right to demand the goods of the captain.

The true rule is stated by Holt (page 74) in his second volume on Shipping, that the indorsement of a bill of lading is an immediate transfer of the legal interest in the cargo to the assignee, provided it be for value. But if shipped without order, the ownership remains in the shipper; or if the indorsement be made without consideration. But it is otherwise, if the bill of lading be filled up to a creditor as a security for his debt. It is laid down in the case of Hibbert v. Carter, 1 Term R. 745, that an indorsement of a bill of lading to a creditor, without any proof or explanation, dehors, is, prima facie, a transfer of the property to him; but if the intention be proved to be only to bind the net profits, it is otherwise. Now this is a very strong case in its application to the present. For, if the mere circumstance of the indorsee being a creditor, amounts to a presumptive transfer of the property, how much stronger must be the case where the object and intention of the indorsement are to secure a debt due to the indorsee, and in fulfilment of an express agreement between the shipper and the indorsee, entered into at the time the debt was contracted, that the indorsement should

be made, or the bills of lading be filled up to the creditor, for the purpose of securing the debt then contracted? This is precisely the present case. The $10,000, for which the respondentia bond was given, were loaned upon an express stipulation in writing, entered into at the time of the loan, that the bills of lading for the outward cargo should be indorsed to the defendants, as a collateral security for the debt, and also that the goods to be shipped on the homeward voyage, being the investment of the money lent, should be assigned to the defendants, and should be consigned to them as collateral security. This agreement was partly executed on the 23d of May, 1822, by the assignment of the outward bill of lading, and of the $10,000 mentioned in it, and of the goods in which they were to be invested, and was afterwards completed by the consignment to the defendants.

Two objections have been made by the plaintiffs' counsel to the application of the principles before mentioned to the present case. (1) That the transfer was incomplete and inoperative, on account of actual possession of the goods brought from Canton having, at no period, been taken by the defendants. (2) That these goods were shipped and were agreed to be so shipped, at the risk and for account of Watkins.

As to the first objection, it is not well founded in point of law. Actual possession is not essential to the transfer of personal property, and the want of it is not even an indicium of fraud, where, from circumstances, it cannot be obtained. The indorsement of a bill of lading for a cargo whilst at sea, for a valuable consideration, transfers the property, although actual possession is not and can not be taken by the assignee. The possession of the master is constructively the possession of the owner of the goods, and the right of possession follows the right of property, according as that may change from one person to another. A contrary doctrine would be attended by the most calamitous consequences to commerce.

The other objection is completely and satisfactorily refuted by the case of Haille v. Smith, 1 Bos. & P. 563, in which it is laid down, that the nature of the trust being, that the proceeds of the cargo should remain with the consignee, applicable to the debt for the security of which the consignment was made, under an agreement to that effect, for a valuable consideration, the risk must necessarily remain with the consignor, notwithstanding the change of property, and that he must suffer, or be benefited by the loss or profit on the sale. The court came to the conclusion, that the cargo vested in the consignees, notwithstanding the risk remained in those who transferred the cargo, and nothwithstanding the cargo was to be sold with a view to the profit or loss of the consignor. In that case, actual possession never came to the hands of the consignee; and it is, upon the whole, a strong authority as to most, if not all, the points discussed in this case.

We are clearly of opinion, that the property in these goods vested in the defendants prior to the act of insolvency committed by Watkins on the 9th of June, 1823, and that they were not liable to the preference claimed by the United States. The only interest which remained in Watkins, was a right of redemption upon payment of the debt due to the defendants, or to any surplus which there might have been upon a sale of the goods, after satisfying the defendants. This being the law of the case, and the facts being all in writing, and agreed between the parties, I must direct a verdict to be found for the defendants.

Verdict for defendants.

Case No. 14,943.

UNITED STATES v. DELVALLE.

[Nowhere reported; opinion not now accessible.]

Case No. 14,944.

UNITED STATES v. DEMARCHI.

[5 Blatchf. 84.] [1]

Circuit Court, S. D. New York. Oct. 18, 1862.

FEDERAL CRIMINAL JURISDICTION — MURDER ON THE HIGH SEAS—INDICTMENT—NATIONAL CHARACTER OF VESSEL—OWNERSHIP.

1. Where an offence is within a general jurisdiction of a court of the United States, it is not necessary that an indictment for the offence should exclude, by descriptive terms, every possible exemption of the defendant from the jurisdiction.

2. Thus, where a murder committed on a vessel is of such a character that a court of the United States can entertain jurisdiction of it, although the vessel has no national character, no national character need be alleged in the indictment, and it need not negative the possible foreign nationality of the vessel.

3. Under the eighth section of the act of April 30, 1790 (1 Stat. 113), it is sufficient, in an indictment for a murder committed on board of a vessel on the high seas, by an alien, to allege that the vessel was owned by a citizen of the United States, without alleging otherwise the national character of the vessel.

This was an indictment against [Ferdinando Demarchi] an alien, for a murder on the high seas, committed on board of the ship Blondel. The defendant, having been convicted, now moved for an arrest of judgment, on the ground that the indictment did not allege that the Blondel was an American vessel.

E. Delafield Smith, U. S. Dist. Atty.

Edwin James, for defendant.

SHIPMAN, District Judge. This indictment is founded on the eighth section of the act of April 30, 1790 (1 Stat. 113). It alleges that the murder was committed on board of the Blondel, "owned by a certain person or

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

persons to the said jurors unknown, being a citizen or citizens of the United States of America." It is insisted that this allegation is, on its face, insufficient to give the court jurisdiction, and that, therefore, the judgment ought to be arrested. The argument is, that, the jurisdiction of the courts of the United States not being unlimited over crimes committed upon all vessels on the high seas, it must be confined to American vessels, that is, vessels whose nationality is fixed and determined by registration in conformity with the navigation laws of the country, and that this national character of the vessel must be alleged in the indictment, unless the defendant is described as a citizen of the United States. This objection is purely technical, as the Blondel was proved, on the trial, to be, in fact, an American vessel, although her register was not produced. She was proved to have been built in the United States, and to have been exclusively owned by citizens of the United States, at the time of the commission of the offence.

The power of the government of the United States to punish offences on the high seas, is co-extensive with that of any other nation. Like all other maritime nations, it punishes robbery and murder on the high seas, whenever and wherever committed by its own subjects on the ocean, and whenever and by whomsoever committed on board of vessels belonging to its own subjects. Indeed, like other nations, it goes further than this, and punishes piracy and piratical murder on board of all vessels found on the high seas, which have no national character, and whose ownership cannot be determined. It was expressly decided, in U. S. v. Klintock, 5 Wheat. [18 U. S.] 144, that the act on which this indictment is founded extends to all persons, on board of all vessels which throw off their national character, by cruising piratically and committing piracy on other vessels. This indictment charges a piratical murder, and, if the court has jurisdiction to try such a case, where the offence was committed on board of a vessel having no national character, it is clear that no national character need be alleged in the indictment. It is quite true, that the proof in any given case may disclose the fact that the offence was committed on board of a foreign ship, sailing under a foreign flag, by a foreigner, and upon a foreigner, and that the crime was, therefore, one merely against another government. On such a disclosure, it would be the duty of the court to dismiss the case. But it is not necessary for an indictment, when the offence comes within a general jurisdiction of the court, to exclude, by descriptive terms, every possible exemption of the defendant from that jurisdiction. If the offence is of such a character that the court can entertain the case, although the vessel has no national character, no national character, as has already been remarked, need be alleged; and it would seem equally clear, that the possible foreign nationality of the vessel need not be negatived in the indictment. This seems to have been the understanding of the courts and the profession in England, and to this understanding the practice in that country, in similar trials, has conformed, for a long series of years. That practice has been adopted here, and been steadily adhered to since the foundation of this government.

In indictments for piracy, both at common law and under the statutes, in England, there is usually no allegation either of the nationality of the vessel or of the citizenship of the defendant. The ownership of the vessel is sometimes, although not always, alleged to be in the subjects of the queen. Archb. Cr. Pl. & Ev. (14th London Ed.) pp. 363–365; 3 Chit. Cr. Law (4th Am. Ed.) p. 1093. Indeed, in cases where the offence charged is not piratical, and is not alleged to have been committed piratically, the nationality of the vessel and of the defendant, and even the ownership, are often omitted. This was so in the case of Rex v. Thompson [2 East, P. C. 514, 517] in which the indictment is said to have been drawn by an eminent crown lawyer, and where the offence is not charged as having been piratically committed, but as an assault upon the captain of the vessel, by some of his own crew, with intent to murder him. The same is true of indictments for burning ships or sinking them at sea. 3 Chit. Cr. Law, pp. 1097, 1098.

But, independently of the foregoing considerations, I am satisfied that the allegation in this indictment, that this ship was owned by citizens of the United States, is sufficient to bring the case within the jurisdiction of the court. Even admitting, for this purpose, that the course of proceedings, both in our own and the English courts, has often departed from the sound rules of criminal pleading, still, I am not aware that citizens of the United States are permitted to sail, under any foreign flag, ships exclusively owned by them. Under the doctrine laid down by the supreme court of the United States, in the case of U. S. v. Palmer, 3 Wheat. [16 U. S.] 610, and U. S. v. Klintock, 5 Wheat. [18 U. S.] 144, the circuit court has jurisdiction of a case of murder and robbery, under the eighth section of this act of 1790, unless the defendant be a foreigner, and the offence be committed on board of a vessel which, at the time, "in point of fact, as well as right, is the property of subjects of a foreign state, who have at the time, in virtue of this property, the control of the vessel." The allegation of ownership, in this indictment, excludes the case from that class of vessels over which the jurisdiction of the court does not extend.

Motion overruled.

Case No. 14,945.

UNITED STATES v. DEMING.

[4 McLean, 3.] [1]

Circuit Court, D. Michigan. June Term, 1845.

PERJURY—FALSE BANKRUPT SCHEDULES—INDICTMENT—MISNOMER OF COURT—OATH—AUTHORITY TO ADMINISTER.

1. Where such words of description are used in an indictment, as to have an application only to the proper person, it is sufficient, although the words of the statute be not used.

2. On a charge of perjury by a petitioner in bankruptcy, the indictment need not set out, particularly or substantially, the petition.

3. A general reference to it, which shall show its character and object, is sufficient.

4. To sustain an indictment for perjury, the oath must be administered by some one authorized.

[Cited in U. S. v. Howard, 37 Fed. 667.]

5. An authority to a county clerk, to swear petitioners resident in his county, does not give him power to administer an oath to one who resides in another county.

[This was an indictment against Benajah H. Deming for perjury.]

The District Attorney, for the United States.

Abbott & Lathrop, for defendant.

OPINION OF THE COURT. This is an indictment for perjury, in swearing falsely in a proceeding in bankruptcy, the jury having found a verdict of guilty. A motion is now made to arrest the judgment on the following grounds:

1. Because there is a misnomer in the indictment, as to the court before whom the proceeding was had. The 7th section of the bankrupt act provides that all petitions in bankruptcy shall be had "in the district court," etc., and the allegation in the indictment is of a petition made "to a judge sitting as a bankrupt court." And it is contended, that this, being descriptive of the personal of the judge, must be substantially, if not strictly, set out in the indictment. That the description given might refer to the circuit court, etc. As no judge can sit in bankruptcy except the district judge, we think the indictment in this respect is sufficient. The circuit court has jurisdiction to hear appeals in bankruptcy, from the bankrupt court, but the circuit judge, in hearing these appeals, can not be said to sit in bankruptcy. Such a sitting can only apply to the district judge.

2. The indictment is alleged to be defective in not setting out the petition with sufficient particularity and certainty. It is argued, if the prosecutor undertakes to set out proceedings material to the offense, even unnecessarily, he must do it with the same certainty as if they were required. That formerly, all the proceedings in the course of which the perjury is charged to have been committed, were required to be set forth, and though now excused by statutes both in England and this country; yet, if the prosecutor does not avail himself of the statute, he is held to the ancient strictness. 2 Chit. Cr. Law, 307; 2 Russ. Crimes, 536. It is unnecessary to set out the petition, substantially or otherwise; a mere reference to its character and object is sufficient. And we do not think that the indictment contains any allegations or statements which bring it within the rule laid down by the counsel. We recognize the principles relied on, but we do not think they apply to the indictment as framed.

3. The third ground is, that the alleged false oath was not administered by any person legally authorized. The bankrupt act requires that petitions shall be sworn to; but does not declare before whom the oath shall be taken. The district court, under the act, adopted a rule which authorizes the clerk of the district court to administer oaths generally to petitioners; and another, as follows: "Ordered, that the petitioners residing out of the county of Wayne, may verify their petitions before the county clerk of the county in which they reside; and the clerks of the different counties of this district are hereby appointed commissioners to administer oaths or affirmations to petitioners applying for the benefit of the bankrupt law." The indictment shows that the defendant was a resident of the county of Jackson, but it alleges that he took the oath before the clerk of Washtenaw county. And the question is made, whether he had the power to administer the oath. As clerk merely, we suppose he had not the power. But had he not authority, under the rule of the court? The first part of the rule limits the authority of the clerk to administer the oath, to residents in his county. The words are, that the petitioners may take the oath "before the county clerk of the county in which they reside." But the prosecutor insists, that the latter part of the order enlarges the power of the clerk, as it appoints him a "commissioner to administer oaths or affirmations to petitioners applying for the benefit of the bankrupt law."

In giving a construction to this order, the whole of it must be taken together. The clerks were not appointed commissioners generally, under the act of congress, but merely for the special purpose of administering oaths to petitioners, and to persons, as it would seem, who reside in their respective counties. We think that this is a fair construction of the rule, and, consequently, that the clerk of Washtenaw county had no power to administer an oath to the defendant, who was a citizen of Jackson county.

The judgment is arrested.

[1] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 14,946.

UNITED STATES v. DENEALE.

[1 Cranch, C. C. 34.] [1]

Circuit Court, District of Columbia. July Term, 1801.

REGISTER OF COURT—CUSTODY OF RECORDS.

The register of the orphans' court in Alexandria is entitled to the custody of the record books of wills, of the late court of hustings.

Mandamus nisi, commanding the defendant [George Deneale] to deliver to Cleon Moore, register of the orphans' court, the records of wills, &c., remaining in the hands of Deneale as late clerk of the court of hustings for the town of Alexandria. The return denied the right of Moore to the custody of those papers. The following acts were cited: Supplement to the act of congress concerning the District of Columbia, March 3, 1801, § 3 (2 Stat. 115); the sixth section of the act of Virginia, respecting the district courts, December 12, 1792 (Rev. Code, p. 70); eighth section of act of Virginia, respecting the general court, December 13, 1792 (Rev. Code, 70); 1785, p. 45, concerning wills, &c.; 1792, § 10, concerning wills; and twelfth section of the act of congress concerning the District of Columbia, February 27. 1801 (2 Stat. 103).

Peremptory mandamus ordered.

Case No. 14,947.

UNITED STATES v. DENNEE et al.

[3 Woods, 39.] [2]

Circuit Court, D. Louisiana. April Term, 1877.

SUBORNATION OF PERJURY — INDICTMENT — AVERMENTS.

1. Subornation of perjury is in its essence but a particular form of perjury itself.

2. An indictment for subornation of perjury must aver that the defendant knew that the testimony which he instigated the suborned witness to give was false, and that in giving such testimony the witness would willfully and corruptly commit the crime of perjury.

[Cited in U. S. v. Evans, 19 Fed. 912; U. S. v. Thompson, 31 Fed. 335; U. S. v. Edwards, 43 Fed. 67.]

[Cited in People v. Ross (Cal.) 37 Pac. 379; Cryne v. People, 124 Ill. 25, 14 N. E. 671; State v. Geer (Kan. Sup.) 30 Pac. 237.]

Indictment for subornation of perjury. Heard on demurrer.

The indictment contained two counts. The first alleged the pendency in the United States court of claims, of a suit brought by one Harriet Mills, who claimed to be a loyal citizen of the United States, against the United States to recover from the treasury the proceeds of one hundred bales of cotton which she alleged were her property, and which were taken in August, 1874, by the United States military forces, turned over to the officers of the treasury department, and afterwards sold and the proceeds amounting to $40,000, paid into the treasury of the United States, and that said court had jurisdiction to pass upon said claim; that on May 10, 1875, at the city of New Orleans, the defendants, R. Stewart Dennee, lawyer, and Samuel Gamage, yeoman, "unlawfully, corruptly, wickedly and maliciously did solicit, suborn and instigate and endeavor to persuade, and did then and there suborn, instigate, and procure one Martha L. Knight to appear before one Robert H. Shannon" United States circuit court commissioner, authorized by law to administer oaths, etc., "and did then and there wickedly and corruptly instigate and procure the said Martha L. Knight to give evidence and her deposition in said issue, * * * and upon her corporal oath, duly administered according to law, to falsely swear and give evidence to certain matters material and relevant to the said issue, and to matters therein and thereby put in issue to the effect following, that is to say." The first count of the indictment then set out certain questions and the answers thereto, given by the said Knight, which was followed by a traverse of the truth of each and every answer given by her as set out in the indictment. The count then concluded as follows: "Whereas in truth and in fact she, the said Martha L. Knight, on or about, or concerning the matters touching which, she in her said deposition, did declare and testify had no knowledge or belief of the truth thereof in so far as any and all matters by her sworn to, stated and deposed as aforesaid in her said deposition aforesaid, were or are material to the issue so joined in the said court of claims as aforesaid, there and then at no time when she did so swear, depose and her evidence give as aforesaid contrary to the form of the statute, etc." The second count set out in substantially the same manner as the first the pendency and nature of the suit of Mills against the United States in the court of claims, the jurisdiction of the court over the cause, and then proceeded to aver that the defendants, at New Orleans, on the 10th day of March, 1875, "did unlawfully, corruptly, wickedly solicit, suborn and instigate, and endeavor to persuade, and did then and there suborn and instigate and procure one Martha L. Knight to appear as a witness in said cause, * * * and did so wickedly and unlawfully, as aforesaid, cause and procure the said Martha L. Knight then and there * * * to appear before one Robert H. Shannon" who was a commissioner of the United States circuit court, authorized to administer oaths, "and did then and there wickedly and corruptly instigate and procure the said Martha L. Knight to give evidence and her deposition in said issue, * * * and to falsely swear and give evidence to certain matters material and relevant to the said issue" to the effect

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

following, that is to say. Then followed a statement of certain questions propounded to the said Martha L. Knight, and her answers thereto under oath and a traverse seriatim of each and every answer so set out. The second count then concluded with the same averments as the first.

The demurrer was based on the alleged ground that the indictment did not set out any offense against the laws of the United States.

W. H. Hunt, John Ray, and F. W. Baker, for the demurrer.

John H. New, Asst. U. S. Atty.

WOODS, Circuit Judge. The crime of subornation of perjury has several indispensable ingredients which must be charged in the indictment or it will be fatally defective: (1) The testimony of the witness suborned must be false. (2) It must be given willfully and corruptly by the witness, knowing it to be false. (3) The suborner must know or believe that the testimony of the witness given, or about to be given will be false. (4) He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false. A careful scrutiny of the counts of this indictment fails to reveal any averment that the defendants knew or believed that the testimony of the witness whom they are charged with suborning would be false, or that they knew it was false, or that they knew that the witness knew it was false, or that they knew that she would willfully and corruptly testify, or had willfully and corruptly testified to facts as true, knowing them to be false.

To make a good indictment for subornation of perjury the false swearing must be set out with the same detail as an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about to give, was false, and knowing that he would corruptly and willfully give false testimony. In the case of Com. v. Douglass, 5 Metc. [Mass.] 244, the defendant was indicted for subornation of perjury. On the trial the court below instructed the jury that "if it was proved to them beyond a reasonable doubt that the defendant on the former trial for forgery (referred to in the indictment) put Fanny Crossman on the stand or caused her to be put on the stand as a witness, knowing that she would testify as set forth in the indictment, and intending that she should so testify, and he put her on the stand, or caused her to be put on the stand for the purpose of her so testifying, and she did so testify and such testimony was false, and he knew when he put her on the stand, that if she did so testify her testimony would be false; it would be sufficient to prove that part of the indictment which alleged that defendant suborned Fanny Crossman to commit perjury as set forth in the indictment."

This charge was assigned for error, and the supreme judicial court in passing upon it said: "The remaining exception to the charge of the presiding judge is of more importance, and is, we think, well founded. The jury were instructed that if certain facts stated in the exceptions were proved beyond reasonable doubt, it would be sufficient proof of that part of the indictment which charged that the defendant suborned Fanny Crossman to commit perjury. Now, we are of opinion that all these facts might exist and yet the defendant might not be guilty of the crime charged in the indictment. The defendant might know or believe—for he could not know with certainty—that the witness whom he called would testify as she did, and he might know that her testimony would be false, but if he did not know that she would willfully testify to a fact knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must willfully testify falsely, knowing the testimony given to be false. 1 Hawk. P. C. c. 69, § 2; Bac. Abr. 'Perjury,' A; 2 Russ. Crimes, 1753. A witness, by mistake or defect of memory, may testify untruly without being guilty of perjury or any other crime." Subornation of perjury is in its essence but a particular form of perjury itself. 2 Bish. Cr. Law, § 1197. See, also, Whart. Prec. Ind. pp. 598, 599, forms c, d. See, also, form of indictment in Archb. Cr. Pl. & Ev. pp. 575, 577. See same form, 2 Bish. Cr. Proc. § 878; State v. Carland, 3 Dev. 114.

Tested by these authorities, both counts of the indictment are bad, first, because they do not aver that the defendants knew that the testimony which they instigated the witness to give was false, and second, because there is no averment that the defendants knew that the witness knew that the testimony she was instigated to give was false.

Demurrer sustained.

[NOTE. The defendants were, at the same term of the court, indicted for conspiracy with intent to defraud the United States. A demurrer to the indictment was overruled. See Case No. 14,948.]

Case No. 14,948.

UNITED STATES v. DENNEE et al.

[3 Woods, 47.] [1]

Circuit Court, D. Louisiana. April Term, 1877.

CONSPIRACY TO DEFRAUD UNITED STATES—INDICTMENT—AVERMENT OF MEANS AGREED ON—OFFENCES.

1. An indictment for a conspiracy to do an unlawful act, need not aver the means agreed

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

on whereby the conspiracy was to be carried into effect.

[Cited in brief in U. S. v. Patterson, 55 Fed. 616.]

2. An indictment for conspiracy under section 5440, Rev. St., which avers the conspiracy and the overt acts done to carry it into effect, is sufficient without stating the means agreed on to accomplish the purpose of the conspiracy.

[Cited in brief in U. S. v. Patterson, 55 Fed. 616.]

3. Section 30 of the act of March 2, 1867 [14 Stat. 484], entitled "An act to amend existing laws relating to internal revenue, and for other purposes," which is embodied in the Revised Statutes as section 5440, prohibits a conspiracy to defraud the United States, not only by committing some one or more of the offenses described in other sections of the act, but in any manner whatever.

Heard on demurrer to the indictment. The indictment was found on the 6th day of June, 1876, and was predicated on section 30 of the act approved March 2, 1876, entitled "An act to amend existing laws relating to internal revenue, and for other purposes." 14 Stat. 484. The section declares, "that if two or more persons conspire, either to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not exceeding two years." This section is substantially embodied in the United States Revised Statutes as section 5440. The indictment charged that Harriet A. Mills, spinster, Samuel Gamage, yeoman, R. Stewart Dennee, lawyer, and others, naming them all, late of the said district of Louisiana, being persons of evil minds and dispositions, on the first day of March, in the year of our Lord eighteen hundred and seventy-four, at and within the state of Louisiana, and the district of Louisiana aforesaid, and within the jurisdiction of said court, with force and arms, unlawfully and wickedly did conspire, combine, confederate and agree together and among themselves, and with Martha L. Knight, Joseph P. Murphy, * * * and divers other evil-disposed persons, whose names are as yet to the grand jurors unknown, unlawfully and fraudulently to defraud the United States of America of a large sum of money, to wit, forty thousand dollars lawful money of the United States, of the property and moneys of the United States. Then followed averments setting forth, with great particularity and precision, numerous overt acts of the defendants, or some of them, done to effect the object of the conspiracy. The overt acts charged were the prosecution, by suit against the United States in the court of claims, of a false, feigned and fraudulent claim by false and perjured testimony. The demurrer alleged that the indictment was not sufficient in law, and that defendants were not bound to answer the same.

John H. New, Asst. U. S. Atty.

Wm. H. Hunt, John Ray, and F. W. Baker, for defendants.

WOODS, Circuit Judge. It is objected to the indictment, that it does not set out and aver the manner in which and the means whereby the object of the conspiracy charged was to be carried into effect, and that the averments setting out the overt acts, done in furtherance of the conspiracy, do not supply this defect. There is much conflict in the adjudged cases, on the point whether, in an indictment for conspiracy to cheat and defraud, it is necessary to aver the means agreed on to carry the conspiracy into effect. The affirmative of the proposition has been held in Massachusetts. Com. v. Hunt, 4 Metc. [Mass.] 111; Com. v. Eastman, 1 Cush. 189; Com. v. Shedd, 7 Cush. 514; Com. v. Wallace, 16 Gray, 221. It has also been so held in the following cases: State v. Parker, 43 N. H. 83; State v. Roberts, 34 Me. 320. In the case of Lambert v. People, 6 Cow. 578, the indictment being for a conspiracy to cheat and defraud, etc., without averring specifically the means to be used, the court for the trial of impeachments and errors was equally divided on the question whether the indictment was a good one or not. It was decided by the casting vote of the president, that it was defective, and the judgment of the supreme court sustaining it reversed. On the other hand, it is the settled English rule that the words "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" one "of his goods and chattels," contain a sufficient allegation of conspiracy, without mention of any means intended. 2 Bish. Cr. Law, § 200, and cases there cited. See, also, Rex v. Gill, 2 Barn. & Ald. 204; Rex v. Seward, 1 Adol. & E. 706. The same doctrine is held in the following American cases: People v. Richards, 1 Mich. 216; State v. Younger, 1 Dev. 357. A somewhat careful consideration of the authorities convinces me that the better reason is with those who deny the necessity of setting out the means by which the conspiracy was to be carried into effect. But it seems clear that the statute upon which this indictment is based was intended to relieve the pleader from any supposed necessity of setting out the means agreed upon to carry out the conspiracy, by requiring him to aver some act done in furtherance of the conspiracy, and making such act a necessary ingredient of the offense. In the case of Com. v. Shedd, 7 Cush. 514, the court said, that "the great difficulty in giving effect to the allegation of overt acts in an indictment for conspiracy on a motion in arrest of judgment for insufficiency of the indictment, is this, that overt acts are merely alleged by way of aggravation of the offense, and though alleged, they need not be proved,

and the alleged conspiracy might be found by the jury without proof of the precise overt acts charged to have been done in pursuance of the conspiracy." That difficulty does not exist here, for the overt act is a part of the offense, and must be proved, as laid in the indictment. The reason given in the case just quoted from, why the averment of overt acts cannot have effect in the indictment for conspiracy, does not apply. In my opinion, therefore, this indictment which avers the conspiracy, and then sets out the overt acts done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. The averment of acts done to effect the object of the conspiracy, and which must be proven to sustain the indictment, is more than the equivalent of an averment of means agreed on to carry it into effect. This objection to the indictment is not well taken.

It is further objected to the sufficiency of the indictment, that the law upon which it is based is exclusively a revenue law, and intended only for the punishment of conspiracies to do certain things prohibited by the act itself. And it is urged that this is not a revenue case, as the overt acts charged are not prohibited by the body of the act, on the thirtieth section of which the indictment is based. In other words, it is claimed that because the act of March 2, 1867, supra, does not in terms forbid the prosecution of fraudulent suits against the United States in the court of claims, and the recovery of judgments and the receipt of money thereon by means of false and fraudulent claims, and perjured testimony, a conspiracy to commence and carry on to a final judgment such a suit, cannot be punished under section 30 of said act above quoted. This, it seems to me, is too narrow a reading of section 30. It denounces a conspiracy to defraud the United States, not simply by committing one or more of the offenses specified in the act, but to defraud the United States "in any manner whatever," or to commit any offense against the laws of the United States. The language of the section is too broad to be confined within the narrow range sought to be imposed upon it.

It is next said that it is not an indictable offense—to prosecute a suit in the court of claims—that the court to which the claim is submitted must pass upon its genuineness, and if held good, no other court can inquire into or re-examine the question thus passed upon, that the United States is a party defendant to the suit before the court of claims, has the right and opportunity to defend, and cannot, pending the decision of the question therein involved, or subsequent thereto, proceed criminally against the other parties to the cause in another court to punish them for prosecuting a false and fraudulent claim. Non constat, but the court of claims may decide the claim just.

The real question is, whether a conspiracy to prosecute a false and fraudulent claim against the United States, and to procure the evidence of false witnesses to support and maintain it, is a conspiracy to defraud the United States. If it is, it falls within the purview of the statute. If a witness gives a false deposition in a civil cause, he may be prosecuted therefor criminally, notwithstanding the fact that the court in the civil cause must pass upon the credibility of his testimony. And the fact that, on the strength of his false testimony the civil case has been decided, is no reason why the false witness should not be prosecuted for his crime. The successful issue of the perjury rather furnishes an additional reason for the criminal prosecution.

The position taken in support of the demurrer, amounts to this: that no fraud, no perjury, no subornation of perjury, employed to gain a civil cause can ever be punished, because to prosecute and punish the crime would be equivalent to a collateral re-examination of the cause tried and determined by another court. To state the proposition is to refute it.

It is further insisted that the offense charged is barred by the statute of limitations. The indictment was found June 6, 1876, and the offense is laid as of March 1, 1874. The section of the law on which the indictment is based has been held to constitute a part of the revenue laws of the United States (U. S. v. Rindskopf [Case No. 16,165]; U. S. v. Fehrenback [Id. 15,083]), and by section 1046, Revised Statutes, prosecutions for any crime arising under the revenue laws of the United States must be instituted within five years after the offense is committed. The original section on which the indictment is based, is embodied in a law devoted to the subject of the internal revenue, and it seems clear that a conspiracy to defraud the United States by withdrawing money from its treasury by a false and fraudulent claim, supported by false testimony, is an offense against the revenue laws of the United States. I do not understand that the term "revenue laws" is confined exclusively to laws providing for the collection of the revenues, but may extend to any provision of the laws on the subject of revenue, intended to protect the funds collected under those laws, or which in any other manner have lawfully been paid into the treasury. As the indictment was filed within five years after the date fixed as the time when the offense was committed, the prosecution is not, in my judgment, barred.

It is urged as a further objection to the indictment, that there is a fatal variance and repugnancy in the dates set out in the indictment. After a careful reading of the indictment, I am unable to find any impossible or repugnant dates. Demurrer overruled.

[A demurrer to an indictment against Dennee and Gamage for subornation of perjury was sustained at the same term of the court. See Case No. 14,947.]

Case No. 14,949.

UNITED STATES v. DENNIS.

[1 Bond, 103.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1850.

RECOGNIZANCE—CERTAINTY—ACTION UPON—UNITED STATES MAIL.

1. A recognizance is sufficiently certain if it sets out an act punishable by the statute without any of the particulars.

2. Where an action of debt was brought on a recognizance, the condition of which was, that the defendant should appear "to answer to the charge of stealing from the mail of the United States, contrary to the statute of the United States, in such case made and provided:" *Held*, that the felonious or criminal character of the act was charged with sufficient certainty.

3. The mail of the United States embraces everything which may by law be transported or conveyed by post.

[This was an action by the United States against John J. Dennis.]

John O'Neill, U. S. Dist. Atty.
Lee & Fisher, for defendant.

LEAVITT, District Judge. This is an action of debt on the recognizance of the defendant as bail for the appearance of Henry Fulkerth, who has been charged, before a commissioner of this court, with a violation of the mail of the United States, the said Fulkerth being a postmaster. The commissioner required the accused to give bail, and, in default thereof, he was committed to jail. He subsequently appeared before the district judge, and, on his application, was admitted to bail and discharged from custody. The defendant entered into a recognizance for the appearance of the accused person at the October term of this court. It is averred in the declaration that he failed to appear, and that the defendant was called and duly defaulted. A general demurrer has been filed to the declaration, and the exception relied on is, that the recognizance does not define or state any crime made punishable by an act of congress and of which this court has jurisdiction. The condition of the recognizance is, that the accused person shall appear at the then next term of the circuit court of the United States "to answer to the charge of stealing from the mail of the United States, contrary to the statute of the United States, in such case made and provided, and also such other charge or charges as may be exhibited against him." It is insisted that the allegations of "stealing from the mail of the United States, contrary to the statute," etc., are vague and indefinite, and do not import any specific crime for which the accused is to answer. The same certainty is not required in a recognizance that is required in an indictment; it is sufficient if it sets out an act punishable by the statute, without any of the particulars. It is very clear that a charge of stealing from the mail of the United States imports a crime without any statement of what was stolen. The mail of the United States embraces everything which may by law be transported or conveyed by post, and every unlawful taking from the mail of anything which constitutes a part of it is a crime. There is, therefore, no ground for a presumption that stealing anything, whether a mere letter or a letter containing money, or any paper or any other thing designated in the statute, can be an innocent act; it necessarily imports a crime. But when, as in this recognizance, it is added that such stealing was "contrary to the statute of the United States in such case made and provided," the felonious or criminal character of the act is charged with sufficient certainty. A case decided in Kentucky, reported in 3 J. J. Marsh. 641, has been cited by the defendant's counsel, where a recognizance for "gaming" was held bad by the court for uncertainty. That decision was right for the reason that gaming, as a general term, did not necessarily import a crime. It was only a crime when committed under the circumstances stated in the statute; under other circumstances it was perfectly innocent. It was necessary, therefore, to set out the game and the circumstances. If the charge had been "gaming contrary to the statutes of the state of Kentucky," it would have been good. But as before stated, no state of facts can be conceived of, in which stealing from the mail of the United States can be an innocent act—it implies a crime.

The demurrer will therefore be overruled.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

Case No. 14,950.

UNITED STATES v. DE RODRIGUEZ et al.

[7 Sawy. 617.] [1]

District Court, N. D. California. Nov. 26, 1864.

MEXICAN LAND GRANT—EXCEPTIONS TO SURVEY—BOUNDARIES.

[When the dividing line between two ranchos has been fixed in proceedings for the confirmation of one of them, to which the claimant of the other was a party, such line should not be disturbed on exceptions to the official survey of the latter rancho, when this would involve the issue of overlapping patents creating certain litigation, and a possible loss by the claimant of the former rancho of part of the land confirmed to him in such proceedings.]

[Claim by Maria Concepcion Valencia de Rodriguez and others to the Rancho San Francisquito, in Santa Clara county, granted May 1, 1839, by Juan B. Alvarado to Antonio

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

Buelna. The claim was confirmed by the commission November 28, 1854, by the district court February 4, 1856, and appeal dismissed April 2, 1857.]

HOFFMAN, District Judge. This case comes upon exceptions to the official survey filed on the part of the United States and on the part of the neighboring rancheros. To understand correctly the question raised, a brief review of the proceedings to obtain the grant, and those which resulted in the confirmation, is necessary.

The original petition of Buelna asked for the place called San Francisquito, "to the extent of eight suertes of two hundred varas square each, making sixteen hundred, according to the reglamento of colonization." The language of the decree of concession, and of the grant, is somewhat involved; but the land is clearly enough described as eight suertes of two hundred varas each, including the land lying between the Chemisal and the San Francisquito creek, and extending from the upper crossing of the road leading to the sierra to the road leading from Santa Clara to San Francisco, known as the "Middle Road."

The third condition describes the land granted as of the extent of two-thirds of a league, a little more or less. On the diseño attached to the expediente, the boundaries mentioned in the grant are clearly exhibited. On the north is the brook; running parallel with it, and at a short distance to the south, is the Chemisal. On the west is the road to the sierra, which crosses the brook, and on the east is the middle road. It would seem, however, that the grant was not intended to extend as far as this road, for a little to the west of it a line is drawn from the Chemisal to the brook marked "raya," indicating that it is the eastern boundary of the tract. On the corner of the diseño is a note, stating that the land is of the extent of eight suertes.

I have been unable to understand the meaning of the clause in the third condition, stating the land to be of the extent of two-thirds of a league. If the eight suertes asked for were to be each two hundred varas square, the total area of the tract would be three hundred and twenty thousand square varas. A square league is five thousand varas square, and its area is twenty-five million of varas.

Parol testimony was taken before the board of land commissioners to show that a juridical possession was given of the land by metes and bounds. No record of the act of possession was produced, but the board confirmed the claim according to the juridical possession, as sworn to by the witnesses. Its decree sets forth particularly the boundaries of the tract, and states the extent of land confirmed to be "two-thirds of a league, a little more or less." This decree was affirmed on appeal to this court, the United States offering no opposition. The tract thus described extends to a considerable distance to the south of the Chemisal, between which and the San Francisquito creek both the decree of concession and the grant describe the land as situated. It also extends to the eastward beyond the line marked "raya," which the diseño designates as a boundary in that direction. In the official survey, the calls of the decree seem to have been wholly disregarded, as also the indication of the map, which the claimants themselves presented to the board as a correct survey of the tract of which judicial possession was given. The most that the claimants can ask for is that the boundaries called for in the decree be followed. I cannot perceive, therefore, how the official survey can be sustained.

It is objected, however, on the part of the owners of the adjoining rancho, confirmed to the heirs of Mesa, that the dividing line between the ranchos has already been fixed in a proceeding to which the present claimant was a party, and that that line must be adopted in fixing the boundaries of the claimant's land, notwithstanding that it is a different line from that described in his decree of confirmation. It appears that when the Mesa Rancho was surveyed, objections to the survey were filed, and the proceedings required by the act of 1860 [12 Stat. 33] were taken. The owners of the Rodriguez Rancho intervened, and were heard, and the court, after due deliberation, located the Mesa Rancho as appeared to be just under the decree of confirmation and the evidence in the case.

On the part of the owners of the Mesa Rancho, it is contended that the location of the common boundary between the ranchos has thus become res adjudicata, not only as against the United States, but as against the owners of the Rodriguez Rancho, who were parties to the proceeding, and who might have appealed if dissatisfied with the decree; that the object and effect of the proceedings under the law of 1860 were to settle disputes of this nature between contiguous proprietors; and that, inasmuch as the Mesa Rancho has been finally located, the Rodriguez Rancho cannot be made to include a part of the same land, unless overlapping patents be issued, which is never done by the United States.

On the part of the present claimants, it is urged that the final decree obtained by them gives a definite location to their land; that it describes the boundaries clearly and specifically; that it in terms adopts the judicial measurement testified to in the cause; that their rights are thus fixed and determined by the decree; and that the power of the court, under the act of 1860, is limited to an inquiry, whether the survey is in accordance with the terms of the decree.

It is also urged that the intervention in the case of Mesa had for its object to prevent the boundaries of that rancho from being so fixed as to include any portion of the land

already confirmed to the claimants, and thus to avoid future dispute and litigation; that although this object was not attained, yet that their own rights under their decree were not waived by them; that the adjudication in that suit only fixed the boundaries of the Mesa Rancho—it did not, and could not, affect the boundaries of the Rodriguez Rancho, already established by the decree of confirmation, and which was not then before the court; and that they are now entitled to have their land surveyed as described in their final decree of confirmation, notwithstanding that they include lands already embraced in the Mesa survey.

It will be perceived that the question thus presented is difficult and important.

Since the argument of this cause, the opinion of the supreme court in the Case of Fossat [2 Wall. (69 U. S.) 649] has been received. Before proceeding to inquire how far the decision in that case disposes of the questions raised in the case at bar, I deem it due to myself to correct some misapprehensions, as to matters of fact, into which both the counsel who argued the cause and the supreme court appear to have fallen.

The opinion, after detailing the previous history of the cause up to the time when the survey was ordered into this court, under the provisions of the act of 1860, states that the district court entered an order reforming the survey as to the eastern line. "This direction," the court observes, "not only reformed the survey of the tract, as made by the surveyor general, but reformed the decree itself of the court, entered on the eighteenth of October, 1858, in pursuance of which the survey had been made. The court assumed that the survey and location of the tract were not to be governed by the decree, but on the contrary, that it was open to the court to revise, alter, and change it at discretion, and to require the surveyor general to conform his survey and location to any new or amended decree—for certainly if it was competent to change the eastern line from that settled in the decree, it was equally competent for it to change every other line or boundary as there described and fixed."

"Now it must be remembered that this decree of the district court, designating with great exactness this eastern line—with such exactness that the surveyor general had no difficulty in its location—was entered in pursuance of and in accordance with the mandate of this court, and by which that court was instructed, at the time of the dismissal of the appeal, that the three external lines declared in it were in conformity with the opinion of this court, and that the other line—the north line—only remained to be completed by a survey to be made, and that this line was to be governed by quantity, which quantity had been previously determined."

"This radical change, therefore, of the eastern line of the tract, involves something more than a change by the court of its own decree; it is the change of a decree, entered in conformity with the mandate of this court."

If it be true, as here stated, that a subordinate judge has not only radically changed his own decree, without color of authority, but that the decree so changed was one "in conformity with the opinion" of the superior tribunal, his action would deserve stronger language of censure than the supreme court has used.

I shall show, however: (1) That no decision as to the eastern line of the Fossat claim was ever made by this court until its last decree in the proceedings had under the act of 1860; that the questions in regard to the location of that line were never until then argued or submitted to the decision of the court; and, further, that under the rulings of the supreme court, this court had, prior to the act of 1860, no jurisdiction to locate and establish that line. (2) That this court had no reason to suspect that any supposed decision with regard to that line had been affirmed, or in any way passed upon by the supreme court; that when the location of the eastern line was, in a proceeding taken under the act of 1860, for the first time submitted to this court, it was not suggested by any of the counsel that the supreme court had affirmed or expressed any opinion whatever upon the correctness of the location of even the southern line, which had been argued and decided by this court, still less upon the location of the eastern line, which had not been argued, and which, it was universally conceded, could not be determined in a proceeding to which the adjoining owner was not a party. (3) That even if the location of the eastern line had been determined by this court, and if that determination had been affirmed by the supreme court, there were good reasons for believing that, under the act of 1860, it was the duty of the court, on the intervention of Berreyesa, then for the first time heard in the cause, to determine the line according to justice and right, and irrespective of any decree obtained by either party in a proceeding between himself and the United States.

I. By the act of March 3, 1851 [9 Stat. 631], the board of commissioners and the courts on appeal were empowered to decide only upon "the validity" of land claims. This act differed from the laws of 1824 [4 Stat. 52] and 1828 [Id. 292] in withholding the power, conferred by those acts on the courts, of deciding "all matters relative to the extent, locality and boundaries" of the claims. The controversy was strictly limited to the United States and the claimants, and third persons were not permitted to intervene. But the law provided that their rights should not be affected by the decree or patents under them. The duty of locating finally confirmed land claims, was confided to the surveyor-general; and with respect to interfering or conflicting claims, he was authorized to de-

cide in the first instance, leaving to the parties interested the right of recourse to the ordinary tribunals.

That such was the true construction and effect of the law was explicitly decided by the supreme court. In U. S. v. Fossat, 20 How. [61 U. S.] 413, certain adversary claimants had been permitted to appear, and adduce evidence in the name of the United States. The supreme court says:

"It is the opinion of the court that the intervention of adversary claimants, in the suit of a petitioner under the act of 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged. The board of commissioners was instituted by congress to obtain a prompt decision on the validity of private land claims, to enable the government to distinguish the public lands from that which had been severed from the public domain by Mexico; and that it might fulfil the obligation assumed at the time of the cession of California, to secure and protect the property of its inhabitants.

"The jurisdiction of the board of commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, is limited to the making of decisions on the validity of the claim, preliminary to its location and survey by the surveyor general of California, acting under the laws of the United States. This officer is required to survey and furnish plats of the claim that may be confirmed.

"In reference to interfering or conflicting claims, he is authorized to decide by adopting the lines agreed to by the claimants, and in the absence of an agreement to follow the rules of justice.

"The acts of congress provide that neither the decisions of the commissioners, nor of the district or supreme courts, nor of the surveyor general, shall preclude a legal investigation and decision by the proper judicial tribunal between parties having such interfering claims, * * * and a patent under the act is only conclusive between the United States and the claimant, and does not affect third parties. The language and policy of these enactments limit a controversy like the present to the United States and the claimants." 20 How. [61 U. S.] 424.

This decision, though made subsequently to the first decree of this court, in the Fossat Case, merely affirmed the correctness of the construction previously given by the board, the court, and the bar, to the provisions of the statute.

When, therefore, the Case of Fossat was presented, it was contended by the district attorney that the court had no authority whatever to fix any of the boundaries of the tract, not even those between it and the public land, but that all questions of boundary and location must be determined by the surveyor general. It was considered, however, by the court, that an inquiry into the validity of a claim necessarily involved, to a certain extent, inquiries into its location and extent, and that when a question arose between the United States and the claimant, as to the identity of a natural object called for in the grant, and which formed the boundary between the land granted and the public land, it was the duty of the court to hear and determine the dispute. The correctness of this view was explicitly affirmed at a subsequent stage of the cause by the supreme court. U. S. v. Fossat, 21 How. [62 U. S.] 449.

But, with regard to the dividing lines between the claimant and a neighbor, when the controversy related to lands admitted to belong to one or the other, and therefore private, it was universally conceded that the court had no jurisdiction to determine it, especially as the adjoining owner had no right to intervene in the suit, and no decision of the disputed boundary could affect his rights. The evidence and arguments in the cause were, therefore, exclusively directed to the question raised with regard to the southern boundary.

The location of the eastern line was not disputed or discussed, nor was any question respecting it submitted to the court. So, as far as the record disclosed, there was nothing to show that the location of that line was in controversy.

The court was aware, however, that with regard to that line a dispute in fact existed. This dispute was understood to arise from a supposed repugnancy between the description of the line contained in the grants and the delineation of it on the diseño of Berreyesa.

The decree of the court, therefore, after determining the southern boundary, describes the eastern line in the language of the grants, but it especially refers to and adopts the dotted line marked on the diseño of Berreyesa, as indicating the boundary between the ranchos. And it was supposed that by these means all questions between the claimants, under Larios and Berreyesa, would be left open and undecided. Such, even yet, appears to me to be the fair construction of the decree.

The case having been appealed, the decree of this court was reversed on points hereafter to be referred to, and the cause was remanded to this court with instructions "to declare the three external boundaries designated in the grant, from the evidence on file and additional evidence to be taken." It is in the opinion then delivered by the supreme court, that the declarations above cited, with regard to the jurisdiction of the court and the determination by the surveyor-general of lines between conflicting and interfering claims, are found. Any doubt which this court might have entertained as to its authority to determine, in the absence of Berreyesa, the disputed line between the ranchos, was dissipated by the very explicit language of the supreme court.

On the return of the cause, further evidence was taken, and counsel were heard. The location of the eastern was, as before, not debated, and the arguments related solely to the location of the southern line. The court, in its decree, reaffirmed its previous decision with regard to that line. The eastern line was described as before, in the language of the grants, and the dotted line on the diseño was again carefully referred to and adopted, as indicating the boundary between the ranchos. An appeal having been taken from this decree, it was held by the supreme court that the decree was interlocutory, and not final; that the northern line, which was merely described as a line to be run for quantity, should have been fixed upon the ground by a survey. The appeal was therefore dismissed.

The cause having been remanded to this court, no further proceedings in it were had until after the passage of the act of 1860, when the counsel for the claimant moved for and obtained an order directing the surveyor to survey the tract, and to give notice according to the provisions of that act, of the approval of the plat and survey. This was done, and the survey was ordered into court on the application of the Berreyesas, who thus for the first time became parties to the cause. Their own rancho had also been surveyed, and the same dividing line adopted by the surveyor as in the Fossat survey. This survey was also on their application ordered into court, and the Quicksilver Mining Company, claiming under Larios, and the New Almaden Company, intervened and became parties to the proceeding. All parties being thus before the court, evidence was taken and argument heard relative to the location of the eastern line. The location of that line was then for the first time decided by the court.

It was not suggested by any of the counsel that this question had ever before been submitted to or passed upon by the court. They knew the fact to be otherwise. Nor was it contended that the language of any previous decree in the suit of Fossat v. U. S. imported a decision of the question. It was not, to my recollection, hinted by any one, nor did the idea occur to the court, that any decision of this court supposed to determine that line had in any way been affirmed, or even considered, by the supreme court. The question was on all sides treated as still open and undecided, and this court proceeded to determine it, without the remotest suspicion that its action was irregular or unauthorized. Its determination, though then for the first time judicially declared, was in accordance with the opinion it had entertained from the time when, in an ejectment suit brought long before in the circuit court, the counsel for the New Almaden Company had contended for the location of the eastern line, as claimed by the representatives of Larios.

That opinion has been adjudged by the supreme court to be erroneous; but as this court has been supposed to have not only departed from its decrees, but to have changed its opinions, I shall be pardoned, I trust, for stating, with all deference to the superior judgment of the appellate tribunal, that notwithstanding all that has been said, I am still unable to discover the error of the final decision of this court by which the line between the ranchos was determined. I believe that the history and nature of the dispute between the grantees, their evident and necessary object in fixing upon the line, and, above all, the plain and palpable delineation of it upon the diseño, unmistakably show the intention and understanding of the parties; that to this evidence, the words of the grants, which are very obscure, and which were intended to describe a line already agreed upon by the parties, and delineated on the diseño as a substitute for an actual marking on the ground, ought to yield; that to carry out the principal and controlling intention of the parties, either the call in the grants for the "falda," or that for "a straight line," must be sacrificed—which of them, was practically immaterial, for they were both or equal dignity; but both were, in my judgment, subordinate to the mute but visible call of the diseño, which showed how the line was to be drawn, where it was to strike the sierra, and how the valley was to be divided between the disputants.

On these grounds I believe that Castillero, who denounced the mine, Pico, the alcalde, Berreyesa himself, and, so far as we know, the neighbors and contemporaneous inhabitants of the country, were not all mistaken, when without doubt or dispute they asserted the recently discovered quicksilver mine to be "on the lands of the retired sergeant Jose Reyes Berreyesa."

But whatever may be thought of the correctness of these views, it is certain that the location of the eastern line was never adjudicated by this court until its last decree was made, and that in that adjudication, whether erroneous or not, it did not revise, or change, or alter, as has been supposed by the supreme court, any previous decision of its own, with respect to the location of that line.

II. I shall not show that this court had no reason to suspect that any decree supposed to determine that line had ever been affirmed by, or declared to be in conformity with, "the opinion of the supreme court."

The first decree of this court confirmed the title of the claimant to the easterly portion of the valley described in his petition as the Canada de los Capitancillos. This valley is on the north and south bounded by parallel ranges of hills, and the tract confirmed was limited on the west by the Arroyo Seco, and on the east by the line agreed

on between Larios and Berreyesa, the latter of whom had obtained a grant for the easterly portion of the valley.

The third condition of the grant declared the land to be of the "extent of one square league, a little more or less (poco mas o menos), as explained by the map accompanying the expediente."

In the grant, only three boundaries were mentioned, viz. the southern, the western, and the eastern. But the diseño to which the grant referred plainly represented the range of hills which formed the northern limit of the valley, while the designation in the petition of the land solicited as the valley of the Capitancillos and the situation of the petitioner's house, seemed to indicate unmistakably that the tract asked for and granted was the canada or valley extending from the Arroyo Seco on the west to the land of Berreyesa on the east.

On the argument, the only disputed boundary was the southern. It was claimed by the United States and the counsel for the New Almaden Company, that the "sierra" called for in the grant was the base of a range of foot-hills, or "lomas bajas;" while the claimant contended, that by that term the chain of high mountains behind and parallel to the "lomas" was evidently referred to. The court adopted the latter view.

There was, therefore, confirmed to the claimant the valley lying between the sierra on the south and the pueblo hills on the north—and extending from the Arroyo Seco to the agreed line of division between the ranchos. Its extent was, as the grant declared, a little more than one square league; but how much more could not be ascertained until the dispute with Berreyesa, in regard to the dividing line, should be finally settled.

This decree was reversed by the supreme court on appeal. It was held by that court, that, as only three boundaries were mentioned in the grant, there "was no other criterion for determining the fourth, or northern boundary, than the limitation of the quantity as expressed in the third condition." The words "poco mas o menos" were rejected, as "having no meaning in a system of survey and location like that of the United States," and the court observed: "If the limitation of the quantity had not been so explicitly declared, it might have been proper to refer to the petition and diseño, or to have inquired if the name 'Capitancillos' had any significance as connected with the limits of the tract." The grant to Larios was therefore declared to be "for one league of land, to be taken within the southern, western, and eastern boundaries designated therein, and to be located at the election of the grantee, or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of this government."

The district court was directed "to declare the external boundaries designated in the grant, from the evidence on file, and such other evidence as may be produced before it." [U. S. v. Fossat] 20 How. [61 U. S.] 427.

It will not, I presume, be contended that this opinion, or the mandate in pursuance of it, in any respect constituted an affirmance of the decision of this court with regard to boundaries.

The location of the southern boundary, which was the principal question discussed in the court below, is not alluded to; no intimation is given whether, in the opinion of the supreme court, the "sierra" mentioned in the grant was the range of low hills or the mountain chain behind it, and the cause is remanded, with direction to this court to declare the three boundaries mentioned in the grant from the evidence on file, and such other evidence as may be produced, clearly showing that the supreme court intended to keep the question as to the location of those boundaries open and undecided, and that they supposed it might be elucidated by further testimony.

On the return of the cause, further testimony was taken, and the location of the southern boundary reargued. This court reaffirmed its previous judgment with respect to that line, and after describing, as has been stated, the eastern line in the language of the grants, with a reference to and adoption of the dotted line on the Berreyesa diseño, directed, in the very language of the supreme court, the northern line to be run for quantity "at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of this government."

It is evident that no more precise decree could have been made without an actual survey, which it had not, up to that time, been supposed this court had power to order, nor could a final survey have been made at that stage of the cause, for the northern line being required to be run for quantity, it obviously could not be run until all the other lines were established, and no establishment of the eastern line or disputed boundary between Larios and Berreyesa could be made in a proceeding wherein, by the express decision of the supreme court, the latter was not permitted to intervene, and the decree in which could have no effect upon his rights.

It will also be observed that the refusal of the supreme court to recognize the natural boundary of the valley on the north, as the northern limit of the tract, and the direction to this court to locate the league "within" the three other boundaries, and to run the northern line for quantity, at the election of the grantee, necessarily compelled this court to locate the grant, in great part, among the hills toward the south.

If, then, there be in the final survey the anomaly of locating a grant for a valley among the mountains, excluding the valley

solicited, it has been the direct and inevitable result of the instructions given to this court by its superior.

From the second decree of this court, an appeal was again taken, and a decision as to the disputed southern line was on all hands confidently expected.

That expectation was not fulfilled. When the cause came up, a doubt was suggested by the chief justice, "whether there had been a final decision by the district court under the mandate, and whether the appeal ought not to be dismissed on that ground."

On this suggestion a motion to dismiss was made and argued.

The merits of the case do not appear to have been alluded to in the argument of the counsel. They certainly are not referred to in the opinion of the court.

It was decided that the decree appealed from was not a final decree, and the appeal was dismissed.

In the opinion, the court, after reciting its previous direction to this court to declare the external boundaries designated in the grant, from the evidence on file, and such further evidence as might be produced, says: "The district court, in conformity with the directions of the decree, declared the external lines on the sides of the tract, leaving the other line to be completed by a survey to be made. From the decree in this form the United States have appealed. A motion has been submitted to the court for the dismissal of the appeal, because the decree was interlocutory, and not final." [U. S. v. Fossat] 21 How. [62 U. S.] 447.

This statement of the action of this court is in all respects accurate. I am to this day unable to perceive what else, or what more this court could have done under the mandate and under the law as it had been up to that time expounded by the supreme court.

But I must be permitted to express my profound astonishment at discovering that this simple sentence, which states the action of this court under the previous mandate, has been considered as amounting to an affirmance by the supreme court of the correctness of the location, not only of the southern line, which had been discussed and decided, but also of that of the eastern line, which had never been argued, which was an interfering claim, declared by the supreme court, to be left by law to the decision of the surveyor general, and which it seemed repugnant to reason and justice to decide finally, in any controversy to which Berreyesa was not and could not be a party.

But, even with respect to the southern line, it was not for a moment suspected by this court, nor was it even suggested by counsel, that the supreme court, on a preliminary motion to dismiss an appeal, without hearing argument on the merits, without alluding to the grave and difficult question involved, meant, at the moment it was deciding the decree appealed from to be interlocutory and not final, and thus, in effect, declaring itself without jurisdiction, to finally pass upon and determine every question involved in the case.

That such was its intention I am bound to conclude from its recent opinion. On that supposition alone can the observation above cited, that "the change of the eastern line by this court involves something more than a change by that court of its own decree—it is the change of a decree in conformity with the mandate of this court,"—be accounted for.

I have thus, I believe, established beyond all doubt or controversy, that if this court has changed a decree, the correctness of which had been affirmed by the superior tribunal, it has done so unintentionally and unconsciously—and under circumstances which did not suggest nor could they reasonably have suggested to either court or counsel the construction which has since been given to the opinion and mandate of the supreme court.

III. I shall now show that if the eastern line had been fixed by this court, and even if that decision had been affirmed by the supreme court in a suit between Fossat and the United States, there were good grounds for believing that when, under the provisions of the act of 1860, Berreyesa, for the first time, became a party to the cause, and when under the same act his own rancho was before the court for location, in which proceeding the claimants under Justo Larios intervened, it was the right and duty of the court to determine in both suits the true location of the dividing line between the ranchos, irrespective of any decree obtained by either claimant in a suit to which his neighbor was not a party.

To fully understand the question here presented, a precise notion must be obtained of the circumstances which led to the passage of the law of 1860.

It has already been stated that the supreme court dismissed the appeal from the second decree of this court on the ground that it was interlocutory, and not final. It was held that all the boundaries of the tract should have been ascertained and established by a survey, and a decree of confirmation entered for the tract surveyed.

In answer to the objection that the district court had no means of ascertaining the boundaries by a survey, or compelling the surveyor to execute its decree, that court declared that the district court had power to enforce the fulfilment by the surveyor of its decree, and added that "the power of the district court over the cause does not terminate until the issue of a patent conformably to its decree." [U. S. v. Fossat] 21 How. [62 U. S.] 451.

The decision was received here with surprise, but with great satisfaction. The authority thus attributed to this court was immediately invoked, and application was made in many cases for orders to the surveyor general to return into this court, for reform and correction, surveys alleged to be erroneous.

Before exercising this jurisdiction the court heard an argument, in which most of the

members of the bar concerned in land cases participated, as to the true construction and effect of the decision of the supreme court and the practice to be adopted under it. The views of the bar were various and conflicting. It was held, however, by the court, that the decision in question in effect overruled the previous decisions of the supreme court, which had declared the jurisdiction of the court to be "limited to making decisions upon the validity of land claims preliminary to their location and survey by the surveyor general," and that henceforth the court must assume the duty of correcting and reforming all surveys made under its decrees, when alleged to be erroneous.

This construction of its decision was recognized by the supreme court as correct in subsequent cases.

"In the case of U. S. v. Fossat, 21 How. [62 U. S.] 445, this court had occasion to refer to the limits of the authority of the courts of the United States under the act of March 3, 1851, above cited. We stated in that case that if questions of a judicial nature arose in the settlement of the location and boundary of grants confirmed to individuals, the district court was empowered to settle those questions upon a proper case being submitted to it before the issue of a patent, and in such case the judgment may properly be extended to the confirmation of the survey, and an order for the patent to issue." Castro v. Hendricks, 23 How. [64 U. S.] 442.

In the case of U. S. v. Berreyesa's Heirs, 23 How. [64 U. S.] 500, the supreme court says: "The appellees have requested the court to give instructions relative to the location and survey of this grant, similar to those found in the case of U. S. v. Fossat, 20 How. [61 U. S.] 425. But no question was decided in the court below upon the location of the lines of the tract, and it would be irregular for this court to assume that the action of that court will not conform to the established rules on the subject. The decree of the district court has not been called in question by the appellees; and should any difficulty arise in the location of the grant, it will be competent for the appellees to invoke the aid of that court."

This court having announced that it would exercise the new jurisdiction attributed to it, numerous surveys were ordered before it for revision and correction. The means thus offered of obtaining a judicial determination of the many difficult and important questions relative to the location of grants which had arisen were eagerly seized on by both the representatives of the United States and of the claimants, for it substituted an inquiry in court, where witnesses could be summoned, examined and cross-examined, where counsel could be heard and a decision rendered, the grounds of which were exposed in an opinion, and from which an appeal could be taken to the supreme court, for the quasi trial before the surveyor general, and for the still more unsatisfactory examination by an officer in Washington on ex parte affidavits, the contents of which, and even the fact that they had been forwarded, might be unknown to the party against whom they were taken.

But in the discharge of the duty thus imposed upon the court, great embarrassment was experienced. The supreme court had declared that the contest was limited to the United States and the claimants, and that third parties had no right to intervene. But it was obvious that the parties immediately affected by an erroneous location would often be colindantes or adjoining owners, between whom and the claimant a common boundary line was to be run, or purchasers from the original grantee of lands within the exterior boundaries, which might have been erroneously excluded from the survey, or grantees of the sobrante or excess within the exterior boundaries, who had a clear right to be heard as to the location of the first grant.

The United States, also, had an evident interest in requiring the dividing lines between the ranchos to be determined before the establishment of the lines to be run for quantity. For how could the latter be fixed while the former remained uncertain?

Although the court had power to hear and determine objections to surveys, no time was limited within which objections were to be made, except that it must be before the issue of a patent; nor were any means prescribed for giving notice to parties interested that a survey had been completed and approved by the surveyor-general. A survey, therefore, might be made, approved, transmitted to Washington, and a patent issued before, as was alleged to have happened in some cases; persons affected by it, and who would have objected to it, were apprised of the fact. Further legislation thus seemed to be indispensable. The law of 1860 was, therefore, recommended and passed, not to confer a new jurisdiction on the district courts, but, as its title imports, to define and regulate the jurisdiction the supreme court had already decided them to possess.

It provided in substance for a notice, by publication, of the approval of surveys by the surveyor general. It limited the time within which objections were to be taken. It permitted all parties interested to intervene and be heard, and it assigned a limited period (six months) for taking an appeal from the decisions of the district courts. These are similar provisions, I believe, to have been indispensably necessary for the proper discharge by the district courts of the duties imposed upon them by the decision in U. S. v. Fossat

I believe, also, that the law has been found, in practice, salutary and beneficial, and has been so regarded, almost universally, by the parties affected by it or acquainted

with its operation; and that the difficult and most important questions raised, with respect to the location of land claims, have been settled under it more justly and satisfactorily to all parties than, making due allowance for the errors of a court not claiming to be infallible, was practicable under any other system.

It has recently been said, on very high authority, that the questions submitted by this law to the courts "involve the consideration of various matters not properly the subject of judicial inquiry," and that "it creates a new and anomalous jurisdiction in the court, which cannot be assumed independent of the act, and under it should be exercised only the cases coming clearly within its language."

I have already shown that the jurisdiction was declared by the supreme court substantially to exist, independently of and prior to the passage of the law of 1860, and that the act was passed to enable the district courts to carry out and give effect to the decision of the supreme court. That the jurisdiction conferred was not new or anomalous I shall now proceed to show

By the provisions of the act of May 26, 1824, relative to land claims in territory acquired under the Louisiana purchase, which provisions were, by the act of May 23, 1828, made applicable to land claims in Florida, the courts were charged with a double duty: (1) That of determining all questions arising in the cause, relative to the title of the claimant; and (2) all questions relative to the "extent, locality, and boundaries of the claim."

In defining the duties of the court under these acts, Mr. Justice Catron says: "First, the paper title to such private property it is our duty to investigate and ascertain, and by our decision to establish; and, secondly, it is our duty to ascertain and cause to be surveyed and marked by definite boundaries the lands granted." U. S. v. Forbes, 15 Pet. [40 U. S.] 182.

In the case of U. S. v. Lawton, 5 How. [46 U. S.] 28, the same justice holds substantially the same language.

Under the act of May 26, 1824, the proceedings were conducted according to the rules of a court of equity. All parties interested, or claimed to be interested, were brought before the court; process was served as in other cases, and the court had power to decide finally all questions and matters arising in the cause. U. S. v. Moore, 12 How. [53 U. S.] 223.

Under the act of March 3, 1851, the jurisdiction of the courts is limited to the making of decisions on the validity of the title; process is not issued, nor are all parties in interest brought in, or permitted to intervene.

The survey and location of claims, which have been confirmed, are committed to the surveyor, who is even invested with a quasi judicial authority to decide upon conflicting or interfering claims.

But the decrees of the courts and surveys of the surveyor general, under the act of 1851, unlike the decrees and locations under the act of 1824, are conclusive only upon the United States and the claimants, and do not bind third parties. U. S. v. Fossat, 20 How. [61 U. S.] 425.

When, therefore, the supreme court, overruling its previous decision, attributed to this court jurisdiction, and made it its duty to fix the boundaries of the claim confirmed by an actual survey made under its direction, and declared that without such a survey the decree was not final, and that the jurisdiction of this court over the cause continued until the issue of a patent ([U. S. v. Fossat] 21 How. [62 U. S.] 450); and, when congress, by the law of 1860, regulated and provided for the exercise of this jurisdiction by authorizing the courts to review and correct the surveys of the surveyor general, after admitting all persons interested to become parties to the proceedings, the law, instead of being anomalous and exceptional, merely supplied a defect in the act of 1851, and brought the legislation, with regard to California land claims, into harmony with the previous legislation of congress in similar cases.

The defect of the law of 1851 consisted in giving to the courts jurisdiction to decide only upon the validity of claims, while questions of boundary and location were left to the decision of the surveyor-general. It thus attempted to separate, and subject to different modes of determination, inquiries in their nature almost inseparable.

The inquiry the courts were authorized to make, was only whether the claim was valid, as against the United States, and all inconvenience or injustice which might arise from the exclusion of third parties was supposed to be obviated by providing the decrees and patents should not affect their rights.

The supreme court, in its first decision in the Fossat Case, distinctly traced, as we have seen, the line of discrimination between the duties of the courts and those of the surveyor general. But even then it was apparent, and when the case came up again it was expressly recognized, that the inquiry into "validity" necessarily involved "questions of extent, quantity, location, and boundary, essential to be determined before even the 'validity' of the claim could be decided." The distribution of powers, contemplated by the statute, was thus found to be impracticable, and the line of discrimination between the duties of the surveyor general and those of the courts became obscure and undefined. Had the grants in California been for tracts bounded by natural limits, it might have been sufficient to determine the validity of the claim and establish its boundaries where it adjoined public land, leaving

the boundary lines between the claimant and his neighbors to be settled by a litigation inter partes.

But when the grants are for quantity, and the lines between the claimant's and the public land have to be drawn so as to include a certain area, it is obvious that no final, or at least no just, settlement of any of the boundaries can be made until the lines between the claimant and his neighbors are fixed. When, therefore, in its second opinion in the Fossat Case, the supreme court directed this court to cause the northern line, which was to be run for quantity, to be surveyed upon the ground, it is apparent that this direction could not have been complied with until the eastern line was located either finally or provisionally.

But that line was in dispute, and certainly no final determination of it could be made in a suit between the United States and Fossat, to which Berreyesa was a stranger.

But if it were merely fixed provisionally, and its final location still remained subject to future determination, to what end run other lines upon the ground, which depended upon and should be varied according to the future location of the eastern line?

I have referred more especially to the Case of Fossat, because its circumstances are well known; but similar difficulties were presented in every case where the court was asked to inquire into surveys which pretended to fix external lines required to be run for quantity, while the dividing lines between the claimant and his neighbors remain unsettled. The law of 1860 removed these difficulties, by enabling the neighbors to be heard and become parties. It supplied the omissions of the law of 1851, and gave to the court the jurisdiction, which they should have possessed from the beginning, to inquire and decide, as under the laws of 1824 and 1828, all questions of location and boundary, after first admitting as parties all persons interested. Why the questions thus submitted to the courts are less fit subjects for judicial inquiry than similar questions of disputed boundary, daily litigated in ejectment suits, I have been unable to perceive.

If all questions of location and boundary are to be left to the decision of executive officers, as well might we declare that the duty of the ordinary tribunals, in appropriate cases, is merely to pass upon the issues raised by pleas of non est factum, or devisavit vel non, but that all questions as to the construction and operation of the deed, or will, are to be decided by the marshal or the sheriff. The Case of Fossat, alone, would seem sufficient to apprise us, that a question of boundary involving such immense interests, to elucidate which volumes of depositions have been taken, and in which the briefs of counsel occupy hundreds of printed pages, is not in its own nature proper to be passed upon by merely executive officers, without hearing the testimony of witnesses, the arguments of counsel, or using the other means of arriving at truth available in courts of justice.

The law of 1860 has been repealed. This court is thus relieved of what has hitherto been the most difficult, and the least grateful part of its duties. But as I was personally instrumental in procuring its passage, and as its wisdom and policy have been in high quarters doubted or assailed, I have thought it not improper to avail myself of this occasion to explain the grounds upon which it was recommended and believed to be necessary and beneficial.

The dismissal of the appeal from the second decree of this court, in the Case of Fossat, occasioned some embarrassment to the court and the counsel for the claimant. The supreme court had, in effect, decided that the decree was not final, because no survey of the land had been made. See last opinion of the supreme court in U. S. v. Fossat. The law of 1851, authorized the surveyor general to survey those lands only the claims to which had been finally confirmed. It thus seemed that there could be no final decree without a survey, and no survey without a final decree. The law of 1860 relieved the counsel for the claimant from this dilemma. He accordingly moved for and obtained an order, directing the surveyor general to survey the tract confirmed to Fossat, and on the approval by him of the plat and survey thereof, to give notice of such approval, as required by the act of congress approved June 14, 1860.

No opposition was made to the granting of this motion. The order appears to have been entered on the day the motion was made. The original is on file, signed by the judge, but drawn by and in the handwriting of the counsel for the claimant. Under this order a survey was made, and having been returned into this court at the instance of the New Almaden Company, the heirs of Berreyesa intervened, objected to the survey, and for the first time became parties to the controversy. The New Almaden Company also intervened and objected to the survey, and the parties proceeded to take testimony for and against it.

The Berreyesas having obtained a final confirmation, their rancho had been surveyed; and this survey, which adopted the same boundary line between the ranchos as that assumed in the Fossat survey, was also ordered into court on the application of the Berreyesas, in whose behalf exceptions are filed.

In this proceeding, the New Almaden Company, claiming under Castillero, and the Quicksilver Mining Company, claiming under Fossat, intervened and became parties. All parties being thus before the court, in each of the two suits, it proceeded to hear evidence and argument, and to decide upon

the disputed line between the ranchos. It was not pretended by the counsel who before this court represented Fossat, that the controversy had ever been decided by this court on its merits. It was not by any one suggested, or suspected by the court, that the supreme court had, on a motion to dismiss an appeal on the ground it was taken from a decree not final, but interlocutory, meant to affirm, or any way to pass upon the correctness of the decree appealed from.

This court, thereupon, after full argument and deliberation, determined, by a decision applicable to both cases, the common line of division between the ranchos. But even if the original decree, entered when Fossat and the United States alone were parties, had assumed to determine the boundary line between the ranchos, and if that decree had been affirmed, I should not have hesitated, when the surveys of both ranchos came up for approval, to determine their common line of division as might under the evidence then adduced have appeared to be just, and irrespective of any decree obtained by either disputant in the absence of his adversary. And this for the following reasons:

1. The first decree of this court had been reversed, and the cause remanded, with directions to declare the boundaries mentioned in the grant within which the league of Larios was to be taken. This the court had done, and expressed its decision in a decree. That decree the supreme court had declared to be interlocutory, and not final. For that reason alone the appeal had been dismissed, and this court had been directed to cause a survey to be made, which when approved and embodied in its decree, would impart to it finality. The survey in the Fossat Case had thus been made under a decree, which, by the positive declaration of the supreme court, was not a final, but merely an interlocutory decree. As such it was open to revision, until the court, by approving and adopting a survey, had made what the supreme court had declared would alone constitute a final decree in the cause.

2. It could not be pretended that the location of the dividing line was in any respect determined by the decree in the Berreyesa Case; for that decree merely described his land as "adjoining that of Justo Larios, with the boundaries mentioned in the grant and delineated on the diseño." Berreyesa, therefore, had in his own case a clear right to have his land surveyed as might appear to be just. He could not be bound by decrees entered in another suit between Fossat and the United States, in which he had not been heard, and to which he was not and could not have been a party. If, then, the survey of the Fossat Rancho was to be controlled by decrees previously entered in that suit, from which the court was not at liberty to depart, while the survey in the Berreyesa Case remained open to further inquiry, and subject to the decision of the court on the merits, the result must have been that two inconsistent surveys would have been approved, and overlapping patents issued.

To make inconsistent decrees, and approve conflicting surveys, I considered wholly inadmissible. It would only have produced future litigation unnecessary and vexatious; when all the parties were before the court, and were anxious for a determination by this court, and the supreme court on appeal, of the controversy which had so long been pending.

3. The decision of the supreme court, and the provisions of the act of 1860, had imposed upon this court the duty of establishing by a survey all the boundaries of the Fossat Rancho. As the northern line was to be run for quantity, it could only be fixed after all the other lines were determined. The dividing line between the ranchos had, therefore, first to be ascertained before the court or a surveyor could know where the northern line should be drawn, so as to make up the precise quantity of one league and no more.

If, then, Berreyesa, intervening for the first time in the cause, had practically no right to be heard, and if the location of the dividing line was to be considered as fixed by a decree made before he became a party to the suit, such a course could be consistent with the commonest rule of justice only on the hypothesis that the location did not and could not affect his rights, but that the final location of the line would remain open to contestation in the ordinary tribunals.

But if this were so, the attempt to determine the northern boundary was idle and vain; for if Fossat was to obtain exactly one league, and no more, the line run for quantity ought to be varied with every subsequent location of the disputed boundary. Justice and the interests of the United States, demanded, therefore, that in this and similar cases the lines between the claimant and his neighbors should be established before those run for quantity should be fixed; and it is obvious that this could be done only in a proceeding where the adjoining proprietors could appear, take evidence, and be heard, and in which they could not be bound by a decree entered in the suit before they were admitted as parties.

I have already observed that if, in a proceeding under the act of 1860 to correct a survey, the colindantes intervening in the suit are to be bound by the previous decree, it can only be on the theory that they are not affected by the survey, decree, or patent under it, but retain their rights unimpaired and capable of assertion in the ordinary tribunals.

But this theory would in practice be found deceptive, and the right of recourse to the ordinary tribunals illusory.

The California land claims are for the

most part founded on mere equities—the legal title remaining in the United States, to divest which a patent is necessary.

If, then, a grantee to whom a patent for a specified tract of land had been issued, were to attempt before the ordinary tribunals to assert a right under his original grant to land not covered by his patent; and if, in addition, the land thus claimed were included within the patent of a neighbor, to whom it had been surveyed and patented under another, and perhaps older, grant; it may well be doubted whether the bare statement of the case would not insure its dismissal by the ordinary tribunal. The "legal investigation and decision, by the proper judicial tribunal, of disputes between parties having interfering claims," which the act of 1851 contemplates, would, therefore, be found, after patents have been issued to both, a wholly unavailable remedy for the party injured by the erroneous determination of the dispute by the surveyor general, or an ex parte decision of it by the United States courts.

But if, to avoid this result, and to give to both parties an equal standing in the ordinary courts, conflicting decrees should be made and overlapping patents issued, it is evident not only that interminable litigation would ensue, but that one of the claimants would be wronged by the United States; for the unsuccessful party would lose a part of the land covered by his patent, and would fall short to the extent of the land in dispute of the quantity to which he was entitled by his grant.

On these grounds I was of opinion that where two or more surveys of coterminous ranchos are before the court, on proceedings under the act of 1860, where the controversy relates to their common boundary lines and all the claimants have intervened in and become parties to the suit with respect to each survey, it was the duty of the court to determine the dividing lines irrespective of any decree obtained by either as against the United States; and that to make conflicting decrees and issue overlapping patents, or to fix the lines according to decrees entered before the colindantes were heard in the cause, would, in the one case, involve the parties in vexatious litigation, and, in the other, practically deprive the colindante of his rights without a hearing.

The language of the act of 1860 appeared to this court not merely to justify, but to demand, this construction of its provisions. By the third section, all persons having an interest in, or whose rights are affected by any survey or location, are permitted to intervene. By the fourth section, the parties so intervening are allowed to take testimony "as to any matters necessary to show the true and proper location of the claim;" and the court, on hearing the allegations and proofs, is empowered to render judgment thereon; and if, in its opinion, the location and survey are erroneous, it is authorized to set aside and annul the same, or to correct and modify. 12 Stat. 34.

It will be perceived that the intervening parties are permitted to take testimony, not merely as to whether the survey conforms to a previous decree of the court, by which their rights may have been prejudged in their absence, but "as to any matters necessary to show the true and proper location of the claim;" and the court, after hearing the new allegations and proofs, is required to render judgment thereon, and to set aside the survey, not when it fails to conform to the previous decree, but whenever, after hearing the proofs, the location and survey are "in its opinion erroneous." If congress had intended to give to the courts the same powers as were conferred upon them by the acts of 1824 and 1828,—viz., to decide finally, after bringing before them all parties in interest, all questions relating to the extent, boundaries, and locality of the claims,—I know not what other language could have been used to express the intention.

But to construe the act as limiting the powers of the court on the intervention of parties previously strangers to the cause, to the inquiry whether the survey conformed to the decree already made, would defeat in great part the purpose of the law; for the determination of the court would settle nothing. It could not settle the dividing lines, for they would be fixed according to a decree made before the colindantes were heard; and even the exterior lines where the claim is bounded by public land could not rationally be considered as established, so long as the dividing lines by which in a grant for quantity they must necessarily be governed remained uncertain.

I have thought it right thus to explain fully the grounds on which the opinion of this court was based, in order that its action which has been so much criticised, may be thoroughly understood, and the nature of its errors (if errors it has committed) may be exactly appreciated. I have felt at liberty to do so, from the fact that in the recent opinion of the supreme court the question last considered is not discussed, but the construction given by the counsel for the claimant to the act of 1860 seems to have been adopted as necessarily and of course correct. I have explained the reasons for my opinions, not in any spirit of rebellion or protest against the authority which it is my duty and my desire to obey, but because I thought it just to present to the supreme court, it may be for the first time, the reasons which led me to arrive at a conclusion which it has pronounced to be incorrect, and to show that the action of this court, though perhaps erroneous, was not, as has been supposed, inconsistent, hasty, or inconsiderate.

With respect to the supposed change of

the decrees of this court, I believe I have shown beyond controversy:

(1) That no decision was ever made, or intended to be made, of the dispute regarding the eastern line until the last decree under the provisions of the act of 1860, and that this court had good grounds for believing that it had no authority to make any such decision.

(2) That it was not aware, and had no reason to suspect, that any decree supposed to determine that line had been affirmed by the supreme court.

(3) That even if the fact had been otherwise, there were strong reasons for believing that a decree so entered in a suit between the United States and the claimants did not and ought not to bind other parties subsequently intervening for their interests under the provisions of the act of 1860.

I trust, therefore, that the injustice of the implied censure contained in the recent opinion of the supreme court will be recognized by that high tribunal.

It remains to determine how far the decision of the supreme court in the case of U. S. v. Fossat is decisive of the question raised in the case at bar. It will be observed, that though in the opinion of the supreme court it is distinctly declared that, in a proceeding under the act of 1860, the duties of this court are limited to an inquiry whether the survey conforms to the decree previously entered in the cause, yet that the location of the dividing line is discussed on its merits, and the location adopted by this court adjudged to be erroneous; that at least a majority of the court assented to its judgment is certain. But it may very possibly be that the assent was given by some of its members on the ground that they agreed on the question raised as to the true location of the eastern line, without concurring in the general principle announced, viz., that colindantes and other intervenors in a proceeding under the act of 1860, who then for the first time are heard in it, are bound by the terms of a decree entered when the only parties to the suit were the United States and the claimant. The volume containing the last decisions of the supreme court has not been received in this state. Whether or not a majority of the court adopted all the views expressed in the published opinion, I am uninformed. I only know that they assented to the judgment.

But on the hypothesis that they did, the case at bar is distinguishable from that of Fossat. Here the claimant has intervened and become a party to a proceeding which necessarily involved the determination of the common boundary line between the ranchos. From the decision in that proceeding he might have appealed, and in case the location of the Mesa Rancho as established by this court had been altered, there would still have been assigned to the claimant of that rancho the full quantity of land to which he was entitled. As the case now stands, the owners of the Mesa Rancho can only obtain the land as surveyed and located under the decision of this court; and if the claim of the owners of the Rodriguez Ranch be allowed, their land will in part be located on the tract surveyed to Mesa, and overlapping patents must be issued creating certain litigation, and a possible loss by Mesa of a part of his land. The position of Rodriguez is thus closely analogous to what would be the position of Berreyesa if he should seek to have the line between him and Fossat adjudicated anew, according to the calls of his own decree.

It may well be doubted whether the supreme court would re-open the whole controversy, and on finding that the Berreyesa decree called for a line different from that called for in the Fossat decree, would make a new location of it, and direct overlapping patents to issue.

In the case at bar, the injustice of now depriving Mesa of a considerable portion of the land which, contrary to his own wishes, has been surveyed to him, is so manifest that I do not feel called upon, on the authority of a single case, where the effect and practical operation of the doctrines announced may not have been fully presented to the supreme court, to take from Mesa lands surveyed and perhaps patented, and for which there are now no means of giving him an equivalent by extending his lines in other directions.

I think, therefore, that the survey of the land confirmed to Rodriguez should be corrected by conforming the lines strictly to those called for in the decree, except that on the east it must follow the lines established by the final survey of the Mesa Rancho, as the lines of division between the ranchos.

Case No. 14,950a.

UNITED STATES v. DERRINGER.

[2 Hayw. & H. 72.] [1]

Circuit Court, District of Columbia. April 9, 1851.

CONTRACTS — ACTION FOR BREACH — MUTUALITY.

1. When the clerk of the house of representatives made a contract with the defendant to deliver wood at a given price and the time for delivery was extended by the clerk, *held*, that the clerk could not rescind the contract for non-delivery of the wood until the expiration of the time agreed upon for its delivery.

2. Where the defendant had contracted with the clerk of the house of representatives to furnish the government with wood, without an appropriation from congress to pay for the same, it was *held*, in a suit brought by the United States against the defendant for a breach of contract, that as, in the absence of an appropriation by congress, the United States would not be bound to answer in damages if they had refused

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

to accept the wood, for the same reason the defendant would not be liable for not furnishing the wood.

Declaration:

"That whereas the said Bronaugh M. Derringer, on the 8th day of May, in the year 1845, by his certain writing obligatory, sealed with his seal, and to the court here shown, whose date is the day and year above written, acknowledged himself jointly and severally with one Henry Derringer, Esq., to be held and firmly bound unto the said United States in the sum of $1,000, which said writing obligatory was with a condition therein written, that if the said B. M. Derringer did well and truly execute a contract entered into between B. B. French, clerk of the house of representatives of the United States, acting for and in behalf of the United States, which contract bears date the 8th day of May, 1845, in and by which said contract, amongst other things the said Derringer had contracted and engaged with the said B. B. French, acting as aforesaid, that for the consideration therein mentioned, the said Derringer would furnish and deliver at the office of the clerk of the house of representatives aforesaid, in the city of Washington, free of any charge or carriage, on or before the 1st day of September, 1845, 100 cords of the best hickory wood, to be sawed into lengths of two feet and piled away in the vaults appropriated for the reception thereof, at and for the rate of $5.49 per cord; and the said B. B. French, clerk as aforesaid, and acting as aforesaid, stipulated and agreed for, and on account of the United States, of the said United States with the said B. M. Derringer, otherwise called Bronaugh M. Derringer, to pay the said Derringer for the wood aforesaid, so as aforesaid to be delivered, sawed and piled away, according to the price and terms aforesaid, as soon as the account of the said Derringer thereof should be audited by the committee of accounts of the house of representatives, and an appropriation be made therefor by the congress of the said United States. And the United States in fact say that the said Derringer did not fulfill in whole, or in part, the said contract, but wholly failed therein, to wit: at the county aforesaid, and that the said Derringer did not furnish and deliver at the office of the clerk of the house of representatives of the United States, the quantity of wood aforesaid, viz. 100 cords of wood, and did not saw, or cause to be sawed, the same, or any part thereof, into lengths of two feet, and did not pile away, or cause to be piled away, the same, or any part thereof, in the vaults appropriated for the reception thereof, at or before the time stipulated in said contract, or at any time thereafter whereby an action hath accrued to the said United States to demand and have of him, the said Derringer, the sum of money above demanded, nevertheless the said Derringer, although often requested, has not paid to the said United States the said sum of money above demanded, or any part thereof, but so to do has hitherto wholly refused, and still doth refuse, to the great damage of the United States, to the value of $1,000, and therefore they bring suit," etc.

Pleas of the defendant to the declaration:

"And the defendant comes and defends the wrong and injury, when, etc., and craves oyer of the writing obligatory set forth in the declaration as the foundation of the action and of the condition thereof, and also of the agreement therein referred to, purporting to have been made between B. B. French, clerk of the house of representatives of the United States, and said defendant, B. M. Derringer, which said two writings are read to him in the words and figures to wit: the first, the bond entered into by the defendant and Henry Derringer; second, the contract, which writings being heard and understood, the defendant saith the United States their action against this defendant to have and maintain ought not, because the defendant doth aver that after the said 8th day of May, 1845, and before the said 1st day of September, 1845, to wit: On the ——— day of ———, in the year 1845, at Washington, D. C., at the office of the house of representatives, it was mutually agreed between the said B. B. French, clerk of the house of representatives of the United States, and the said B. M. Derringer, that the time for the delivery of the said wood was and should be extended to the 1st day of October, 1845, and that a delivery of said wood on or before the said day of September, 1845, was dispensed with; and the said stipulation of this defendant to deliver the said 100 cords of wood on or before the 1st of September, 1845, was waived, released, set aside and cancelled by the said B. B. French as aforesaid, by and with the consent of this defendant, and by concurrent wills and consent of said B. B. French, clerk of the house of representatives aforesaid, and the said B. M. Derringer, the defendant.

"(2) And the defendant, for a further plea, saith that after the said execution of the contract of May 8, 1845, and before the said 1st day of September, 1845, to wit: On the ——— day of ———, at the district and county aforesaid, by mutual agreement of said B. B. French, clerk of the house of representatives, and of said defendant B. M. Derringer, the time for the delivery of said 100 cords of wood was extended, and it was by said parties mutually then and there agreed that the time for delivery of said wood, instead of on or before said 1st day of September, should be on or before said 1st day of October, 1845; and the defendant doth further aver that after the said time for the delivery of the wood had been so as aforesaid extended, and before the expiration of the said 1st day of October, 1845, he, the said B. B. French, clerk as aforesaid, did give notice to this defendant not to deliver the wood, and did declare the contract as not obligatory upon him, the said B. B. French, the one party, and did declare to this defendant that he, said French, no longer looked to this defendant, B. M. Derringer, for a supply

of wood for the house; and he, the said B. B. French, clerk as aforesaid, said by his certain writing, signed with his name, and dated 'Office of House of Representatives, United States, Washington, October 1, 1845,' and addressed to this defendant, and to him delivered in the morning of said day, did therein and thereby admit and acknowledge the extension of the time for delivery of the wood as hereinbefore set forth and pleaded; and he, the said French, clerk as aforesaid, did, in and by said writing, so addressed and delivered to this defendant, to wit: on the said 1st day of October, 1845, in the District of Columbia, and county of Washington, aforesaid, put an end to the said contract for the delivery of the wood, and prevent this defendant from delivering of the wood; and the defendant brings here and shows to the court the said letter bearing date, 'Office, Hall of Representatives, United States, October 1, 1845,' signed with the name of him, the said B. B. French, clerk of the house of representatives as aforesaid, by J. E. Millard, therein authorized by said French; and this defendant doth say that he, the said B. B. French, clerk as aforesaid, by his own acting and doing, did prevent the delivery of the wood on the said 1st day of September, 1845, and on the said 1st day of October, 1845; and this defendant avers that he, the said B. B. French, clerk as aforesaid, is the cause why the said wood was not delivered, and did obstruct, prevent and prohibit, this defendant from the delivery of the wood.

"(3) And for a further plea this defendant saith that after the said contract of the 8th May, 1845, for the delivery of the said wood on or before the 1st day of September, 1845, and before the said 1st day of September, 1845, it was mutually agreed, to wit: On the ——— day of ———, in the year 1845, by and between the said B. B. French, clerk as aforesaid, and this defendant, that the time for the delivery of said 100 cords of wood should be extended, and that the time for delivery of said 100 cords of wood shall be on or before the 1st day of October, 1845; and the said defendant doth further say and aver that before the said extended time for the delivery of the wood had expired, and whilst this defendant was, as he doth aver, with all due diligence and care, preparing to deliver the wood in performance of the said contract, he, the said French, clerk as aforesaid, did contract with one Joseph Rafliffe, for the purpose of supplying said wood, and therefore and thereupon did give notice to this defendant not to deliver the wood, and that the said French did not look to this defendant for a supply of wood; which said notification to this defendant was made in writing, signed with the name of the said B. B. French, as clerk of the house of representatives of the United States, bearing date on the 1st day of October, 1845, at the office of the house of representatives, wherein is stated and set forth as well the said extension of time for delivery, as also the notification to this defendant not to deliver the wood, and likewise the notification to this defendant that said B. B. French did not look to this defendant for a supply of wood for the said house of representatives, which said written notification, bearing date on the day and year aforesaid, is to the court here now shown; and the defendant avers that said writing so aforesaid, made in the said office of the house of representatives, and signed with the name of B. B. French, was made and delivered to this defendant on the said 1st day of October, 1845, at Washington, in the district of Columbia aforesaid, and was delivered to this defendant before noon of that day, and all of which this defendant is ready to verify.

"(4) And for a further plea this defendant saith that the said B. B. French, by his certain writing, signed with his proper name, and officially made as clerk aforesaid, made and delivered to this defendant in the forenoon of the 1st day of October, 1845, in the county of Washington and District of Columbia, and to the court here now shown, bearing date at the office of the house of representatives; and on the said 1st day of October, 1845, did therein and thereby waive, release, discharge, acquit and absolve this defendant from the said contract for the delivery of said wood, and did therein and thereby give notice and information to this defendant not to deliver the said wood; and did therein and thereby give notice and information to this defendant that he, the said French, clerk as aforesaid, did not look to this defendant for the supply of said wood for the use of the house of representatives, and this the defendant is ready to verify.

"(5) And for a further plea this defendant saith that the congress of the United States had not made, on or before the said 8th day of May, or 1st of September, or 1st day of October in said year 1845, any appropriation of money for the purchase of said 100 cords of wood for the use of the house of representatives, and that neither the United States nor congress of the United States had given to said B. B. French, individually, or in his official capacity as clerk, authority or rightful power to bargain for the purchase on credit and bind the United States or the congress to pay for said wood; and that the said contract made by said B. B. French, in his official capacity, and purporting to have been by him done as acting for and on behalf of the United States, was without any warrant of law, done by usurpation and assumption, was void in the beginning, of no validity in the course of time; that in and by said writings no valuable, lawful or good consideration flowed or accrued therefrom or thereby to this defendant, and that the said contract in the declaration supposed was null, and is of no force and effect in law, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have and maintain the action in the declaration in manner and form as therein set forth, complained and alleged," etc.

Plaintiff's additional count:

"And whereas, also, the said B. M. Derringer, otherwise called Bronaugh M. Derringer, on the said 8th day of May, in the year 1845, at the county aforesaid, by his certain other writing obligatory of that date, sealed with his seal, and here in court to be produced, bound and acknowledged himself to be indebted, with one Henry Derringer, to the said United States of America, in the full and just sum of $1,000, of current money of said United States, which said last mentioned writing obligatory was, with a certain condition thereunto written, setting forth that a public advertisement, dated on the 16th day of April, in the year 1845, was issued by the clerk of the house of representatives of the said United States; that the defendant had contracted to deliver at the office of the clerk of the house of representatives of the United States, for the use of the said house of representatives, on or before the 1st day of September, in the year 1845, free of charge for carriage, 100 cords of hickory wood, according to the specification in said advertisement, at $5.49 per cord, and that the said clerk of the house of representatives as aforesaid, had notified his acceptance of the said proposals, and had required security for the due and faithful delivery of said wood; and that the said defendant would well and truly cause to be delivered at the said office of the clerk of the house of representatives, the said wood, agreeably to a certain contract for furnishing the same, and in conformity with the terms specified in the said advertisement, and that the said defendant would well and faithfully fulfill all the terms of his said contract, which said contract was entered into by and between the defendant and the said French, clerk as aforesaid, and acting as aforesaid, bears date on the said 8th day of May, in the year 1845, sealed with the respective seals of the said defendant and the said French, and is here in court to be produced; and by which contract said defendant on his part agreed with said French, clerk as aforesaid, and acting as aforesaid, to deliver at the office of the said clerk in the city of Washington, free of charge for carriage, on or before the 1st day of September, 1845, 100 cords of the best hickory wood, to be sawed into lengths of two feet and piled away in the vaults appropriated for the reception thereof, at and after the rate of $5.49 per cord; and the said French, clerk as aforesaid, stipulated for and on account of the said United States to pay for the wood aforesaid, according to the price and terms aforesaid, as soon as the account of the defendant therefor should be audited by the committee of accounts of the said house of representatives, and an appropriation be made therefor. And the plaintiffs aver that on or about the said 1st day of September, 1845, the time stipulated in the contract in the said last mentioned writing obligatory mentioned, for the delivery, sawing and piling away of the wood aforesaid, according to the price and terms in the said last mentioned contract mentioned, having then expired or being about to expire, and the defendant not having fulfilled his said last mentioned contract, the defendant informed the said Benjamin B. French, clerk as aforesaid, and acting as aforesaid, in the county aforesaid, that said defendant could not fulfill his said last mentioned contract, and could not deliver, saw and pile away said wood as aforesaid at or by the time limited and stipulated in said last mentioned contract for such delivery, sawing and piling away; and on or about the said 1st day of September, in the year aforesaid, at the county aforesaid, requested the said Benjamin B. French, clerk as aforesaid, and acting as aforesaid, to enlarge the time specified in said last mentioned contract for the delivery, sawing and piling away as aforesaid of said wood, so as to give the defendant all the said month of September for delivering, sawing and piling away the same, strongly assuring said French that should such indulgence be given, said French should not be again disappointed. Whereupon said French, clerk as aforesaid, and acting as aforesaid, at the special instance and request of the defendant, consented to enlarge the time aforesaid so as to give the defendant all the month of September within which to deliver, saw and pile away said wood as aforesaid. And so the plaintiffs say that on or about the said 1st day of September, 1845, at the county aforesaid, the said French, clerk as aforesaid, and acting as aforesaid, and the defendant, did, on the aforesaid special instance and request of the defendant, agree together to enlarge and extend, and did enlarge and extend through all the said month of September, the time fixed and limited in the said last mentioned contract, and in the said last mentioned writing obligatory for the delivery, sawing and piling away of the said wood as aforesaid; but that neither the said last mentioned contract nor the said condition of the last mentioned writing obligatory was, on the day and year last named, or at any other time, in any other particular than as to the time of delivery, sawing and piling away, altered or varied in any respect or degree whatever, but remained in full force, virtue and effect, except as to the time of delivery, sawing and piling away, as if said time of delivery, sawing and piling away had not been so enlarged and extended as aforesaid. Yet the defendant did not, on or before the 1st day of September, 1845, nor at any day or time during the said month of September, nor at any other day and time whatever, well and faithfully fulfill said last mentioned contract either in whole or in part, and has not, at any other day or time whatever, well and faithfully fulfilled the said last mentioned contract, either in whole or in part; in this, that the defendant did not, on or before the said 1st day of September, 1845, nor at any day or time during the said

month of September, nor at any other day or time whatever, deliver or cause to be delivered at the office of the clerk of the house of representatives of the United States, in the city of Washington, saw or cause to be sawed into lengths of two feet, pile away or cause to be piled away in the vaults appropriated for the reception thereof, 100 cords of the best hickory wood or any part thereof, and has not, at any other day or time whatever, delivered or caused to be delivered at said office, sawed or caused to be sawed, and piled away or caused to be piled away in the vaults appropriated for the reception thereof, said 100 cords of the best hickory wood or any part thereof, whereby an action has accrued to the plaintiff to demand and to have of the defendant the sum of money last above demanded; nevertheless the defendant, though often requested to do so, has not paid to the plaintiffs the said last above demanded sum of money, or any part thereof, but so to do has hitherto wholly refused and still refuses. By means of which said premises the plaintiffs have sustained damages to a large amount, to wit: to the amount of $1,000, and therefore they bring their suit," etc.

"And the defendant, for further plea to the said declaration, and to the additional count filed by the attorney of the United States, doth allege and say that B. B. French, clerk of the house of representatives, by his certain writing, signed with his name, bearing date on the ——— day of ———, 1845, did extend and enlarge the time for the delivery of the wood in the declaration mentioned to the 1st day of October, 1845, and that the defendant had by said extension the whole of said 1st day of October, 1845, for the delivery of the wood; and that the said B. B. French, by his letter to this defendant, delivered on the said 1st day of October, 1845, and before sunset of that day, to wit: at 11 o'clock in the forenoon of the said day, at the city of Washington, and county of Washington, in the District of Columbia, forbid the said defendant to deliver the wood, and this he is ready to verify, without that the contract and time for delivery was extended only to the last day of September, as the plaintiff in pleading hath alleged."

"And the plaintiffs saith the contract and time for the delivery was extended and enlarged to include the last day of September only, and not to include the 1st day of October, 1845, as the defendant, in pleading of, hath alleged, and this the plaintiffs pray may be enquired of by the country."

And the defendant likewise.

P. R. Fendall, for the United States.
Ould & Bibb, for defendant.

The plaintiffs to support the issue on their part joined offered evidence, tending to prove that on the 16th day of April, 1845, one Benjamin B. French was clerk, duly elected and qualified as clerk of the house of representatives of the United States, and so continued to be until the 1st day of November following; and long after that, on the day and year first aforesaid, the said French, as such clerk, caused to be published in the National Intelligencer and other newspapers printed and published in the city of Washington, in the District of Columbia, a notice in the words following: (Prout the same.) The plaintiffs then offered evidence tending to prove that proposals for furnishing said wood were accordingly made by sundry bidders; that the lowest bid was made by the defendant, and at the rate of $5.49 per cord; that on ——— day of May, 1845, the said French, as such clerk, accepted the defendant's said bid; that on the 8th of May next following, the defendant and the said French, as such clerk, entered into a contract for the delivery of said wood, and on the same day the defendant executed his bond for the delivery of said wood, which said contract and bond were read in evidence to the jury and are in words and figures following: (Prout the same.) The plaintiffs then offered the evidence of B. B. French, tending to prove that on or before the 1st day of September, 1845, the day fixed by the condition of said bond for the delivery of said wood, the defendant called on said French, represented that he was not prepared to deliver the said wood on that day, and solicited an extension of the time for delivery throughout said month of September; that said extension was granted by said French as such clerk, but that in all other respects the original contract remained unaltered; that said wood, or any part thereof, was not delivered nor offered to be delivered during said month of September, nor at any other time; that on the 1st day of October next following, one I. C. Millard, a clerk in the office of said French, by authority of said French, addressed a letter to the defendant in the words and figures following: (Prout said letter.) This letter of October 1, 1845, was given in evidence by plaintiffs before the parol evidence as to extension of time, and the defendant objected to that part of the parol evidence of French which tended to prove that the extension of time for delivery was confined to the month of September, to the exclusion of the first day of October. The court admitted the evidence subject to the further consideration of the court.

The plaintiffs then offered evidence to prove that on or before said 1st day of October, 1845, and thereafter, the defendant resided in Georgetown, District of Columbia; that the office hours of said French, clerk as aforesaid, ended at 3 o'clock p. m., and it was the usage of his office for letters written there to be sent to the post office after 3 o'clock in the afternoon; that the defendant on or before the 1st day of October, 1845, kept a wood and coal yard in the city of Washington, but had no wood; that shortly before the 2d day of October, 1845, the said French addressed

letters to the two bidders successively, who were next lowest to the defendant, apprising them on information which said French had received of the probability that the defendant would fail to comply with his contract, and enquiring whether they would be willing to furnish the wood; that receiving no answer from either of the two next lowest of them, or an answer declining, he agreed with the third for the delivery, sawing and piling away of the wood, as provided by the contract, at the price of $6.50 per cord; that this was a fair market price on the 2d of October, 1845, of hickory wood of the quality called for by the contract, delivered, sawed, and piled away as therein required; that the new contractor was industriously occupied between three and four weeks delivering, sawing and piling away said 100 cords of hickory wood, which was conveyed in numerous carts, some of them being hired by the contractor, and that for them he paid at the rate of $1 a cord; that with the aid of all the carts in the city of Washington and Georgetown, it would have been impossible for 100 cords of hickory wood to be conveyed, sawed and piled away in the vaults of the house of representatives in a single day. The plaintiffs further offered in evidence the rules of the house of representatives, existing and in force when said contract was made, being the rules printed by order of said house, in the year 1837, by Thomas Allen, printer thereto, and the plaintiffs then offered evidence tending to prove that in the year 1833, the said French was first employed in the clerk's office of the house of representatives, and that there was then existing and in force a usage (established long before the passage of the act of congress of February 23, 1815 [3 Stat. 212], requiring the clerk of the house of representatives, to give bond and security for the faithful application and disbursement of the contingent fund), under which usage it was the duty of the clerk to have charge of the contingent fund annually appropriated by congress for the use of said house; to provide and pay for out of it fuel and other necessaries for the use of said house, and to make contracts for their purchase and delivery; that claims for articles furnished under such contracts, after being passed by the committee of accounts, were paid by the clerk, and subsequently allowed at the treasury of the United States; that when the contingent fund was exhausted congress made appropriation for the deficiency, and such claims as the first appropriation had proved insufficient to meet were, as aforesaid, paid out of the appropriations for deficiency, and allowed at the treasury; that before the passage of the act of congress of 26th of August, 1842 [5 Stat. 534], requiring printing and stationery to be advertised for, it was the usage for the clerk to make purchases and contracts without advertising for proposals, but that since the passage of that law, the usage has been for the clerk to advertise for proposals to furnish fuel, in the manner prescribed by that law, in regard to stationery and printing; and that in view of the possibility of the contingent fund proving insufficient for its objects, a clause was generally inserted in the contracts, to the effect that the articles (after being audited by the committee of accounts) should be paid for "as soon as an appropriation should be made therefor," which clause was inserted in the contract with the defendant, although by the act of congress of March 3, 1845 [5 Stat. 752], making appropriations for the civil and diplomatic expenses of the government, for the year ending June 30, 1846, and for other purposes, $100,000 were appropriated for stationery, fuel, printing and all other contingent expenses of the house of representatives; and although no deficiency in said fund so appropriated was apprehended. And the plaintiffs offered evidence tending to prove that in point of fact no such deficiency did occur, and that the wood furnished under the defendant's contract by the substituted contractor was paid for out of said appropriation.

The defendant then offered evidence tending to prove that in the months of September and October, 1845, the best hickory wood in Georgetown was sold and delivered in Georgetown at $5.50 per cord, but that this price was exclusive of the cost of sawing and piling away

Instructions:

Whereupon the defendant's counsel prayed the court to instruct the jury as follows: That if they believe from the evidence the said B. B. French had no authority in law to contract for and on behalf of the United States, and to bind the United States by the said contract in the declaration mentioned, and that the said contract not binding on the said United States did not bind said defendant, he is entitled to a verdict in this suit, which was given.

THE COURT gave also the following instructions:

1. That if the jury find from the evidence that by mutual agreement between B. B. French, clerk of the house of representatives, and the defendant, the time for the delivery of the wood in the declaration mentioned was extended and enlarged for the 1st day of October, 1845, then the defendant has verified and maintained his second, third, fourth, and sixth pleas, and the jury should find for the defendant.

2. That if the jury shall find from the evidence the letter bearing date October 1, 1845, to be genuine letter issued from the office of the clerk of the house of representatives, by the authority of B. B. French, the clerk, and delivered to the defendant on the same day, then the law of the case is for the defendant, and the jury should find for him.

To which giving of said instructions the plaintiffs, by their counsel, except.

The above instructions were concurred in by MORSELL and DUNLOP, Circuit Judges.
Verdict for defendant.

Motion for new trial on above exceptions. Motion overruled, and judgment rendered on the verdict.

Case No. 14,951.

UNITED STATES v. DESMOND.

[39 Hunt, Mer. Mag. 332.]

Circuit Court, S. D. New York. April, 1858.

CUSTOMS—OBSTRUCTING OFFICER.

This was an indictment [against Timothy Desmond] for obstructing a custom-house officer in the discharge of his duty. It appeared from the evidence that the defendant was a gatekeeper on Pier No. 44, North river, at which the steamer Kangaroo was lying; that the custom-house officer, Mr. Munroe, was on board the ship, and, hearing a confusion at the gate, went there, and found the defendant refusing to allow parties in, whereupon he ordered him to open it, and, on his refusal, undertook to open it himself, and, in doing so, got hit on the head by the defendant with a stick.

Mr. Yoachimssen, for the United States.
Mr. Donohue, for defendant.

HALL, District Judge, thought this was hardly a part of Munroe's duty, as a custom-house officer, and the jury found a verdict of not guilty.

UNITED STATES v. DE SWATZ. See Case No. 13,680.

Case No. 14,952.

UNITED STATES v. DEVAUGHAN.

[3 Cranch, C. C. 84.] [1]

Circuit Court, District of Columbia. April Term, 1827.

JUROR—VOIR DIRE—DISQUALIFICATION—CONTEMPT.

1. The question which may be asked of a juror when called up to be sworn, is, "Have you formed and delivered any opinion as to the guilt of the prisoner?"

2. If a juror, after being summoned, voluntarily forms and delivers an opinion as to the guilt or innocence of the prisoner, with a view of disqualifying himself for serving on the jury at the trial, it is a contempt of court, inasmuch as it tends to the obstruction of justice.

[Cited in Re May, 1 Fed. 742; U. S. v. Anonymous, 21 Fed. 770.]

Indictment [against Jonathan Devaughan] for the murder of Tobias Martin, in the county of Washington; the cause having been removed to this county at the request of the prisoner.

A. C. Casanove, one of the venire, was asked by Mr. Hewitt, the prisoner's counsel, whether he had formed an opinion respecting the guilt of the prisoner.

CRANCH, Chief Judge, said he understood the proper question to be, whether he had formed and delivered an opinion as to the guilt of the prisoner upon this indictment; and the question was so put.

Mr. Casanove answered that he had. One of the judges asked whether he had so formed and delivered it since he was summoned on the venire. He answered in the affirmative. One of the judges then asked him whether he did so with a view to disqualify himself for serving on the jury. His answer was, yes, partly with that view, and certainly with a hope that it would have that effect.

THE COURT (nem. con.) thought that this conduct of Mr. Casanove, in thus disqualifying himself to serve on the jury, after he had been summoned, was a contempt of court, and ordered him to be fined $50 for the contempt.

CRANCH, Chief Judge, said, that A. C. Casanove, one of the jurors summoned upon this venire, having stated to the court, that since he was summoned as a juror in this cause, he has formed and delivered an opinion as to the guilt of the prisoner in this cause, partly with a view to disqualify himself for serving as a juror in the cause, and with the hope that it would have that effect, the court is of opinion that Mr. Casanove's conduct, in that respect, was a contempt of court, and that he be fined $50. That the court did not suppose Mr. Casanove intended any contempt to the judges personally, nor to the court simply as a court, but that as it tended to the obstruction of justice, the court deemed it necessary to take this notice of it, reserving to itself the right to mitigate the fine, or to rescind the order upon any proper representation which may hereafter be made by Mr. Casanove, upon the subject.

Mr. Casanove was then rejected as a juror. Several of the other jurors, having formed and delivered opinions against the prisoner before they were summoned, were discharged.

The case of U. S. v. Burr [Case No. 14,694], was cited, in which case it appears that the question put to the jurors was, whether they had formed and delivered an opinion, &c.

The evidence was very clear against the prisoner. He was convicted; sentenced, on the 5th of May, 1827, to be hung on the last Wednesday in June, and executed in the county of Alexandria.

UNITED STATES (DE VILLEMONT'S HEIRS v.). See Case No. 3,839.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,953.

UNITED STATES v. DEVLIN.

[6 Blatchf. 71;[1] 7 Int. Rev. Rec. 94; 1 Am. Law T. Rep. (U. S. Cts.) 38; 15 Pittsb. Leg. J. 398.]

Circuit Court, E. D. New York. March 14, 1868.

JURY — PEREMPTORY CHALLENGE — INDICTMENT —JOINDER OF OFFENCES—INTERNAL REVENUE.

1. No right to make a peremptory challenge to a juror exists, in the circuit court of the United States for the Eastern district of New York, on the part of a person on trial on an indictment for a misdemeanor.

[Cited in U. S. v. Coppersmith, 4 Fed. 199.]

2. The act of July 20, 1840 (5 Stat. 394), does not confer such right.

3. The neglect or failure of an officer of the internal revenue to perform a duty required of him by law, does not relieve another person, who has violated the law, from the consequences of such violation.

4. In an indictment for a misdemeanor, several offences may be joined in different counts; and, when that is done, the prosecution cannot be compelled to elect between the several counts.

5. On the trial of an indictment under the internal revenue law, for having carried on business without a license, and without having paid a special tax, and for having failed to keep books required by law to be kept, the burden of proof is on the defendant to show that he had a license, and paid the special tax, and kept the books.

This was a motion for a new trial. The prisoner [John Devlin] had been convicted on an indictment, charging him with offences against the internal revenue laws. [Case No. 14,955.]

Benjamin F. Tracy, U. S. Dist. Atty.

William C. De Witt, for prisoner.

BENEDICT, District Judge. The application for a new trial is based on several grounds, the most important of which relates to the right of peremptory challenges in this court, and will be first considered. The ruling of the court on the trial was, that the offences charged against the prisoner were misdemeanors, and that, in such prosecutions, no right of peremptory challenge existed in this court. The ruling was not made without consideration, and, having now again examined the question, in the light of the argument on this motion, I see no reason to change the opinion then formed. Although apparently doubted on the trial, the ruling that the offences charged were misdemeanors, has not been seriously questioned on the present motion. These offences are three in number, set forth in as many counts. The defendant is charged, first, with having carried on the business of a wholesale dealer without having taken out a license; second, with having carried on the same business after September, 1866, (when the law requiring a new registration and the payment of a special tax took effect,) without having paid the special tax; third, with having failed to keep the books which the law requires to be kept by wholesale dealers in liquors. No general statute of the United States exists according to which these offences can be declared felonies, nor are they declared to be such by the statute creating them, although there are offences in the same act expressly designated such. They are not made punishable by hard labor, and a felonious intent is not made a part of the offence. In character, they are such that an intention to raise them to the rank of felony is not to be presumed, in the absence of any expressed indication of such an intention. A statute will not be construed to create a new felony, unless its express words or their necessary implication so require. 1 Bish. Cr. Law, § 557. The offences, then, are misdemeanors. If so, the right of peremptory challenge must be found conferred by some statute of the United States; for, at common law, no such right exists in such cases. 4 Bl. Comm. 353. It has, accordingly, been argued, that, by the act of congress of July 20, 1840 (5 Stat. 394), the state statute of 1847, which gives to a prisoner the right of peremptory challenge in the tribunals of the state, is made, in effect, a statute of the United States and available as conferring such right in this court. But, although it is true, that, under the state act of 1847, the right in question exists in the tribunals of the state, I am unable to see how the language of the United States statute of 1840 can, by any fair construction, be considered as giving effect to that act in this court. The words of the act are as follows: "Jurors to serve in the courts of the United States in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have, and are entitled to, and shall hereafter, from time to time, have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised, and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof." These words seem to me clearly to confine the act to the subject of the qualifications of persons to serve as jurymen, and their exemptions from that duty, and in no wise to relate to the right to a peremptory challenge, which is the setting aside a juryman without regard to his qualification or exemption. Such was the construction placed upon this act, in 1851, by Mr. Justice Nelson, in the case of U. S. v. Douglass [Case No. 14,989], and, the decision of the supreme court in the case of U. S. v. Shackleford, 18 How. [59 U. S.] 588, is to the same effect. This last case brought up, on a certificate of division, the question of the right to peremptory challenges, in a prosecution for a misdemeanor in Kentucky, and the determination of the court, as I understand it, was, that, by virtue of the latter portion of the act of 1840, the courts of the United States are empowered to adopt, by rule, an existing state statute upon the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

subject of peremptory challenges, but that, in the absence of any such adoption by rule, the right to a peremptory challenge, in a prosecution for a misdemeanor, could not be held to exist, either under the common law, or under a law of the state not so adopted by the court. The point in question is thus settled adversely to the prisoner by authority; for, in this court, the state act of 1847 has never been adopted by rule or in practice, nor has that act, to my knowledge, been adopted in any of the courts of this circuit.

The next question to be considered relates to the rulings of the court in excluding certain offers of evidence made by the defence. These offers are based upon the proposition, that the citizen and the officer of the revenue bear such a relation to each other, in regard to the law, that the neglect or failure of the officer to perform the duties which the law requires of him, relieves the citizen from the obligations which the law imposes upon him. The proposition is manifestly unsound. To maintain it would be to hold, that a revenue officer, by failing to obey or enforce a law, could destroy the law. It would be, in effect, to transfer to officers of the revenue the law-making power, and would enable them to make the law binding upon those only whom they might desire to have bound. This cannot be. The officers may, or may not, comply with the law, but the law exists, nevertheless, in full force, and visits with its punishment both the citizen and the officer, when they are shown to have disregarded its requirements. These views are not new, but have been repeatedly expressed by courts, in disposing of defences based upon the same theory now advanced on behalf of this prisoner. Com. v. Blackington (Shaw, C. J.) 24 Pick. 352; Lord v. Jones (Shepley, J.) 24 Me. 439, 442; Mayor v. Mason, 4 E. D. Smith, 142, 145 (Woodruff, J.). If, then, it were true that the failure of an assistant assessor to register the application of the prisoner, prevented him from obtaining a license from the collector, that would not make it lawful for him to proceed without a license. The refusal to grant a license is not equivalent to a license. So, too, if it be true, as appears from the papers offered in evidence, that, after the commission of the offence here charged, and after the prisoner had been arrested, and these very offences had, to some extent, been judicially examined into, the officers of the internal revenue accepted from him an application for a license, and received from him the amount of the special tax, this proceeding on the part of the prisoner does not tend to show that he had a license at the time in question, or had paid his special tax before he proceeded to do business; nor did the action of the officers work out a pardon for the offences thus previously committed. Neither the law-making power, nor the pardoning power, has been entrusted to the collectors and assessors of the internal revenue.

The next question raised is based upon the refusal of the court to compel the prosecution to elect between the several counts in the indictment. On this point it is only necessary to say, that an examination of the text-books will show it to be well settled that, in cases of misdemeanor, several offences may be joined in different counts, and that there is no right, in such cases, to compel the prosecution to rely on one transaction. 1 Bish. Cr. Law, §§ 209, 212.

One other point has been taken on this motion, and that relates to the charge to the jury, that the burden rested on the prisoner to show that he had taken out a license, and had paid the special tax, and had kept the books required by the law. On this point it must first be noticed, that no exception was taken to this portion of the charge, nor was it objected to at the trial. Therefore, the point cannot be properly raised on this motion. But, without intending, in any degree, to countenance the practice of omitting to object at the time to portions of a charge supposed to be erroneous, I may add, that the charge could only have been understood to be declaratory of the law of the case as it stood on the evidence, and not to be the announcement of an abstract proposition. That it correctly declared the law of the case is not to be disputed; for, there was, in the case, positive evidence, from the prisoner's own clerk, that the books were not kept, and, also, evidence going to show that no license had been issued to the prisoner, and that no special tax had been paid by him. But, I apprehend that, considered as an abstract proposition, it will be found to be correct in principle and sustained by authority. Thus, in State v. Geuing, 1 McCord, 573; which was an indictment for selling liquor without a license, the court, upon appeal, say: "It is the opinion of the court, that the burthen of the proof lay on the defendant, and that it was incumbent on him to show that he had been licensed to retail, a fact which, if it existed, could easily have been made to appear, by the adduction of his license." So, also, in Wheat v. State, 6 Mo. 455, which was an indictment for keeping a ferry without a license, it was held, that the burden was on the defendant to show that he had a license, without the state offering any evidence to show the contrary.

I have now considered all the points raised on the part of the defence on this motion, and the result is, that no good ground for a new trial has been shown. The motion for a new trial must, therefore, be denied.

Case No. 14,954.

UNITED STATES v. DEVLIN et al.

[5 Int. Rev. Rec. 182.]

Circuit Court, E. D. New York. June, 1867.

VIOLATIONS OF INTERNAL REVENUE LAWS—FRAUDULENT INSPECTOR'S BRAND.

[The thirty-eighth section of the act of July 13, 1866, making it a felony for "any person"

to use any inspector's brand upon casks purporting to contain distilled spirits, with intent to defraud, etc., is not confined to frauds in which the inspector himself is concerned, but includes such use of the inspector's brand by any other parties.]

In this case, which was one of several indictments found against the defendants [John Devlin, T. T. Levan, F. H. Tappan, and A. J. Phillips] arising out of the great frauds in distilled spirits, the defendants demurred to the indictment on the ground that the statute had not constituted the acts charged an offence.

The demurrers were argued by:

Dist. Atty. Tracy, for United States.

Mr. Evarts, for defendants.

NELSON, Circuit Justice (orally). In this case we have looked into the question raised by the demurrer, argued by counsel on both sides, and have satisfied ourselves that the demurrer is not well taken, and it will be overruled. The first two counts in the indictment charge substantially these defendants with having put an inspector's brand upon barrels of whiskey or distilled spirits, the brand being, "Manufactured prior to Sept. 1, 1866. A. J. Phillips, Inspector, New York;" with having put this inspector's brand upon large numbers of barrels or casks of distilled spirits, which brand imports in the judgment of law that the tax upon the whiskey has been paid; has been paid by the manufacturer. That is the import of the brand, whereas the defendants knew that the liquor was manufactured subsequent to the 1st of September, 1866. They knew at the time that the taxes had not been paid, and that this brand was put on with the intent to defraud the government. That is the charge substantially of the first two counts in the indictment. The third count charges these defendants with having put upon their casks of distilled liquor a counterfeit brand—a false and counterfeit brand of the inspector—with the intent to defraud the government. Now, the act of July 13, 1866, § 38 [14 Stat. 159], contains this provision: "Any person who shall with fraudulent intent use any inspector's brands, or plates upon any cask or package containing, or purporting to contain distilled spirits, or who shall knowingly make or use any counterfeit brand or spurious brand, or plate, upon any cask or package of distilled spirits, shall be deemed guilty of a felony, and upon conviction thereof shall be fined $1,000, and imprisoned not less than two nor more than five years." Any person who shall with fraudulent intent use any inspector's brand, or who shall use a counterfeit brand, knowing that it was a counterfeit brand, with the intent to defraud the government, will be subject to this penalty. Our opinion is, that the first and second counts come within this portion of the thirty-eighth section.

An attempt has been made to confine this section to cases where the inspector himself is concerned in the perpetration of the fraud. In the previous part of the section there is an offence described of that kind. But this clause covers all offenses committed by any person, and therefore embraces these defendants as well as, probably, an inspector himself. A clause in the same section, in relation to the using of counterfeit brands or marks, embraces the third count of the indictment.

We are also inclined to think that the indictment is brought, at least the first and second counts would be brought, within the forty-third section. The forty-third section, among other things, provides, that any person owning any distilled spirits intended for sale, manufactured prior to the time when this act takes place, exceeding fifty gallons altogether, shall notify, in writing, the collector of the district where such spirits may be stored, held or owned, within sixty days thereafter, to gauge and prove the same; and upon receipt of said notice the collector shall cause said spirits to be gauged and proved, and the casks or packages containing the same to be marked by the inspector in the following manner: "Manufactured prior to ——, 186–, District —— Inspector," this mark or brand to be put upon these casks or barrels. Another clause of that section has this provision: "And any person who shall so brand any package containing spirits, knowing the taxes thereon have not been paid, shall forfeit such spirits, and be deemed guilty of a misdemeanor." Now the charge in these counts is that certain brands described are placed upon certain casks by these defendants, knowing at the time that the taxes had not been paid; knowing also that the brand imported that they had been paid; that it was put on fraudulently and with the intent to defraud the government. There is undoubtedly a question on the statute itself —a matter of construction, which involves the only doubt in connection with the case, arising from the fact that in the subsequent part of the section another brand is referred to and made the subject of an offence. The argument is that the last clause does not embrace the previous matter described in the section. We are inclined to think that it was meant to embrace the false brand referred to in the previous part of the section. Our opinion is, that the indictment may well be sustained on all counts first, second and third, under the thirty-eighth section. We are inclined to think that the first and second counts may be sustained under the forty-third section. We must, therefore, overrule the demurrer and give judgment for the government.

On the rendering of this decision the district attorney moved the court that judgment be entered in favor of the United States against the defendants on the demurrer, and that the court proceed to sentence them on the first and second counts of the indictment, which were based on the forty-third section

of the act of 1866, the offence under which was only a misdemeanor, for where a defendant demurs to an indictment for a misdemeanor, if it is decided against him, he is not allowed to plead over, but judgment absolute is rendered against him.

Mr. Evarts said that if that was the law, it was the defendant's counsel who ought to go to prison rather than the defendants.

The district attorney said that such was certainly the law settled by the court of errors of this state in the case of People v. Taylor, in 3 Denio [91], and by the courts of Connecticut, in a case which he cited from the Connecticut Reports.

NELSON, Circuit Justice, said that he would not hold the defendants to any technical rule in the matter. The questions might just as well have been raised by a motion to quash as by a demurrer, and he thought on the whole the defendants better be allowed to plead. They were accordingly notified to plead to the indictment.

[NOTE. Subsequently John Devlin was convicted upon an indictment charging him with distilling without license, and without having paid the special tax. Case No. 14,955. Motion for new trial was denied. Id. 14,953.]

Case No. 14,955.

UNITED STATES v. DEVLIN.

[7 Int. Rev. Rec. 44.]

Circuit Court, E. D. New York. Feb. 5, 1868.

VIOLATION OF INTERNAL REVENUE LAWS—FRAUDULENT DISTILLING—SPECIAL TAX—INDICTMENT—BURDEN OF PROOF—BAIL AFTER CONVICTION.

[1. In prosecutions for carrying on the business of a wholesale liquor dealer without a license, or without having paid the special tax, or without having kept the books required by the internal revenue laws, the burden is upon the defendants to show that they have a license or have paid the special tax and kept books as required.]

[2. Where, after conviction, time is granted for the prisoner's counsel to prepare a case and move in arrest of judgment, it seems that the court has no authority to take bail in the meantime.]

[This was an indictment against John Devlin for defrauding the government out of the tax on distilled spirits. There were indictments against Devlin and others for falsely branding spirits. See Case No. 14,954. The most material part of the defendant's evidence is given in the report below.]

Thursday, Jan. 30.

Immediately after the opening of the court, the question as to whether the count, charging the prisoner with not having kept books, should be retained in the indictment, was brought before the court by counsel for the prisoner. The judge ruled that he would retain it.

Moses Richards was the first witness called for the defence. He said that in 1866 he held the office of assistant assessor of the Fifth division of the Third district; the other assistants were Alex. M. Gurly, Nelson Northrup, and various others; a Mr. Robinson was assessor, and Mr. Bowen was collector; the business of witness was to canvass in the district and take in applications of license when brought in; on the 15th of each month a list was made of the applicants to pay special tax, and then sent into the assessor's office; knew Mr. Devlin well; also knew that he had sent in an application under the indictment; Devlin applied to him for registration; had some forms of application at that time, but wanted them; refused to give him one; furnished him, a week afterward, with a form; after having sent the form it was left at witness' office thirty days after it was sent him; put the paper in Mr. Northrup's office; had nothing to do with regard to the payment of the tax; previous to May or June, 1865, knew him only by reputation; never had any business transactions with him; was in charge of the Fifth division from November, 1865, to May, 1867; his office was No. 166 Johnson street; the plumber's shop was within his district; had been in the plumber's shop three or four times altogether; during the summer of 1866 saw Devlin every week; did not know what his business was except by hearsay; after he made his application found what he was; never saw him do business; never had his check for any purpose (prosecution here presented a check for $700 found in Devlin's check-book on the Atlantic Bank, made by Devlin to Mr. Richards. The check read "Aug. 21, M. Richards, salvage $700. Pay to bearer $700, John Devlin;) witness denied all knowledge of the check; check (produced) dated Aug. 20, for $550 was not in his handwriting; from May to August could not recollect any person who returned for a month over two barrels of whiskey; knew Peter Austin, distiller, for the four months from May to August he returned as shown by copies of returns (produced) only two barrels; made the returns of Burns.

Thos. A. Murray was examined. He said he knew Devlin; acted as clerk to him; remembered going with him to Mr. Richards in May last in regard to registry of an application for license; heard what passed between Devlin and Richards; Richards said he had not a form, but would get some that day and would send one down to Frank Devlin's plumber shop; afterward received a form of application; Jas. Devlin then got it, and it was handed, the last Sunday in June, to John Devlin; the blanks were filled up, and the Tuesday following the application paper was carried to Mr. Richards' house and laid on the desk; Mrs. Richards only was there inside.

Richards was then recalled. He said Patrick Burns was a distiller; but did not know anything about the capacity of his distillery; saw the paper (produced) which showed the capacity of his still was 125 gallons; could

not say whether that was so; was book-keeper in a distillery; the return of Patrick Burns for the month of May showed that taxes had been paid on 202 gallons of whiskey.

Friday, Jan. 31.

Immediately on the opening of the court the cross-examination by the district attorney of Moses Richards was resumed. The witness identified thirty-three applications for distilleries (produced) as having been made during his term of office, and transmitted by him to the assessor; identified monthly returns of distillers (produced) taken before him, and by him transmitted to the assessor's office; it was not his duty to visit these distilleries from day to day or week to week; was obliged to visit only once a month; did not remember that a distiller should make a statement every ten days as to the quantity on mash; that book (produced) was a tri-monthly book; but sworn statements were only made monthly; never was in the habit of signing blank affidavits; a blank, or rather partly filled form of affidavit (produced) was signed by him, but he did not see what it was signed for; when the registers for license came in he filed them on the back; the applications (produced) were signed by him according to usual custom; did not file or indorse Mr. Devlin's application; could not say whether any indorsement was filled on it or not.

The direct examination being resumed, the witness said that Devlin not being in his district he did not indorse the application, but had it put in Mr. Northrup's box; did not know who filled up the blank affidavit not sworn to; could not tell whether the blank affidavits in Mr. Rice's books were sworn to; never heard any complaint against himself of irregularity of conduct in the office of assessor; never before had seen the check-books of Mr. Devlin; knew nothing about them other than what was shown him in court; resigned at the suggestion of the assessor.

John W. Salvage testified that since the 1st of June, 1867, he had acted as clerk in the assessor's office, Third district of New York; found among the papers in the assessor's office an application from John Devlin; the paper (produced) was not that found, but this paper (produced) was the one found in the assessor's office; it was an application paper from Devlin, and found in the January monthly papers in the assessor's office.

Richard C. Egan, clerk in the assessor's office, deposed that an application paper was handed him in the office; he was searching for it at the time, but failed to get it, and another clerk of a former collector handed it to him; could not tell where the clerk got the paper; a Mr. Tappen handed it to him; found a paper in the assessor's office, of which he took a certified copy.

Charles Tappen, clerk in the collector's office, deposed that he knew an application paper had been handed in, and having searched for it, found it; if an applicant wished to pay in advance of the monthly list, the collector required the assessor to send up a duplicate of the application.

Thomas A. Murray swore that the partly-filled affidavit alluded to previously was not filled in by Richards, though he believed the signature was that gentleman's; could not say whether the paper found was the same as that handed in in May.

John D. Carrol deposed that official papers that went to Mr. Northrup were all turned over to the succeeding assessor.

Counsel on both sides then agreed that Mr. McCormack did not receive the application paper, or take it away from the assessor's office.

Mr. Evarts proposed next to read the receipt dated Feb. 6 and 7, for tax paid for the year ending May, 1867, also a receipt dated March 13, 1867, for the reassessment of Aug. 1, 1866, which was made necessary by the act of 1864 [13 Stat. 223]. Both papers were objected to.

Mr. Murray was recalled, and said he acted in Mr. Devlin's employment in the capacity of clerk; he kept no book, but did errands for Mr. Devlin, and sometimes filled up his check-books; took deposits on the bank for Francis Devlin but was paid by John; from February to May did not receive money from John Devlin to deposit in the bank; did nothing particular or general for him; was paid $20 a week; did everything he was asked to do; check-books were on the table, and anybody could write in them; often scribbled in them; could not tell his own hand-writing in blocks of check-books produced; John Devlin, wife and child, boarded in witness' house in Carlton avenue.

Mr. Evarts applied for permission to give oral evidence of the contents of the application-paper handed in in May which was refused. Documents relative to the granting of a license to Devlin in February last were handed in, after which the proceedings were adjourned to Monday.

Monday, Feb. 3.

THE COURT announced that he would exclude papers—a duplicate application and another paper found after Devlin's arrest—offered by the defence on Friday as evidence, but would give them the benefit of an exception.

Frederick J. Warburton swore to the accuracy of the stenographic report of proceedings taken before Commissioner Newton. As to the correctness of Mr. Cocheu's testimony, impugned by that gentleman, witness said the evidence was correct, with the exception of a few trifling verbal errors.

Charles Tappen, recalled and examined, deposed that in the book of special tax assessment the letters "D. N." meant "Demand Notice."

The district-attorney then offered in evi-

dence the testimony of Cocheu, taken before the commissioner.

The evidence was objected to, and his honor ruled it out.

The district-attorney next offered to read a letter written by Mr. Devlin to Mr. Cocheu, which would be corroborative evidence of the conversation between both gentlemen.

THE COURT admitted the evidence.

The handwriting of the letter having been proved, the document itself was read. It ran thus: "Oct. 2, 1866. Dear Sir: My liberal offer of this morning, the same as I extend to others, which you refused, is withdrawn. This is after reflection and consultation. Your manner seemed menacing and defiant. I never submit to it from any one, especially from one so vulnerable as Mr. Cocheu. If you wish me to consider it as a challenge to test our strength in certain quarters, I accept it. Yours, &c., John Devlin."

John W. Salvage swore that he made an abstract of returns (produced) which was correct.

Mr. Brady then spoke for the defence. He argued that his client was merely a broker, and it was therefore unnecessary for him to keep a book. He entered very fully into the case, arguing it at great length, and finally asked for a verdict for his client.

Mr. Stoughton replied on the part of the government. He recapitulated the evidence, and said from the state of facts presented, there was no other course open for the jury but to find a verdict for the government.

THE COURT then charged the jury: This case that now closes carries with it great responsibility. Responsibility on the jurymen in any case is no very light thing. It is dependent in this case, from the nature of the cause, for this is a revenue cause, an effort on the part of the treasury department of the United States to enforce the revenue laws of the country—laws upon which rest the credit of the country, laws which touch every portion of society, and upon which almost the life of the nation rests—most unpleasant laws, laws which must be enforced, which in any country that expects to live must be obeyed, both by the poor and the rich, by the powerful as well as by the weak, and those laws can be enforced in a free government but in two ways, and both lead through the courts of law. They provide as a means of enforcing them forfeiture, where the government seizes the property of persons claimed to have violated those laws, and confiscates, forfeits, sells it, hoping thereby to compel obedience to the laws by the milder form of punishment by losing property. The other feature—method of enforcing—is by criminal prosecution, in which a party is charged with offending those laws. Although having many severe features, although stringent in their terms, they are not necessarily harsh statutes. Whether they were so or were not, would be of small consequence here, for your duty and mine would be to impose them; but that you may not be under the impression that you are asked in this or in any other case to enforce a law that is hard and harsh, it is only necessary to consider that in the first place for violation of that law, it rests with the government prosecutor whether he will prosecute. If he determines that the prosecution must be pursued, the matter then goes before the grand jury, and the grand jury must say whether they think it must be prosecuted. If they so declare by their indictment, it comes into a court of justice, before a court and jury, and there, in most instances, great discretion is conveyed, giving to the court in the matter of punishment, as in this case, the option to inflict a fine ranging from $10 to $500, and the term of imprisonment from a few days to two years; and if the grand jury found the man guilty, the case comes, as I said, before a petty jury, so that the law is law, and may be enforced without any unnecessary harshness. Now, government having tried, as is well known, in the enforcing of this revenue law, the milder form of punishment by forfeiture, has at last been driven to resort to criminal prosecution. It is the last resort. If criminal offenders against the United States can pass through courts and go free, there is no other way in a free government by which the revenue can be collected. Upon the juries of the country rests the responsibility of saying in all revenue cases whether or no this law shall be obeyed, and that is the responsibility that is upon you in this case. Now I don't say this to have you suppose that this man's cause is to be disposed of upon no general considerations, nor upon facts or law of other cases. He is entitled here in this case, as every criminal, every prisoner, every defendant is, to have his own case judged upon its own law and its own facts, without reference to its effect upon the community, and that must be the judgment in this case. But every criminal prosecution has two objects in view, one to punish the offender for the crime he has committed, and the other by the example to prevent others from committing the like offence, and so that the general consideration of the object of these prosecutions is the proper thing—the necessary thing for you to consider in order that you may come to a proper conclusion. Realize the responsibility which rests upon you when you are called upon to decide a case of this kind. I am making these remarks with reference to the responsibility more freely in this case, because, I say frankly and under a sense of my own responsibility, that under the law, as I understand it, and under the evidence as it appears to me, there is no doubt as to the judgment which should follow the prosecution. In such a case, where there is so little doubt, the responsibility comes upon

the jury clean and clear. It should be realized. Now, this is no action to recover $50 or $100. It is no case of a contract between the government of the United States or any of the United States officers and John Devlin. It has another signification. As a matter of money, it makes but little difference whether a man of the Ninth or Fifth ward runs a distillery, produces a few gallons of whiskey, or whether this prisoner brought fifty or one hundred gallons, and did not pay the tax on them into the treasury on such a day. It is, as a matter of money, little; but whether or no this man or the other man shall or shall not obey the law is a matter of great moment, and that is the question here. This man is prosecuted because he has, if the facts be true as the witnesses have sworn, because he has declined and refused to obey the law, and that gives the case a great significance. Now realize your responsibility. I call your attention to your rights and duties as jurymen, to rights and duties which you, in common with all juries called in courts of justice, have in this case. In our country a jury in most classes of cases, is a part of every court of justice. In many lands there is no jury; cases are passed on—all the facts—by one judge or three judges. In our country, in some classes of cases, the judge passes upon the law and facts. In the admiralty cases tried here I am never assisted by a jury, for I myself alone have to assume the responsibility and pass upon the law and facts. But in ordinary court cases there is always in our country a jury, and the jury passes upon the facts, and the court passes upon the law. Under that class of cases, there are also other considerations that the judge there has the right, as in civil cases, to indicate to the jury to direct their verdict by his own opinion of the evidence. When there is no dispute about the facts, then the judge directs the jury, and the jury find upon the opinion of the court on the evidence what the verdict should be. But when you come to a criminal case, under our form of government the case must always go to the jury, and the responsibility shifts from the court to the jury, who pass upon facts, and whose verdict is final. They pass upon the facts alone; they take the law. You must take the law in your case as you receive it from the court; you have no right to differ; you have no right to doubt, for the purposes of this case.

The law as declared from the bench is the only law you can look to. That law you have a right to apply to the facts as you find them. and on that you render your verdict—which is conclusive. That is your duty here, to consider the facts, and I will declare the law. Let us look to see what the case is—for you must still remember this case is the case we are to try and no other. This man, the prisoner at the bar, is charged with three offences, all made criminal by the law. In the first place, he is charged with having carried on the business of a wholesale dealer in liquor, from the months of May to September, 1866, without having a license. In such a case the onus of proof, as to whether a man has or has not a license, rests on the defendant. The government is not bound to prove that a man has a license, for the very simple reason that that man has merely to produce his license if he has one. In this case, from the evidence as it stands, there is no evidence to show that a license has been taken out by John Devlin for carrying on the business of a wholesale dealer in liquor from May to September, 1866; so that the question is, "Did he carry on the business of a wholesale dealer in liquor in this district during that period?" That is the question of fact for you to pass upon. The definition of a wholesale dealer is fixed by the statute, which declares that a wholesale dealer is a person who shall sell liquor in quantities exceeding three gallons to one person at the same time, and a person who carries on that business of dealing in those wholesale quantities is an offender where he has no license. So then you see clearly the question you have to ask yourselves. Look at this, which I think is the second count, but which in point of time is the first charge. Did he carry on the business of dealing for gain in disposing of those wholesale quantities of liquor in this district? If you find that he did, why then you are bound to render your verdict of guilty. You heard the evidence here. You have heard what the witnesses said, and you are bound to believe the witnesses unless in the circumstances attending the transaction as proved, or in the other matter there was something to lead you to discredit their statements; but if there are no circumstances which lead you to doubt the evidence of Mr. Paffer, Cunningham and another witness which you recollect having before you—if you believe the statements of these witnesses, then you are bound to say the man carried on the business of a wholesale dealer in liquor at this time without having had a license. There is no evidence in the case that will warrant you in finding he was a pedler. The question is, was he a pedler, after the definition of a pedler as given in the statute? And I charge you that he was not, and the person, if he feels aggrieved by this statement of the law, may have the benefit of an exception. We dispose of the first charge. The simple question of fact I don't direct on. I direct the law, and upon you is the responsibility of saying if this man carried on the business as a business of dealing for gain—this dealing in the article of liquor—during the period I have mentioned.

Now, the next charge, which is the first charge in this indictment, is that, after September, he carried on the business of a wholesale dealer in liquor without having

paid a special tax. The 1st of September the law was changed, no more licenses were required, but a man was bound to register himself, as he was under the first statute, with the assessor of his district, and after registering to apply to the collector, and there pay the sum which was called special tax, for which he got a receipt; and it is declared by the law that any man who carries on the business without having paid the special tax is a vender; and the charge is here that after this law came into operation, which was after September, the person charged—the accused—carried on the business of a wholesale dealer in liquors without having paid this tax. Here also, as in the other case, the burden did rest upon him to prove that he had paid the tax, and he has failed to prove he paid it. So here it is the same question as in the first charge. Did he, during this different period, carry on the business of a wholesale dealer in liquor? It is sworn to by others of these witnesses. You remember what the evidence is. You will consider and say, on your oaths, whether or no he dealt in this article of liquor, in quantities exceeding three gallons, for the latter period mentioned in the indictment. The third charge is distinct, arising out of the same person's occupation, and it is that he failed to keep books as provided by law. The law in that behalf declares that every wholesale dealer in liquor shall keep a book stating in it the persons from whom he buys, the quantity of his dealings, and it makes it a penalty—an offence—not to keep this book, and that is the law of the land. It was a law which was obligatory upon this man if he was a wholesale dealer, and the question here is, as in the other, had he kept a book in which his sales were entered and his purchases? But it is not shown that he did keep a book. The burden was upon him, and you will recollect the evidence of the witnesses on that point. If he was a wholesale dealer and failed to keep a book, then he must be found guilty under this charge. Those are the three charges to be borne in your mind. They are distinct from each other, and must be passed on by you, and they are, as I said in the first place, by no means trivial. Then the difficulty about this law is that many suppose that the simple feature of it is one particular thing; that each particular thing is trivial and unimportant. It is not for you or me to say whether it is important that he should keep a book, but the law says that he shall. So then, gentlemen, there you have the case. Three charges against the man are to be passed upon by you, and your verdict is to be rendered by your oaths as you find the facts to be. Only one conclusion can be arrived at, but it will be your conclusion and not mine. This person—this prisoner—is entitled in this case, as every prisoner is, to the benefit of every reasonable doubt upon the facts. It must be a reasonable doubt, and that he should have, if a reasonable doubt can be found to exist. Your duty is, under the law, to consider the evidence, and if you believe the testimony that has been offered, and you think there is no reasonable doubt but that he carried on the business, in these quantities, you will find him guilty —otherwise you will acquit him.

After an absence of about ten minutes the jury returned with a verdict of guilty on all three counts.

Mr. Evarts asked for time to make a case and to move in arrest of judgment, and on consultation between counsel and the court the 24th of February was fixed for the hearing of the motion.

THE COURT then ordered the accused to be remanded to custody. His counsel stated that they supposed he was already on sufficient bail in this case and under the other indictments. [See Case No. 14,954.]

The district-attorney said it was not sufficient in the present state of the case, and there might be a doubt as to taking bail after conviction.

Application to Put in Bail.

Wednesday, Feb. 5.

BENEDICT, District Judge, gave his opinion on the application to admit the prisoner to bail. He said: "I have considered the matter of bailing John Devlin, and made inquiries as to the practice in the Southern district court. A doubt is supposed to exist as to the power of taking bail after conviction under the words of the statute which permits bail to be taken. The practice seems to have been not to take bail. There being a doubt with the court as to taking bail that is sufficient to defeat the application in the present case, the prisoner must be remanded until the argument takes place."

[A motion for a new trial was subsequently made, and denied. Case No. 14,953.]

Case No. 14,956.

UNITED STATES v. DEWEY.

[6 Biss. 501.] [1]

District Court, W. D. Wisconsin. Jan., 1876.

JUDGMENT—RECOVERY IN ANOTHER STATE—BAR.

It is a good plea that since the commencement of a suit, judgment was recovered between the same parties in another federal court upon the same cause of action. It is immaterial which suit was first commenced.

[Cited in Radford v. Folsom, 14 Fed. 100.]

This was an action brought to recover the sum of $6,215 of the defendant [Nelson Dewey] as one of the sureties of George W. Gaffitt and James J. Dewey, upon a bond given by them to the United States, on the 7th day of January, 1868, as manufacturers

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

of friction matches, etc., conditioned to pay for all revenue stamps that might be needed by them from the commissioner of internal revenue, from time to time, according to law. There were two other sureties upon the bond, who reside in New York, where the principals also reside. It is now shown that prior to the commencement of this suit, a suit was prosecuted by the United States, in the district court for the Southern district of New York, against all the parties to the bond, but that service was not made on Dewey, as he was a resident of this state, but that after this suit was at issue, he voluntarily appeared in that suit, and thus gave that court jurisdiction over him. It further apears by the affidavit of defendant, filed on this motion, that on the 7th day of December, 1875, judgment was obtained against all of the defendants therein, including himself, for the amount claimed as due upon the bond. Upon this state of facts, the defendant, when the case was called for trial, moved for leave to file a plea setting up these facts, by a plea puis darrein continuance, as a bar to the further prosecution of this action.

H. M. Lewis, U. S. Dist. Atty.
Gregory & Pinney, for defendant.

HOPKINS, District Judge. I was not cited, nor have I been able to find a decision of the federal courts upon this question, or whether the pendency of a suit in one district may be plead in abatement to a suit in another district of the federal courts. I find that the decisions of the United States circuit courts are not in accord upon the right to plead the pendency of a suit for the same cause of action in the state courts in abatement to suits prosecuted afterwards in the United States courts, although I think the weight of authority in those courts is in favor of the right, particularly when the suit is pending in the same state with such courts.

Judge Love, in Brooks v. Mills County [Case No. 1,955], has examined and collected the authorities sustaining this view with great industry. Justice Clifford, in Lowring v. Marsh [Id. 8,514], says, however, that the rule has always been that such a plea was not good in the First circuit, but in this circuit it has been the other way. Earl v. Raymond [Id. 4,243].

The question has never been decided by the supreme court of the United States. I must say I do not see any satisfactory reason for denying the plea in abatement of suits pending in the courts of other states. Multiplicity of litigation is vexatious, and should be discouraged, and only when necessary should any suit be sustained, and when a party sues in one jurisdiction, I do not see why he should be allowed to sue at the same time in another, for the same cause of action. On that point I concur with the intimation of the court in 30 Vt. 538, hereafter cited.

But it may not be necessary to decide that question in this case, for here it is alleged that there has been a recovery for the same cause of action. If so, it is a merger, and no recovery can be had in any other court, state or federal, upon the same cause of action. This is too well settled to be questioned. Mason v. Eldred, 6 Wall. [73 U. S.] 231; Eldred v. Bank, 17 Wall. [84 U. S.] 545; Freem. Judgm. § 186.

In this case it appears that as to this defendant this court first got jurisdiction, so that the suit in New York could not for that reason have been plead in abatement to this suit, hence the question whether a plea of a suit pending in another district for the same cause is immaterial to consider on this motion.

The matter proposed to be set up does not go to the form of the remedy, but to the right to maintain the action at all. It shows that the cause of action is gone—is merged in a judgment,—and therefore, no longer in a legal sense exists. Nicholl v. Mason, 21 Wend. 339. This is the rule prevailing in regard to suits prosecuted in different states at the same time. The pendency of the one first commenced cannot be plead in abatement to another subsequently prosecuted in another state, but a judgment in either without reference to the question as to which was commenced first, may be plead in bar to the other. Bank of U. S. v. Merchants' Bank of Baltimore, 7 Gill, 415; Bank of North America v. Wheeler, 28 Conn. 433; McGilvray v. Avery, 30 Vt. 538; Rogers v. Odell, 39 N. H. 452; 1 Chit. Pl. 454.

This doctrine is held to necessarily result from the provision in the constitution of the United States, that the judicial proceedings of each state shall have like effect in every state as in the state where they were taken. But I think the effect given to judgments of courts of competent jurisdiction, by the common law, would lead to the same conclusion.

As the defendant appeared in that case, the judgment therein extinguished the cause of action. But there does not seem to be any advantage accruing to the United States by prosecuting this suit to judgment, for an execution issued upon the judgment obtained in the Southern district of New York, may run into and be executed in this state as well as if issued from this court (Rev. St. U. S. § 986), so that the reason for admitting that judgment as a bar to this suit is much stronger than in a case between private parties, where executions are confined to the states where judgment is recovered. The motion of the defendant is therefore granted.

UNITED STATES (DEXTER v.). See Case No. 3,869.

UNITED STATES (DE ZALDO v.). See Case No. 3,872.

UNITED STATES (DIAZ v.). See Case No. 3,878.

Case No. 14,957.

UNITED STATES v. DICK.

[2 Cranch, C. C. 409.] [1]

Circuit Court, District of Columbia. May Term, 1823.

BASTARDY—COMPLAINT—JURISDICTION.

In cases of bastardy this court has no jurisdiction, unless upon complaint of the overseers of the poor of the county.

A case of bastardy.

Mr. Taylor, for the defendant [David Dick, Jr.], contended that no proceeding can be instituted against the reputed father of a bastard child but on application by the overseers of the poor of the county, or of one of them. Laws Va. Dec. 26, 1792, § 23. But the application, in this case, was made by Jonathan Swift, who was a trustee of the poor of the town, under a by-law of the corporation of Alexandria.

Mr. Swann, contra. That relates only to the manner of bringing the party before the court, but being now before the court, it has authority to make an order for the support of the child, and to indemnify the county.

THE COURT (THRUSTON, Circuit Judge, absent) said that they had no jurisdiction. That in order to give this court jurisdiction, the application must be made by an overseer of the poor of the county.

Case No. 14,957a.

UNITED STATES v. DICKINSON.

[Hempst. 1.] [2]

Superior Court, Territory of Arkansas. Jan., 1820.

RAPE—INDICTMENT—JURY.

1. It is not a fatal defect in an indictment for rape that it also alleges that the woman was gotten with child.

2. Before a jury is made up, incompetent jurors who have been summoned, may be discharged, and others summoned in their places.

Indictment [against Thomas Dickinson] for rape.

Before SCOTT, J.

This was an indictment for rape committed on the person of Sally Hall, to which the defendant pleaded not guilty, and there was a trial by jury composed of Richmond Peeler, Charles Roberts, Manuel Roderigue, John Jordolas, Jacques Gocio, Stephen Vasseau, Nathal Vasseau, Michael Petterson, John Pertua, Manuel Pertua, Pierre Mitchell, and Attica Nodall, who, after hearing evidence and arguments of counsel, retired to consult of their verdict, and, after deliberation, returned into court the following, namely, "We, the jury, find the defendant guilty of rape, in manner and form as in the indictment alleged."

The counsel for the prisoner moved in arrest of judgment for the following reasons: "(1) It does not appear by the indictment that the same was found by the grand jurors of the United States. (2) No place is mentioned in the indictment where the offence was committed, nor is it mentioned in what year it was committed. (3) The assault and rape are not positively and directly charged in the indictment. (4) It is not stated to have been feloniously committed. (6) It is not alleged in the indictment that Sally Hall was in the peace of God and the United States when the offence is alleged to have been committed. (7) Two offences, which are inconsistent with each other, are alleged to have been committed at the same time, in the indictment, namely, rape on Sally Hall, and the getting her with child.[2] (8) The place of residence and occupation of the accused is not mentioned in the indictment. (9) It appears by the record that H. Armstrong was foreman of the grand jury who found the bill of indictment, and that H. Armstrong is not a competent juror, not having resided 12 months in this territory. (10) Three jurors were dismissed by the court after they were sworn, and before they found a verdict, as appears from the record."[3]

Joshua Norvell, for the United States.

Jasin Chamberlain, Henry Cassady, Alexander S. Walker, and Perly Wallis, for prisoner.

THE COURT overruled the motion, and said that some of the reasons urged in arrest of judgment were not sustained by the record; that others were not proper grounds in arrest of judgment, and that some had not been presented at the proper time nor in a proper manner, if good at all.

The prisoner being asked if he had any objection why sentence should not be pronounced against him on the verdict of the jury, said that he objected to any sentence, because he was advised that the indictment did not properly charge the commission of a felony.

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[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Samuel H. Hempstead, Esq.]

[2] The old notion that if the woman conceived, it could not be a rape, because she must in such case have consented, is quite exploded. 1 Hale, P. C. 631; 1 Hawk. P. C. c. 41, § 8; 1 East, P. C. p. 445, c. 10, § 7; 1 Russ. Crimes, p. 677. Impregnation, it is well known, does not depend on the consciousness or volition of the female. If the uterine organs be in a condition favorable to impregnation, this may take place as readily as if the intercourse was voluntary. Tayl. Med. Jur.

[3] Before the jury was made up, three persons who had been sworn as jurors, namely, William A. Luckie, John O'Regan, and Thomas Stephens, were discharged on the motion of the prosecuting attorney, on the ground that they had not resided 12 months in the territory (Geyer, Dig. p. 34), and others were ordered to be sworn in their places, and to this proceeding, the counsel of the accused objected.

THE COURT disregarded his objection, and sentenced him to be castrated according to the law in that behalf provided, by a skillful physician, under the direction of the sheriff of Arkansas county, on the 15th February, 1820, between 10 o'clock a. m., and 3 o'clock p. m., of that day.[4]

A motion was made by the prisoner for a writ of error coram nobis, but the motion was overruled.

Case No. 14,958.

UNITED STATES v. DICKINSON.

[2 McLean, 325.] [1]

Circuit Court, D. Ohio. Dec. Term, 1840.

INDICTMENT — COUNTS — ELECTION — WITNESS — CHARACTER—IMPEACHMENT—LEADING QUESTIONS.

1. The court will not compel the prosecuting attorney to elect on which count in the indictment he will try the defendant, where there are different counts, charging offences of different grades, of the same class, and connected with the same transaction.

[Cited in U. S. v. Peterson, Case No. 16,037.]

[Cited in Buck v. State, 1 Ohio St. 66; Mills v. State, 52 Ind. 191; State v. Smalley, 50 Vt. 741.]

2. Offences are so varied in the different counts, as to agree with the evidence.

3. And no injustice is done, as the court will always protect the rights of the defendant.

4. A defendant convicted of an infamous offence, if not sentenced, is a competent witness.

5. A witness is not obliged to answer a question which would show her or his character to be infamous.

6. The character of a witness must be impeached by general questions as to his truth.

[Cited in Fletcher v. State, 49 Ind. 133.]

7. On crossexamination of a witness, a question irrelevant to the matter in issue can not be asked, to impeach him.

[Cited in Kent v. State, 42 Ohio, 433.]

8. Nor can a witness be impeached by proving a statement different from the one sworn to, unless he has been examined as to his having made such statement.

[Cited in Conrad v. Griffey, 16 How. (57 U. S.) 47; The J. W. Everman, Case No. 7,591.]

9. Leading questions not proper, except on crossexamination.

[This was an indictment against Daniel J. Dickinson for larceny from the United States mail.]

The Prosecuting Attorney, for the Government.

Anthony & Swayne, for defendant.

OPINION OF THE COURT. This was an indictment for stealing letters and packets from the mail of the United States. The indictment contained nine counts, as follows: 1. For stealing the mail; 2. Stealing letters and packets out of the mail; 3. Stealing the mail, and opening it, and taking therefrom certain bank notes; 4. Stealing from the mail three certain letters containing bank notes; 5. For cutting the mailbag, with intent to steal, and take a letter therefrom; 6. For being present, aiding and assisting Charles Bostwick in stealing the mail; 7. For receiving certain bank notes, knowing them to have been stolen; 8. For concealing certain bank notes, knowing them to have been stolen from the mail; 9. For aiding Bostwick in concealing certain bank notes, knowing them to have been stolen from the mail.

After the defendant had pleaded not guilty, and before the jury were called, the counsel for the defendant moved that the district attorney be required to make an election, on which count in the indictment he will rely for a conviction of the defendant; and English Crown Cases, 234, was cited in support of the motion. It was opposed by the district attorney.

The principal ground on which an election by the prosecuting attorney is urged, is, that by including distinct offences in the same indictment, the defendant is restricted in his right of challenge. He may be willing to be tried by some of the jurors on some of the counts, but unwilling that they should pass upon others. It is clear that offences of a different class, and which require different punishments, as murder and larceny, can not be joined in the same indictment. In the case of Young v. Rex, in error, 3 Term R. 106, the court held that it was no objection in arrest of judgment, that the indictment contains several charges of the same nature in the different counts. The same principle was held in 2 Maule & S. 379. Lord Kenyon remarked, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they might be joined in the same indictment. In the case of Reg. v. Strange, 8 Car. & P. 172, it was held that the offences of stabbing and cutting, with intent to murder, and with intent to maim and disable, although the judgment differs, being capital on the first count, and not on the others, they would not require the prosecutor to elect on which charge he will proceed.

It is no objection, in point of law, that an indictment charges prisoners, in one count, as principals in stealing, and, in another, as receivers; but, upon a case reserved, the judges were divided in opinion, whether the prosecutor should have been put to his election, and directed that both charges should not, for the future, be put in the same indictment. Rex v. Galloway, 1 Moody, Crown Cas. 234. And a rule was subsequently adopted by the judges, that, in a case like the above, the prosecutor should be put to his

[4] This sentence was not executed, the prisoner having been pardoned by James Miller, the governor of Arkansas territory.

[1] [Reported by Hon. John McLean, Circuit Justice.]

election. Rex v. Flower, 3 Car. & P. 413. But this being a rule of practice, merely, is not received as an authority. A count charging a person with being accessory before the fact, may be joined with a count charging him with being accessory after the fact, to the same felony; and the prosecutor can not be required to elect upon which he will proceed, as the party may be found guilty on both. Rex v. Blackson, 8 Car. & P. 43. A receiver may be indicted as an accessory in one count, and for a substantive felony in another count; and although, in his discretion, the judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts can not prejudice the defendant. Rex v. Austin, 7 Car. & P. 796; Rex v. Hartall, Id. 475; Rex v. Wheeler, Id. 170. Although a prosecutor can not charge a defendant with different felonies, in different counts; yet he may charge the same felony in different ways, in several counts, in order to meet the facts of the case. Archb. Cr. Pl. (Ed. 1840) 56.

The first five counts in the indictment charge, substantially, the same offence, though taking a letter or packet which contains bank notes, as charged in the third and fourth counts, is punished by a higher penalty. In fact, the court can not but know that all the counts in the indictment relate to the same transaction, and that the variation of the form in which the offence is charged, in the different counts, is done with a view to meet the evidence, and that they present only different grades of the same offence. Should the jury convict the defendant under the third or fourth counts, it would virtually cover all the other counts. There could be but one punishment. This subject must depend, in a great degree, on the exercise of a sound discretion by the court. They will see that offences shall not be so joined, in the same indictment, as to deprive the defendant of any right which the law gives him. Experience shows the propriety, and, indeed, necessity of charging the offence in different ways, so as to meet the proof; and within the knowledge of the court, no injustice has been done, under this practice, to defendants. And we think, that in a case like the present, great injustice would be done to the public, by compelling the prosecuting attorney to make an election. The motion is, therefore, overruled.

The jury being sworn, in the course of the examination of the witnesses, Bostwick, who was the driver of the mail stage at the time the mail is charged to have been robbed, and who, having been indicted for the same at the present term, pleaded guilty, was offered as a witness by the prosecuting attorney; and the court held that sentence not having been passed on him he was a competent witness. That the circumstances under which he was offered, could be used to impeach his credit. He was informed, however, by the court, that he was not bound to state any fact which would criminate himself. Eliza French was, also, called as a witness, and, while under examination, was asked a question which, if answered one way, would show her character to be infamous; and the court informed her that she need not answer the question. Witnesses were afterwards called to impeach her character, and on a question being asked whether she was not a lewd woman, the court interposed, and said that the question must be restricted to her general character for veracity. See U. S. v. Vansickle [Case No. 16,609], and the authorities there cited. A question was then asked a witness whether Eliza French had not stated, in his hearing, certain facts, with the view of discrediting her evidence, by showing that such statement was materially different from the facts sworn to by her. This was objected to, and the court sustained the objection, on the ground that as the witness, when under examination, had not been questioned as to such statement, it could not be proved to discredit her. That to lay the foundation for such evidence, Eliza French must have been asked, when under examination, whether she made such statement. M'Kinney v. Neil [Id. 8,865]; 1 Phil. Ev. (Ed. 1839) 293; 2 Brod. & B. 286, 315. Eliza French was again called, without objection, and the question was asked her whether she had made a certain statement, repeating the substance of it, to an individual, naming him, which she answered in the negative. After this the impeaching evidence was heard. And certain questions were asked of her, by the defendants' counsel, in regard to certain matters which, though they had a remote relation to the subject matter of inquiry, had no direct relevancy, with the view of contradicting her answers, to discredit her. This was objected to, and the court sustained the objection.

Such questions must be relevant to the matter in issue. Spenceley v. De Willott, 7 East, 110. If the answer were given on a collateral matter, no contradictory evidence could be heard. Harris v. Tippett, 2 Camp. 638; 1 Blackf. 86; Ellmaker v. Buckley, 16 Serg. & R. 77. This question came distinctly before the supreme court, at the last term, in the case of Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 461, in which the court said, "that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination." A witness may be examined as to expressions or acts conducing to show a bias for or against either of the parties. Under this rule it might be proper to ask the witness, whether he did not prevent, or endeavor to prevent, the attendance of a witness, and whether he did not threaten to be revenged of one of the parties. This has no direct relevancy to the matters in issue, but it affects the credit of the witness, and, therefore, is admissible.

In the course of the examination an inquiry was submitted to the court, as to the form of a question to be propounded to a witness in chief. The court said it was extremely difficult, if not impracticable, to adopt any form which would be proper in all cases. The rule is, that a question shall not be so propounded to a witness as to indicate the answer desired. The form laid down in some of the books, "do you or do you not known," &c., is a leading question, and may be so emphasized as to indicate, in the strongest terms, the desired answer. It is a matter of no great difficulty, in every examination of a witness, by a general remark, to inform him on what points he is to be examined, and then to elicit his knowledge respecting them, by such questions as do not lead to the answer desired. In the crossexamination leading questions are admissible on the ground that the witness, having been called by one party, may not be equally willing to disclose all he knows that shall be favorable to the other. And there may be circumstances, arising from the conduct of a witness, which shall require leading questions to be put to him, when examined as a witness in chief. This matter must depend upon the judgment of the court.

Except the above, no questions of law were raised in the course of the trial; and it is not deemed necessary to state the facts which were submitted to the jury. The verdict was, "Not guilty."

UNITED STATES (DILLINGHAM v.). See Case No. 3,913.

Case No. 14,959.

UNITED STATES v. DISTILLED SPIRITS.

[See Case No. 15,960.]

Case No. 14,960.

UNITED STATES v. DISTILLERY.

[23 Int. Rev. Rec. 147.]

District Court, S. D. New York. April Term, 1877.

INTERNAL REVENUE LAW—PROCESS FOR VINEGAR MAKING—PRODUCTION OF ALCOHOL.

[The owner of a vinegar manufactory is liable under 15 St. 125, if by the process used by him he obtains alcohol from his mash so that he is saved the expense of purchasing the alcohol necessary for the making of vinegar.]

[This was a proceeding to forfeit distillery at 390 Eleventh avenue, New York City.]

Roger M. Sherman, Asst. U. S. Atty.

Charles S. Spencer, for claimant.

BLATCHFORD, District Judge (charging jury). There is a single question, and but a single question, according to my understanding of the law as applicable to this case, for your consideration. This defendant was, according to the testimony, a maker of vinegar. His ultimate product was vinegar. There is no testimony to show that any distilled spirits, as such, came out of his establishment, and the evidence to the contrary is about as strong as negative evidence can be. His establishment according to the testimony was watched to see whether it was not used for making distilled spirits, but the officers never found anything of the kind. So that it is quite clear that there was not any illicit action on the part of Mr. Jessen in producing spirits there, and taking it away out of the establishment, as spirits. He was a vinegar maker. Several statutes have been passed on the subject, which have been read and commented upon, and in 1868, in consequence of various decisions of the court, the law was passed, which is embodied now in the Revised Statutes [15 St. 125]. The substance of the law, as I understand it, is that a person may make a mash out of molasses, and water, and yeast, and just such a mash as a distiller would make, if he were going to make distilled spirits or rum, and such person may lawfully make this mash to be used exclusively to make vinegar, but he must not apply to that mash a process of distillation which, by the use of a still, or of a vessel equivalent to a still, will give him substantially in his vinegar the product of this mash, in the shape of alcohol, just as if, at the point where the product of such still enters into the mixture, he had put in alcohol from the outside, instead of having that alcohol as the result of the process he uses. That is the law. It is for you to say, on the evidence, whether you believe that the defendant, by his process substantially introduced spirits into his mixture, and had the spirits there for subsequent oxydation to make vinegar. We know that vinegar is the result of the oxydation of spirituous substances, which are oxydized by exposure to air. In the process of making vinegar in large quantities, shavings and charcoal, and other substances are used, which will make an extensive surface for exposure of the alcohol to the air, and promote rapid oxydation. If Mr. Jessen, by this process of his, got some alcohol out of his mash, by the use of his boiler, and was thus saved some expense of purchasing alcohol outside, he is liable in this case, otherwise he is not. The government must make out its case by a fair proponderance of evidence. This substantially covers all the questions in this case In so far as what I have said does not concur with the requests on the part of the government, I must be considered as declining to charge in accordance with those requests. You will understand, gentlemen, that the testimony of Mr. Jessen is, that after his product entered the receiver in his basement, it was pumped upstairs, and alcohol was added and it was put through generators. But the point is whether he got into his mixture any alco-

hol, which was a substitute for other alcohol, which he would otherwise have been obliged to buy to put into it.

A Juror. Can we use our technical knowledge?

THE COURT. You must go according to the evidence.

The jury could not agree upon a verdict, and were consequently discharged, ten being for forfeiture, and two against.

With the intimation of the court, on a motion for a retrial, that the process adopted was clearly illegal, the motion was granted. The agreement was tendered by the claimant, that the apparatus used by him should be at once torn down by him in the presence of a deputy collector, and a certificate being furnished by the deputy collector of its destruction, the government agreed not to press the motion.

Case No. 14,961.

UNITED STATES v. DISTILLERY AT PETERSBURG.

[1 Hughes, 533;[1] 22 Int. Rev. Rec. 195; 8 Chi. Leg. News, 314.]

Circuit Court, E. D. Virginia. 1876.

INTERNAL REVENUE — DISTILLER'S BOOKS — FOR WHAT PURPOSE KEPT—SEIZURE OF BOOKS—EVIDENCE.

1. The books of a distiller, kept in accordance with sections 3303 and 3304 of the Revised Statutes of the United States, are quasi records, false entries in which, or an omission to make such entries as the law requires in which, or a refusal to produce which, on proper demand, will subject the distillery to forfeiture.

2. The seizure of such books by a collector of internal revenue upon an order of one of the executive departments of the government, given in the legitimate exercise of its duties, is not a "judicial proceeding" in the contemplation of section 860 of the Revised Statutes, such as deprives the government of the right to use them as evidence in the trial of a libel for forfeiture filed against such a distillery.

The facts of the case of the United States against a distillery [owned by M. & E. Myers] at Petersburg were as follows: Section 3303 of the Revised Statutes provides that every distillery shall, from day to day, make, or cause to be made, in a book or books to be kept by him in such form as the commissioner of internal revenue may prescribe, certain specified entries recording in detail his transactions at the distillery. Section 3304 then provides that these books "shall always be kept at the distillery, and be always open to the inspection of every revenue officer, * * * and whenever required shall be produced for the inspection of any revenue officer."

On the 1st day of November, 1875, the collector of internal revenue for the Second collection district of Virginia, acting under special authority for that purpose from the commissioner of internal revenue, seized the distillery, which is the subject-matter of this action, for a violation of section 3257 of the Revised Statutes, and with it took possession of the books kept upon the premises pursuant to the requirements of section 3303. At the trial of this suit in the district court, the United States, to maintain the issue on their part, offered these books in evidence, but the claimants objected to their admissibility, upon the ground that they had been obtained from the distillers by means of a judicial proceeding. This objection was based upon section 860 of the Revised Statutes which is as follows: "No pleading of a party, nor any discovery or evidence obtained from any party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." The district court sustained the objection and excluded the evidence. To this ruling the United States excepted in due form upon the record, and the question presented for consideration stands upon that exception.

WAITE, Circuit Justice. The books of a distiller, kept in obedience to the requirements of the statute, are, so to speak, quasi records. They are intended for use as much by the government as the distiller. They constitute part of the machinery which the law has provided for the enforcement of the revenue laws. Their object is to furnish the government with evidence of the daily business of the distillery, and with the means of detecting frauds. They are to be preserved two years for that purpose, and are to be produced for the inspection of the proper government officials whenever demanded. They are, in a sense, part of the distillery itself, and as much subject to inspection and use for the purpose of securing the payment of the revenue as the building or any part of the fixtures or apparatus. False entries therein, or an omission to make such entries as the law requires, or a refusal to produce them upon proper demand, will subject the distillery to forfeiture The possession of the books in this case was not obtained by means of any judicial proceeding. The seizure was not by virtue of any warrant issued by a court or judicial officer, but upon an order of the executive departments of the government, made in the legitimate exercise of its powers for the enforcement of the laws. The books were taken because found on the premises in the place where the law required they should be kept for the purposes of evidence, to be consulted and considered by the government. They were no more excluded by this statute from use as evidence, on account

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

of the manner in which they were obtained, than were the tubs or other apparatus seized at the same time.

This case is entirely different from that of U. S. v. Hughes [Case No. 15,419], decided by Judge Blatchford, in the Southern district of New York. There the warrant of seizure was issued by a judge and made returnable to the court (14 St. 547, § 2). The evidence obtained consisted exclusively of private books and papers, which were in no sense whatever public. They were excluded because they had been obtained under a warrant issued in a judicial proceeding by a judge to a marshal, returnable with the papers, etc., to the judge for his judicial action. Here, as has been seen, the books were public books, kept for the purposes of evidence, and intended for use as well by the government as the distiller. The United States have the right to demand their production without judicial protest for all purposes connected with the revenue liabilities of the distillers or the distilleries.

We think the district court erred in excluding the testimony, and the judgment must for this reason be reversed. It is unnecessary now to consider any other questions presented by the record, as upon another trial, with additional evidence, the court may be able to find the facts more specifically and definitely than they appear in the present record.

The case is remanded for a new trial.

[For an action of debt against M. & E. Myers, to recover $47,800, claimed for taxes due and unpaid, see Case No. 15,846.]

Case No. 14,962.

UNITED STATES v. DISTILLERY AT SPRING VALLEY.

[8 Ben. 473;[1] 22 Int. Rev. Rec. 218.]

District Court, S. D. New York. June, 1876.

INTERNAL REVENUE — FORFEITURE — CONNIVANCE OF STOREKEEPER.

The connivance of a government storekeeper in charge of a distillery, with the person who runs the distillery, will not have the effect to destroy the forfeiture of the property resulting from the acts of such person under the internal revenue acts of 1864, 1866, 1868, and 1872 (13 Stat. 240; 14 Stat. 111; 15 Stat. 59, 132, 134; 17 Stat. 240).

A suit was brought by the United States to forfeit this property for alleged violation of the internal revenue acts, and, under the charge of the district court, the jury found a verdict against the government. The judgment was, however, reversed by the circuit court, on writ of error (see [Case No. 14,963]), and the case came before this court for a second trial, at which the claimant maintained, that, as it now appeared that the frauds upon the revenue, charged to have been committed by the person who was running the distillery, were commited with the connivance of the government storekeeper in charge of the distillery, the forfeiture of the property could not be enforced.

R. M. Sherman, Asst. U. S. Dist. Atty.

Geo. Ticknor Curtis, for claimant.

BLATCHFORD, District Judge. If the decision of the circuit court in this case [Case No. 14,963] is a correct exposition of the law, I do not see how the connivance and complicity of the government storekeeper in the fraud committed by the person who ran the distillery, can operate to destroy the forfeiture resulting from the acts of such person. The person who carried on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, did not any the less carry on such business with such intent, because he did not commit his fraud secretly, but had for a participant in it the government storekeeper. I think, therefore, there must be a decree for the United States, because I think the decision of the circuit court in this case, above cited, covers, substantially, every question now presented.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

Case No. 14,963.

UNITED STATES v. DISTILLERY AT SPRING VALLEY.

[11 Blatchf. 255;[1] 18 Int. Rev. Rec. 59.]

Circuit Court, S. D. New York. Aug. 12, 1873.

FORFEITURE — OWNERSHIP OF PROPERTY — DISTILLING AFTER NOTICE OF SUSPENSION — FORFEITURE OF LAND — COMPLICITY OF OWNER.

1. The 48th section of the act of June 30, 1864 (13 Stat. 240), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 111), in providing for a forfeiture of "tools, implements, instruments and personal property," is not limited to the property of the person having the fraudulent purpose mentioned in the section, or to property constituting part of the manufacturing apparatus used in the business.

[Cited in U. S. v. Sixteen Barrels of Distilled Spirits, Case No. 16,300.]

2. The 22d section of the act of July 20, 1868 (15 Stat. 134), as amended by the 12th section of the act of June 6, 1872 (17 Stat. 240), in providing that a distiller who carries on business after the time stated, in a notice of suspension, as the time of suspension, shall incur the forfeitures provided for persons who carry on the business of a distiller without having given the bond required by law, being the forfeitures mentioned in the 44th section of the same act (15 Stat. 142), as amended by the 12th section of the said act of June 6, 1872, means, by the words "shall incur," "shall cause or bring on," and is not limited to a forfeiture only of the interest of such distiller in the things which are made the subject of the forfeitures.

[Cited in U. S. v. Loeb, 14 Fed. 688.]

3. The said 44th section, in providing for the forfeiture of the interest in the land on which a distillery is situated, of every person who know-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ingly has suffered or permitted the business of a distiller to be there carried on, or who has connived at the same, does not require that he should have knowingly suffered or permitted it to be fraudulently carried on, or that he should have connived at such fraud.

[Cited in Dobbins' Distillery v. U. S., 96 U. S. 404; Gregory v. U. S., Case No. 5,803; U. S. v. One Copper Still, Id. 15,928.]

4. The 5th section of the act of March 31, 1868 (15 Stat. 59), in declaring that a distiller shall forfeit the distillery and distilling apparatus used by him, means, by the words "shall forfeit," "shall subject to forfeiture."

5. The 19th section of the act of July 20, 1868 (15 Stat. 132), in providing that "the distillery," &c., shall be forfeited, forfeits the property, irrespective of the question of its ownership.

6. In none of those sections is any proof required of the actual complicity of the owner of the property to be forfeited, in the fraud or other thing which causes the forfeiture.

[Cited in U. S. v. Two Horses, Case No. 16,578.]

[In error to the district court of the United States for the Southern district of New York.

[This was a suit by the United States to forfeit the distillery at Spring Valley, New York, for violation of the internal revenue acts. In the district court there was a verdict for the claimant. Case unreported. The plaintiff then brought error.]

Thomas Simons, Asst. U. S. Dist. Atty.

George T. Curtis, for claimant.

WOODRUFF, Circuit Judge. The distillery at Spring Valley, in Rockland county, New York, with the land on which it stands, and certain land used for ingress to and egress from the same, and, also, the stills and other apparatus, tools, implements, and instruments used, fit and intended for use, in the distillation of spirits, were, together with certain distilled spirits and raw materials for distillation, seized, on the 22d of January, 1873, for alleged violations of the internal revenue laws relating to distillers, distillation, and the taxes, &c., imposed thereon. Upon such seizure, the information, in behalf of the United States, in this cause, was filed in the district court, and condemnation of the property prayed for, as forfeited by reason of such violations. Elijah Brown only appeared herein as claimant, setting up his ownership of the distillery, and its fixtures, and the real estate seized, in fee, and the ownership of the tools, implements, apparatus and instruments, (other than fixtures,) provided for, used. and intended for use, in distilling upon the premises, but making no claim to the distilled spirits, or to the raw materials seized. It is unnecessary to state the pleadings more fully, since no question is made, on the argument herein, that the pleadings are not sufficient for all the purposes of proof, or of the argument of the questions raised on the trial. The revenue laws alleged to have been violated, and to which the several counts in the information relate, are, section 48 of the act of June 30, 1864 (13 Stat. 240), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 111), section 22 of the act of July 20, 1868 (15 Stat. 134), as amended by the 12th section of the act of June 6, 1872 (17 Stat. 240), section 44 of the last named act (15 Stat. 142), as amended by the 12th section of the said act of June 6, 1872, section 5 of the act of March 31, 1868 (Id. 59), and section 19 of the said act of July 20, 1868 (Id. 132), the provisions of which, so far as material to the questions discussed, will be hereinafter stated.

Evidence was given showing that, on, and for more than three years prior to, the day of the said seizure, the claimant, Elijah Brown, was the owner in fee of the distillery and fixtures and real estate seized, and claimed by him herein, and the owner of the movable tools, implements and instruments used and fit, and intended to be used, for distillation, seized on the premises, and also claimed by him as aforesaid. Evidence was also given, tending to show, that, on the 3d of November, 1870, an indenture of lease of the said lot or tract of land on which the distillery is situate, with the distillery buildings thereon, and the machinery and fixtures in said buildings, was executed and delivered by the said claimant to the copartnership firm of M. Newman & Company, (which consisted of Marcus Newman, Simon Kahnweiler and the said claimant, Elijah Brown,) to carry on the business of a distiller therewith, for five years from the 12th of October, 1870, at a rent therefor in money, manure and distillery slops, as particularly mentioned; that, on the same 3d of November, 1870, the said Brown, the claimant, executed his consent, in form as required by the 8th section of the act of July 20, 1868 (15 Stat. 128), reciting the execution of the said lease, and, among other things, containing as follows: "I do hereby consent that the leasehold premises aforesaid may be used for the purpose of distilling spirits, subject to the provisions of law, and I stipulate and agree that the lien of the United States for taxes and penalties shall have priority to my reversionary interest, and that, in case of the forfeiture of the distillery premises, or any part thereof, the title of the same shall vest in the United States, discharged from my claim as such reversioner and owner;" that the said firm of M. Newman & Company never did any business under their said copartnership, but, on or about the 27th of September, 1871, the interest of the said M. Newman & Company was transferred by the said claimant, Brown, to Marcus Newman; that, on the said 27th of September, 1871, the said claimant, Brown, entered into and executed an agreement with the said Marcus Newman, with covenants relating to the conditions upon which the said Newman should carry on the business of a distiller at the said distillery and premises of the said Brown, during

the residue of the said leasehold term and an extension of such term, if desired, and that said Newman should have the privilege of procuring a railroad to be built, and have a right of way across the said Brown's land to his said distillery; and that thereafter, and to the date of the said seizure, the said Newman carried on the business of a distiller at said distillery and premises under the said agreement, and carried it on there with the knowledge of the said Brown that it was carried on there, and with the permission and sufferance of the said Brown to the carrying it on there, and that such railroad was constructed and used as a way over or across the land of the said Brown, for the purpose of ingress and egress to and from the said distillery, such land so used as a way being the same seized as such way and claimed herein by the said Brown, and was so used by the said Newman with the like knowledge and permission of the said Brown. It was also proved, that all of the property claimed by the said Brown, other than the lot of land and distillery buildings thereon, and the land used for ingress and egress as aforesaid, was property found in the distillery buildings, some part thereof attached thereto by screws, bolts, cleets and other fastenings, and the residue thereof not attached thereto by screws, bolts or other fastenings, but the whole thereof belonged to the claimant, Brown, and was part of the manufacturing apparatus used in the business of distilling, supplied by the claimant, Brown, at his own expense; and that the said Marcus Newman filed the distiller's notice and the usual distiller's bond, duly approved, and other papers required by law, and carried on said business, as respects the officers of the revenue, solely in his own name. Evidence was also given tending to prove violations of the said several sections of the internal revenue laws, and frauds mentioned therein, during the period of about thirteen months prior to the seizure, at the said distillery, and other evidence was offered having a like tendency, which, in harmony with the ruling of the judge presiding at the trial in the district court, on the principal question of law, was rejected; but no evidence was given tending to show that the claimant, Brown, had any knowledge of such frauds or violations of law, or of the intention of the said Newman, or the persons conducting or superintending such business, to commit such violations of such frauds, or that he consented to or connived at any fraud or violation of the law in the conduct of the business, or otherwise in relation thereto, or to the spirits distilled at the distillery or found therein.

It seems to me unnecessary to give, in any further detail, the state of the evidence received, the exceptions to the exclusion of the evidence which was rejected, the numerous requests for specific instructions to the jury which were refused, or the details of the charge which were given and excepted to. A few extracts from the charge will show the principles which governed the conduct of the trial, and which entered into the various other rulings, and the detailed or specific instructions to the jury, and these will exhibit the main and controlling question argued in this court.

The judge charged, that, under the 48th section of the act of June 30th, 1864, no property, other than personal property, could be forfeited; and, second, that all of the machinery and apparatus and other things found in the distillery buildings, and on the distillery premises, used for and in connection with the business of distilling there carried on, and permanently connected with the soil, or with anything attached to the soil, were part of the land, and so not forfeitable under said section; and, third, that all movable articles or implements, found in the distillery or on the premises, if constituting part of the manufacturing apparatus used in the business of distilling, and if supplied by the claimant, at his own expense, as part of the distillery premises, were part of the land, and so not forfeitable, by reason of the charges of the information under said section. The judge further charged, that none of the property claimed and owned by Elijah Brown could be forfeited under section 22 of the act of July 20th, 1868, by reason of any violation, by said Newman, of the provisions of said section, proven as charged in the information, because no property is declared by said section to be forfeitable, except property of the distiller; that the distillery and distilling apparatus claimed and owned by the said Elijah Brown could not be forfeited under the 5th section of the act of March 31st, 1868, although used by said Newman, in carrying on the business of a distiller, in defrauding the United States of the tax on the spirits distilled by him, because no property is declared by said section to be forfeitable, except the property of the distiller; and that, under the 44th and 19th sections of the said act of July 20th, 1868, the articles or implements above described, whether permanently connected with the soil, or movable articles or implements constituting part of the manufacturing apparatus used in the business of distilling, and supplied by the claimant at his own expense, as part of the distillery premises, were part of the land, and not personal property, within the meaning of those sections. The judge further charged, that, in order to forfeit any real estate described in the information, and claimed by said Elijah Brown, under any provision of the internal revenue laws, involved in the present action, by which real estate is, under any circumstances, made forfeitable, the jury must be satisfied that the claimant had guilty knowledge of, and was in complicity with or connived at, the fraudulent or unlawful acts or omissions and intents of the said Newman.

By these or other specific directions the jury were instructed, that, under the 5th section of the act of March 31st, 1868, and the 22d section of the act of July 20th, 1868, no property of the claimant could be forfeited; that the tools, implements, and instruments, used in the work of distilling, owned by the claimant, and furnished at his own expense therefor, as a part of the distillery premises, were to be regarded as real estate, under the 48th, 44th, and 19th sections aforesaid, and could not be forfeited under the 48th section; that the real estate, thus including such tools, implements, and instruments, and including the way owned by the claimant, used for the purposes of ingress and egress to and from the distillery, could not be forfeited, unless the jury should find that Newman was guilty of the fraudulent acts, omissions, and intents mentioned in the aforesaid 48th, 44th, and 19th sections, charged in the information, and should also find that the claimant, with guilty knowledge of, and complicity in, the fraudulent acts and intents of Newman, suffered or permitted the business to be carried on by said Newman with such fraudulent intent, or connived at the carrying on of the same by Newman, with such intent; and, as to false entries in books, or entries omitted, that the claimant knowingly suffered or permitted said Newman, or some other person, to make those false and fraudulent entries or omissions, or connived at the same.

This abbreviation of the charge seems to me to exhibit all that is material to an understanding of the questions hereinafter considered. These instructions were, of course, under a proviso, that the jury should also find, as does not appear to have been denied or doubted, that Marcus Newman held the said distillery premises under a lease from the claimant, as lessor and owner in fee thereof, and that the claimant did not participate in any way in the profits of the distillery, and selling of the liquors manufactured by Newman, but reserved and received money, distillery slops, and manure, as rent for the occupation and use of the distillery premises.

Although several questions apparently arise out of these instructions, and some others out of the rejection of evidence, all would seem to be substantially answered by an answer to the principal inquiry, whether the owner and lessor of a distillery can be deprived of his property without proof of some guilty participation in, or connivance at, the fraudulent or unlawful acts claimed to be causes of forfeiture. This question was, on the trial in the district court, answered by the judge in the negative, by what was tersely stated by the counsel for the claimant, on the argument herein, to be the substance of the charge to the jury, namely, that, where property is leased, the fee cannot be forfeited unless the owner knowingly permits it to be used fraudulently, or connives at such fraudulent use. The correctness of this is insisted upon, first, as being in accordance with the proper construction of the several sections of the internal revenue acts upon which the information proceeds; and, second, because the contrary would make the law declaring such forfeiture unconstitutional.

To determine the true construction of the several sections counted upon, their language, the intent apparent therein, and the general scope and design of the legislature, manifest when other provisions of the acts are also brought into view, may all be useful; and it will be convenient to state the substance of the sections to be construed, in the order in which they are counted upon.

The 48th section of the act of June 30th, 1864, as amended in 1866, declares, that "all goods, wares, merchandise, articles or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized * * * and the same shall be forfeited to the United States; and, also, all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and, also, all tools, implements, instruments and personal property whatsoever, in the place or building, or within any yard or enclosure, where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector as aforesaid, and the same shall be forfeited as aforesaid." In view of the rulings had upon the trial, two observations upon this section are immediately pertinent—First, there is no word nor phrase therein that describes the tools, implements, instruments and personal property whatsoever, as owned by the person or persons having the fraudulent purpose. "All tools, implements, instruments and personal property whatsoever, in the place," &c., literally excludes any inquiry into the ownership or title; and, second, no distinction is made between tools, implements and instruments constituting part of the manufacturing apparatus used in the business, and other tools, implements and instruments there for some other purpose. Possibly, under this section, fixtures may not be deemed included in the words "tools, implements and instruments," which are more apt to describe articles movable and not attached to the freehold. But, if neither fixtures nor movable articles used in the conduct or carrying on of a manufacturing business are meant, it is obvious, that, in general, the terms, "all tools, implements and instruments," would have no operation, for such tools, &c., are not usually found in a manufactory, intended for

use elsewhere; and, on the contrary, where, in speaking of an intent to manufacture raw materials into articles subject to tax, congress provided for the forfeiture of "all tools, implements and instruments * * * in the place," there would seem to be a presumption that the tools, implements and instruments provided for, and to be used in, such manufacture, were prominently in view.

The 22d section of the act of July 20th, 1868, as amended by the act of 1872, after providing that any distiller desiring to suspend work in his distillery may give notice in writing, stating when he will suspend, and that no distiller, after having given such notice, shall, after the time stated therein, carry on the business of a distiller on said premises, until he shall have given another notice in writing, stating the time when he will resume work, declares, that "any distiller, after the time fixed in said notice declaring his intention to suspend work, who shall carry on the business of a distiller on said premises, or shall have mash, wort or beer in his distillery, or on any premises connected therewith, or who shall have in his possession, or under his control, any mash, wort or beer, with intent to distil the same on said premises, shall incur the forfeitures and be subject to the same punishment as provided for persons who carry on the business of a distiller without having given the bond required by law." The forfeitures here referred to are declared in the 44th section of the same act, to be hereafter stated. The doubt, however, of the meaning of this 22d section, if any, arises mainly from the use of the word "incur." The 44th section employs other language. It declares that certain specified things "shall be forfeited." Now, under the 22d section, does the language, "shall incur the forfeitures," mean, shall bring into operative effect the forfeitures denounced in the 44th section, or does it mean that he shall forfeit his interest in the things so mentioned in the 44th section? When a distiller incurs a forfeiture, it would seem, that, literally, he subjects himself to it, and not that he brings it on another; but, in connection with the 44th section, it may well mean, that the acts described in the 22d section shall have the same operation and effect, in respect of forfeiture, as those which produce forfeitures under the 44th section; in other words, the forfeitures shall be the same in each case—he shall thereby cause, or bring on, the forfeitures. &c. The consideration of the general scheme and purpose of the law will bear significantly upon this.

This 44th section of the same act declares, that "any person * * * who shall carry on the business of a distiller, without having given bond as required by law, or who shall engage in or carry on the business of a distiller, with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offence, be fined * * * and imprisoned * * *. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation * * * of spirits, * * * owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery, * * * or in any building, room, yard, or enclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or who has connived at the same, and all personal property owned by, or in the possession of, any person who has permitted or suffered any building, yard, or enclosure, or any part thereof, to be used for the purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or enclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States." In this section congress seem to have anticipated a possible discussion, whether it was intended to forfeit property found upon the premises or used for the purposes of distillation, not belonging to the distiller, and to have purposely been so explicit as to preclude inquiry into mere questions of title, and, at the same time, in respect to the real estate, to protect one whose land under lease or out of possession, may, without his knowledge or consent, or, perhaps, even against his will, when he has no power to prevent, be used in or for the purposes of a distillery. Thus, the forfeiture is, first, of spirits, wines, stills and other apparatus owned by the distiller, wherever found; secondly, of all distilled spirits, wines, and personal property found in the distillery, or in any building, &c., connected therewith, and used with or constituting a part of the premises. This second forfeiture is declared irrespective of ownership. It plainly includes property not owned by the distiller. All spirits, wines, stills and other apparatus owned by the distiller had already been declared forfeited, whether found on the distillery premises or not. It would have been meaningless to declare again, second, that the same should be forfeited when found there. Spirits, &c., owned by the distiller, are brought into distinct contrast with the other spirits, &c., named. The latter are only forfeited when found on the distillery premises; the former are forfeited wherever found. Owners of personal property may, in general, be presumed to know where it is, to know for what purposes the place is used, and to be competent to protect it. Indeed, when the practical conduct of the business of distilling is brought into view, the probability is, by no means, slight, that spirits and other personal prop-

erty found on the distillery premises have some connection with or relation to the very business carried on, as, e. g., the product thereof, the implements therefor, or instruments used in some manner in aid thereof, cattle, hogs, &c., fed therefrom, and the like, all of which tend to its encouragement. The forfeiture is, third, of all the right, title, and interest of the distiller in the lot or tract of land on which such distillery is situated; and, fourth, all right, title, and interest of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same. Here, again, the distinction between the distiller's property and the property of others is declared. Interests in real estate are various, present, future, vested, and contingent. The title may be in one, the present lawful possession and control may be in another. The interest or title of no one ought to be, and by this section is not, exposed to forfeiture, unless there is voluntary permission or sufferance that the premises be used for the business which was here regulated, or there was connivance at its use for that business. But, an owner using the premises as a distillery himself, and an owner voluntarily permitting his premises to be used as a distillery, or conniving at such use, might, without great impropriety, be placed on the same footing. Their relation to a government legislating to suppress frauds in that very business is not very widely different. At least, the government might cast upon such owners responsibility for the use of their own property; and that it was the intention of this law to do so will appear in the progress of the discussion.

One word, however, seems to be called for, in this place, relative to the terms, "has connived at the same." It is argued, that this means, connived at the fraud or intent to defraud. Neither the terms used nor their connection warrant any such interpretation. The interest of one who permits the business of a distiller to be there carried on is forfeited. That language is entirely explicit; and, connived at "the same" means, connived at the carrying on of the business of a distiller there. There was reason for using the word. Sometimes, express permission and knowledge could be proved; but, often, it might be difficult to go further in proof than to show connivance at the carrying on of the business. When, next, the section declares the forfeiture of all personal property owned by, or in possession of, any person who has "permitted" or "suffered" any building, yard, or enclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or enclosure, and of all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, nothing is said about connivance. It is enough that it provides for the knowing permission or suffrance of the use for, or in aid of, the business of distilling. The great facility of concealing the business of distilling in rear buildings and in cellars, and in places only accessible through other buildings or passages through the property of others, and, particularly, in cities, no doubt makes this provision an important one.

I pass to the next section counted upon, the 5th section of the act of March 31st, 1868, which declares, that "every person engaged in carrying on the business of a distiller, who shall defraud, or attempt to defraud, the United States of the tax on the spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all raw materials for the production of distilled spirits, found in the distillery and on the distillery premises." It is pertinent to observe here, that not a word is said touching the ownership of the subjects of forfeiture; that, whereas, elsewhere, stills and property owned by the distiller are mentioned as forfeited, and the right, title, and interest of the distiller in the premises is spoken of, here it is the distillery and distilling apparatus used by him that are mentioned—not necessarily owned by him, but used by him—and all spirits and raw materials found on the premises. The criticism is, doubtless, possible, that, by the terms, "shall forfeit," congress mean, that he, and he only, shall be subjected to loss; and that a person can only forfeit that which he has, or has a right to keep—his own. If this section declared the only forfeiture found in this system of laws, there would be some plausibility in this verbal criticism; but, read as a part of a system, and, especially, in connection with the other sections already adverted to, and with still others not involved in this case, a broader meaning must be given thereto. It means, that he, by his fraud, subjects to forfeiture the property mentioned.

The remaining section referred to in the information is the 19th section of the before-named act of July 20th, 1868. It requires, that "every person making or distilling spirits, or owning any still, boiler, or other vessel used for the purpose of distilling spirits, or having such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or using any such still, boiler, or other vessel, shall, from day to day, make, or cause to be made, true and exact entry, in a book or books to be kept by him," of various particulars touching the kinds and quantities of materials used, and the procurement thereof, the fuel, water and ice purchased, &c., the grain used, and various other particulars tending to show, or enable the officers of the revenue to ascertain, the amount of tax, &c. It then requires the distiller to render an account, and that the distiller, or principal manager of the distillery, shall make oath to such re-

turn in a form prescribed, the book to be always kept at the distillery, and to be always open to the inspection of any revenue officer, &c., and provides that, "if any false entry shall be made, or any entry shall be omitted therefrom, with intent to defraud, or to conceal from the revenue officers any fact or particular required to be stated or entered in either of said books, or to mislead in reference thereto, or if any distiller, as aforesaid, shall omit or refuse to provide either of said books, or shall cancel, obliterate, or destroy any part of either of such books, or any entry therein, with intent to defraud, or shall permit the same to be done, or such books, or either of them, be not produced when required by any revenue officer, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property of every kind and description on said premises, used in the business there carried on, shall be forfeited to the United States." I place no especial stress upon the circumstance, that this section begins with the declaration that every person, whether making or distilling spirits, or owning a still, boiler, or other vessel used for the purpose of distilling, shall make, or cause to be made, the entries specified; and yet this is in harmony with the general design, elsewhere shown, to make the owner of machinery and apparatus easily used for defrauding the government, conveniently employed in the perpetration of frauds, which the government was struggling, by the most careful, minute, and stringent precautions, to prevent, responsible, in a large degree, for the manner in which his own machinery and apparatus was used, whether by himself, or by others to whom he should entrust it for use. The observations already made upon some of the other sections, and the terms in which specific things are declared forfeited, are pertinent to this section, both as to real and personal estate; and, in this place, I desire only to add, that, if congress designed to declare such forfeiture, irrespective of the question of ownership, and so as to exclude any inquiry into the title to the property, words more explicit and unqualified could hardly have been employed.

The court cannot be controlled by the supposed or real harshness of these enactments. Considerations founded in the suggestion of hardship are for the legislature. If the law be valid, the courts cannot refuse to carry it into effect. If the law is explicit and clear, construction cannot be permitted to destroy its meaning. Nor is it the duty of courts to apologize for the law; and yet it seems obvious, that, in these laws, in relation to distillers, distilleries, and distilled spirits, there appears, in successive enactments, amendments, change and increase of penalties, punishments, and forfeitures, with greater minuteness and greater comprehensiveness, from time to time, a violent struggle to restrain or regulate and control a business heavily taxed, in which there are extraordinary temptations to fraud, and more than usual facilities for its perpetration. If we now look to the purpose and intent of congress, manifested in the general scheme of the legislation on the subject, we shall find light and aid in the interpretation of the sections which have already been commented upon, and confirming what has been suggested as to each, with especial reference to the question, whether congress intended that property should be forfeited, in any case, without proof of the actual complicity of the owner in the alleged fraud. Not only so, the views already expressed are not only confirmed, but the other provisions of the law go very far to relieve the statutes from any apparent hardship or unreasonableness, in forfeiting the property of one for frauds committed by another.

By the act of July 20, 1868 (15 Stat. 125), the subject of the taxation of distilled spirits was very largely revised, and, by the first section, the intent to hold the owners of distilleries to some responsibility for the use which should be made of them, whether by themselves or others, is declared, by making every proprietor of a distillery, &c., and every person interested in the use thereof, jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax is declared a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the said distillery is situated, together with any building thereon. Section 5 requires every person having in his possession, custody, or control, any still or distilling apparatus set up, to register the same, and declares that any still or distillery apparatus not so registered, with all personal property in the possession or control of such person, and found in the building, yard, or enclosure, shall be forfeited. Here it will be seen that the law takes hold of the property, whoever owns it, and makes it imperative that the owner shall see that the law is observed.

In view of the lien contemplated, and of the forfeitures and penalties pronounced in the act, congress did not fail to see that there might be cases, in which prior valid liens might exist upon the property, in favor of persons who could not control its use, and whose interests ought not to be affected by the sole act of another, nor, also, to see that there might be many cases in which the legal possession might be in holders for a term of years, or having other temporary control, where the owners of the reversion, remainder or other future or contingent estate or interest had no lawful right to interfere with the present use of the property, nor that there might be cases in which the title, or some interest, was held by femes covert, minors or other persons under disability. It was, therefore, determined not to permit the business of

distilling to be carried on, unless, nor until, all impediments to the creation and enforcement of a contemplated lien, as well for penalties as taxes, and all impediments to the enforcement of forfeitures, were removed; and this was important to prevent any suggestion that the law violated the constitution, or its fundamental principles, and, also, to hinder any allegation that property had been forfeited belonging to one who had not consented voluntarily to place it within the operation of, and make it expressly subject to, the law. Accordingly, by the 8th section, it is provided, that no bond of a distiller shall be approved, unless he is the owner in fee, unincumbered by any mortgage, judgment or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice of intention to commence the business, the written consent of the owner of the fee, and of any mortgagee, judgment creditor, or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment or other incumbrance, and that, in case of the forfeiture of the distillery premises, or any part thereof, the title of the same shall vest in the United States, discharged from any such mortgage, judgment or other incumbrance. What could possibly more distinctly exhibit the intent to look to the property for security, to hold the property to the fulfillment of all the requirements of the law, to forfeit the property and all the title and interest of owner, lessee, and incumbrancers, whenever forfeiture was denounced? Without such intention, what useful purpose does this consent of an owner to the use of the premises as a distillery serve? Is it an idle form? It is suggested that it means consent of the owner to a forfeiture for any cause for which the property of an owner can lawfully be forfeited. Then it is a useless paper. For such a cause the title and interest of an owner may be forfeited as well without as with his consent. It was intended not merely to obviate cavil about the invasion of the rights of the innocent, in violation of the alleged principle, that no man shall suffer for the offense of another, (which, we may be permitted to say, is, by no means, of universal application,) but it was intended to close the mouth of the owner in advance, and meet his claim by the exhibition of his voluntary consent that the use of his property for a distillery shall be subject to the provisions of law, by his express stipulation, (given in advance, and as a consideration for the license granted,) that, in case of forfeiture, that is, of any forfeiture declared by law, the title shall vest in the United States. The act of the owner is voluntary. His stipulation is, in its nature, and, so far as any constitutional question is involved, his stipulation is, in effect, that the forfeitures shall have operation notwithstanding his ownership. The case is not so hard as many forfeitures under revenue laws enforced in cases of smuggling and the like, against the means, instrument, vessel or vehicle by aid of which the law is violated. As in those cases, this law holds the rem, and treats it as guilty, and the owner here has, moreover, voluntarily stipulated, in advance, that it may be so held.

The act then provides for the case of a distillery erected prior to the passage of the act, and held for a term of years only. In such case, the tenant might not be able to procure the consent of the owner of the remainder or reversion. That he may not for that reason be deprived of the lawful use of his distillery, and may have due license to distil, the tenant is permitted to give bond for the full value of the property, to be enforced in case the distillery, &c., should be forfeited, and so, where the fee, or a mortgage or other incumbrance, belongs to a feme covert, infant, a lunatic, or one who is disabled to give such consent, such bond may be given. Why all this, if it is only the interest of the tenant which is, in any event, to be forfeited, for his violation of the law? The construction contended for makes this procurement of consent, and the giving of a bond in lieu thereof, an absurdity.

Then follow various provisions prescribing penalties, declaring liens and the various forfeitures which have above been commented upon, and others. Section 37 is an illustration of one forfeiture declared, in close analogy to many which result from the breach of laws against smuggling. It forbids the removal of spirits after sunset and before sunrise, and declares, that, in case of violation, the spirits, together with any vessel containing the same, and any horse, cart, boat, or other conveyance used in the removal thereof, shall be forfeited to the United States; and section 55, as amended by the 12th section of the said act of 1872, provides, that, where spirits which have been withdrawn and shipped for exportation shall be intentionally relanded within the United States, the spirits, the vessel from which the same were relanded, and all boats, vehicles, horses or other animals used in relanding and removing such spirits, shall be forfeited. No question of ownership is made. It is expected that the owner of property will see to the use made of it, at his peril. Other parts of the act might be referred to, and words might be largely multiplied upon the need of stringent provisions to protect the government from frauds and evasions of the law, and the slight restraint that would exist when only a forfeiture of a holding at will, or at sufferance, or from month to month, or even from year to year, was all that is to be apprehended.

But, enough and more than enough has been said to express the opinion that the trial below proceeded upon an erroneous interpretation of the law governing the rights of the parties. Under the views here expressed, it may not be of any materiality to discriminate

between fixtures and movable articles, tools, implements, and instruments used in the distillery. It is probable that the instruction to the jury to treat the latter as real estate, for the purposes of the trial, grew out of the other instruction, that the property of the owner could not be forfeited unless the owner was a party to the fraud, or in complicity with the distiller therein. Under the views expressed in this opinion, the question raised thereupon is, probably, not material. It is, however, proper to say, that, if a case be made in which tools, implements, instruments and personal property found on the premises are forfeited, I see no ground on which, by calling them real estate, or part of the distillery apparatus, they can be withdrawn and saved.

The judgment must be reversed, and a new trial ordered.

[NOTE. Upon the second trial the above decision was substantially followed, and a decree entered for the United States. Case No. 14,962.]

Case No. 14,964.

UNITED STATES v. DISTILLERY, ETC., OF J. C. McCOY et al.

[21 Int. Rev. Rec. 165.]

District Court, D. Nebraska. May Term, 1869.

FORFEITURE — BOND TO ANSWER — TITLE TO FORFEITED PROPERTY — MECHANIC'S LIEN.

1. The title to property forfeited for wrongful and fraudulent acts passes by the operation of law to the United States at the moment of the commission of the acts causing the forfeiture, and the acceptance of a bond to answer a judgment against the claimants to the property forfeited does not reinvest the title in them.

[Cited in Dobbins' Distillery v. U. S., 96 U. S. 402.]

2. A modification of this rigid rule of law is allowed in this case in favor of the mechanics' liens of those who furnished the material and machines by which the property has been built up and made more valuable, but without passing judgment as to their legal title, and solely on the plea "that no great injustice could result therefrom to the government, whilst a refusal to apply a part of the fund to the payment thereof might result in the greatest injustice."

[This was a suit to forfeit the distillery and rectifying establishment of J. C. McCoy & Co. Judgment of forfeiture entered.]

Strickland, Mason, Kennedy, and U. S. Atty. Neville, for the government.

Redick, Woolworth, Doane & Kennedy, for creditors.

G. W. Ambrose, for the assignee in bankruptcy.

General Estabrook, for Lamaster, claiming as informer.

Mr. Kennedy, for Copeland, claiming as informer.

Judge Wakely, for Haynes and Brewer, sureties in the release bond.

DUNDY, District Judge. Heard on application for distribution of finances in registry of court. This case is perhaps the most remarkable one ever brought in this court. It is peculiar in some, and of the first importance in many, respects. The complicated questions arising during the several stages through which the cause has passed; the magnitude of the interests involved; the lapse of time since the institution of the suit; and the great number of eminent counsel engaged both for and against the government, all combine to give additional interest to the proceedings. For general convenience, a history of the origin and progress of the litigation growing out of the original seizure of the distillery and rectifying establishment seems necessary, as well as proper. The distillery and rectifying establishment was seized and closed up by a government officer, on the 22d day of December, 1868. On the 28th of the same month, the United States attorney filed an information on which the property was afterwards condemned, as forfeited to the United States. This information charged the said McCoy and Co., with the commission of several criminal acts which led to the seizure of the property in question. These criminal acts are alleged to have been committed on the 13th day of October, 1868, and on other days subsequent thereto. The verdict of the jury sustains the truth of the allegations in the information.

On the 14th day of January, 1869, the distillery and rectifying establishment, together with a large amount of personal property, were released on bond given by McCoy and Co., claimants. On the 2nd day of September, 1869, trial was had, and the verdict of the jury was for the government. A judgment of condemnation followed this verdict on the 2nd day of September, 1869. On the 14th day of February, 1870, an order was made directing the marshal to sell the distillery and rectifying establishment and to bring the proceeds arising from the sale into court to abide its further order. The sale was duly made by the marshal and the proceeds, amounting to the sum of $14,900.00, brought into court to be applied as the court might further direct. This sale was confirmed by the court and a deed made to the purchaser by the marshal. On the 30th of April, 1869, and during the progress of the cause, proceedings in bankruptcy were instituted against McCoy and Co., which eventually resulted in their being adjudicated bankrupts. Shortly before, and soon after this several suits were commenced in the state court against McCoy and Co., in most of which judgments were rendered by default for the whole amount claimed to be due. The several judgment creditors claimed to have liens on the property sold, and now apply for the money realized on the sale of the same. The judgment of Winehagen and Hanbostle was rendered on the 29th day of April, 1868, for the sum of $8,375. Judgment of I. B. Fleming was obtained on the 14th day of October, 1868, for $1,527. Judgment of Hastings, Ledyard and Co., on the 16th day of October, 1868, for $2,668.38. Judgment

of Hoagland, based on a mechanic's lien, was obtained on the 29th day of June, 1869, for $2,229. The lien was for materials furnished, between the 17th of September, 1868, and the 15th of December, of the same year. Judgment of W. P. Anderson, on the 20th day of October, 1869, for $978.19. Harris and Fortus, judgment, on the 2nd day of July, 1870, for $1,360, is also based on a mechanic's lien for materials furnished between 13th day of September, 1868, and the 6th day of February, 1869. In addition to these alleged liens, the Council Bluffs Iron Works Co. claims a mechanic's lien for the sum of $2,800, for materials furnished between the 17th of February, 1868, and the 23d of February, 1869. Fitzpatrick also claims a balance due on a mechanic's lien, of $119.35. This was for materials furnished between the 14th of October, 1868, and the 12th of March, 1869. At the time the distillery was seized, there was due from McCoy to the government about $3,110 taxes, which constituted a valid lien on the premises seized. Before the time of making the order in which the marshal was directed to sell the property seized, the United States had commenced suit in the circuit court against McCoy and Co., with whom were impleaded all of the above named creditors of McCoy and Co., the object of which was at least in part to settle the question of lien, between the government and the said parties. This suit was commenced on the 15th day of January, 1870; hence the order directing the proceeds arising from sale, to be brought into court to abide its further order. The second amended bill was not filed in that case until December, 1871. After the issues were made up, a large mass of testimony was taken, the cause tried in the circuit court and the bill was there dismissed. And by common consent of all parties in interest, the record in the case in that court was transmitted to this court, where the questions there raised were to be decided. That cause was decided at the November (1872) term of the circuit court. At the October (1873) term of this court a question was submitted to a jury relative to the disputed facts between two parties who claimed a moiety as informers. At the same term of court, counsel on behalf of Omaha City and Douglas county, asked leave to file a claim for taxes said to have been assessed and on the distillery.

These facts constitute the basis upon which the original proceedings were instituted, upon which this cause has been conducted, and upon which (at least so far as this court is concerned) it is to be finally disposed of.

At the time of seizing the property by the revenue officers, the distillery and rectifying establishment was closed up, and thereafter held by them until the same was released on bond. After the release, the distillery was run for a short time, when it was abandoned by the owners, who soon after fled from the state. The property, mainly for the want of better care than could be bestowed on it by the government officers, began to rapidly depreciate in value. This fact was made to appear from the statement of parties in interest and from a personal inspection of the premises. And it was thought to be for the best interests of all concerned to have the property sold at as early a day as practicable, and to have the proceeds brought into court, when such as might desire so to do could apply for and receive the proceeds, should they be found entitled thereto. It is claimed, however, that a portion only of the parties in interest consented to the making of the order in question. The testimony seems to be conflicting upon that point. But suppose no consent was given by any one of the parties—suppose that instead of consenting, each and every one of them had protested against making the order as some of them do here now, could that possibly affect the validity of the order? Manifestly not. The court either had, or had not the authority to make the order of sale. If the authority to make it existed then no consent of a creditor, whether judgment creditor or not—who was not a party to the suit—who had in no way intervened, was necessary to give validity to the order; if the court had not the lawful authority to make the order, then certainly the lien holders consenting thereto would not confer the right to make any such an order. There can be no reasonable doubt of the jurisdiction of the court in this behalf. As the property was lawfully seized it was eventually condemned and forfeited to the government for violations of the revenue law committed with and about it by McCoy and Co., the owners. There is no question about the validity of the seizure nor the binding force of the judgment of condemnation. But the sole objection seems to be to the validity of the order directing the marshal to sell the identical property seized. At the time this order was made, McCoy and Co. had the legal title to the property seized, unless that title was vested in the United States by operation of law, at the time McCoy and Co. committed the wrongful acts that led to the seizure. Now, if those wrongful acts divested McCoy and Co. of the title, and vested it in the United States, then there can be no question about the validity of the order. If the title still remained in McCoy and Co., then most clearly it was subject to buy and sell to satisfy the judgment rendered against them, and after the judgment was entered on the bond, and execution issued thereon the marshal was clearly justified in proceeding to take and sell the property as that of McCoy and Co., to satisfy the said judgment. This he could have done as well without as with the order of sale to which objection is here made. Any property which McCoy and Co. had in this state was subject to seizure and sale to satisfy the judgment. And it was the duty of the marshal to first exhaust the property of the principals before proceeding to take the

property of the surety in the release bond. It seems then that no valid or lawful objection existed against making the order of sale. The propriety of making the order at the time it was done cannot well be questioned, as the property sold for very much more than it was originally appraised at. Besides, since the sale was made by the marshal, and down to the time of hearing of the case in the circuit court, the government had realized something over two hundred and thirty thousand dollars out of the distillery in the shape of taxes. If any other or further indication of the action of the court in making the order of sale be necessary, it will be found in the opinion of the circuit judge, delivered by him in the case before referred to. It follows from these views that the money is properly in this court, awaiting its further order.

The property was seized and condemned under the act of congress of July 20, 1868 (15 Stat. 162). The amended information contains several counts or distinct charges and specifications in most of which it is distinctly stated that McCoy and Co. committed the wrongful acts which led to the seizure and caused the forfeiture on the 13th day of October, 1868, and on other days between that date and the 22d day of December, the time of the seizure. One of the principal charges is that on the 13th day of October, 1868, McCoy and Co., after the survey and registration of the distillery, enlarged the producing capacity of the distillery without giving notice to the assessor, with intent to defraud the United States. The other charges of fraud are both numerous and important, but need no further notice here. The verdict of the jury was for the government "on all the issues joined," of which the specification above stated was one.

It will be seen, then, that the wrongful and fraudulent acts that caused the forfeiture of the distillery were committed on the 13th of October, 1868. At the date last stated the wrong was done, the fraud committed and the property forfeited. The moment the fraudulent act is committed which causes the forfeiture, the owner is divested of the property, and the title, by operation of law, changes and vests in the United States. So in this case, the title of McCoy and Co. was lost, notwithstanding they retained possession of the property for a time after the commission of the fraud. In all such cases, and in that one, the property was seized and held for a time for the purpose of protecting the rights of the government, and the object to be gained in instituting proceedings to condemn property so seized is to have a judicial determination of the question of right involved between the claimants of the property and the authority that seizes the same. So far as this distillery is concerned, it has been judicially determined that the title of McCoy and Co. to the same was divested on the 13th day of October, 1868, and parties who dealt with them after that date before as well as after the seizure, did so at their own risk and peril, and as the property was at all times within the jurisdiction of the court, it cannot be said that the United States relinquished or in any way abandoned the right and claim thereto, notwithstanding bond was given to answer whatever judgment might be recovered against the claimants. If a fraud had been committed upon the court in procuring the approval of a bond with worthless sureties, would that fact have exempted the property from being further proceeded against as was done in this case, especially when the property had never changed hands after the seizure? We think not. Was anything of this kind attempted by the sureties on the bond in this case? It is unnecessary perhaps to pursue this inquiry, as it is enough to say that the sureties justified on oath, each swearing that it was worth $1,600.00 in unencumbered real estate in this state, and that it is a matter of general notoriety that the sureties have long since left the state, and are believed to be out of reach of ordinary executions. It cannot therefore be seen that the act of releasing the distillery on bond would reinvest the title to the same in McCoy and Co. And if it did not so reinvest it, then no person could acquire an interest in the property after the act of forfeiture was committed, or at least after the time of the seizure. The circuit court, in the case before referred to, must have taken this view of the case, otherwise it would be difficult to see on what principle the court there decided that "in any event all the interest of McCoy and Co. in the property was forfeited to the government, and this forfeiture has been judicially ascertained and decided, and therefore it is not perceived what interest the bankrupts' estate has in the fund." The judge in delivering his opinion in that case further says, that "at the time of the sale the United States was the owner of the property, under a forfeiture judicially ascertained, and had been such owner from the time of the violation of the law for which it was seized." Keeping these principles in view and with such light for a guide, the questions of lien presented for consideration will be decided according to the views here expressed. So far as the record shows McCoy and Co. never held the legal title to the lot of ground on which the rectifying establishment was situated; and for aught that is known, no title to the fee in that case really passed to the purchaser under the marshal's hand. Whatever title McCoy and Co. and the United States had in the lot, may have passed to the purchaser, but nothing more than that appears from the record. And McCoy and Co. may or may not have had such an interest in that lot as would have been bound by a judgment in the state court. The proceeds arising from the sale of the rectifying establishment, excepting the marshal's percentage on the sale of the same, is awarded to the United States, and is to be credited on the decree accordingly. McCoy and Co.

acquired title to lot 4, on which the distillery was located, on the 13th day of August, 1868. At the time of the rendition of a judgment in the state court, all of the real estate of the party against whom the judgment is obtained, if situated in the county where judgment is rendered, became bound for the payment thereof. But lands acquired by a judgment debtor after judgment rendered, are not bound thereby, until execution issues and is levied thereon. Under the Code practice as understood and practiced in this state, argument is unnecessary to demonstrate the truth or correctness of this proposition. This view of the case necessarily disposes of the alleged lien of the judgment of Winehagen and Hanbostle, which was rendered in the district court of Douglas county on the 29th day of April, 1868. And as no execution seems to have been issued, or levy made on the property, at any time before the 13th October, 1868, at which time the property became forfeited, this claim must be rejected. The judgment of J. B. Fleming, obtained in the same court on the 14th day of October, 1868, was after the commission of the act of forfeiture, and the title vested in the United States. There was no lien created in this case, by the entry of this judgment, and the claim must therefore be rejected. The judgment of Hastings, Ledyard and Co., was rendered on the 16th of October, 1868, and stands on the same footing as the last above described. The same is true of the judgment of W. P. Anderson, obtained the 20th of October, 1869. The claims in the two cases last stated must be rejected.

A question of greater difficulty is presented with respect to the claims of those who filed mechanics' liens against the distillery. In the case before referred to the circuit court expressly refused to pass upon the validity of these liens as against the government, and no adjudicated case have I been able to find, where such questions have been determined. And if these views heretofore expressed are correct, then a rigid application of the rule stated (i. e. that a person dealing with another after the commission of the act of forfeiture, would do so at his own risk) would exclude any interest of the parties supposed to have been acquired after the 13th October, and the time of releasing the property on hand. Under the mechanic's lien law of this state, as it existed in the years 1868 and 1869, persons who furnished material or machinery for the erection of buildings or construction of mills or manufactories, were entitled to a mechanic's lien to secure payment therefor; to secure the lien, it was necessary to file the same within four months from the time of furnishing the last material or machinery. The law in this respect seems to have strictly been complied with by all the parties, who are here claiming under and by virtue of their mechanics' liens, and ordinarily no difference would be experienced in enforcing these liens in the state court. It seems that these parties commenced to furnish the materials on the 18th of February, 1868, and concluded on the 12th of March, 1869. A portion of the same was furnished after the commission of the acts of forfeiture by McCoy and Co., and before the seizure, and also after the property was released on bond. The great and most difficult question raised in this connection, and which must of necessity be here determined, is as to what effect the forfeiture had on these several mechanics' liens. If a rigid rule of law should be here applied and enforced, it might be that the claimants would be without a remedy to enforce their alleged rights. But if a more enlarged and liberal view is to be taken, and an equitable disposition of the fund is to be made, then the claims of these several lien holders may be respected, and their rights secured. I confess I have serious doubts about this, and have no opinion thereon that I may not feel bound to abandon and disown tomorrow. Of one thing, however, I feel quite well assured, and that is if these material men and machinists who furnished material and machinery for the distillery are paid their just claims out of the proceeds of the sale of the property, which their material and machinery had built up and made valuable, that no great injustice could result therefrom to the government, whilst a refusal to apply a part of the fund to the payment thereof might result in an act of the greatest injustice. And when the duty of the court to make other disposition of the money is not clear, I prefer to apply the money where the least injustice will be done. There can then be no doubt about where the money is to be applied. I conclude then, that the amount due on the lien of the Council Bluffs Iron Works Co., amounting to $2,888.60; the lien of Hoagland amounting to $2,229.05; the lien of Fitzpatrick amounting to $119.35, and the lien of Harris and Foster for $1,369.00 must be paid out of this fund. No costs, however, will be allowed on any of these claims, as the suits in the cases of Hoagland and Harris and Foster, were commenced and prosecuted in the state court after the property was seized, and after proceedings in bankruptcy were commenced against McCoy and Co.

On the 24th day of November, 1873, the city of Omaha and Douglas county filed written applications for a portion of the money to be applied to the payment of taxes said to have been assessed against McCoy and Co., a part of which was assessed on the property sold. It nowhere appears that the district attorney or any of the several claimants had any notice of the filing of these claims. Such notice ought to have been given to the district attorney, at least, so as to have given him an opportunity to attack the validity of the tax, had he seen proper to do so; especially as the cause had been fully submitted to the court before the filing of the claims. These claims may be, and perhaps are meritorious ones, but as the applications now stand, both must be rejected. Order of dis-

solution will be made conforming to the views here expressed.

I find on the files an application made by private counsel for an allowance out of this fund for services rendered during the progress of the trial. The assistant counsel was employed under an order made by the secretary of the treasury, and as the court made no order directing the services to be performed, and as the counsel were not subject to the control of the court, it is not apparent that the court has the right to make the order desired.

Just before the close of the last term of court, for my own convenience, and owing to the great amount, and conflicting character of the testimony on the subject, I submitted to a jury the questions in dispute between the two persons who claimed to be informers. The jury found that the two acted in concert, and both gave information at the same time which led to the seizure of the property. Of course, this verdict has no binding force, but it is so manifestly just, as appears from the testimony, that the finding of the jury will be adopted as the finding of the court.

The fund now in the registry of the court ought to be distributed and applied as follows: Out of the fund realized from the sale of the rectifying establishments ($2,800) pay: First. The marshal's fee for selling. Second. The balance to be credited on the decree. Out of the fund realized from the sale of the distillery, on which liens were filed: First. All costs and expenses incurred for the seizure, trial, condemnation and sale of the whole of the property seized, including any allowance to officers of the court, in lieu of fees or otherwise. Second. The mechanic's lien heretofore described of the Council Bluffs Iron Works Company for $2,883.60.

Hoagland for	$2,229 05
Fitzpatrick for	119 35
Harris and Foster for	1,369 00

—And the balance of the said fund to be applied to and credited on the decree. And it is so ordered. Owing to the voluminous record, and the amount of labor required in conjunction with the clerk and marshal to tax the cost bills, the case will be referred to General Manderson, a member of the bar, to tax the costs, make distribution of the fund, and to report the same to this court on the first day of the next (May) term thereof.

Case No. 14,965.

UNITED STATES v. DISTILLERY IN WEST FRONT STREET.

[2 Abb. (U. S.) 192;[1] 11 Int. Rev. Rec. 174; 18 Pittsb. Leg. J. 61; 4 Brewst. 246.]

District Court, D. Delaware. 1870.

REVENUE LAWS—VALIDITY OF PROVISIONS IMPOSING FORFEITURE.

An act of congress,—such as section 44 of the act of July 20, 1868 (15 Stat. 142), which declares that real property employed in a violation of a revenue law shall be forfeited therefor,—is not unconstitutional. Such an act may be sustained as a regulation of civil policy appropriate to accomplish a purpose vital to government.

This was a libel of information to enforce a forfeiture.

HALL, District Judge. This is a case of libel of information on behalf of the United States in rem; that is to say, a distillery, being a brick building, 106 West Front street, Wilmington, and the lot of land on which the said distillery stands, and certain apparatus, &c., which John S. Prettyman, U. S. collector of internal revenue for this district, had seized as forfeited to the United States, according to section 44 of the act of congress "imposing taxes on distilled spirits," &c., of July 20, 1868.

The libel of information alleges that Archibald McKinley, being a person distilling spirits, on the —— day of ——, 1869, at the distillery aforesaid, did carry on the business of a distiller, with intent to defraud the United States of a part of the tax on the spirits distilled by him, contrary to section 44 aforesaid, and that Philip Plunket had right, title, and interest in the said lot of land on which the said distillery is situated, and did knowingly suffer and permit the business of a distiller to be carired on by the said Archibald McKinley, at the said distillery.

Archibald McKinley and Philip Plunket have appeared and claimed the property, and answered the information severally; Philip Plunket claiming the real estate (the distillery and lot of land on which it is situated, in which he says he has an estate in fee simple). The answer put in issue all the allegations in the libel of information. On trial before a jury, a general verdict has been found for the plaintiff.

It is thus established that Archibald McKinley, a distiller, did carry on the business of a distiller at the distillery before mentioned, situated on the afore-mentioned lot of land; that Philip Plunket had a right, title, and interest in the said lot of land, and did knowingly suffer and permit the said Archibald McKinley to carry on the said business of a distiller there, or, in the phraseology of the said section 44, "the said business of a distiller to be there carried on by him." Therefore, all the right, title, and interest of Philip Plunket in this distillery and lot of land, according to this section 44, was forfeited to the United States, and a decree of condemnation should be pronounced, according to the prayer of the libel of information.

It is objected to this, that this section 44, cannot have this effect upon the real estate of Philip Plunket, under the clauses of the constitution of the United States prohibiting the passing of a bill of attainder or forfeiting real estate, even for punishment of treason, except for life; arguing that the forfeiting real estate by the mere enactment of the

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

legislature, without offense or delinquency of the owner, is, in practical effect, a bill of attainder, certainly open to the same objection, and when the fundamental principle of our government will not allow forfeiture, except during life, for the highest crime, it certainly cannot be suffered for a misdemeanor.

In answer, it is obvious to remark, that these clauses of the constitution of the United States have respect to high crimes, and punishment of them, restraining rigor, and guarding against arbitrarily enacting guilt. The case before the court is a civil suit in rem, against the thing, to ratify the seizure of it, and the provision of the act of congress under which it is alleged to be forfeited, and therefore was seized, is a regulation of civil policy, framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for congress, in the exercise of its legislative power, to determine. That power is not unlimited; but what are the objections to the provision upon which this case depends?

Certainly, congress can impose a tax on distilled spirits, and provide the processes and measures for collecting it; for preventing the government being defrauded of it; and what measure more obvious, germane, or suitable, than to make the defrauding of the tax cause of forfeiting the distillery (viz: the building and the lot of land on which it is situated), the provision under consideration.

The objection that would first occur would be, that the forfeiture is unreasonably large; but of this, congress is the rightful judge, and experience in this matter has guided to this provision. There is no objection; it is in natural course; it is common to make the use of a thing for an unlawful purpose, its employment in an injurious way, cause of its forfeiture. Carrying on the distilling business, with intention to defraud the government of the taxes on the spirits distilled, and actually defrauding it, the case before the court upon this verdict, so far from exhibiting the provision complained of as intolerable for hardship, commends it to a sense of justice and propriety. I can see no force in the protest against its action on real estate—fee simple in land.

Under the feudal system, all title to land was derived from the king, and held for doing service to him; and those holding from him granted to those under them, upon like tenure, doing service to them; the holders or tenants must all be choice men, in whom there was personal trust to perform the stipulated service—all controlling considerations of the grants, in those times of violence and war. But the tenants must hold the land in order to perform the service. The service was indispensable; hence the land was inalienable, the service being essentially personal; and the feudal system thus established principles of land tenure, which the nation, as it became commercial, had a constant struggle with—an interesting part of English history.

We have never adopted nor allowed like principles in our land tenure. Our earliest statutes, 1694 and 1700, make land liable to pay debts, when sufficient personal estate cannot be found; and it was not till about seventy years afterward, about 1770, that the regulation was made that, if the profits would pay the debt and interest in seven years, the land should not be sold, but delivered to the creditors on elegit, to be held till payment from the profits. This regulation does not affect the character of land in its liability for debt. It can be sold from the owner by adverse proceeding, in fee simple, for debt, for taxes, for a fine for an assault and battery upon a judgment of a justice of the peace; it is property, and subject, as property is subject, to answer demands which law makes upon it for the ends of justice.

As a further reason against construing and administering the provision of the act of congress upon which this case rests, according to its literal meaning, it is contended that it is in practical effect a bill of attainder, taking from Philip Plunket this real estate, by mere force of enactment, without offense or delinquency on his part.

I have already met this argument. I may add, further, this is not a proceeding against Philip Plunket; he has intervened in this case, making himself, of his own accord, a party. The proceeding is against this distillery, as a thing forfeited for being used as a means for carrying on the business of distilling spirits, with intent to defraud the United States of the tax on the spirits distilled; and the allegation informing Philip Plunket, who has made himself a party to the proceeding, why his property is forfeited, is, that he knowingly permitted the distiller who carried on this business to use this distillery. As the use was by his permission, he must abide the consequences.

The distillery is thus made, by this provision of the act, a pledge, to the amount of its value, that the business of distilling in it shall be carried on fairly, without intention to defraud the United States of the tax on the spirits distilled, or any part of it; and Philip Plunket, by knowingly permitting its use under this provision—and no man is allowed to plead ignorance of the law, and also the written instrument under his hand, according to the eighth section, attests his privity—consents to this; so that this view of the case comes to this point—that Philip Plunket, knowingly permitting this property to be used as a distillery, subjects it to be security for the fair carrying on of the business. This is the scope of the provision, and there can be no objection to it.

Let there be a decree of condemnation in the usual form.

Case No. 14,966.

UNITED STATES v. DISTILLERY NO. TWENTY-EIGHT et al.

[6 Biss. 483; [1] 21 Int. Rev. Rec. 366; 8 Chi. Leg. News, 57; 2 Cent. Law J. 749.]

District Court, D. Indiana. Nov. 4, 1875.

INTERNAL REVENUE—DISTILLERS—BOOKS—JURY TRIAL—PENALTY—EX POST FACTO LAW.

1. The act of June 22, 1874 [18 Stat. 486], does not apply exclusively to cases arising under the custom revenue laws, but applies as well to cases arising under the internal revenue laws.

2. The fifth section of the act of June 22, 1874, is constitutional, and does not violate articles 4, 5 and 7, of the amendments to the constitution.

[Cited in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 535.]

3. This is a proceeding against the distillery and not against the claimants; any statements made by them as witnesses in the proceeding against the distillery could not be used against them in any subsequent criminal prosecution.

4. The court had the power to make the order requiring the production of the books and papers, and to enforce it.

5. When the issues are made up, the claimants will have the constitutional right to demand a jury trial.

6. The penalty for not complying with the order to produce books is that the allegations in the motion shall be taken as confessed.

7. The objection that the act of 1874 is an ex post facto law considered.

Informations were filed in two cases under the internal revenue laws against distillery No. twenty-eight, and certain rectifying houses and other property. Gordon B. and John W. Bingham intervened as claimants and the causes were consolidated. Subsequently, upon the written motion of the district attorney, under the fifth section of the act of June 22, 1874, an order was entered against the claimants to produce in court certain business books and papers relating to their business as distillers, rectifiers and wholesale liquor dealers, on a day and hour certain, subject to the examination of the district attorney, under the direction of the court. On the day named claimants appeared by counsel, and moved that this order be vacated for the following reasons: (1) That the act of June 22, 1874, applies exclusively to cases arising under the custom revenue laws, and not at all to proceedings under the internal revenue laws. (2) That the books and papers ordered to be produced are not described with sufficient particularity. (3) That the fifth section of the act of June 22, 1874, is unconstitutional in this, that it violates articles 4, 5 and 7 of the amendments to the constitution.

Nelson Trusler, Dist. Atty., Charles L. Holstein and Thomas M. Browne, for the United States.

James M. Shackelford and Charles Denby, for claimants.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

GRESHAM, District Judge. The section under which the order was entered against the claimants reads as follows: "That in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which the suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination, (at which examination the defendant or claimant, or his agent, may be present,) of such entries in said book, invoice, or papers, as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of the said books and papers, his agent or attorney, shall have subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

Language more general could hardly have been employed. It provides for the production of books, papers, etc., "in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States."

It is true the act is entitled "An act to amend the custom revenue laws and to repeal moieties," and that, with the exception of the fifth section, its provisions relate solely to the customs-revenue. But it also appears that the provisions of the former acts, repealed by the act of 1874, also related exclusively to the customs-revenue. Why, then, did not congress expressly limit the operation of this act, providing for the production of business books and papers to cases arising under the customs-revenue laws, as it did the provisions of the several acts referred to in this act and repealed by it? Clearly for the reason that in all suits other than criminal, arising under any of

the revenue laws of the United States, congress designed that the court might require the production of any business book and paper belonging to or under the control of the defendant or claimant.

Besides, it is seldom that the title of an act of congress is resorted to as an aid in its construction. The title neither extends nor restrains any positive provisions contained in the body of the act. It is well known that congress often embodies in a single act incongruous provisions, having no reference to the matters specified in the title. Hadden v. Collector, etc., 5 Wall. [72 U. S.] 107.

The second objection made to producing the business books, papers, etc., is that the same were not described with sufficient particularity.

The act must receive a reasonable construction. Such a decree of particularity as was insisted upon by counsel for claimants would render the fifth section practically nugatory. The district attorney cannot be required in his motion to describe the business books as journal A or B, or ledger A or B, for he may not know what particular books the claimants have.

The description of the books and papers in the written motion, and the order of the court is, substantially· Certain day books, journals, cash books, ledgers, blotter-books, blotters, invoices, dray-tickets, etc., kept, received, and taken by the claimants in their business as distillers rectifiers and wholesale liquor dealers, between certain dates named, and since the 22d day of June, 1874, showing the amount of spirits produced, received, removed, and sold by them during the time named. The claimants were sufficiently advised by this description what books and papers were meant No greater certainty of description was required to satisfy the statute. U S v. Three Tons of Coal [Case No. 16,515]; Myer v. Becker [Id. 1,208].

In considering the constitutionality of the fifth section of the act of June 22, 1874, it is necessary to determine the real character of the case at bar.

The charges made in the libel are against the property and not against the claimants. It is the distillery and other property proceeded against that are treated as the offenders. The claimants, strictly speaking, are not parties to the proceeding. They are here of their own motion, and not on the process of the court. The judgment must be for or against the property libeled, not for or against the claimants. A forfeiture of the property does not convict the claimants. This proceeding is entirely independent of any criminal prosecutions which have been commenced, or which may hereafter be commenced against them The books and papers, which may or may not, when produced, inculpate the property, can only be used in evidence in this action. After being thus used they go back into the possession of the claimants.

The question, therefore, of compelling a person to accuse himself or to testify against himself in a criminal case is not before the court. Even if the act of 1874 were not in existence, the claimants might be compelled by a subpœna duces tecum, to bring in the books and papers called for in the order of the court; and I can see no reason why they might not also be compelled to testify concerning all the allegations of the libel. Any statements thus made by them as witnesses in the proceeding against the distillery and other property could not be used against them in any subsequent criminal prosecution.

The act of February 25, 1868 [15 Stat. 37], section 860, Rev. St., provides that "no discovery or evidence obtained from the party or witness, by reason of a judicial proceeding * * * shall be given in evidence or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

It was said in argument that under this statute the books and papers, even if produced, could not be used in evidence on the trial of this cause

The act of 1874, expressly provides that the books and papers may be thus used in evidence. This is the last expression of the legislative will. So far as the two acts are inconsistent or repugnant, the act of 1868 is repealed. The claimants are not justified by article five of the amendments to the constitution in refusing to produce their books and papers to be used in evidence. U. S. v. Mason [Case No. 15,735]; U. S. v. Three Tons of Coal [supra].

The claimants next attempted to shelter themselves under the provision in article four, of the amendments to the constitution which secures the people in their persons, papers and effects, against unreasonable searches and seizures.

Congress is empowered by the constitution "to levy and collect taxes, imports and excises," provided the laws are uniform in their operation. The mode and manner of exercising this power is left to the discretion of congress. Under the exercise of that power congress has provided the internal revenue system. By that system the government raises the principal portion of its revenue. The tax on the production and sale of spirits is a material source of revenue. The government has, therefore, practically assumed control of the manufacture and sale of spirits. It has adopted regulations for the government of distillers, rectifiers, and wholesale dealers, with fines, penalties, and forfeitures for their violation. They are required to keep books in which they are to enter daily all their business transactions with the utmost particularity. These books are at all times open to the inspection of the proper

revenue officers, and are popularly known as government books. If properly kept they will show the exact amount of spirits produced, received, and removed on any given day. If so kept, they will correspond with their business books, and this correspondence ought to exist. No one can engage in the manufacture and sale of spirits without the consent of the government. That consent is obtained on certain terms and conditions. No one can be allowed to say that, as a distiller, rectifier, or wholesale liquor dealer, he has kept a private record of his transactions. His books and entries are quasi public books and entries. The government has a right to see any record kept by him of his business. This right has been exercised by the government since its organization. The first and subsequent congresses have enacted such laws. It is too late to question the validity of such statutes. Experience has shown that without severe and even inquisitorial regulations the government cannot successfully collect the tax levied upon the production and sale of spirits, and the necessities of the government justify the existence and rigid enforcement of such regulations.

The order of the court complained of by the claimants authorizes neither search nor seizure. It calls on the claimants to produce certain books and papers relating to their business as distillers, rectifiers, and wholesale liquor dealers. If their business books and papers are not produced the allegations of the libel are taken as confessed.

The claimants were equally unsuccessful in invoking the protection of article seven of the amendments to the constitution. That article provides that "in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." And it has been settled that a proceeding in rem under the internal revenue laws is a suit at common law within the meaning of that article. The Sarah, 8 Wheat. [21 U. S.] 391.

It is clear then that when the issues in this proceeding are made, and the case is ready for trial, the claimants will have a constitutional right to demand a jury.

But they must first submit to and comply with all reasonable and proper rules and orders of the court entered against them in making up the issues and preparing the case for final trial.

As already stated, the books and records kept by the claimants are quasi public records. If their government books were kept as the law required them to be kept, their business books will make the same showing as the government books. And if this correspondence exists, the production of their business books and papers will not harm the claimants. If their government books were not so kept, and their business books and papers contain evidence which will tend to prove the allegations in the libel, there is justice in the demand of the government for their production.

The act of 1874, authorized the court to make the order in controversy. That act, and others of the same nature, have not only been held constitutional, but reasonable and proper, in view of the object sought to be accomplished. The statute authorizing the order for the production of books and papers also fixes the penalty for disobedience of that order—the allegations in the motion shall be taken as confessed.

If congress had not seen proper to prescribe the penalty or punishment for disobedience of the order, it can hardly be doubted that the courts, in the exercise of a sound discretion, would have been authorized to enforce compliance either by fine or imprisonment, or both. In this case the statute has fixed the penalty, and the court can inflict no other. If the claimants refuse to comply with the order of the court they are in contempt of its authority. That question is not triable by a jury. The contempt can be purged only by a compliance with the court's order. The constitutional right of the claimants to a trial by jury will not shield them from punishment for disobedience of the order of the court.

Whenever in the progress of a proceeding a party acts contumaciously by disobeying a lawful order entered against him, that proceeding, so far as he can claim any advantage under it, is at once arrested, and goes no further until the contempt is purged. Where the United States courts are not limited by statute, their power to enforce obedience to their orders by punishing for contempt is discretionary. The object to be accomplished by the exercise of this power may be punitive in its character, or it may be at once punitive and remedial, according to the given case.

In the case of Texas v. White [reported, sub nom. In re Chiles, 22 Wall. (89 U. S.) 157], in the supreme court of the United States, Justice Miller used this language: "The exercise of this power has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect of the authority of the court or its order; and second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. Stimpson v. Putnam, 41 Vt. 238. In the former case the court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it." Also see Bish. Cr. Law (3d Ed.) §§ 232–259, inclusive.

The first ten articles of the amendments to the constitution were proposed by the first congress of the United States at its

first session on the 25th day of September, 1789. At the same session, and about the same time, the act commonly called the judiciary act was passed. Section fifteen of that act (section 724, p. 137, Rev. St.) is as follows: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of non-suit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."

In the case of U. S. v. Twenty-Eight Packages Pins [Case No. 16,561], it was held that this statute did not apply to proceedings in rem. The contrary, however, was held by Judge Treat, of the Eastern district of Missouri, in the case of U. S. v. Four Hundred and Sixty-Nine Barrels of Spirits [Id. 15,148], in which ruling he says he is supported by the circuit judge in a well-considered opinion. This section of the judiciary act is important as a legislative construction of the seventh article of the amendments to the constitution. The very act organizing the federal courts is contemporaneous with the articles of the amendments to the constitution, whose protection was relied on by the counsel for the claimants with such seeming confidence. The act is still in force. It authorizes the courts to order the production of the books and writings of a party, and to enforce such order by summary judgment against the party failing or refusing it. The motion in the case at bar was made under the act of 1874, and not under that of 1789 [1 Stat. 73]; but the argument by which the former statute is sustained necessarily establishes the validity of the latter. The further point was made by counsel for the claimants that the fifth section of the act of June 22, 1874, was ex post facto, and, therefore null and void. In support of that position the case of U. S. v. Hughes [Case No. 15,416], was cited.

That was a case pending before the passage of the act of 1874. It was a suit to recover penalties for an alleged violation of the revenue laws, committed prior to the enactment of the law of 1874. The motion in the case involved the production of books and papers of the defendant used and kept by him prior to the act of 1874. Judge Blatchford held, that as applied to that case, the act of 1874 was ex post facto, in that it altered the legal rules of evidence which applied prior thereto and at the time of the alleged violation. This case is expressly limited to the books, papers, etc., of the claimants, relating to their business since the act of June 22, 1874. Whether or not a statute is ex post facto, depends upon the facts of the particular case.

The court has been aided in the consideration of these questions by the labors of the counsel upon both sides, and especially by those of Mr. Holstein, the assistant district attorney.

The motion of counsel for claimants is overruled, and the order of the court requiring the production of the business books, papers, etc., will stand.

Case No. 14,967.

UNITED STATES v. DIXEY et al.

[3 Wash. C. C. 15.] [1]

Circuit Court, D. Pennsylvania. April Term, 1811.

EMBARGO BOND — EXCUSE FOR NONPERFORMING VOYAGE—PUTTING INTO FOREIGN PORT —SEAWORTHINESS.

Want of seaworthiness, in a vessel sailing under a bond given according to the provisions of the embargo law, may or may not, according to circumstances, deprive the obligee of the excuse of prevention from performing the voyage, by the perils of the sea. If the vessel be lost before she arrive at her port of destination, or at another port in the United States, the obligors would be excused, whether she was seaworthy or not. If the vessel proceeded to a foreign port, from want of seaworthiness, it may afford strong presumption that it was not the real cause of her so doing, but that a breach of the condition was originally intended.

Action on an embargo bond. The question of law, was, whether the want of seaworthiness of the vessel, does not deprive the obligor of the benefit of the excuse of prevention, by danger of the sea, or other unavoidable accident. The voyage was from Philadelphia to New-Orleans; and in consequence of the disabled state of the vessel, she was obliged to put into Havana, whence the defendant [Dixey, Coxe & Price] was not permitted by the governor to take away the cargo.

In the charge, it was stated that want of seaworthiness might or might not have this effect. The case is to be considered in reference to the object and intention of the law, which was, to prevent a vessel going to a foreign port. If, for instance, the vessel should be lost before she reaches the port of her destination, or any other port in the United States, it would not deprive the obligor of the benefit of the exception of loss by a peril of the sea, to prove that she was not seaworthy. If she should go to a foreign port, though in consequence of a peril of the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

sea operating as the immediate cause, the want of seaworthiness might or might not be important, according to circumstances. It may afford strong ground of suspicion, that the avowed destination was not bona fide, and that the excuse was a mere cover to a breach of the law; as if the vessel is not sufficiently provisioned for the avowed voyage, and on that account, called at a forbidden port. But this intention may be repelled. In this case, the voyage was one which the defendant was accustomed to carry on, and which had been performed to New-Orleans only the year before, in the same vessel. It is very improbable, that he would risk so large a cargo in a vessel which he did not deem sufficient to carry it safely, and he could not calculate her condition so nicely, as to think her sufficient to go to Havana, and not to New-Orleans. Besides, the immediate cause of her incapacity to proceed, arose from her striking on the Bahama Bank. The question is, was the breach of the condition of the bond produced by a peril of the sea, or unavoidable accident—or merely from the fault of the defendant? If the former, the verdict should be for the defendant, if the latter, against him.

Verdict for defendant.

Case No. 14,968.

UNITED STATES v. DIXON.

[1 Cranch, C. C. 414.] [1]

Circuit Court, District of Columbia. June 25, 1807.

CRIMINAL LAW — INDICTMENT FOR BURGLARY — CONVICTION OF LARCENY—RETRACTING PLEA OF GUILTY.

1. Upon an indictment for burglary, the jury may find the prisoner guilty of larceny only.

2. Upon an indictment for larceny at common law, the court may render judgment according to the statute.

3. The court will suffer the prisoner to retract his plea of guilty in a capital case, and to plead not guilty.

Indictment [against Godfrey Dixon] at common law for burglary, in the house of John Curran. The jury having retired, sent to the court to know whether they could, upon that indictment, find the prisoner guilty of stealing only, and acquit him of the burglary. THE COURT having ordered the jury to be brought into court, told them, it was in their power to find a general verdict of guilty, or not guilty, or to find specially that the prisoner was guilty of a part only of the facts which go to constitute the crime of burglary; and that if they were not satisfied as to the breaking and entering the house in the night-time, they might so find their verdict, and that he was guilty of larceny only. Whereupon the jury retired, and in a short time returned a verdict, not guilty as to the breaking and entering the house in the night, but guilty of feloniously stealing the goods, &c. Sentence, 39 stripes, and one dollar fine. The sentence was under the act of congress, of 30th April, 1790, § 16 (1 Stat. 116).

NOTE. When Dixon was first arraigned he pleaded not guilty, and Mr. Hiort and Mr. Key were assigned as his counsel.

When called for trial his counsel informed the court that he wished to withdraw his plea of not guilty, being satisfied that the proof of his confessions were too strong to admit of any hope, and that he thought it might be the means of his obtaining a pardon, especially as he was not the principal perpetrator of the act. Whereupon THE COURT explained to the prisoner the nature of his indictment, and stated the punishment to be death, and asked him whether he fully understood the nature of the charge against him and the punishment of the crime, to which he answered in the affirmative, upon which THE COURT suffered him to plead guilty, and remanded him.

On the 25th of June he was ordered into court; and THE COURT again explained to him his offence and its punishment, and told him he had an opportunity, if he pleased, of retracting his plea, and of putting himself upon his trial; and asked him if he still persisted in pleading guilty, when he said he wished for a trial, and to plead not guilty. And THE COURT suffered him to withdraw the plea of guilty and put himself on his trial. The result of which is stated above.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,969.

UNITED STATES v. DIXON.

[2 Cranch, C. C. 92.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

SALE OF LIQUORS — POWER TO GRANT LICENSE — CITY OF WASHINGTON.

An indictment will not lie against an inhabitant of the city of Washington for retailing spirituous liquors within the city.

[Cited in U. S. v. Holly, Case No. 15,381.]

Indictment [against Jacob Dixon] for retailing spirituous liquors within the city of Washington, without license under the act of Maryland, 1784, c. 37, § 24.

The case having been submitted without argument, THE COURT decided that the exclusive power of granting licenses for retailing, and the exclusive power of regulating the same, was, by the charter of Washington, vested in the corporation, and that the indictment would not lie.

Case No. 14,970.

UNITED STATES v. DIXON.

[4 Cranch, C. C. 107.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

COMMON GAMING-HOUSE — INDICTMENT — COMMON LAW OFFENCE.

It is an indictable offence at common law to keep a common gaming-house, and for lucre

[1] [Reported by Hon. William Cranch, Chief Judge.]

and gain to cause idle and evil disposed persons to come and play together there, and to game for divers large and excessive sums of money, to the common nuisance of the citizens of the United States.

[Cited in Marcus v. U. S., Case No. 9,062a.]

[Cited in People v. Sponsler, 1 Dak. 289, 46 N. W. 460.]

Indictment for a common nuisance in keeping a common gambling-house for playing at the unlawful game called faro. The indictment was founded upon the model of that in the case of Rex v. Rogier, 1 Barn. & C. 272, 8 Serg. & L. 75, and charged, "that the said Jacob Dixon did, on," &c., "at," &c., "and on divers days and times," &c., "with force and arms at," &c., "unlawfully keep and maintain a certain common gambling-house, and in the said gambling-house, for lucre and gain, on the said first day of January and on the other times aforesaid, then and there, did unlawfully and wilfully cause and procure divers idle and evil disposed persons to frequent and come to play together at a certain unlawful game called faro, and in the said common gaming-house on the said first day of January," &c., "unlawfully did permit and suffer the said idle and evil disposed persons to be and remain playing at the said unlawful game called faro, for divers large and excessive sums of money; to the great damage and common nuisance of the good citizens of the United States, to the evil example of all persons in like cases offending, and against the peace and government of the United States."

The jury having found the defendant guilty upon this indictment, Coxe & Dandridge, for defendant, moved in arrest of judgment, and for a new trial; and after full argument on the part of the defendant, Mr. Swann, for the United States, cited the precedent in Archb. Cr. Law, 363, and submitted the case to the court.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent), as follows:

Coxe & Dandridge have moved the court in arrest of judgment, and contend that the matters charged in the indictment do not constitute an offence at common law. That at common law no game or gaming was unlawful; nor was it unlawful to keep a common gaming-house; and to this point they cited 3 Reeves, Eng. Law, pp. 170, 293; 1 Curwood's Hawk. P. C. 721; Jac. Law Dict. "Gaming"; 9 Anne, c. 14; 4 Tuck. Bl. 171; Com. v. Richards, 1 Va. Cas. 133; 3 Chitty, for the forms of indictment containing a count for a disorderly house. Rex v. Rogier, 1 Barn. & C. 272; Hawk. P. C. bk. 1, c. 32, § 2; Rex v. Dixon, 10 Mod. 335; 33 Hen. VIII. c. 9, § 12; 1 Doug. 60, 61, in Chandler v. Roberts, referring to 10 Mod. 256. The British statutes of 16 Car. II. c. 7, against deceit in gaming; 9 Anne, c. 14, § 1, avoiding securities for money lost at gaming; Id. § 2, providing that if more than £10 be lost at play, at one sitting, it may be recovered; and section 3, requiring the winner to answer on oath, are in force in this country. But the English and British statutes, prohibiting certain games to certain classes of persons, never were in force in Maryland, and, consequently, are not in force here. The act of 1797 (chapter 110, § 2) is the only act in force in this county, for restraining any kind of games, except the by-laws of the corporations of Washington and Georgetown; and that act only prohibits the setting up, keeping, and maintaining certain gaming-tables, or devices, in any tavern, or house occupied by a retailer of wine, spirituous liquors, &c. The game of faro is not an unlawful game. No person can be punished under that statute for playing at that game, whether it be played in a tavern or a private dwelling-house. The offence under the statute, is the setting up and maintaining the table or device.

The indictment, therefore, in the present case, derives no assistance from any statute; nor does the playing at faro constitute any part of the offence. If it can be supported at all, it must be as an indictment for a common nuisance in keeping a common gaming-house, for lucre and gain, at which divers idle and dissolute persons were permitted to assemble and game for divers large and excessive sums of money. Hawkins (book 1, c. 75, § 6) says: "Also it hath been said that all common stages for rope-dancers, and, also, all common gaming-houses, are nuisances in the eye of the law;" "not only because they are great temptations to idleness, but, also, because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood." And in section 7, he says: "And it seems to be a proper distinction between playhouses and the nuisances mentioned in the foregoing section; that playhouses having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; whereas the others cannot but be nuisances." Hawkins cites Higginson's Case, 2 Burrows, 1232, for keeping and maintaining "a certain common, ill-governed, and disorderly house, and in the said house, for his own lucre and profit, certain evil and ill-disposed persons, of ill name and fame, and of dishonest conversation, to frequent and come together, then and there unlawfully did cause and procure; and the said persons, in the said house, then," &c., "and there to be and remain, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit; to the great damage and common nuisance of all the subjects of our said lord the king, inhabiting near the said house, and against the peace," &c. Upon a motion in arrest of judgment this indictment was adjudged good, by the court of king's bench. He cites, also Rex v. Howel, 3 Keb. 465, 510, which was an indictment at common law for keeping a cock-

pit six days, for which he was fined forty shillings a day, the court making the statute of 33 Hen. VIII., c. 9, § 11, the rule of the fine, although the indictment was not under that statute. He also cites Rex v. Dixon, 10 Mod. 336. The court there said, that the keeping of a gaming-house was an offence indictable at common law. In that case, indeed, the indictment was upon the statute of 33 Hen. VIII. c. 9, § 11; and the objection was, that the statute, having chalked out a particular method of proceeding for the recovery of the penalty of forty shillings a day, indictment would not lie. But the court said, that "where the statute gives a new penalty, or a new remedy for a common-law offence, the remedy at common law shall not be taken away without negative words."

It was also objected, that if it were to be considered as an indictment at common law, it would not be good, for want of concluding "ad commune nocumentum"; but the court said it was "not necessary to conclude so here; the offence, in its own nature, importing that it is so. Besides, the word 'common' supplies this defect, if it were one." The statute of 9 Anne, c. 14, which makes playing at any game unlawful, if more than £10 shall be lost at one sitting, is in force in this country.

The indictment, in this case, is taken from the precedent in Archbold's Criminal Pleading (page 363), which is the exact form used in the case of Rex v. Rogier, 1 Barn. & C. 272; in which case Abbott, C. J., upon a motion in arrest of judgment, said, "I have no doubt that the facts stated in this indictment constitute an offence at common law. Hawkins, in the passage which has been cited, observes, 'It has been said that common gaming-houses are nuisances in the eye of the law;' and then he assigns the reason, namely, that they tend to produce certain evil consequences; which is not very different from saying that they are nuisances, if those consequences are produced. Since his time, many parties have been convicted upon indictments in which the keeping of such a house has been charged to be an offence at common law." After stating that the recitals in the statute of 25 Geo. II. c. 36, are "a legislative declaration that the keeping of a gaming-house is an indictable offence," Mr. Chief Justice Abbott proceeds: "Besides, the 9 Anne, c. 14, § 2, makes playing at any game unlawful if more than £10 shall be lost. Now, in this case, the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would, of itself, make any game unlawful; and, if so, there can be no doubt that this is an offence at common law." Bayley, Holroyd, and Best, Justices, concurred, and Holroyd, J., further added, "that in his opinion, it would have been sufficient merely to have alleged that the defendants kept a common gaming-house." The motion in arrest of judgment was overruled. It may be observed, that in that case the judges laid no stress upon the fact charged in the indictment, that the defendant caused persons to come to play together at a certain unlawful game called rouge et noir; nor have I been able to find, that at the time when that case was decided the game of rouge et noir had been made unlawful by any statute. The statute of 33 Hen. VIII. c. 9, repealed all the former "statutes made for the restraint of unlawful games, or for the maintenance of artillery, as touching the penalties and forfeitures of the same." By the eleventh section, it is enacted, That no person shall, for his gain, lucre, or living, keep "any common house, alley, or place, or place of bowling, coyting, cloysh, cales, half-bowl, tennis, dicing-table, or carding, or any other manner of game prohibited by any estatute heretofore made; or any unlawful new game now invented or made; or any other new unlawful game hereafter to be invented, found, had, or made; upon pain to forfeit and pay for every day keeping, having or maintaining, or suffering any such game to be had, kept, executed, played, or maintained, within any such house, garden, alley, or other place, contrary to the form and effect of this estatute, forty shillings."

The first statute, prohibiting any kind of game, was that of 12 Rich. II. c. 6 (Anno 1388), and applied only to servants of husbandry, laborers, and servants of artificers and victuallers; not to servants of gentlemen; and it commands them to refrain from such games as "hand and foot ball, coits, dice, throwing of stone keyles, and such other importune games." The statute of 11 Hen. IV. c. 4 (Anno 1409), enforces the 12 Rich. II. c. 6, against laborers and servants playing at such unlawful games, by six days' imprisonment. The statute of 17 Edw. IV. c. 3 (Anno 1477), "For unlawful games," says: "That as, according to the laws of this land, no person shall use any unlawful games, that is to say, coits, foot-ball, or such like games;" "contrary to which laws, the said games, and divers newly-devised games called cloish, kayles, half-bowle, hand-in-and-hand-out, and quekeborde, from day to day, are used in divers parts of this land;" "which gamesters are daily supported and favored by the masters and occupiers of divers houses, tenements, gardens, and other places in which they use, and play at their said ungracious and not commendable games;" wherefore, it was enacted, that no occupier or master of any house, tenement, &c., should voluntarily suffer any person to play at any of the said games, in any their said houses, tenements, &c., or any other place, under pain of imprisonment for three years, and to lose for every default £20. And that no person should use or play at any of the said games, under pain of two years' imprisonment, and £10 for every default. The statute of 11 Hen. VII. c. 2 (Anno 1494), provided, that no artificer, laborer, or servant, should play at any unlaw-

ful game, but in Christmas. But by the statute of 19 Hen. VII. c. 12 (Anno 1503), certain persons were forbidden to play at unlawful games. The statute 3 Hen. VIII. c. 3 (Anno 1511), provided that unlawful games should not be used. By the statute 27 Hen. VIII. c. 25 (Anno 1535), "there shall be no playing at unlawful games." These are all the statutes upon the subject prior to 33 Hen. VIII. c. 9. The titles only of the last four are given in Ruffhead's edition of the statutes, it being stated in the margin, that they were repealed by 33 Hen. VIII. c. 9. No principles are stated in any of them by which it can be ascertained what newly-invented games, (that is, games invented after these statutes,) should be deemed unlawful. The 12th section of the statute of 33 Hen. VIII. c. 9, makes it penal in any person to haunt the gaming-houses mentioned in the 11th section, and to play there. By the 13th section certain placards or licenses might be obtained, expressing what games should be used, and what persons should play thereat; security being given by recognizance to the lord chancellor, not to use the placard contrary to the form thereof. The 16th section provides, "that no manner of artificer, or craftsman of any handicraft or occupation, husbandman, apprentice, laborer, servant at husbandry, journeyman, or servant of artificer, mariners, fishermen, waterman, or serving-man," "shall play at the tables, tennis, dice, cards, bowls, clash, coyting, logating, or any other unlawful game, out of Christmas, under pain of 20s. to be forfeit for every time; and at Christmas to play at any of the said games in their masters' houses, or in their masters' presence; and also that no manner of persons shall, at any time play at any bowls in open places out of his garden or orchard, upon pain," &c. By the 21st section, leases of gaming-houses were to be void. By the 22d and 23d sections, masters might license their servants to play with themselves or other gentlemen. This statute did not prohibit gaming of any kind, at all times by all persons, and at all places; so that there was not, in truth, any game which was in itself unlawful. It only became unlawful by being used by certain persons, or in certain places, or at certain times.

The keeping of a common house for any unlawful game, for lucre and gain was prohibited; but no game was made unlawful unless played at such common house. The statutes thus formed a circle. Every game played in a common gaming-house, was unlawful; and every common house for playing at an unlawful game was unlawful. Some other games are prohibited by name, in subsequent statutes, and all games with dice, except back-gammon; but the game of rouge et noir is not, as far as I have been able to search, mentioned in any of them. It was not, therefore, an unlawful game, unless made so by being played in an unlawful place, or by persons not authorized to play it, or at an improper time. If all games were unlawful when played in a common gaming-house, then it was unlawful because it was played in such a house. But, as I have before said, the court, in the case of Rex v. Rogier, did not lay any stress upon its being, in itself, an unlawful game. They seem to have decided the cause entirely upon the ground that a common gaming-house, kept for lucre and gain, at which persons are permitted to play for large and excessive sums of money, is, per se, a common nuisance. The reason why it is to be considered as a common nuisance, is, that it tends to draw together idle and evil disposed persons; to corrupt their morals, and to ruin their fortunes; which is the same reason which is given in the case of houses of common prostitution. It is not because the game played in such a gaming-house is, in itself, an unlawful game, but because it is a common gaming-house kept for lucre and gain, where persons are permitted to play for money and other valuable property.

It has been said, in argument, that if the law be so, every man who has a whist-party at his house is liable to be prosecuted and punished for a nuisance. But the distinction is broad and palpable. To become a common nuisance, it must be a common gaming-house, kept for lucre and gain; holding out allurements to all who are disposed to game, and kept for that purpose. We entirely concur with the English judges, in saying that we have no doubt that the facts stated in this indictment, constitute an offence at common law.

The motion in arrest of judgment must therefore be overruled.

But there is also a motion for a new trial; and it is understood that the grounds are: (1) That there was no evidence that the playing was for large and excessive sums of money, which is a necessary constituent in the offence. (2) That there was no evidence that it was in fact a common nuisance; nor that idle and evil-disposed persons were there; nor that it was a common gaming-house, open to everybody. (3) That only one instance of playing was proved.

1. As to the first ground, the evidence was that the defendant kept a faro-bank, and the jury may be presumed to know the nature of the game and may have inferred from it, as they had a right to do, that whenever the game is played, it is for large sums; and that large sums are generally won and lost at that game.

2. It is not necessary to prove that it was a common nuisance. It was sufficient to prove that it was a common gaming-house, kept for lucre and gain.

3. It is not necessary to prove more than one act of gaming. It may be proved to be kept as and for a common gaming-house by other evidence than that of its having been often used as such.

Motion overruled.

UNITED STATES (DIXON v.). See Case No. 3,934.

Case No. 14,971.

UNITED STATES v. DOBBINS.

[1 Pa. Law J. Rep. 5.]

District Court, W. D. Pennsylvania. March, 1842.

BANKRUPTCY — PRIVILEGE FROM CIVIL ARREST.

A petitioner in bankruptcy is privileged from arrest on civil process pending the proceedings on this petition to be declared a bankrupt.

This was a habeas corpus commanding the defendant, a constable, to bring before the court the body of Johnathan Ramaley. By the return on the writ, it appeared that the relator, Johnathan Ramaley, was arrested on an execution issued by an alderman of the city of Pittsburgh; that, previously to his arrest, the relator had filed his petition in due form to this court to be declared a bankrupt; that the schedule annexed to said petition contained the name and amount of the debt, &c., of the arresting creditor; that the said court had made an order appointing the 12th day of March for the hearing of the relator and his creditors; and that notice of this order was published according to law.

T. Mellon, for relator.

IRWIN, District Judge, decided that the relator was within the jurisdiction of the court by the proceedings in bankruptcy, and, being bound at all times to abide its orders and decrees in the matter of his petition, he was entitled to its protection, by being privileged from arrest in the present case, pending the proceedings in his application for relief under the bankrupt law. It was therefore ordered that the relator be discharged from arrest, and that the arresting creditor pay the cost of the proceedings on the writ of habeas corpus.

Case No. 14,972.

UNITED STATES v. DOBBS et al.

[15 Int. Rev. Rec. 9.]

District Court, N. D. Mississippi. Dec. Term, 1871.

INTERNAL REVENUE LAW—ILLICIT DISTILLERY.

[1. On a prosecution for conducting a distillery without giving the necessary bond or paying the tax, ignorance on the part of defendants that the bond had not been given or tax paid is no defense.]

[2. The presence of defendants while the distillery was in operation is merely a circumstance to show their connection with it, and will not alone justify a conviction.]

[This was an indictment against Newman H. Dobbs and E. S. Elliott on a charge of illicit distilling.]

G. Wiley Wells, U. S. Dist. Atty.

R. O. Reynolds and Samuel J. Ghoulson, for defendants.

Upon the trial of this cause the following proceedings were had:

After the jury was placed in the box, but before they were accepted by the defendants, defendants' attorneys proposed to challenge peremptorily John Anderson, one of the jurors in the box, which was objected to by the district attorney, who contended that, in the courts of the United States in cases other than those in which the punishment is death, neither party is entitled to challenge a juror except for cause.

HILL, District Judge. By the common law peremptory challenges of jurors in misdemeanors were not allowed, nor is there any act of congress making such provision. But by the act of July 20, 1840 (5 Stat. 394), it is provided among other things that for the purpose of conforming as nearly as might be the qualifications, etc., of jurors to those in the state courts, the courts of the United States shall have power to make all necessary rules and regulations for conforming the designation and empanelling of juries in substance to the laws and usages then in force in such state; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which might be thereafter adopted by the legislatures of the respective states for the state courts. The power and authority to make orders and rules under the provisions of this act in respect to challenges of jurors, whether peremptory or for cause, and in causes both civil and criminal, other than for treason, and those in which the punishment is death, was held and declared by Justice Nelson in case of U. S. v. Shackleford, 18 How. [59 U. S.] 588. By the provisions of article 297, § 61, c. 64, p. 621, it is provided that in cases not capital the accused shall be allowed four peremptory challenges, and the state two. That if the rules heretofore adopted by this court do not adopt this provision as a rule of this court, and allow the United States two peremptory challenges, and the accused four, the same is now adopted, and that number of peremptory challenges allowed each party in causes in this court other than the causes provided for by the act of congress.

Whereupon the district attorney challenged peremptorily one, and the defendants two jurors. The district attorney then introduced Perry Campbell, who testified that he was the assistant assessor of internal revenue for the Third district of Mississippi in the year 1870; that as such assessor he visited distillery No. 2, situated on Horne Lake in said district, and in De Soto county in this judicial district, at various times during the months of February, March, and April of that year; that said distillery was registered in the name of O. H. Pollard, but the business was transacted with

him as such assessor by defendant Elliott; that notice was given for a discontinuance of said distillery; when he went to close it up, he was not furnished with the kind of lock required by the commissioner of internal revenue, but other locks were procured and the establishment locked up; that he visited the establishment on the 23d of May, 1871, when he found the locks broken and the distillery establishment in operation, that defendant Dobbs was in the distillery and gave him some beer to drink, which was taken out of a stand in the house; that he met defendant Elliott, who remarked, "You have caught us, but Pollard has gone to Okolona to execute the bond, and we will make it all right;" that he reported the facts to the assessor, and upon his report the establishment was seized by the collector.

The district attorney then introduced A. P. Shattuck, who testified that he is now and was during the year 1870 assessor of internal revenue for the Third district of Mississippi: That distillery No. 2 is situated on Horne Lake in De Soto county in said district, and had been conducted in the name of O. H. Pollard in the months of February, March, and April, 1870; that he had given the bond and paid the special tax for that time, but had not given notice of his intention to continue or resume said distillery operation after the 1st of May of that year; that O. H. Pollard and defendant Elliott about the 1st of May came to his office and proposed giving bond to resume operations in said distillery; that the bond was filled up, said O. H. Pollard as principal and said Elliott as surety; that he declined to accept and approve the same, when he was asked if Austin Pollard would be sufficient as an additional surety, when he replied that he would. O. H. Pollard said Austin Pollard was in Jackson and he would get him to sign the bond when he returned, that he was expecting his return in a few days, but that the bond was never completed nor was any assessment made or further steps taken in his office.

The district attorney then introduced B. B. Emory, who testified that he was the collector of internal revenue in 1870 for said district; that distillery No. 2 mentioned was conducted in the months of February, March and April in the name of O. H. Pollard; that defendant Elliott transacted all the business connected with his office in relation to said distillery during said time; that no special tax was paid by any one on account of said distillery for the revenue year commencing May 1, 1870; that he seized said distillery June 1, 1870; that he found the still warm, and mash, or beer, in the tubs, and some liquor, which he took to be whiskey, in the still, did not taste it, but it smelled like whiskey; that Dobbs pointed out a number of cattle and hogs, which he said belonged to him individually, and some to Major Wicks, and not to the firm; that he pointed out other property which he said belonged to the distillery; that he understood from both the defendants that they and O. H. Pollard composed the firm doing business in said distillery; that when he seized said distillery he found the ground wet around the still, and saw fresh wagon tracks going immediately from the still.

The district attorney then introduced J. B. Hood, who testified that about June 4, 1870, he took possession of said still as custodian under said Emory as collector and seizing officer; that there was then no whiskey in the cistern, but some mash in the tubs, which he threw out to the stock. It was also in proof that one Franks, one Hunt, and another were engaged as operatives in running said distillery at the time both Campbell and Emory were there after the 1st of May, 1870.

The defendants then offered to read to the jury, as evidence, a deed to the land on which the distillery was situated, to Austin Pollard, and a lease from him to O. H. Pollard, also a distiller's bond given by O. H. Pollard to the United States for the license year ending May 1, 1870, with all other papers on file in the collector's office relating to said distillery, filed by said Pollard during the said license year ending May 1, 1870, to show that prior to May 1, 1871, the ownership of the distillery was in O. H. Pollard. This being objected to by the district attorney, the objection was sustained, and the evidence offered excluded, on the ground that any such ownership could not relieve for acts done after the 1st of May, 1870.

BY THE COURT (charging jury). The defendants are charged in the indictment in three separate counts: 1st. That they, on the 23d day of May, 1870, carried on the business of distillers without having given the bond required by law therefor. 2d. That they on said day carried on the business of distillers without having paid the special tax therefor, as required by law. 3d. That they on said day made mash, wort, and wash, fit for distillation and the production of spirits, in a building other than a distillery authorized by law. To these charges the defendants have plead not guilty, and it is for you to determine from the testimony whether they are or are not guilty of either one or all the charges against them.

All these men are presumed to be innocent until their guilt is established by sufficient testimony. To justify you in finding a verdict of guilty against the defendants, or either of them, the proof must satisfy your minds of the truth of the charges in the indictment; if it does, so that your minds can rest easy upon the conclusion of the truth of charge, you will so find in your verdict. But should it fail to produce such conviction, you will return your verdict of not guilty. If you shall find that one of them is guilty, and the proof not satisfy you of the guilt of the other, you

will return a verdict of guilty as to the former, and not guilty as to the latter; or, if you shall find the defendants guilty of the charge in one count of the indictment, and not guilty as to the others, or either of them, you will so find. All distillers are required to execute the bond as required by law, on the 1st day of May of each year, or thereafter before commencing operation, and to have an assessment made, and pay the special tax, and must also file the proper notice of the time of commencing, and perform all requirements of the law, to authorize commencing distillation in such distillery; and if they commence before such compliance, it creates the offence of carrying on an illicit distillery, and this is substantially the offence charged in the first and second counts; and if mash, wort, and wash were made by the defendants, or either of them, in said building, although it was constructed with all the appertainments prescribed, yet, if the bond had not been given, and the special tax not paid, it was not a legally authorized distillery, and the offence charged in the third count was committed. If the proof satisfies you that the defendants, or either of them, were in any way connected with said distillery, as owners, partners, or employees, in operating said distillery after the 1st of May, 1870, it is incumbent on them to show by proof that the requirements of the law had been fulfilled to authorize such distillation; it was incumbent on them to ascertain whether or not the requirements of the law had been fulfilled to authorize the operation of the distillery; and their ignorance as to whether the bond had been given and tax paid will be no excuse. The presence of the defendants, if you are satisfied from the proof that they were present when the distillery was in operation, is a circumstance to show their connection with it, but, if nothing more is shown, will not be sufficient evidence to justify a conviction; but this circumstance must be taken and weighed with all the other evidence in the cause. If the evidence shows that one of the defendants is guilty of the charge, but does not show which, then you must acquit both. Confessions of a party accused of crime are said in law-books to be the most uncertain kind of evidence; but to constitute confessions a crime must have been charged when the confession is made, which, it is presumed, would alarm and affect the party charged. When admissions are freely and voluntarily made, and in advance of any charge of crime, such admissions are to be considered as any other evidence.

With the punishment annexed to a violation of the law you have nothing to do, nor with any real or apparent hardship, your duty being to determine from all the proof, and nothing else, whether the charges made in the indictment are true or not.

The jury returned a verdict in favor of the United States.

Case No. 14,973.

UNITED STATES v. DODGE.

[1 Deady, 124.] [1]

District Court, D. Oregon. July 15, 1865.[2]

CUSTOMS DUTIES—LIABILITY OF CONSIGNEE—WHEN DUTIES ACCRUE—BONDED WAREHOUSES.

1. The importer or consignee of imported goods, is personally liable for the duties charged thereon.

2. An importation is complete when the goods arrive at the proper port of entry, and the duties accrue at that time, and not at the time of the subsequent entry at the custom house.

3. In 1864 there were no public stores or bonded warehouses in the district of Oregon, and therefore goods imported into such district, before June 30 of that year, could not come within the description or operation of section 19 of the act of that date (13 Stat. 216).

This action was commenced June 23, 1865, to recover a balance of $738.68, alleged to be due from the defendant [Alexander Dodge] to the plaintiff, for duties on a cargo of salt imported from the Sandwich Islands to Portland, in the district of Oregon, in the month of June, 1864. The case was tried by the court without the intervention of a jury. From the findings it appears: That on June 12, 1864, the bark Cambridge arrived at the port of Astoria, in this district, from the Sandwich Islands, with a cargo of 401,364 pounds of salt in bulk, consigned to order; that prior to June 30, the defendant purchased said salt, and became the owner and consignee thereof, and as such made a verbal entry of the same for consumption, which entry was to be made in writing, as soon as the salt was discharged from the vessel, and the exact quantity ascertained; that in pursuance of said purchase and verbal entry, and prior to June 30, said salt was, by permission of the proper officer, discharged from said vessel, and received by the defendant in his premises; and that, afterwards, on July 23, the entry of the salt was made and verified in writing by the defendant, and the duties thereon computed at the rate of twenty-seven cents a hundred pounds, amounting in the aggregate, to $1,083.68, of which sum the defendant shortly afterwards paid to the collector, $300, but thereafter refused to pay the remainder of $783.68.

Joseph N. Dolph, for plaintiff.

Lansing Stout and Charles Larabee, for defendant.

DEADY, District Judge. There is no doubt but that the defendant is personally liable for whatever duties are legally due upon the salt. When he purchased a cargo consigned to order, he became the consignee thereof. In Meredeth v. U. S., 13 Pet. [38 U. S.] 493,

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

[2] [Affirmed by the circuit court. Case unreported.]

the supreme court held that both the importer and consignee were personally liable for duties on imported goods. Upon the argument no serious question was made as to the facts of this case, but admitting them to be as found by the court, the defendant makes two objections to the plaintiff's right to recover more than the sum of $422.45, which he admits to be due.

First: That under the act of June 30, 1864 (13 Stat. 213), salt was only liable to pay a duty of eighteen cents a hundred pounds, and that this cargo came within that act by virtue of section 19 thereof (13 Stat. 216), which provides: "That all goods, wares and merchandise which may be in the public stores or bonded warehouses on the day and year this act shall take effect shall be subjected to no other duty upon the entry thereof for consumption, than if the same were imported respectively after that day." In support of this conclusion counsel attempt to maintain that the salt after its discharge from the Cambridge and prior to July 23, was in a "public store," and not yet entered for consumption. The material fact assumed in this proposition is not true. There are not now nor never were any public stores or bonded warehouses for the storing of imported goods established in Portland. The salt was delivered from the vessel on to the private premises of the defendant. At the time it is apparent that he had no thought of such a thing as the salt being entered in bond or deposited in a public store or warehouse. The duties being more than the defendant was prepared to pay at once, the collector, as a favor, trusted the defendant until he could dispose of some portion of the salt. Upon this arrangement he paid the $300, but hearing soon after of this provision in the act of June 30, 1864, he appears to have conceived the idea of claiming that this importation came within section 19 of said act, because the salt was in fact stored in a warehouse (his own) when the act took effect, and because the formal entry for consumption was not made until after that date. If there had been a bonded warehouse in Portland, as there should have been, it is more than likely that this salt would have been entered in bond, and thus brought within the operation of said section 19, and thereby been admitted to consumption at one third less duties than it was. For this reason, it may be said that the defendant was within the equity of the statute, and if he had promptly paid the duties according to the collector's assessment and his agreement, and then appealed to the secretary of the treasury in the mode prescribed by law, the difference might have been remitted to him. But as it was, the defendant not only refused to perform his agreement with the collector, but seemed disposed to avoid the payment of even the $422.45 which he now admits was due from him in any event.

Second: That the importation was not complete until the formal written entry of the goods for consumption on July 23, and that therefore the duties thereon are to be computed under the act then in force. But the reason of the thing and the whole current of authorities are otherwise. Duties accrue when the vessel containing the goods arrives at the proper port of entry. This is the moment when the importation is complete, and not the subsequent entry at the custom house. This is the long and well established rule even in cases like this, where a new act has been passed increasing or diminishing duties upon goods imported after a specified period. Meredeth v. U. S., cited above; U. S. v. Bowell, 5 Cranch [9 U. S.] 372; Arnold v. U. S., 9 Cranch [13 U. S.] 120; U. S. v. Lindsey [Case No. 15,603]; Prince v. U. S. [Id. 11,425]. Judgment that the plaintiff recover of the defendant, $783.68, with interest thereon at the rate of ten per centum per annum, from July 23, 1864, amounting to $76.19, together with its costs and disbursements of this action, taxed at $70.72.

[Affirmed on error in the circuit court September 13, 1866 (Field, Circuit Justice). Case unreported.]

Case No. 14,974.

UNITED STATES v. DODGE.

[1 Deady, 186.] [1]

District Court, D. Oregon. Nov. 7, 1866.

INTOXICATING LIQUORS—SALE WITHOUT LICENSE—PROCEEDS OF SALE—PROOFS—CREDIBILITY OF WITNESSES.

1. A sale of spirituous liquors, without a license therefor first obtained, is a violation of section 73 of the act of June 30, 1864 (13 Stat. 249), although the party making such sale intended at the time to give the proceeds thereof to the sanitary commission or other charitable use.

[Cited in State v. Dunbar, 13 Or. 591, 11 Pac. 300.]

2. Reputation is competent proof of the name of a person, place or house; and, therefore, upon the trial of an indictment against one Dodge for selling liquor without license, the government was allowed to prove that the house where the witness bought the liquor was called Dodge's, and that the name of the man who kept it was called Dodge.

3. Power and duty of a jury in judging of the credibility of witnesses, and the value or effect of evidence.

This was an indictment [against Solomon Dodge] found under section 73 of the Act of June 30, 1864 (13 Stat. 249), commonly called the "Internal Revenue Act." It charged the defendant with selling liquor at retail without a license therefor, between July 12 and September 15, 1845, at Yaquinna Bay, in the district of Oregon. The plea was "Not guilty." On the trial, it was admitted that between the dates aforesaid, or since, the defendant was not licensed to retail liquor. From the evidence it appeared that he was

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

the proprietor and occupant of a house in the village of Oysterville, on the waters of Yaquinna Bay, where he was in the habit of entertaining travelers with board and lodging; that he kept spirituous liquors in his house and furnished them to his guests and others, by the drink or bottle, without any direct charge therefor, but that such guests and others at the suggestion of the defendant, deposited the value of such liquor in money in a box kept on the mantelpiece with a hole cut in the lid of it, and called by the defendant "the sanitary box." There was no evidence tending to show that the moneys so deposited were ever in fact applied by the defendant to any use other than his own.

Joseph N. Dolph, for plaintiff.
William M. Strong, for defendant.

DEADY, District Judge (charging jury). The internal revenue act of June 30, 1864, provides: Section 71: "That no person, firm, company or corporation, shall be engaged in, prosecute or carry on any trade, business or profession hereinafter mentioned or described, until he or they shall have obtained a license therefor in the manner hereinafter provided." Section 72 prescribes the mode of obtaining such license, and devolves upon the person requiring it the duty of applying therefor, and furnishing the proper officer the necessary information to enable him to issue the same, and also to pay the tax thereon. Section 73: "That if any person or persons shall exercise or carry on any trade, business, or profession, or do any act hereinafter mentioned, for the exercising, carrying on, or doing of which trade, business or profession, a license is required by this act, without taking out such license, as in that behalf required, he, she, or they shall, for every such offence, besides being liable for the payment of the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both." Section 73 defines the crime with which the defendant is accused, and prescribes the punishment therefor. It consists in the exercising or carrying on the business of a retail liquor dealer. Section 79 of the act (subdivision 5) defines the business of a retail liquor dealer, as follows: "Every person who shall sell, or offer for sale foreign or domestic spirits * * * in quantities of three gallons or less, * * * shall be regarded as a retail dealer in liquors under this act."

If the evidence satisfies you that the defendant, between the dates charged in the indictment, was engaged in the business of retailing liquor, within the terms of this definition, you should find him guilty, otherwise not. Proof of a single act of selling or offering for sale, is sufficient to constitute the crime, and warrant a conviction. The object of section 73, is to punish persons who do or attempt to defraud the revenue of the United States in this particular, and unless it is honestly and impartially enforced by courts and juries, the government is cheated, and gross injustice is done to all honest people, who pay their taxes fairly and promptly. Proof that the defendant was engaged in the business of a retail liquor dealer, may arise from circumstances, other than a particular instance, of selling or offering to sell. A person is engaged in a business within the meaning of the act, when he has the means to do so at his command, and holds himself out to the world, or the public in that capacity, or is ready or offers to do a particular act, constituting such business. If he should not succeed in securing custom or making sales, this fact is not an excuse for having engaged in the business without a license. The license must be first obtained, and then, and not before, the party is at liberty to sell or offer for sale, liquor in less quantities than three gallons. The liquor may be offered for sale without a special or personal solicitation of any particular person to become a purchaser. It may be done by general advertisements in the press, or by the exhibition of signs or symbols in the vicinity of the place of the alleged business, or by having the article on sale, with intent to dispose of it to any one offering to purchase.

Counsel for the defendant ask the court to instruct you, as a matter of law, that if the money recovered by the defendant for liquor, was honestly intended by him for the use of the sanitary commission, he cannot be convicted. I hardly suppose counsel is in earnest in making this proposition. But be that as it may, I decline to give the instruction. The delivery or furnishing of liquor by the defendant to any one with the intent on his part to obtain and receive a compensation therefor, directly or indirectly, constitutes a violation of section 73 of the act; and any ulterior purpose, whether real or pretended, to bestow the money or compensation so obtained upon any person or object of charity, or otherwise, does not affect the character of the transaction or purge the defendant of the guilt incurred by such unlicensed traffic. As well argue that it is justifiable to cheat or steal generally for the benefit of the sanitary commission. The old maxim applies—"Be just before you are generous." However, upon the facts known to the court, this "sanitary-box" appears to be a mere dishonest device to avoid the payment of the tax, and not a very ingenious one. It is a matter of history that the Confederate army under Lee surrendered to Grant on April 9, 1865. Practically, the Civil War then terminated, and with it the collections for the sanitary commission. Such being the case, judge you if it is not absurd now to claim that the defendant was retailing liquor at the remote and insignificant village of Oysterville, on the coast of Oregon, without a license, in the month of Sep-

tember, 1865, for the benefit of the sick and wounded of the army of the Republic. Besides, before the defendant is excused upon this ground, in common honesty, he ought to show that he has paid over the money made or received to the commission. Nothing of the kind has been attempted, and you are therefore warranted in concluding that this defence is untrue in fact as well as insufficient in law.

A witness has been allowed to testify before you that the house in Oysterville, where he obtained liquor, was on one occasion "called Dodge's." Counsel for the defendant objected to the introduction of this evidence on the ground that it was hearsay. Not satisfied with the ruling of the court, counsel appeals to you in somewhat extravagant terms, to disregard it as incompetent. I suppose you are aware, if counsel is not, that it is the province of the court to decide what evidence is competent and relevant, and not that of the jury. In the heat of argument and from a desire of victory, counsel sometimes make extravagant assertions before juries, for which they are hardly accountable, and to which you should give no heed.

The testimony of the witness has been allowed by the court to be offered to you as competent, and it is your duty so to receive and consider it as such. The house "was called Dodge's," and the man who dealt out the liquor "was called Dodge"—in other words, the house, and the man who kept it, had the reputation in that vicinity of being named Dodge. Reputation or hearsay is competent proof of the name of a person, place or house. But the effect or value of this evidence upon the point in controversy —whether the witness got his liquor from the defendant or at a place under his control—is for you to determine. And so it is with all the evidence in the case. The degree of credit to be given to the testimony of the witnesses, and the inferences, if any, to be made from the facts proven, are matters within your province to determine. Yet your power in this respect is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence. Your oath to decide according to the law and evidence given you in court, obliges you to do this. And it is the duty of the court to make such suggestions to you in this respect as it conceives proper under the circumstances of the case.

It is not contended that any of the witnesses have deliberately stated what is untrue. The presumption of law is that a witness testifies truly, and you are to act upon this presumption until it is overcome by the evidence or circumstances of the case. The witnesses, so far as appears, are persons without any grudge against the defendant, and having no special or personal interest in his conviction. From the fact that it appears they obtained liquor at his house for their own convenience, they may be reluctant to testify against the defendant, and thus be the means of his being punished for that act. Such feelings are natural, and have their foundation in a generous sentiment, but you should bear in mind that they may lead a witness to, unconsciously or otherwise, state the facts concerning which he is interrogated as favorably for the defendant as he can, without telling a deliberate falsehood. As in this case, a witness upon his examination in chief, may state a fact against the defendant positively, and upon cross-examination, at the suggestion of counsel for defence be very ready to cast doubt upon such statement, by admitting the possibility of his being mistaken in regard to some important circumstances connected therewith. Considering the relation which the witnesses called by the government appear to sustain to the defendant, it is fair to infer that their testimony is as favorable to him as their consciences would permit. Subject to these suggestions and your oaths, you are to judge of the credibility of the witnesses and the value of their evidence, and find accordingly.

The law presumes that the defendant is innocent of the crime charged against him. The burden of proof is upon the government to overcome that presumption, and prove the charge as laid in the indictment beyond a reasonable doubt. A reasonable doubt is not a mere caprice, whim or possibility, but a doubt arising from the circumstances of the case, and founded upon a substantial reason. It is not required that the proof should amount to absolute certainty. Moral certainty is sufficient to authorize a verdict of guilty, and you are not to acquit the defendant because by some possibility or other he may not be guilty. If, upon a careful consideration of all the circumstances of the case, you are satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you should say so by your verdict, otherwise not.

The jury found the defendant guilty as charged in the indictment. Judgment that the defendant pay a fine of $50, and the costs of the action, taxed at $76.26, and that in default thereof he be committed to the county jail at Multnomah county until the same was discharged, at the rate of one day for every $2 of such fine and costs.

Case No. 14,975.

UNITED STATES v. DODGE.

[2 Gall. 313.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

CONTEMPT—PURGING—PERJURY.

If the party purge himself on oath, the court will not hear collateral evidence for the purpose of impeaching his testimony, and proceeding against him for the contempt. But if perjury

[1] [Reported by John Gallison, Esq.]

appear, the party will be recognised to answer, &c.

[Cited in Re Pitman, Case No. 11,184; Re May, 1 Fed. 743; U. S. v. Anon., 21 Fed. 768.]

[Disapproved in Re Bates, 55 N. H. 327. Cited in Burke v. State, 47 Ind. 531; Fishback v. State, 131 Ind. 318, 31 N. E. 86; State v. Earl, 41 Ind. 465. Disapproved in State v. Matthews, 37 N. H. 456.]

This was a process of attachment against the respondent for a contempt in forcibly rescuing T. P. Shaw, a prisoner in the custody of the marshal, under an indictment for treason.

G. Blake, for the United States.

L. Saltonstall, for respondent.

PER CURIAM. We cannot receive any collateral evidence as to the offence, but if the respondent, by his affidavit, and answers on oath to interrogatories proposed by the district attorney, discharges himself of the contempt, no further proceedings can be had against him on the attachment. If, from any collateral evidence, it should appear, that there is reason to believe the respondent has perjured himself, we will recognise him to answer, at the next term of the court, to such matters as may be found against him. See, as to contempts and practice thereon, Vin. Abr. "Contempts," A, B; Prac. Reg. 99, 100; Gilb. Com. Pl. 20, 21; 12 Mod. 511; Mod. Cas. 73; Com. Dig. "Chancery," D, 3; Salk. 321; 4 Bl. Comm. 283; Rex v. Horsley, 5 Term R. 362; 3 Hawk. P. C. bk. 2, c. 22, §§ 1, 32–34; 1 W. Bl. 640; Wyatt's Reg. 138; 2 Burrows, 796; Doug. 516; Bac. Abr. "Attachment," B.

The respondent was discharged.

Case No. 14,976.

UNITED STATES v. DODGE et al.

[1 Tex. Law J. 47.]

District Court, W. D. Texas. Oct. 3, 1877.

CIVIL RIGHTS — RAILWAY PASSENGERS — MASTER AND SERVANT.

[1. A railway employé who denies to a female passenger having a first-class ticket a right to ride in the only car in the train appropriated for the accommodation of ladies alone, solely because she is a person of African descent, is guilty, under the civil rights law of March 1, 1875 (18 Stat. 335), whether he acts under the instructions of his employer or not. If he acts under the instructions of superior officers of the railway company, they also are guilty under the law.]

[2. If there are two cars, equally fit and appropriate, in all respects, for the use of white female passengers as well as colored female passengers, then there is no offence, under the law in denying a colored female passenger entrance to one, and requiring her to ride in the other.]

DUVAL, District Judge (charging jury). The information filed in this case charges that W. E. Dodge, as president, W. R. Baker, as vice president, and J. Durand, as superintendent, of the Houston & Texas Central Railway Company, together with John Burdisch, an employé of said company, being in control and managing the cars of said road, did on the 26th of April, 1876, with an unlawful common intent and purpose, deny to one Milly Anderson admission into a car intended and provided for the transportation of female passengers, for the sole reason that she was a person of African descent, contrary to the act of congress of March 1, 1875, entitled, "An act to protect all citizens in their civil and legal rights." The act in question, so far as it bears upon the present case, provides "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of public conveyances on land or water," etc., "subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The act then goes on to denounce a penalty upon any person who shall violate this provision. Although the passage of this act, including the provision just read, was no doubt suggested by the condition of the late slave race of the Southern states, who had afterwards been made citizens of the United States, yet it is not confined in its operations to them alone. It extends to the white race, also, and embraces every person who is a citizen of the United States. One of the most valuable rights which every citizen of the United States enjoys is the right of passing from one place in the Union to the other, either for purposes of business or pleasure. To enable him to enjoy this liberty of locomotion, the incidental right exists, both by common and statute law, that he or she shall be conveyed on and over the great public lines of transportation which traverse the country by land or water. These lines of transportation, whether they consist of railroads, steamboats, or stages, are known to the law as common carriers. They owe to the public at large a general duty, independent of any contract in the particular case. The law imposes upon them the duty of transporting every citizen who pays the fare demanded to some designated point, and of giving him or her full and equal accommodation, convenience, and comfort, as is accorded to other passengers, male and female, who pay a like fare. This right of the citizen, and this duty of the common carrier, is recognized and exists by the common law of the land, and it is only to protect this right, and enforce this duty, that congress passed the provision of law which I read to you. Persons who refuse to conform to reasonable regulations on the part of the carrier, or who, for good reason, are not fit associates for other passengers, as, for instance, those who are drunk, disorderly, indecent, or offensive in their conduct, or who have contagious diseases, and the like, may properly be refused passage. But, with these and perhaps other like exceptions, every citizen of the United States, male or female, native born or naturalized, white or black,

who pays to the carrier the fare demanded for the best accommodations, is entitled to the best provided for the different sexes; and no discrimination, as against the one, in favor of the other, can be legally made, provided they are decent in person and inoffensive in conduct. Mere race or color will not justify any such discrimination. The officers or employés of an incorporated railroad company are presumed, in the absence of proof to the contrary, to do their duty,—to act according to the instructions given them by their principal. But where an officer or employé of such company denies to a citizen of the United States admission into and passage upon a railroad car, to which such citizen is legally entitled (there being room for him or her to sit therein), then such officer or employé would be liable to a prosecution like the present, whether he acted under the instructions of his principal or not.

If the jury believe, from all the evidence in this case, that Milly Anderson, on the occasion referred to in the information, had purchased a first-class ticket, entitling her to a seat in a car of the Houston & Texas Central Railway Company, destined and appropriated for the accommodation of ladies alone, and there was but one such car, and, on presenting such ticket to the defendant Burdisch, she was by him denied admittance therein, solely because she was a person of African descent, then he would be guilty under the law, whether he acted under the instructions of his principal or not; and, furthermore, if the jury believe from the evidence that Burdisch, under such circumstances, acted under the authority and instructions of the other defendants, Dodge, Baker, and Durand, then the said defendants would be guilty; otherwise, they would not. But if the jury believe from the evidence that there were two cars on this occasion, and that they were equally used and appropriated for the carriage of ladies and gentlemen who had first-class tickets, without distinction of race or color, and that they afforded the same advantages, comforts, conveniences, and enjoyments; and if they further believe that under such circumstances the defendant Burdisch, while denying Milly Anderson entrance into one, gave her passage in the other, then he would not be liable to this prosecution, and the jury should return a verdict of not guilty, generally, as to the defendants. But in such case the jury should be fully satisfied from the evidence that the car in which passage was offered was in fact, in all respects, equal to the other, and was as fit and appropriate at that time for white female citizens as for colored female citizens. If there exists on the part of the jury, or any of them, any prejudice for or against the Houston & Texas Central Railroad Company, or for or against colored citizens, I beg that it will be discarded on this occasion, and that under the law as I have given it, and the evidence before them, this jury will determine the guilt or innocence of the defendants just as they would if the denial of rights charged in the information had been in reference to a white female citizen, instead of a colored one.

Case No. 14,977.

UNITED STATES v. DOEBLER.

[Baldw. 519.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1832.

CRIMINAL LAW—EVIDENCE—CONTENTS OF LETTER—NOTICE TO PRODUCE—COUNTERFEITING—SCIENTER—PASSING OTHER COUNTERFEITS.

1. On an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity, and the delivery of one note; parol evidence of the contents of a letter to an accomplice from the defendant on the subject of counterfeit notes, for which the accomplice could not account and had not searched, but believed he has lost, is admissible. If the letter to which it is an answer is in the hands of the defendant, it need not be produced or notice given to the defendant to produce it, before evidence is given of the contents of the answer.

[Cited in Morehead v. U. S., Case No. 9,792.]

[Cited in American Life Ins. & Trust Co. v. Rosenagle, 77 Pa. St. 514; De Baril v. Pardo (Pa. Sup.) 8 Atl. 878.]

2. The law presumes that an accomplice would destroy a letter which would implicate him, and no search is necessary in order to admit secondary evidence.

3. In forgery no notice is necessary to produce a paper in the hands of the defendant, an accomplice, or a third person who secretes it to protect the defendant, or that evidence of its contents will be offered at the trial, though such paper is not the subject of the indictment.

4. If the original would be evidence of the scienter, as to the note laid in the indictment, the law presumes notice that all competent evidence relating to it will be offered.

5. After evidence that a note of the description laid in the indictment had been forged and passed, evidence may be given of delivering or passing other counterfeited notes on the same bank before or after the passing the one in question.

6. The time which elapses between the two acts is not material as a matter of law, but of fact for the jury to draw the inference of the scienter, the presumption being weaker from the length of time.

The indictment in this case contained three counts: (1) For forging, procuring to be forged and assisting to be forged, a note in imitation of a note of the Bank of the United States, for 20 dollars, signed by N. Biddle, president, and W. M'Illvaine, cashier; the payee, the date, and place of date is unknown, which was in the possession of the defendant, and is now in the possession of some person unknown to the jury. (2) For the same offence, omitting the names of the president and cashier, which note remains in the possession of the defendant. (3) For delivering a forged note as described in the

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

first count, knowing it to be forged, which note is in the possession of some person unknown.

The following questions of evidence arose at the trial: On the trial it was testified by one Rallston, an accomplice, that the defendant had in his possession at the Lancaster races, two bundles of counterfeit United States 20 dollar notes, which he said he had filled up, one of which he delivered to witness to pass, saying it was counterfeit; afterwards he told witness to write to him when he wanted any more. He accordingly wrote several letters requesting the defendant to send him some of the same notes, to which he received answers; he sent one of the letters by one Shive, who brought him back a letter, which he opened and read; being asked for the letter, he said he had it not, had no place where he kept letters or papers, did not know where to look for it, or what had become of it, but believed it had been lost. Shive proved the receipt of a letter from Rallston directed to the defendant, that he delivered it to him and received an answer, which he delivered to Rallston, who read it in his presence. Mr. Gilpin then offered to prove the contents of the letter, which was opposed by Mr. Brashears and D. P. Brown, for the defendant, on the ground that the letter was not produced, no search made for it, no notice given that secondary evidence of its contents would be offered, or to produce the letter to which it was an answer. After argument on both sides, the court took time to consider the question. One Empich was then examined, who proved that at the Lancaster races, at the time testified by Rallston, the defendant delivered him a 20 dollar note, stating that it was not good, and requested the witness to play it off at a faro table, which he did not do, but after some time returned it to the defendant. Mr. Gilpin, after stating that this note was not the subject of any indictment, but that the evidence in relation to it was offered to prove the scienter as to the notes charged in the indictment, asked the witness to describe the 20 dollar note, as to the bank, &c. it was on, which was objected to, on the ground that this was matter collateral to the indictment, of which notice ought to have been given to the defendant, and that it was not evidence of the scienter, because the delivery of the note to Empich was subsequent to the delivery of the note which was the subject matter of the indictment, and the question was elaborately argued.

BALDWIN, Circuit Justice. In deciding on the admission of the secondary evidence of the contents of the letter, we must, in this stage of the cause, consider the defendant and Rallston as acting in concert in relation to the passing of counterfeit notes forged by defendant, together with Shive, who was the carrier of the letters which passed between them, and who was also concerned in passing the notes, and that the object of the letters was to procure from the defendant forged notes for the others to pass. The possession of such letters would be strong evidence against them or either of them; Rallston had no inducements to preserve them, but strong ones to destroy them as soon as received; the presumption is, that they were so destroyed to suppress evidence of his guilt, and he testifies that he has no knowledge of where the letter is, but believes it is lost, &c. The general rule is, that the best evidence shall be offered which the nature of the case admits, and is in the power of the party to produce, secondary evidence of the contents of papers, is not admissible when by reasonable diligence the original can be produced, but the degree of diligence depends on the nature of the transaction to which the paper relates, the importance of the paper, and the circumstances of the case. 1 Durn. & E. [1 Term R.] 201; [Riggs v. Tayloe] 9 Wheat. [22 U. S.] 484; [Sebree v. Dorr] Id. 563; [Renner v. Bank of Columbia] Id. 596; [Sicard v. Davis] 6 Pet. [31 U. S.] 124; [U. S. v. Reyburn] Id. 366, 368; 4 Bing. 294; 13 E. C. L. 443. If the court are satisfied that the paper is not kept back by design, that there can be no inducement to withhold it and the paper is of such a nature that no doubt can arise as to its contents in its substantial parts, secondary evidence is admissible even without a search by the party who had once had it in possession (Sicard v. Davis, 6 Pet. [31 U. S.] 124), if the non production is accounted for, so that it appears not to be attainable by the party offering to prove its contents, or that a search would be useless (U. S. v. Reyburn, Id. 366, 368). There must be a well grounded suspicion that better evidence is in the power of the party than what he produces, or negligence in making the proper search, to exclude a copy or other evidence of the contents of papers; but it is difficult to lay down a precise rule applicable to all cases. Reasonable diligence necessarily depends on the features of each case as they are developed. In the present we can have no difficulty. It is not pretended that the letter was ever in the hands of any others than the accomplices of the defendant. If self-preservation would not induce them to destroy it, they certainly had no inducement to preserve it. From the object of the correspondence, there can be no difficulty in ascertaining the subject matter of the letter and its contents, sufficiently for all the purposes of justice. It is in proof that the letter to which it was an answer was put into the hands of defendant, related to counterfeit notes, and that the one in question related to the same subject, and was delivered to the witness by the defendant himself; under such circumstances, we are of opinion that no search was necessary, as every presumption is that the letter was destroyed, and the account given by Rallston

consistent with his situation and the subject of the letter.

It is next contended that the letter to which it was an answer, ought to have been produced, and notice given to the defendant that evidence of the contents of the letter received from defendant would be offered, before the secondary evidence can be given. It is admitted that if the letter was the immediate subject of the indictment, no notice would be necessary, but it is contended that it is necessary in all other cases, according to the rule laid down by the supreme court of this state, in Com. v. Messinger, 1 Bin. 275. Neither the cases referred to by the court in that case, or those cited in the argument, support the distinction contended for, or establish the rule laid down by the chief justice; they establish the principle that other evidence may be given as to papers which a defendant will not produce on notice to himself (Attorney General v. Le Merchant, 2 Durn. & E. [2 Term R.] 201, note; Rex v. Watson [2 Term R. 199], M'Nall. Ev. 354), or to his attorney. Gates v. Winter, 3 Durn. & E. [3 Term R.] 306. Where it is in the hands of a third person, who will not produce it on a subpœna duces tecum (Rex v. Aickles, Leach, 294, 390), or has been secreted by a brother of the defendant and another person to screen him (Com. v. Snell, 3 Mass. 82), no notice is necessary. These were cases of forgery. In cases of treason by writing traitorous letters, copies from a book, which defendant said contained copies of his letters to his respondents, were received without notice, or the production of the original. Francias' Case, 6 State Tr. 98. In Layer's Case, 9 State Tr. 319, a witness was permitted to state the contents of a traitorous paper, which defendant gave to witness to read, and which he read, without notice to produce the original. 6 State Tr. 263, 267, 318, 319. The secondary evidence was in all these cases admitted on the ground of the paper being in the possession of the defendant or third persons, which accounted for their non production, and showed that there has been no default in the prosecutor, where the paper had been secreted to protect the prisoner or is in his own possession. In such cases, the admission of the secondary evidence depends on tracing the original paper to the hands of the defendant, or third person, from whom it cannot be procured, and not on the question of notice. This is the rule laid down in Rex v. Layer, 9 State Tr. 319, and adopted in Le Merchant's Case, 2 Durn. & E. [2 Term R.] 203, note; in Snell's Case, 3 Mass. 82, and in U. S. v. Reyburn, 6 Pet. [31 U. S.] 366, 368. The evidence goes to the jury who will decide whether the paper has been so traced; it is a legal foundation for a verdict against the defendant, as if the original had been produced, and it is not restricted to papers which are the immediate subject of the indictment. Rex v. Gordon [1 Leach, 300, note] was an indictment for killing Mr. Thomas in a duel. Gordon had sent a challenge by his servant to Thomas, who sent his answer by his servant, who delivered it to the servant of Gordon, but it did not appear that Gordon had received it. An attested copy was admitted as legal evidence, and it was left to the jury to decide, whether the original ever reached the prisoner's hands. The acceptance of the challenge was not the offence charged in the indictment, it was only a link in the chain of evidence; the court deemed the delivery to the servant such prima facie evidence of a delivery to the master, as to leave it to the jury, without notice being given to the prisoner to produce it, or that a copy would be offered in evidence. So in U. S. v. Mitchell [Cases Nos. 15,788 and 15,789], which was an indictment for treason in levying war against the United States, the overt act was that the prisoner was in arms with a party at Couch's Fort, assisted in burning the inspector's house, and was active at the meeting at Braddock's Fields; but the indictment made no reference to the writing or circulation of any treasonable paper. The district attorney offered in evidence the copy of a circular letter, written by some of the leaders of the insurrection, calling for an assemblage of the people at Braddock's Fields, and to prove that the letter had been seen by the defendant, with whom it had been left to pass on to another person, and that the copy produced was in substance conformable to the original. This court held that if the copy offered, was a copy of one of those letters circulated at the time of the insurrection, it was admissible evidence, otherwise not. The same principle had been settled in Rex v. Hardy, on an indictment for treason. 1 East, P. C. 99.

The rule laid down in 1 Bin. 275, as to cases of larceny, and in 2 Serg. & R. 31, 496, in civil actions, is undoubtedly correct. The reason is obvious; in larceny the prosecutor is not allowed to give evidence of the stealing of any other articles than those laid in the indictment; the felonious intention in taking the articles in question, cannot be made out by proof of the prisoner taking similar articles at another time, or from another person, and no scienter is necessary to make out, or constitute the criminal offence. In trover and the other actions, the plaintiff must prove property in the specific thing claimed; the thing stolen, or the thing taken or detained, are therefore the only matters in relation to which any evidence can be received. But indictments for treason and forgery are not governed by the same rules, an overt act of treason must be laid and proved as laid, but as a traitorous intention is a necessary ingredient in the crime, that intent, as applicable to the particular overt act, may be made out by evidence of other treasonable acts than the one charged in the indictment, not to convict on such proof of other treasons, but to bring home the guilty intention to the overt act (6

State Tr. 318, 319; Fost. Crown Law, 11, 9, 10, 22, 245, 246; 2 Burr's Trial, 428); the overt act charged being the only act of treason which can produce conviction, and the only point in issue between the parties (4 Cranch [8 U. S.] Append. 493). The constitution and law of the United States require that the overt act should be established by two witnesses, not by the establishment of other facts, from which the jury might reason to this fact; after this fact is established, other facts may be admitted in the character of corroborative or confirmatory testimony. Id. 506, Append. s. p.; 1 East, P. C. 116. The same principle applies to forgery, and for the same reason; as the intention and knowledge with which the act is done, constitute the crime, it may be made out by evidence of other acts of a similar kind with that charged in the indictment. This being the well settled and well known rule in such cases, the prisoner cannot be taken by surprise; when such evidence is offered, he must come prepared to meet not only the evidence which applies directly to the specific act charged, but all other acts which, according to the known rules of evidence, a prosecutor may adduce to prove the act charged. If the note he is charged with forging, passing or delivering, is of the same kind or character with others which he has disposed of, or retains in his possession, he has notice in effect that if practicable to procure it evidence will be given of their counterfeit character, and of his having passed them as true. 1 Bos. & P. (N. R.) 94. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in fact. Notice in fact is notice in form, notice in law is notice in effect, and either are sufficient. Yeates, J., 2 Serg. & R. 34. With the notes in his pocket, he cannot complain that he is ignorant of their character; if he has put them off he knows to whom, and can trace them as easily as the prosecutor; if he has retained a part, he can the better compare them, and thus avoid the imposition to his charge of notes for which he is not accountable. Knowing that proof of all these facts, is as competent to the prosecutor as the one specifically charged, no injustice is done him; all the acts which can be brought against him are his own, or the acts of others acting by his consent, knowledge, or procurement, and no acts of mere third persons can be testified against him. He ought to answer for, and be prepared to meet them, on the same rules of evidence which apply to the principal act for which he is on trial. The indictment is notice of that, and we think it also notice of the other acts, which are as admissible in evidence as the one charged. The reason given by the chief justice in the Case of Massinger applies with great force to a case of larceny.

The defendant has no reason to believe, that the felonious taking of any other paper than the one laid in the indictment, would be brought into question; but the reason ceases in a trial for forgery, and the rule not only ceases with its reason, but a different rule arises from the most obvious reasons. The law, the knowledge of the defendant, and his counsel, all inform him, that the passing of other similar notes will be brought into question, and this is legal notice not only to this extent, but as to any letters or other papers in the hands of himself, his confederates or others, which would be legal evidence if the originals were produced. That this letter would be evidence on this indictment cannot be doubted, the only question about the admission of the secondary evidence of its contents is, whether the prosecutor has made out such a case as makes the evidence offered a substitute for the original.

The Cases of Aickles, Gordon, Snell, Mitchell and Reyburn [supra] are all of papers not in the possession of the prisoner; but it was held in all, that the paper being in the hands of third persons, by delivery by himself, his servant, or secreted by his friends to protect him; circulated among the parties to a treasonable insurrection, or delivered to an accomplice in a kindred crime, might be proved by secondary evidence, on the same principle as where it was in the possession of the party himself. We cannot distinguish the principle of this case from those; the letters written and notes passed or delivered to others by the defendant, are in the custody of some one by his consent, or destroyed, and their possession is so for his possession and custody, that the secondary evidence of their existence, character or contents, may be given under the same rules, which apply to papers in his actual custody or possession. This rule has been applied to cases, where the forged paper is set out specifically in the indictment, it would apply a fortiori, where it is set out generally, as in this case. If the paper is so described as to make it appear that it is the kind and description of paper embraced in the law, evidence may be given relative to any papers coming within that description, if the indictment lays them as destroyed by the prisoner, to be in his possession, or that they cannot be produced, and there has been no laches in the prosecutor. 8 Mass. 59, 110. Whether it is properly laid in this case is a question not now before us, but if it is, then this note, if identified, may be as much the subject of the indictment as the one delivered to Rallston, though it may not be a case in which the court will compel an election to be made, as to which note the prosecutor shall proceed against. Vide E. C. L. 934. Should it be considered as a note laid in the indictment, the objection to the evidence now offered would not apply; because if the witness answers that it was a note of the Bank of the United States, it would be evidence without any notice, as it was retraced back from Empick to the defendant, and corresponded with the one charged in the indictment, or it would be evidence to show the scienter; so that in any view the question is proper without any notice. In Rex v. Millard evidence was given of

the passing of other forged notes than those laid in the indictment, though not produced at the trial, but having been traced to the prisoner, no evidence was given of any notice, nor any objection made for the want of it. Russ. & R. 245, 247.

The indictment, in all cases of forgery, is in itself notice that all competent evidence will be produced; the defendant cannot, therefore, be taken by surprise, when the passing of any other forged notes of a manufacture similar to the one laid in the indictment is offered; whether the mode of proof is by the production of letters, copies, or proof of their contents, or by the notes, is immaterial, so that the evidence conduces to prove the scienter as to the one charged.

It is objected that the evidence of passing other notes in this case is inadmissible, because it was after the delivery or passing the one laid in the indictment. It seems both were passed at the time of the Lancaster races, but it is not proved whether the one delivered to Rallston was previous to the one delivered to Empich, nor is it material if there was an interval, or how long, so that there is any fair ground for presuming the two acts of uttering, to have been so connected as to show a scienter in the one charged in the indictment (Russ. & R. 135, 147); nor whether the other notes are of the same manufacture (Car. Cr. Law, 195). The whole conduct of the prisoner is evidence of his knowledge of the forgery; the jury may judge from his conduct on one occasion, of his knowledge on another; where crimes intermix, the court must go through the whole detail; the more detached they are in point of time, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transaction; it would not make the inference inadmissible, "as if a man should come to Manchester with a bundle of forged notes, his whole demeanour would afford pregnant evidences of the mind and purpose with which he came." Rex v. Wylie, 1 Bos. & P. (N. R.) 94; s. p., 1 Camp. 400; 6 State Tr. 58.

For these reasons we are of opinion that evidence of the contents of the letter received by Rallston from the defendant, and of the description of the note delivered by him to Empich is admissible; it will be for the jury to judge of the knowledge of the note laid in the indictment to be a forgery, from the whole conduct and demeanour of the defendant, whether by acts or writing. Whether the other transactions justify them in drawing the inference, is for them to decide; the distance in point of time between the delivery of the note at the Lancaster races, and the writing the letter to Rallston from Lebanon, may weaken the presumption; but connected as they are by evidence, the jury may look to the whole conduct of the defendant in relation to the delivery or passing of counterfeit notes of a character and manufacture similar to those laid in the indictment.

The jury found the defendant not guilty.

Case No. 14,978.

UNITED STATES v. DOLAN.

[5 Blatchf. 284.] [1]

Circuit Court, E. D. New York. Dec., 1865.

ASSAULT WITH INTENT TO KILL—WHETHER INDICTABLE UNDER UNITED STATES STATUTE.

The circuit court of the United States for the Eastern district of New York has, by virtue of the act of March 3, 1825 (4 Stat. 115), jurisdiction of an indictment for an assault with intent to kill, committed in the navy yard at Brooklyn.

This was an indictment [against Philip Dolan] for an assault with intent to kill, committed in the navy yard at Brooklyn. The defendant now moved to quash the indictment, on the ground that the act of March 3, 1825 (4 Stat. 115), on which it was founded, did not create the offence charged, and that there was no statute of the United States creating the offence

THE COURT (BENEDICT, District Judge) held, that the act of March 3d, 1825, covered the case; that the question had been substantially decided by the supreme court, in the case of U. S. v. Paul, 6 Pet. [31 U. S.] 141, and that Mr. Justice Thompson, Mr. Justice Nelson, and Judge Betts, had held, in the United States courts for the Southern district of New York, that the act of 1825 applied to cases of the kind. Motion denied.

Case No. 14,979.

UNITED STATES v. DOLLAR SAV. BANK.

[4 Chi. Leg. News, 341; 29 Leg. Int. 238; 15 Int. Rev. Rec. 193; 3 Pittsb. Rep. 408; 19 Pittsb. Leg. J. 181.]

Circuit Court, W. D. Pennsylvania. 1872.[2]

INTERNAL REVENUE—BANKS—SURPLUS EARNINGS.

1. The undistributed surplus earnings of savings banks, added during the year to their contingent funds, are subject to taxation under the 9th section of the act of congress of July 13, 1866 [14 Stat. 138].

2. That such a fund is held as an authorized security for depositors does not affect its liability to taxation under the act; that question depends upon the fact that it is the accumulation of surplus earnings, and not upon the purpose for which these earnings are withheld from periodical distribution.

[This was an action of debt, brought to recover taxes alleged to be due.]

H. B. Swoope, U. S. Dist. Atty.

R. Robb, for defendant.

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[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirmed in 19 Wall. (86 U. S.) 227.]

McKENNAN, Circuit Judge. The special verdict returned by the jury in this case finds that the defendant "is a banking institution, chartered by the laws of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors;" and it presents the question, whether the undistributed earnings of such an institution, which were placed semi-annually to the credit of a fund to be retained under its charter for the security of its depositors, is subject to taxation.

The solution of this question is furnished by the 9th section of the act of congress of July 13, 1866 (14 Stat. 138), by which the 120th section of the act of June 30, 1864, is repealed, and it is enacted "that there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policy holders, or depositors or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds."

It needs no argument to prove that the corporation defendant falls within the description of the institutions upon which a tax is imposed by this section. Although it is found to be a banking institution, yet it is perhaps more accurately described in the verdict by its functions as a savings institution, as its corporate name indicates. To whichever of these classes it may be assigned, it is clearly embraced in the category of taxable subjects. Upon such institutions a two-fold tax is imposed—First, upon dividends declared and payable to stockholders or depositors out of their earnings, and, second, upon their earnings in excess of the divided profits, whether held as an undistributed sum or added to their surplus or contingent funds. By a proviso to this sub-section, however, it is declared that "the annual or semiannual interest allowed or paid to the depositors in savings banks or savings institutions" shall not be considered as dividends. This leaves the undistributed sums made or added during the year to the contingent funds of these institutions liable to the tax, and, even if the meaning of the preceding part of the subsection was at all doubtful, clearly indicates the intention of congress to subject to taxation all the annual earnings of such institutions, except that portion of them which is allowed to depositors as interest on their deposits.

Having a contingent fund, made up of surplus undistributed earnings, the defendant, by the express terms of the act, is liable to the tax of five per cent. imposed by it upon the semi-annual increment of this fund. Nor does it affect the question, that this fund is held as an authorized security for depositors; the act makes its liability to taxation to depend upon the fact that it is the accumulation of surplus earnings, and not upon the purpose for which these earnings are withheld from periodical distribution. It is not denied that this is the effect of the part of the section above quoted, taken by itself; but it is contended that it must be considered in connection with another part of the section (14 Stat. 136), amending the 110th section of the act of 1866, and that by the proviso thereto the fund in question is exempted from the tax claimed. That proviso is as follows: "Provided, that this section shall not apply to associations which are taxed under and by virtue of the act 'to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof'; and the deposits in associations or companies known as provident institutions, savings banks, savings funds, or savings institutions, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person; and the returns required to be made by such provident institutions and savings banks, after July, 1866, shall be made on the first Monday of January and July of each year, in such form and manner as may be prescribed by the commissioner of internal revenue." In the body of this sub-section a monthly tax of one twenty-fourth of one per cent., equal to one-half per cent. per annum is imposed upon the average amounts of deposits subject to draft, "with any person, bank, association, company or corporation engaged in the business of banking;" and it is plain that to this tax alone do the terms of the proviso apply; while by the general terms of the enactment all persons engaged in banking are subjected to this tax upon deposits, the proviso exempts from it so much of the deposits, with a special class of institutions, as may be invested in government securities, or as do not exceed five hundred dollars, in the name of any one person; no doubt on account of the beneficial character of such investment, and as a concession to depositors of limited means.

Now the tax in controversy is imposed upon earnings, and, in the case of savings institutions, only upon so much of them as may remain after deducting allowances to depositors as interest upon their deposits. Recognizing again the meritorious objects and oper-

ation of such institutions, the act establishes a provident adjustment of the tax, by which the stipulated gains of the depositors are not abridged. But because the same considerate liberality induced a partial exemption of deposits from taxation, it does not follow that the proviso which secures it, is to be extended beyond the subject to which it is appropriated, or the context which it expressly qualifies. By no latitude of implication can this be done, where both the subject and the rate of taxation to which it is sought to apply the proviso are different from those to which it expressly relates. In the one case the tax is imposed upon surplus earnings, and at the rate of five per cent.; in the other upon deposits, and at the rate of one-half of one per cent. Now the proviso exempts from the latter tax deposits with institutions named, which are invested in certain securities, and are of limited amount in the names of single individuals. It refers exclusively to this tax, and restricts its imposition as stated, and it has no necessary relation to any other tax imposed by the act. It cannot, therefore, by implication, be made more comprehensive than its terms import, or be extended beyond the scope, within which both its reason and its subject confine it.

But it is urged that, as "provident institutions,"—to which it is alleged the corporation defendant belongs—are named in the proviso and not in the sub-section imposing the tax upon earnings, they are excluded from the imposition of this tax. Whether a distinct class of institutions is thus described, or whether they are generally the same, as the others named in the proviso, is altogether immaterial. If they are not banks or savings institutions, their earnings are not taxable. But, as before mentioned, the defendant here is properly found to be a savings institution, and, as such expressly designated by the act, its surplus earnings are subject to taxation. The United States is, therefore, entitled to judgment for the amount of tax in arrear.

Upon this sum interest is claimed, but I do not think it is allowable. Although it does not appear in the verdict, it has been orally agreed by the counsel, that the defendant was not reprehensibly in default, but that its refusal to pay the tax claimed was induced by the inconsistent action and the conflicting opinions of the internal revenue department as to its liability, and its reasonable desire, therefore, to have this judicially determined. Under such circumstances interest ought not to be exacted. But besides this, a specific penalty is imposed for default in the payment of the tax, which is, therefore, the exclusive measure of accountability, beyond the amount of the tax itself. For this a separate action is pending, and the liability of the defendant must be limited to the amount of tax in arrear. It is, therefore, ordered that judgment be entered on the verdict for the plaintiff for the sum of $5,356.

[On error this judgment was affirmed by the supreme court. 19 Wall. (86 U. S.) 227.]

Case No. 14,979a.

UNITED STATES v. The DOLPHIN.

[See Case No. 3,975.]

Case No. 14,980.

UNITED STATES v. DOMAN.

[See Case No. 14,983.]

Case No. 14,981.

UNITED STATES v. DOMINGO.

[See Case No. 16,032.]

Case No. 14,982.

UNITED STATES v. DONAHOO.

[1 Cranch, C. C. 474.] [1]

Circuit Court, District of Columbia. Dec. Term, 1807.

FORCIBLE ENTRY AND DETAINER—WHERE INQUEST TAKEN—GRAND JURORS.

In forcible entry and detainer, it is not necessary that it should appear upon certiorari, that the inquest was taken on the spot where the force was used; nor that the jurors should appear to be qualified according to the requisites of the common law.

[Cited in Holmead v. Smith, Case No. 6,630.]

Inquisition for forcible entry and detainer brought up by certiorari.

Mr. Morsell moved to quash the inquisition, because the inquest was not taken on the spot where the force is alleged to have been used, and because it did not appear that the jurors had the common-law qualifications of grand jurors; this being a proceeding at the common law.

F. S. Key, contra. The issue is joined below on the traverse of the force, and the proceedings were there arrested by the certiorari. The defendant cannot take advantage of any thing but what would avail him in arrest of judgment. The warrant to the marshal is, to summon sufficient and indifferent persons to inquire upon their oath, &c., and it does not appear on the proceedings that they were not sufficient.

THE COURT (FITZHUGH, Circuit Judge, absent) refused to quash the inquisition on either of the grounds suggested.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 14,983.

UNITED STATES v. DONAU et al.

[11 Blatchf. 168; [1] 17 Int. Rev. Rec. 181.]

Circuit Court, S. D. New York. June 2, 1873.

CONSPIRACY — INDICTMENT — UNLAWFUL COMBINATION—ACT TO EFFECT OBJECT.

An indictment for a violation of the 30th section of the act of March 2d, 1867 (14 Stat. 484), which provides, "that, if two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor," is sufficient, if it correctly charges an unlawful combination as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement, as an act intended to be relied upon to show the agreement in operation, although it does not appear, by the face of the indictment, in what manner the act described would tend to effect the object of the conspiracy.

[Cited in U. S. v. Graff, Case No. 15,244; U. S. v. Sanche, 7 Fed. 719.]

This was a motion to quash an indictment [against Simon Donau and Christopher Flood] found for a violation of the 30th section of the act of March 2d, 1867 (14 Stat. 484), which provides, "that, if two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof. the parties to said conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not exceeding two years."

Ambrose H. Purdy, Asst. Dist. Atty., for the United States.

Thomas Harland, for defendants.

BENEDICT, District Judge, in denying the motion, said, in substance:

The 30th section of the act of March 2d, 1867, creates an offence which may be committed without any other action on the part of the accused, than that of conspiring with another to commit an offence against the laws of the United States, or to defraud the United States. The unlawful agreement is, therefore, the gist of the offence which this section intended to create. The requirement that some act to effect the object of the conspiracy be done by some one of the conspirators, is intended to afford a locus pœnitentiæ. Until some act be done by some one of the conspirators to effect the object of the unlawful agreement, all parties to the agreement may withdraw, and thus escape the effect of the statute. After such an act all are liable to the penalty. The act to effect the object of the conspiracy, which the statute calls for, is not designated as an overt act, and was not intended to be made an element proper of the offence. The offence is the conspiracy. Some act by some one of the conspirators is required, to show not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offence of conspiracy is committed when, to the intention to conspire, is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offence intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation.

If, then, an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy. It is sufficient, if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged. It is not the case of an attempt to commit crime. The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud, or to commit an offence, but the object of requiring proof of some act in furtherance of the unlawful agreement is, to show that the unlawful combination became a living, active combination.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

UNITED STATES v. DONLAN. See Case No. 14,978.

UNITED STATES (DONOVAN v.). See Case No. 3,994.

Case No. 14,984.

UNITED STATES v. DOOLEY.

[21 Int. Rev. Rec. 115.]

Circuit Court, D. Massachusetts. Oct. 5, 1874.

INTERNAL REVENUE—BREWERS—ENTRY IN BOOKS —"FERMENTED" AND "MALT" LIQUORS.

In the act of June 6, 1872 [17 Stat. 245], the terms "malt liquor" and "fermented liquor" are used synonymously, and the brewer is expressly required to enter all malt liquors in his book, whether sold to other brewers or to the public.

[Motion in arrest of judgment.]

LOWELL, District Judge. The defendant was indicted and convicted as a brewer for neglecting to make true entry and report of the malt liquors made by him, as required by section 19 of the act of June 6, 1872 (17 Stat. 245), the indictment being framed under section 19 of the same statute, or rather under the corresponding section in the Revised Statutes, section 3340, which is copied exactly from section 19, as is also the section corresponding with section 17 (section 3337). The objection taken is that the indictment speaks only of "malt liquors," while it is said that the statute imposed a tax only on beer, lager beer, ale, porter, and other similar fermented liquors; that there may be malt liquors that are not included in this enumeration is said to be evident from section 27 (17 Stat. 249; Rev. St. § 3351), which provides that malt liquor or tun liquor in the first stages of fermentation, known as unfermented worts, may be sold by one brewer to another, and not be taxed until it has reached its last form. To this the attorney for the United States makes two answers: (1) That the statute in its various sections uses the phrases malt liquor and fermented liquor as synonymous. (2) That the brewer is expressly required to enter all malt liquor in his book, whether he sells it to other brewers or to the public.

I am inclined to agree with the prosecution on both these points. The first is understood to have been assented to by Judge Fox, who tried the cause and over-ruled a motion to quash the indictment.

Taking all the provisions of the statutes together, I think it sufficiently appears that there are no malt liquors known to the law which are not required to be entered on the brewer's books. A brewer is defined in section 3244 as a person who makes fermented liquors of any name or description, for sale, from malt, wholly or in part, or from any substitute therefor, which clearly comprehends the maker of every possible kind of malt liquors. Then, in section 3336, it mentions beer, lager beer, ale, porter and other fermented liquors, without saying similar fermented liquors. In the next section, which requires the keeping of books, it says "such" fermented liquors," and afterwards, beer, lager beer, etc., "or other similar fermented liquors." The "such fermented liquors" can only refer to section 3336, which has mentioned all fermented liquors. But I do not give much importance to this. I think it may be fairly collected, as was argued; that the statute intends to include all malt liquors, though it probably does not include all fermented liquors, such as cider, for instance, and that this is the reason for the qualification which is usually annexed to the words fermented liquors.

I consider, too, that section 3351 does not say that tun liquor is known as malt liquor, but, on the contrary, that it is known as unfermented worts. If it is malt liquor, I think it should be entered on the books; but whether it is or not I do not know.

I conclude that if there be any malt liquor not required to be entered on the books, the statute does not acknowledge it, and that it would be a matter of defence, and not an objection to the indictment on its face. Motion in arrest denied.

Case No. 14,985.

UNITED STATES v. DOSS et al.

[11 Am. Law Reg. (N. S.) 320.]

District Court, W. D. Missouri. 1872.

OBSTRUCTING PROCESS OF UNITED STATES — RELEASING PRISONER ON HABEAS CORPUS.

[A judge of a state court who, in pursuance of a conspiracy and in bad faith, releases on habeas corpus, without any ground therefor, a prisoner committed on an examination by a United States commissioner, to answer an indictment if found against him, is, with those who conspire with him for such purpose, guilty of obstructing process of the United States.]

[This was an indictment against S. P. Doss and others for obstructing a United States officer in the discharge of his duty.]

James S. Botsford, Dist. Atty., and H. B. Johnson, for the United States.

Ewing & Smith and Mr. Philips, for defendants.

KREKEL, District Judge (charging jury). The first count of the indictment charges that Doss, McAfee, Snow and Wray, did knowingly and wilfully obstruct, resist, and oppose McConoughey, United States deputy marshal, in serving, and while attempting to serve and execute a warrant of commitment on Samuel Snow. The second count charges the same defendants with rescuing said Samuel Snow by force from said marshal, who held him under warrant of commitment. These charges are based upon an act of congress, which provides: "If any person shall knowingly or wilfully obstruct, resist, or oppose any officer of the United States in serving or attempting to serve or execute any measure, process or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial process whatever. * * * Every person so knowingly or wilfully offending in the premises, shall, on conviction, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars." "Or if any person or persons shall by force set at liberty or rescue any person committed for, or convicted of, any offence against the United States, every person so offending shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceeding one year."

It appears that one Samuel Snow was arrested on a warrant issued by United States Commissioner Birdseye, upon affidavit filed by one Morris, charging said Snow with hav-

ing in his possession for the purpose of passing as genuine certain counterfeit obligations of the United States. Snow was brought before the commissioner on the 20th day of September, 1871, who continued the hearing of the case to the 30th of the same month. Upon an examination then had, said Snow was bound over for his appearance before the district court for the Western district of Missouri, to answer an indictment if found. Snow gave bail in the sum of one thousand dollars, with two of the present defendants, Wray and David Snow, the latter the father of Samuel Snow, as sureties. Afterwards, under an act of congress, which provides: "That any party charged with a criminal offence and admitted to bail, may in vacation be arrested by his bail and delivered to the marshal or his deputy before any judge or other officer having power to commit for such an offence, and, at the request of such bail, the judge or other officer shall recommit the party arrested to the custody of the United States marshal; and he shall hold him until discharged in due course of law." Samuel Snow was surrendered by his sureties to the commissioner, Birdseye, who delivered him to the deputy marshal, and failing to give bond was committed by the deputy marshal to the jail of Vernon county for safe keeping, until he could be removed to the county jail of St. Louis county. On the day of the surrendering of said Samuel Snow by his sureties, a writ of habeas corpus was sued out before the probate judge of Vernon county, the defendant McAfee, on petition of the said Samuel Snow, under the statute of Missouri, which provides that the applicant for the benefit of the writ shall state under oath in substance, by whom the party for whom relief is prayed is imprisoned or restrained of his liberty, and the place where, naming the parties, all the facts concerning the imprisonment or restraint, and the true cause thereof, and if the imprisonment is alleged to be illegal, in what the illegality consists. Samuel Snow, in his petition for the benefit of the writ of habeas corpus, says that he was arrested by one McConoughey upon some process, or pretended process (charging him with an attempt to pass counterfeit money), issued by one Birdseye, and that he is now restrained of his liberty at the county of Vernon for no crime or criminal matter. The law required him to set out all the facts concerning the imprisonment and the true cause thereof. You will observe how carefully this petition, in spite of the provision of the statute quoted, seeks to withhold the facts, well known to the petitioner, that a United States commissioner, Birdseye, had acted in his case, and that he was in the custody of the United States deputy marshal, McConoughey. The evidence as to the time at which the affidavit annexed to the petition was sworn to, and also how he accounts for his failing to comply with another requirement of the statutes, that if he was restrained or confined by virtue of any warrant, order, or process, a copy thereof must accompany the petition, is before you. Had this part of the statute law been complied with, the judge who issued the writ of habeas corpus could at once have seen what kind of case he was dealing with, and he might well have refused the writ, under that clause of the Missouri statutes providing that if it appears that the party cannot be discharged or otherwise relieved, the writ shall be denied. All these plain provisions of the statutes were staring those engaged in obtaining the benefits of the writ for Samuel Snow in the face at the time of the application. When the return to the writ was made—so full and pointed—it should have arrested attention, especially as the jurisdictional question fully appeared. The return fully sets out all the facts and circumstances of the arrest, the examination, the holding to bail, the surrender of bail, and the recommitment, the cause of the restraint by a United States commissioner (a duly authorized judicial officer of the United States). It was presented by the law officer of the government.

I shall not stop to examine as to what has been said in the discussion of the adjudicated cases as to whether a United States marshal, holding a prisoner under due process of the United States—as Snow was held—is bound to produce the body of the person so detained or imprisoned, together with the time and cause of his imprisonment and detention, as required by the Missouri statutes and the writ, for whatever the law may be the good understanding that should ever exist between the state and national government and its judiciaries should govern rather than the law. The officers of the national government acted properly and in the true spirit of the law in producing the body of Samuel Snow, and the cause of his restraint and detention, thus putting the probate judge fully in possession of the case. When that was done, and the return not denied, for the paper filed the next day can scarcely be called a denial, the probate judge should have abstained from longer interfering with the case. His acts thereafter were illegal. The Missouri statute, in its 35th section of the habeas corpus act, provides, that if it appear that the prisoner is in custody by virtue of process from any court legally constituted, or issued by any officer in the course of judicial proceeding before him, such prisoner can only be discharged on one of the following cases: —First. Where the jurisdiction of such court or officer has been exceeded either as to matter, place, sum, or person. Second. Where, though the original imprisonment was lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to be discharged. Third. Where the process is defective in some matter of substance required by law, rendering such process void. Fourth. Where the process, though in proper form, has been issued

in a case, or under circumstances not allowed by law. Fifth. Where the process, though in proper form, has been issued or executed by a person who is not authorized by law to issue or execute the same, or where the person having the custody of such prisoner under such process is not the person empowered by law to detain him. Sixth. Where the process is not authorized by any judgment, order or decree, nor by any provision of law.

It most manifestly appeared that the process of the United States commissioner was issued by an officer in the course of judicial proceedings before him. This has not in any manner been questioned. By the most liberal construction that can be given to the six classes of cases under which a prisoner may be discharged, not one can be found within which the case before Judge McAfee could be brought. These provisions plainly repudiate the discharge of the prisoner. Such a law as the one quoted, and the enforcement thereof, is an absolute necessity, for where would the interference stop if judicial officers, who had the right to issue the writ of habeas corpus, had nothing to guide them but their own discretion? Every jail in the land would be emptied if it was not for such or similar provisions of law, limiting and restraining the exercise of judicial discretion.

It is asked, is it supposable that a United States commissioner can take a citizen of a state, and he have no redress through its own legal tribunals? Under our system we are citizens of the general government first, and as such we owe paramount allegiance to it. It is a mistake to suppose that the national government operates on citizens of a state. It operates on its own citizens, and enforces its laws upon them as such. But this danger of oppression from the national government is more imaginary than real. Thus, for instance, there are not less than three judges who could have fully examined into and corrected any error which the United States commissioner might have committed. The judges of the Eastern and Western districts, in their capacity as circuit court judges, could have acted besides the circuit court judge proper. Missouri is most favorably situated in respect to the national judiciary. If the people of one district should from any cause distrust the judge of their own district, they need only apply to the other, who as circuit judge has jurisdiction over the whole state. Reference has been made to the concurrent jurisdiction in many cases exercised by the federal and state judiciary, and the case in which the present proceeding had its origin is one of that class. The debasing of the currency of the country is an evil which affects all alike, citizens of the state as well as of the United States. Is it strange that congress and state legislatures should be alike willing to provide a remedy? In applying such remedy no conflict can ever arise, for the well-known rule is, to leave jurisdiction to the tribunal first obtaining it. Had Samuel Snow in this case been arrested by state authority, no one would ever have thought of disturbing or interfering with the rightfully-acquired jurisdiction. To deduce from these concessions the right of the state judiciary to interfere with first and rightfully-obtained jurisdiction of the United States, would be the reversing of both the intent and legal rule.

Let us now return to the real question in issue: How far can a judicial officer of a state justify his interference in the judicial proceedings of the United States? As a matter of course, if Judge McAfee, in combination with others, misused his position and office by making use of the law and his power for the purpose of accomplishing an improper release of Samuel Snow, and you are fully satisfied of that fact, defendant McAfee, and those who acted with him, are guilty of having obstructed the process under the first count of the indictment. If, on the other hand, you should come to the conclusion that there was no combination between all of these defendants, but that there was such a combination between two or more of them, then you should find as many as entered into the combination (not less than two) guilty, under the first count of the indictment. If you shall find that no conspiracy or combination for the purpose stated existed among any of the defendants, you will next inquire, whether any, and if so, how many are guilty of having obstructed the process of the United States under the first count of the indictment, or by force rescued under the second count. In considering the acts of the probate judge you are instructed that the law is that if he acted bona fide, that is, in good faith, he is not answerable, and you should find him not guilty. He was bound to act on the application made to him for the writ of habeas corpus, and if he erred in granting the writ, or in the proceedings had before him under it, for that error he is not responsible in these proceedings. In a late decision as to the custody of a prisoner pending the hearing of a writ of habeas corpus, the supreme court of the United States, in Barth v. Clise [12 Wall. (79 U. S.) 400], held, that by the common law upon the return of a writ of habeas corpus, and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made; that the prisoner is detained not under the original commitment, but under the authority of the writ of habeas corpus; that pending hearing he may be bailed de die in diem, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court.

It would seem that, under the entire control thus given to the court over the prisoner,

the judge may direct any person to take charge of, and hold the prisoner until the case is finally disposed of. The person thus holding the prisoner must of necessity be able to justify for the simple act of holding under the order of the court, and if you shall find that Wray did nothing else than hold the prisoner under order of the court, for that act alone he should not be found guilty of obstructing the process of the United States. But this ruling of the supreme court of the United States also affects the acts of the other defendants. However much the allusion to wire-pulling by Doss, or that to force by Wight or the reference to the power behind the throne of the district attorney, may lead you to understand what was transpiring in that court at a time when men of cool, dispassionate judgment were sadly needed, yet the decision referred to relieves the judge, Doss and Wight of having obstructed process, for if the prisoner was in the custody of the court they could not be guilty of obstructing process of the United States. The case then comes back to the first proposition, was there a conspiracy or combination of two or more of these defendants to improperly release Samuel Snow from his imprisonment, thus obstructing the process of the United States. If you are satisfied there was, you will find so many as entered into such a conspiracy and combination guilty under the first count of the indictment.

This case will point out the caution with which those in authority should proceed. The steps taken could not possibly redound to the benefit of Samuel Snow, for the discharge obtained could not protect him against an examination into his offence before the grand jury. Instead of having him to deal with, if no interference had occurred, we are now engaged in examining into the case growing out of the interference. It seems incomprehensible why a jealousy should exist between the state and the national government, and especially between the judiciaries of the two. Identity of interests, affecting the individual in both capacities as a citizen of a state and the general government alike, when rightly understood, can leave no room for differences. The judiciary, solely interested in the faithful execution of the laws, should hesitate to interfere with each other, because of the conflict which must necessarily follow derogatory to both.

You, gentlemen of the jury, to whom this case is about to be submitted for final action, will enter upon the consideration thereof, I am sure, in that true spirit which recognises its obligations to both governments, and above all, to that spirit of justice and of right on which all government and laws securely rest.

The jury returned a verdict, finding McAfee (the judge who issued the writ) and Doss (the attorney of the prisoner suing out the writ) guilty, and Snow and Wray not guilty.

Case No. 14,986.

UNITED STATES ex rel. WEST et al. v. DOUGHTY.

[7 Blatchf. 424.] [1]

Circuit Court, S. D. New York. June 28, 1870.

PARTIES — UNITED STATES — HOW APPEARANCE MADE—DISTRICT ATTORNEY—PATENTS.

1. Where a bill in equity stated that it was brought by the United States at the relation of certain persons, and did not state that the United States brought it by their district attorney, and was subscribed by certain other persons as solicitors for the plaintiffs, and the prayer of it was that certain letters patent of the United States issued to the defendant might be surrendered to be cancelled: *Held*, on demurrer to the bill, that it was bad, as not stating a case which entitled the United States to the relief sought.

[Cited in U. S. v. Draper, 19 D. C. 94.]

2. This court can, under the 35th section of the act of September 24, 1789 (1 Stat. 92), recognize the United States as a plaintiff on the record, only when the record shows that the United States appear as plaintiffs by the district attorney.

[Cited in Attorney General v. Rumford Chemical Works, 32 Fed. 623.]

[This was a bill in equity by Joseph I. West and others against Samuel H. Doughty, praying the surrender of certain letters patent, No. 25,701, issued October 4, 1859, reissued December 27, 1859 (No. 870), and again August 1, 1870. A trial under the first issue of this patent will be found in Case No. 4,029, and under the second reissue in Case No. 4,028.]

Edwards Pierrepont and Frederick H. Betts, for plaintiffs.

Edwin W. Stoughton and Stephen D. Law, for defendant.

BLATCHFORD, District Judge. This is a demurrer to the pleading filed by the plaintiffs in this suit before the commencement thereof. The pleading styles itself a "bill or information," but is substantially, in form, a bill in equity. It states, that it is brought at the relation of Joseph I. West and three other persons who are named. The prayer of the bill is, that the defendant may be decreed to deliver up and surrender certain reissued letters patent, issued to him by the United States, August 1st, 1865, for an "improvement in skeleton skirts," to be cancelled, and may be enjoined from suing for the infringement thereof, or interfering, by means thereof, with the people of the United States, in the business of making, using, or selling hoop skirts, in accordance with the specification of claim of said reissued letters patent. The ground of the bill is, that the letters patent were issued by the United States inadvertently, and by accident and mistake, and are, therefore, void. The demurrer, which styles the pleading to which it demurs an information, demurs to it for several reasons, one of which is, that it does

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

not state a case entitling the plaintiffs to the relief sought.

The bill appears, on its face, not to be brought by the district attorney of the United States for this district. It is subscribed by certain other persons as solicitors for the plaintiffs. The bill does not state, in the body of it, that the United States bring it by the district attorney, but merely states that they bring it against the defendant, at the relation of the relators. The names of the plaintiffs' solicitors are not found in the body of the bill, but are appended at the end of it. This court can recognize the United States as a plaintiff on the record, only when the record shows that the United States appear as plaintiffs by the district attorney of this district. Upon this bill, if there are any plaintiffs, the United States are such plaintiffs. The relators are not plaintiffs. The bill must be maintained, and is sought to be maintained, if at all, solely on the right of the United States themselves, as plaintiffs, to bring it. Now, by the 35th section of the judiciary act of September 24th, 1789 (1 Stat. 92), it is provided, that there shall be appointed, in each district, a person to act as attorney for the United States in such district, whose duty it shall be to prosecute, in such district, all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. Under this statute, it has always been held by the federal courts in this district, that there is no power conferred on them, by statute or usage, to recognize a suit, civil or criminal, as legally before them, in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the statute. U. S. v. McAvoy [Case No. 15,654]. The fact that the suit is instituted on behalf of the United States by the person who is district attorney, and that he acts as such, in instituting the suit on behalf of the United States, must appear by the face of the bill or declaration, or the pleading will be held bad on demurrer, as not stating a case which entitles the United States to the relief sought. The only intendment that can be drawn from the face of the bill, in this case, is, that it is filed without the authority of the United States, inasmuch, as it does not, by its face, appear to be filed on behalf of the United States, by the officer by whom, alone, the United States can, under the statute, prosecute this suit.

For this reason, the bill must be dismissed, without reference to any of the other points taken by the defendant, on the argument of the demurrer.

Case No. 14,987.

UNITED STATES v. DOUGHTY et al.

[1 Quart. Law J. 69.]

Circuit Court, E. D. Virginia. Nov. 30, 1855.

EVIDENCE — SEAMEN — INDICTMENT FOR REVOLT — SHIPPING ARTICLES — COPY — HANDWRITING.

1. On a charge of revolt against seamen, a copy of the shipping articles purporting to be signed by the prisoners cannot be given in evidence to show that the prisoners were part of the crew, without proof of loss or destruction of the original articles.

2. The original articles cannot be given in evidence unless the handwriting of the prisoner is proved.

This was an indictment under the act of congress, March, 1835, § 2 [4 Stat. 776], for an endeavor to commit a revolt on board of the American ship Arcole (R. A. Pitman, master), while lying in Hampton Roads. Plea not guilty.

John M. Gregory, for the United States.

Henry G. Cannon and James R. Crenshaw, for prisoners.

On the trial, the attorney for the United States offered in evidence a certified copy of the shipping articles, for the purpose of proving that the prisoners were the crew or part of the crew of the said ship.

But, on motion of the defendants, THE COURT held that a copy could not be read in evidence without first proving that the original was lost or destroyed.

The attorney then obtained from the custom house the original articles purporting to be signed by the prisoners. But the defendants moved the court to exclude the original articles unless the attorney for the United States could prove the signatures of the prisoners to have been made by themselves or by some persons authorized to sign for them, which motion THE COURT sustained.

The attorney then offered to prove that the prisoners were on board of the Arcole as her crew; but THE COURT held after argument that any contract different from that provided for and rendered necessary by the act of congress of July 20, 1840, c. 48, § 10 [5 Stat. 395], was void; and that act requiring a written or printed contract, and declaring any contract of a different character to be void, no parol contract or verbal agreement could be proven; and that unless the prisoners were part of the crew of the vessel, they could not be prosecuted for an endeavor to commit a revolt, and therefore the jury must find the prisoners not guilty.

Case No. 14,988.

UNITED STATES v. DOUGLASS.

[2 Cranch, C. C. 94.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

WITNESS—FREEBORN MULATTO.

A freeborn mulatto is a competent witness against a white person.

Indictment for larceny. The defendant [Ruth Douglass] was a white woman. Nancy Butler, a freeborn mulatto, was permitted to testify for the United States, upon the authority of U. S. v. Mullany, at December term, 1808 [Case No. 15,832].

THRUSTON, Circuit Judge, absent.

Case No. 14,989.

UNITED STATES v. DOUGLASS et al.

[2 Blatchf. 207.] [2]

Circuit Court, S. D. New York. June 2, 1851.

CRIMINAL LAW — JOINT INDICTMENT—EVIDENCE—MURDER — CHALLENGE TO JURORS — HOW ALLOWED—QUALIFIED PEREMPTORY CHALLENGES—NEW TRIAL.

1. Where, on a joint indictment against three for murder, one of them is tried separately, it is not competent for him to give in evidence a conversation between the other two, when they were alone, inculpating themselves and exculpating him from all participation in the crime.

2. The cases of Powell v. Harper, 5 Car. & P. 590, and of Doe v. Haddon, 3 Doug. 310, commented on and explained.

3. What is direct evidence, and what circumstantial evidence.

4. In a case of circumstantial evidence, the jury, in order to convict, must find the circumstances to be satisfactorily proved as facts, and must also find that those facts clearly and unequivocally imply the guilt of the accused, and cannot be reasonably reconciled with any hypothesis of his innocence.

5. Where a person is present, actually or constructively, at a murder, aiding and abetting it, that is sufficient, both at common law and under the statutes of the United States, to warrant his conviction under an indictment charging him with the murder, though containing no count charging him with only being present at the murder, aiding and abetting it.

6. The acts of congress of April 30, 1790 (1 Stat. 114, § 10), and of March 3, 1825 (4 Stat. 115, § 4), do not make the aiding and abetting an act of murder by personal presence and assistance, a separate and distinct offence.

7. A qualified peremptory challenge in a criminal case, that is, a right to set aside a juror without challenging him for principal cause or to the favor, and to have him finally excluded from the jury unless the panel is exhausted by the challenges of the prisoner, exists in favor of the government in the courts of the United States. Per Nelson, J.

8. This is the settled doctrine of the common law, and was recognized by the supreme court of the United States in U. S. v. Marchant, 12 Wheat. [25 U. S.] 480. Per Nelson, J.

9. The act of July 20, 1840 (5 Stat. 394), applies only to the mode of selecting the jury, that is, by ballot, lot or otherwise, as prescribed by the state laws, and does not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause. Those questions stand upon the common law, except where regulated by act of congress. Per Nelson, J.

[Cited in U. S. v. Devlin, Case No. 14,953; U. S. v. Coppersmith, 4 Fed. 199.]

10. The act of July 20th, 1840 (5 Stat. 394), manifests a purpose to conform the regulations in regard to the designation and empanelling of jurors in the courts of the United States, so far as may be practicable, to the existing laws of the particular states. Per Betts, J.

[Cited in U. S. v. Devlin, Case No. 14,953.]

11. It is a well-settled principle, in the jurisprudence of the United States, that rules of state practice acted upon by the courts of the United States in a state, as obligatory upon them, have the efficacy of rules adopted by express order of those courts. Per Betts, J.

12. The right to a qualified peremptory challenge in a criminal case did not belong to the crown, at common law. It rested wholly upon a construction of the statute of 33 Edw. I. Per Betts, J.

13. The case of U. S. v. Marchant, 12 Wheat. [25 U. S.] 480, did not involve any question as to the right of the government with regard to challenges of jurors. Per Betts, J.

14. The laws of the state of New-York do not allow to the prosecution, in a criminal case, such qualified peremptory challenge, and the practice of the courts of the United States has always been, to conform in all respects, in trials by jury, as nearly as practicable, to the laws of the state in which they sit. Per Betts, J.

15. The attorney for the United States is bound to assign and substantiate his challenge when it is made, and before other jurors can be drawn. Per Betts, J.

This was a joint indictment against three persons for murder upon the high seas. The prisoners were tried at New-York, before Mr. Justice NELSON and Judge BETTS, in May, 1851, and found guilty. [Edward F.] Douglass was tried separately. James Clements and Thomas Benson were tried together. Before sentence, a motion for a new trial was made before both judges, upon their minutes of the trial and the charge of the presiding judge to the jury. The indictment, in every count, charged the murder of the deceased by each of the prisoners There was no count charging either of the prisoners with only being present at the murder, aiding and abetting it. The points urged as grounds for a new trial were these: 1st. That the court erred in allowing the district attorney to exercise a qualified peremptory challenge, by excluding individual jurors from the jury until the panel should be exhausted, without making any challenge to such jurors for principal cause or to the favor; 2d, that Douglass ought to have been allowed to prove a conversation between Benson and Clements when they were alone, inculpating themselves and exculpating Douglass from all participation in the crime; 3d, that the court erred in not charging the jury that the evidence was purely circumstantial; 4th, that the court erred in not charging the jury that the evidence

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

must exclude, to a moral certainty, every hypothesis but that of guilt, before a conviction could be had, and that the court misdirected the jury, in instructing them that they could convict the prisoners if the circumstantial evidence was found to be more consistent with their guilt than with their innocence; 5th, that the court erred in charging the jury that mere presence, actual or constructive, at the murder, aiding and abetting it, was sufficient to warrant a conviction under the indictment.

Ogden Hoffman and William M. Evarts, for the United States.

Lorenzo B. Shepard and George F. Betts, for prisoners.

NELSON, Circuit Justice. The motion for a new trial made in this case is denied. But it is proper to say, that the judges do not altogether agree in respect to the point made as to the right of the government to a qualified peremptory challenge—that is, the right to set aside a juror without cause, and to have him finally excluded from the jury unless the panel is exhausted by the challenges of the prisoner. If the jury-list is exhausted before the panel is completed, it is admitted that the juror thus set aside must be called and must serve, unless he is challenged by the government for cause. This qualified right of challenge without cause is the settled doctrine of the common law, and has been recognized by the supreme court of the United States in the case of U. S. v. Marchant, 12 Wheat. [25 U. S.] 480, and has been practised upon in some of the circuits. The doubt that is suggested in regard to it arises under the act of July 20, 1840 (5 Stat. 394), which provides for the designation of jurors to serve in the federal courts, by ballot, lot or otherwise, according to the mode of selecting them in the states where such courts are held; and for this purpose, those courts are empowered to make rules and regulations for conforming the designation and empaneling of jurors to the laws and usages of the states as they may exist at the time. A rule to this effect has been adopted in this district. My Brother Betts thinks that the act of 1840 adopts, together with the mode of selecting and empaneling the jury, the law of the state regulating the right of challenge, which would exclude the qualified right of peremptory challenge that belongs to the government at common law. Such is the law of the state. But my own opinion is, that the act of 1840 applies only to the mode and manner of drawing or selecting the jury, that is, by ballot, lot or otherwise, as prescribed by the state laws, and does not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause; and that those questions stand upon the common law, except where regulated by act of congress.

In the present case, the panel was completed before the jury-list was exhausted, and before the privilege of peremptory challenge belonging to the prisoners was exhausted. The question, therefore, in this particular case, is one of no substantial importance in the fair and proper administration of justice. Great liberality was extended by the court to both sides in forming the panel, with a view to the selection of an impartial and intelligent jury, and such was eminently the character of the one obtained.

BETTS, District Judge. The judges differ in opinion upon the first point urged as a ground for a new trial, and concur in regard to all the others.

Upon the second point, we think there was no foundation in law for admitting the evidence offered. The general principle laid down by text-writers is explicitly against it (Best, Ev. 96; 50 Law Lib., N. S., 79); and so is the reason of the thing. Mere assertions by one person, affecting the guilt or innocence of another, show no such privity with the latter as to become evidence for or against him. The case of Powell v. Harper, 5 Car. & P. 590, is too loose a statement to be entitled to reliance, if it intends to declare any such doctrine; and, in so far as it admits the naked declaration of a person not on trial, that he stole certain property, to be evidence against another that he received it knowing it to be stolen, it is against the well-established rules of law. Some feature in the case is undoubtedly dropped in the report of it. The case of Doe v. Haddon, 3 Doug. 310, cited for the prisoners, turned on a different point. The declarations offered in evidence were offered to vitiate an act done by the party making them and show it corrupt and void, that act being introduced as the ground of right by the lessor of the plaintiff.

The third point made rests upon a misconception of the character of the evidence. It was not wholly circumstantial. A very large and most important part of it was direct and positive. The murder of the deceased, the report of a musket, the cry of murder by the deceased, the presence of the prisoners on deck at the time, armed with muskets and other deadly weapons, and the violent interference of two of them to prevent the officers of the vessel from going to the rescue of the dying man, are facts directly proved. Such, also, was the fact of the muskets, coming clandestinely to the possession of the prisoners. The only fact important to their conviction of the murder, which depended upon presumptive proof, was, whether the three concurred in the felonious acts out of which the death of the deceased arose.

The fourth point is not supported by the terms of the charge. It was delivered in writing, and is, accordingly, easily compared with the doctrine contended for by the prisoners' counsel. We think that the clear and unmistakable import of it is, that the jury, in order to convict, must find the circum-

stances to be satisfactorily proved as facts, and must also find that those facts clearly and unequivocally imply the guilt of the prisoners and cannot be reasonably reconciled with any hypothesis of their innocence. This is the plain bearing of the instructions, and if, in particular sentences, expressions of a wider and looser bearing occur, yet, in others, the language is explicit and pointed to that effect, and the whole charge is reconcilable only upon the idea that the jury must find that the circumstances remove all reasonable doubt of the guilt of the prisoners.

We think that the fifth point cannot be maintained. At common law, every person present at a murder, willingly aiding or abetting its perpetration, is guilty of murder, and may be indicted and convicted as principal in the first degree. The acts of congress of April 30, 1790 (1 Stat. 114, § 10), and of March 3, 1825 (4 Stat. 115, § 4), in which aiders and abetters are named, do not make the aiding and abetting an act of murder by personal presence and assistance, a separate and distinct offence. The more probable interpretation of those terms is, that they apply to accessories before the fact. There is certainly no fair ground to infer that they were employed in the statutes to distinguish such aiders and abetters from the principal murderer. Whart. Cr. Law, 224. We therefore think the indictment is good in charging the prisoners with the murder by doing acts aiding and abetting its perpetration in their presence. U. S. v. McGill [Case No. 15,676]; U. S. v. Ross [Id. 16,196].

As the first point involves an inquiry into the practice of the court, of much weight and some difficulty, it is proper to set forth more at large the considerations which influence the minds of the judges in the opinions they adopt in respect to it. The presiding judge holds that, as the matter is not expressly regulated by act of congress, the courts of the United States must resort to the common law to ascertain what the rule is in regard to the right of the government to challenge jurors in capital cases. He construes the act of July 20, 1840 (5 Stat. 394), as extending no further than the judiciary act of 1789, and regards its provisions as limited to the mode and manner of obtaining the general panel of jurors to serve in court, and as not governing the method of empanelling them in a specific case on trial. He also holds, that the common law practice of permitting the crown to have jurors set aside without challenging them, till the whole panel is exhausted by the challenges of the prisoner or the acceptance of jurors called, must be regarded as the rule in the courts of the United States. I maintain a different view. We concur in the opinion that, under the terms of the judiciary act of 1789 (1 Stat. 88, § 29), the state law was made the rule of the courts of the United States only in respect to the mode of designating the jurors, and that, in other respects, the common law was followed. U. S. v. The Insurgents [Case No. 15,443]. But I think that the act of May 13, 1800 (2 Stat. 82), and the act of July 20, 1840 (5 Stat. 394), are more extensive enactments, and manifest a plain purpose to conform the regulations in regard to jurors in the courts of the United States, so far as may be practicable to the existing laws of the particular states.

The 29th section of the judiciary act of 1789 required the jurors to be designated by lot or otherwise, according to the mode of forming juries in the states respectively, to which language the act of May 13, 1800, added the words, "therein now practised;" thus making the state practice of that day the rule governing the courts of the United States in designating jurors. The act of July 20, 1840, annexes to the addition made by the act of 1800, the words, "and hereafter to be practised therein," and more distinctly indicates the intention of congress to bring the whole system substantially within the regulations of the state laws, by declaring first, that the jurors shall have the like qualifications and be entitled to the like exemptions as state jurors "now have and are entitled to, and shall hereafter, from time to time, have and be entitled to;" and secondly, by adding, "and, for this purpose, the" "courts" of the United States "shall have power to make all necessary rules and regulations for conforming the designation and empaneling of juries, in substance, to the laws and usages now in force" in the states. Though it is not claimed for this language that it, in express terms, conforms the entire regulations, both in obtaining jurors and in empaneling juries, to the laws and usages of the states, yet it is most significant to show, that the state laws and usages were looked to as the leading and main authority in both respects. And, moreover, it denotes the competency of the courts of the United States to regulate the subject by adopting express rules to that end. It is a well-settled principle, in the jurisprudence of the United States, that rules of state practice acted upon by the courts of the United States in a state as obligatory upon them, have the efficacy of rules adopted by express order of those courts. Fullerton v. Bank of U. S., 1 Pet. [26 U. S.] 604. Accordingly, the uninterrupted usages of the courts of the United States in this district, for over fifty years, to conduct criminal trials, especially in the organization of juries, conformably to the state laws, is high evidence of an explicit adoption of that practice.

Independently, however, of these considerations, I think that the right claimed by the attorney for the United States in this case was not maintainable upon any doctrine of the common law. There is no evidence that

the crown ever possessed or claimed that right, except under the provisions of the act of 33 Edw. I. The prerogative right on the part of the king, prior to this act, was to challenge jurors peremptorily, without restriction of numbers, which in effect gave the crown the power of selecting juries in capital cases. Co. Litt. 156b; Hawk. P. C. bk. 2, c. 43, § 2; Bac. Abr. "Juries," E, 10; Com. Dig. "Challenge," G, 1; Joy, Conf. 143, 24 Law Lib. (N. S.) 84; Chit. Cr. Law, 434; 2 Hale, P. C. 271. This was the evil which parliament intended to remedy by the act of 33 Edw. I. Co. Litt. 156b. Bacon gives the act at large (Abr. "Juries," E, 10); and these motives for its passage are assigned by Baron Gilbert. He also adds, that it is the established practice of the courts, in the construction of the act, that the king need not show any cause of his challenge till the whole panel be gone through. That this is a practice of the English courts, resting not on the common law, but wholly upon the construction of the statute, is still more definitely settled by the decisions of the king's bench in Rex v. Parry, 7 Car. & P. 836, and in Reg. v. Frost, 9 Car. & P. 129, 136, made upon the provisions of the act of 6 Geo. IV., re-enacting in substance the act of 33 Edw. I.

Mr. Justice Story, in U. S. v. Marchant, 12 Wheat. [25 U. S.] 480, would also seem, on a fair construction of his language, to place the right of the crown to this mode of challenge, upon the uniform practice which has prevailed in the English courts since the statute of 33 Edw. I.; but the reasoning of the learned judge, collateral to the point under consideration by the court, even if it amounts to a recognition of the English practice as a doctrine of the common law, cannot avail as a judgment of the court on the subject. The point raised upon the certificate of division of opinion, and determined by the supreme court, related solely to the right of two or more persons, jointly charged, in the same indictment, with a capital offence, to be tried severally, separate and apart—an inquiry apparently in no way involving the prerogative or authority of the government in respect to its challenges of jurors on such trial. And, even if the very accomplished jurist who drew up the opinion of the court had explicitly pronounced the privilege now claimed on the part of the United States to be a common law right, the declaration could not, in a different case, carry the authority of a judicial decision, though it would command all the consideration which the suggestions of a judge so acute, laborious and exact, upon questions of common law, always merit and receive.

The point in question was directly raised in the Pennsylvania circuit, before Judges Baldwin and Hopkinson, in 1830, in the case of U. S. v. Wilson [Case No. 16,730]. The district attorney challenged a juror peremptorily. His right to do so was denied by the counsel for the prisoner. The court observed, that they had known no case where the right now claimed had been allowed to the prosecution; that they would not be the first to do it in a capital case, unless it was clearly established; but that, on examining the opinion of the supreme court, in the case of U. S. v. Marchant, 12 Wheat. [25 U. S.] 480, they did not feel themselves at liberty to refuse the qualified right of challenge claimed by the United States.

It was upon reading these cases on the trial of the indictment against the prisoners, that this court permitted the exercise of a like challenge, and the presiding judge considers the law on the subject settled by these cases. I dissent from that opinion, and think that the court committed an error on the trial in allowing the challenges of the district attorney.

The cases in Pennsylvania, which were referred to on the argument, throw no additional light on the subject. Those cases do not appear to harmonize in principle with each other, on the question of the right of challenge, while, in one particular, they strongly corroborate the view I have taken against the existence in the states of any common law right to such challenge. In Com. v. Lesher, 17 Serg. & R. 155, the court deny that such a right of challenge exists in Pennsylvania. In the subsequent case of Com. v. Jolliffe, 7 Watts, 585, that decision is treated as having been incautiously made, and it is held that the statute in force in Pennsylvania is substantially the same as that of 33 Edw. I., and that there is no reason why it should not receive the same construction. Whichever decision is adopted as the correct exposition of the law, the doctrine that this mode of challenge is not a common law right, is not affected by it, any further than as the general reasoning of the court in the last case conflicts with the principle involved in the doctrine. And I most confidently insist, that no act of a state legislature and no decision of a state court can be shown, manifesting an intention to set up, in the United States, a privilege to the prosecution in capital cases, in respect to the organization of the jury, greater than is enjoyed by the accused; and further, that it was the palpable purpose of the acts of Edw. I. and Geo. IV., to bring the right of the crown within a narrower restriction, and only to give the king and the prisoner coequal rights of challenge for cause.

Under the English practice, and that proposed to be sanctioned in the United States, a way is open for most unreasonable advantages in favor of the government against the prisoner. Suppose the panel to consist of eighty jurors, (the number returned in the present cases,) and that it should so chance that one-half of the whole number are men free of impeachment by challenge for principal cause or favor, yet so circumstanced as to have naturally strong prepossessions

in support of the prosecution—for instance, that they are shipowners, shipmasters and others, so connected with maritime business as to feel honestly but deeply convinced that every act of a sailor at sea, tending to put in peril the lives of the officers, or the vessel or cargo, should be regarded with the greatest distrust of his motives, and as justly requiring, at the hands of the seaman, most satisfactory evidence of his innocence, and that circumstances which, in other relations, would be regarded as slight or insignificant, should carry a weighty import when brought to bear against a sailor. The other half of the panel may be drawn from the ordinary employments of life, and be in no way, by their business, associations or prepossessions, unfavorably impressed respecting the character and integrity of seamen as a class. On empanelling the jury, the district attorney may set aside every one of the forty who would deal dispassionately with the case, and drive the prisoner to exercise his peremptory challenges and those for cause upon the forty who stand naturally in a relation of distrust, if not of hostility, towards him. This, to the extent supposed, is put as an extreme case. But it marks distinctly the principle, and shows that the government may be enabled to force upon the panel men who, unless constrained by overpowering evidence for the defence, would be ready to refuse the prisoner the benefit of an acquittal under almost any circumstances, and might even be inclined, upon testimony faintly criminating him, to render against him a verdict of conviction.

The whole theory of criminal jurisprudence looks to placing the advantage, if one accompanies the case, on the side of the accused; and I think that, after the efforts almost universally put forth in the United States to strengthen and extend such privilege, particularly to a person on trial for his life, we are taking a long step backwards, in setting up the practices of the English assizes, originating in an age of colder sympathy for human life than pervades our era and the jurisprudence of the United States. Accordingly, I regard it as far more consonant with the spirit of our institutions and the rules of criminal law sanctioned by them, for this court to adhere to the humane and guarded practice adopted in this state, than to recur to one drawn from an English statute, (by means of a construction wearing more the appearance of maintaining a royal prerogative against the will of the legislature, than of securing to a prisoner the pittance of favor accorded by it,) which dates back to about the year 1300, to the reign of a monarch who, in advance of the sentiment of his age, made most meritorious efforts to reform the condition of the law in his realm, both civil and criminal.

The legislation of the state of New-York shows conclusively how the rule is accepted here, and may, with great force, be claimed as declaratory of the true import of the English statutory law on the subject. At all events, it fixes definitively the law governing the state courts in this respect. As early as 1786 it was enacted that, in all cases where the attorney-general of this state, in behalf of this state, or he who shall in any case prosecute for the people of this state, shall challenge any juror as not indifferent, or for any other cause, he who shall make any such challenge shall immediately assign and show the cause of such challenge, and the truth thereof shall be inquired of and tried in the same manner as the challenges of other parties are or ought by law to be inquired of and tried. 1 Jones & V. Laws, p. 311, § 22; 1 Greenl. Laws, p. 269, § 22. This statute was included in the revision of 1801 (1 Kent & R. Laws, p. 385, § 25), and in that of 1813 (1 Rev. Laws, p. 334, § 25), and was preserved in the Revised Statutes (1 Rev. St. p. 734, § 11). If the English statute of 33 Edw. I. was ever in force in this colony or state, it was specifically repealed by the acts of 1786 and 1788 (1 Jones & V. Laws, p. 312, § 27; 2 Jones & V. Laws, p. 282, § 37). And then the common law, as modified by the laws and usages of the state, and not as altered by acts of parliament, would govern the method of conducting criminal trials and selecting jurors. 1 Kent, Comm. 472, 473, and notes.

The practice of the courts of the United States has always been to conform in all respects, in trials by jury, as nearly as practicable, to the laws of the state in which they sit. Conk. Prac. (1st Ed.) 298. On the trial of Col. Burr, Chief Justice Marshall said: "The United States have precisely the same rights as the prisoner has, and make the same challenges for a good cause." 1 Burr, Tr. 425. The counsel for the government argued for the right of the government to challenge jurors for cause. Mr. Martin, for Col. Burr, insisted that the United States had no right to disqualify jurors for the prisoner. Chief Justice Marshall replied: "Certainly, the counsel for the United States may challenge for cause." Id. 424. And, under those rulings of the court, the counsel proceeded immediately to try the cause of challenge. These proceedings manifest most clearly that the challenges were received and disposed of by the circuit court pursuant to the laws of the state or the practice of the state courts, and that no reference was had to the English practice under the statute of 33 Edw. I.

To the like effect were the proceedings in Jones v. Van Zandt [Case No. 7,502]. The action was in the name of an individual, but was treated, under a statute of Ohio, as a criminal prosecution, and the question was made as to the right of the government to challenge jurors, and the right was upheld and exercised in conformity with the state law.

Upon the foregoing considerations, I am of opinion that the attorney for the United States had no right to a peremptory challenge, and was bound to assign and substantiate his challenge when it was made, and before other jurors could be drawn. New trial denied.

Case No. 14,990.

UNITED STATES v. DOW.

[Taney, 34.] [1]

Circuit Court, D. Maryland. April Term, 1840.

CRIMINAL LAW — COPY OF INDICTMENT — LIST OF JURY — PEREMPTORY CHALLENGES — MANNER OF SELECTING JURY — WITNESSES — INDICTMENT — REPUGNANT ALLEGATIONS.

1. In capital cases, the prisoner is entitled to a copy of the indictment, and a list of the jury, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before his arraignment.

[Cited in Logan v. U. S., 12 Sup. Ct. 630.]

2. Under the act of congress of April 30, 1790, c. 36, § 28 [1 Story's Laws, 89; 1 Stat. 118, c. 9], the arraignment is to be regarded as the commencement of the trial; and the two entire days must be exclusive of the day of delivery of the copy of the indictment and list of jurors, and the day of the arraignment.

3. In offences made capital by the act of congress of April 30, 1790, the prisoner may challenge twenty jurors peremptorily; in treason, thirty-five. In indictments for capital offences, under that act, the prisoner may challenge twenty jurors peremptorily, and no more; in offences made capital since that act, he is entitled to thirty-five peremptory challenges, according to the rules of the common law.

4. The act of congress, passed September 24, 1789, c. 20, § 29 [1 Story's Laws, 63; 1 Stat. 88], in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be summoned. The circuit courts are bound to follow the laws of the respective states in which they are held, in the mode of forming the juries, and in determining upon their qualifications; but the laws of the several states do not regulate the courts of the United States in the number to be summoned; upon this subject, they are governed by the rules of the common law.

[Cited in U. S. v. Richardson, 28 Fed. 69.]

5. The prisoner was indicted for the murder of the captain of the brig Francis, on the high seas; the brig was an American vessel, and the prisoner one of the mariners on board; he belonged to the Malay race, and was baptized and educated in the Christian religion; the witnesses on the part of the United States were two free negroes and one free mulatto. On objection being made to the admissibility of the evidence of one of these negroes, *held*, that the question was to be determined by the laws of Maryland.

6. Upon general principles, there was nothing in the case of the witness, or in his color, that would make him incompetent to give testimony in any case

7. The result of the legislation of Maryland on this subject, is, that negroes and mulattoes, free or slave, are not competent witnesses in any case wherein a Christian white person is concerned; but they are competent witnesses against all other persons.

8. The prisoner could not be regarded as a Christian white person, and therefore the testimony was admissible against him.

9. An indictment which states that the prisoner, "late of the district of Maryland, mariner, on the 31st day of October, 1839, then and there, being on board a certain brig, called, &c., on the high seas, on the Atlantic Ocean, in latitude 33°, out of the jurisdiction of any particular state, and within the jurisdiction of the United States, * * * did, then and there, commit," &c., is bad for repugnancy; and no judgment will be rendered thereon.

10. The words then and there, mean "at the time and place aforesaid," and in this case refer as to time, to the 31st day of October, 1839, and as to the place, to the district of Maryland; and this allegation (which is a substantive one) is repugnant to the subsequent allegation, that the offence was committed on the high seas, "out of the jurisdiction of any particular state."

11. The court cannot reject any material allegation in an indictment or information, which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected.

N. Williams, U. S. Dist. Atty.

Z. Collins Lee and S. Teackle Wallis, for prisoner.

TANEY, Circuit Justice. Lorenzo Dow was indicted for the murder of the captain of the brig Francis, on the high seas; the brig being an American vessel, and Lorenzo Dow one of the mariners on board. He was indicted under the act of congress of April 30, 1790, c. 36, § 28 [1 Story's Laws, 89; 1 Stat. 118, c. 9].

At the trial of the case, the following points were ruled by the court, before the jury were sworn:

1. That the prisoner was entitled to a copy of the indictment, and a list of the jury, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before his arraignment. That, under the act of April 30, 1790, c. 36, § 28 [2 Story's Laws, 89; 1 Stat. 118, c. 9], the arraignment was to be regarded as the commencement of the trial; and the two entire days must be exclusive of the day of delivery of the copy of the indictment and list of jurors, and the day of the arraignment. Fost. Crown Law, 230; 4 Bl. Comm. 351.

2. In offences made capital by the act of April 30, 1790, the party may challenge twenty jurors peremptorily; in treason thirty-five (see section 29); and the prisoner being indicted under this law, he was entitled to challenge twenty peremptorily, and no more. In offences made capital since the act of 1790, the party is entitled to thirty-five peremptory challenges, according to the rules of the common law. U. S. v. Johns [Case No. 15,481.]

3. The act of congress of September 24, 1789, c. 20, § 29 [1 Story's Laws, 63; 1 Stat. 88], in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be summoned. The circuit courts are bound to

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

follow the laws of the respective states in which they are held, in the mode of forming the juries, and in determining upon their qualifications; but the laws of the states do not regulate the courts of the United States in the number to be summoned; upon this subject, the courts of the United States are governed by the rules of the common law. U. S. v. Insurgents [Case No. 15,443]; Case of Fries [Id. 5,126].

In this case, the court directed the marshal to summon as many, in addition to those attending on the regular panel for the term, as would make up the number of thirty-six; and that the list of these thirty-six jurors should be delivered to the prisoner, two entire days before his arraignment.

The jury were sworn, and the trial proceeded. It appeared from the admissions on both sides, that the prisoner was a native of the town of Manilla, in one of the Philippine Islands; that his parents were both Malays, living in that town, and subjects of the queen of Spain; that they were Christians, and that the prisoner was baptized and educated in the Christian religion, and had always professed to be a Christian.

At the time of the murder, the captain was the only white person on board; the crew consisted of the Malay, three negroes, and one mulatto; two of the negroes were natives of Philadelphia, and one a native of the state of Delaware; the mulatto was a native of the British province of Nova Scotia; they were all free.

The first witness produced on behalf of the United States was one of these negroes. He was objected to by the counsel for the prisoner, upon the ground, that by the laws of Maryland, a free negro was not a competent witness in any case against the prisoner; or, at all events, not in a capital case.

In deciding upon the admissibility of this evidence, the court must be governed by the laws of Maryland, under the act of congress of 1789, c. 20, § 34 [1 Story's Laws, 67; 1 Stat. 92], which provides, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law." It will be necessary, therefore, to review the different acts of assembly, which have been passed by the state upon this subject; for, if the testimony offered is not admissible, it must be on the ground that it is excluded by some statute of the state. Upon general principles, there is certainly nothing in the case of the witness, or in his color, that would make him incompetent to give testimony in any case.

The first act of assembly upon this subject is that of May session 1717, c. 13. The second section of that law provides, that "no negro or mulatto slave, free negro, or mulatto born of a white woman, during the time of his servitude by law, or any Indian slave, or free Indian, native of this or the neighboring provinces, be admitted or received as good and valid evidence in law, in any matter or thing whatsoever, depending before any court of record, or before any magistrate, within this province, wherein any Christian white person is concerned." And the third section of this law makes the several persons excluded by the second section, witnesses against each other, where other sufficient evidence is wanting, "provided such evidence or testimony do not extend to the depriving of them, or any of them, of life or member."

It will be observed, that this act of assembly disqualifies the persons mentioned in it from giving testimony, in any case wherein a Christian white person is concerned; but permits them to be examined, in the discretion of the judge, against one another, in cases not extending to life or member. This qualified admission of their testimony against each other, was always held to be an implied exclusion of it in favor of one another; and this produced the act of assembly of 1801, c. 109, which permitted them to give testimony for, as well as against, each other, in prosecutions for stealing goods, or for receiving them knowing them to be stolen.

The act of 1808, c. 81, was the next in order, and made them witnesses in all criminal prosecutions, for and against one another. In this act, as well as in the act of 1801, before mentioned, "Indian slaves," and "free Indian natives," are not mentioned, because before the passage of these laws, that unfortunate race had disappeared from the state. And it is also proper to remark, that in the act of 1808, the expression used in the act of 1717, of "mulatto born of a white woman, during the time of his servitude by law," is altogether dropped, and the persons authorized to give testimony are, "any negro or mulatto slave, or any mulatto descended of a white woman, or any negro or mulatto free or freed;" and the persons for or against whom it may be given, in any criminal prosecution, are described in precisely the same words. The acts of assembly that subjected a mulatto, born of a white woman, to a certain period of servitude, were not in force when the law of 1808 was passed; they were repealed by the act of 1790, and again in 1796, c. 67, § 14.

The result of these various acts of legislation is this: negroes and mulattoes, free or slave, are not competent witnesses, in any case wherein a Christian white person is concerned; but they are competent witnesses against all other persons. It is true, that the act of 1808 does not, in so many words, say that negroes and mulattoes shall be competent witnesses in all cases except those wherein a Christian white person is concerned; the language of the statute merely enables them to give testimony in the cases there specified. These were cases in which, among others, negroes and mulattoes had been made incompetent witnesses by the act of 1717; and the effect of the act of 1808 was to repeal so much

of this law. And as negroes and mulattoes, as well as persons of any other description, were competent witnesses upon the general principles of the common law, and as they had been disabled merely by the prohibitory provisions of the act of 1717; they are now competent witnesses in all cases, where the provisions of that statute are no longer in force; and the only disabling clause of that statute still in force, is the one which makes them incompetent where any Christian white person is concerned; the other disabling clauses have all been repealed.

We do not speak of the clauses in relation to Indian slaves, or native Indians; the silence of the laws of 1801 and 1808, in relation to this class of persons, has already been accounted for. The prisoner, however, is not an "Indian slave, or a free Indian native of this or any of the neighboring provinces;" and if the provisions of the act of 1717, in relation to persons of that description, be regarded as still in force; and if negroes or mulattoes would be incompetent witnesses against them, in cases affecting life or member, yet the prohibition does not reach the case of the prisoner.

The only question is, whether he is to be regarded as a Christian white person? We think he is not; the Malays have never been ranked by any writer among the white races. But the act of 1717, which excludes the testimony of negroes and mulattoes, in cases where Christian white persons are concerned, did not look to the differences, moral or physical, which have been supposed to exist between the different races of mankind; the law was made for practical purposes, and grew out of the political and social condition of the colony. The colonists were all of the white race, and all professed the Christian religion; from the situation of the world at that time, no persons but white men professing the Christian religion could be expected to emigrate to Maryland; and if any person of a different color, or professing a different religion, had come into the colony, he would not, at that time, have been recognized as an equal by the colonists, or deemed worthy of participating with them in the privileges of this community. The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.

The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter. Christian white men could not be reduced to slavery, or held as slaves in the colony; but they might, according to the laws of the colony, lawfully hold in slavery negroes or mulattoes, or Indians. The white race did not admit individuals of either of the other races to political or social equality; they were regarded and treated as inferiors, of whom it was lawful, under certain circumstances, to make slaves. These three races existing in the same territory, one possessing all the power, and holding the other two in a state of subjection and degredation, it was natural, that feelings should be created by such a state of things, that would make it dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded; hence free negroes and mulattoes, and free Indians of this or the neighboring provinces, as well as those who were held in slavery, were disqualified from being witnesses against Christian white men. No one who belonged to either of the races of which slaves could be made, was allowed to be a witness where any one was concerned who belonged to the race of which the masters were composed.

In order, therefore, to make the negroes and the mulatto incompetent witnesses in this case, it must be shown that the prisoner belonging to the white race, that is to say, to that race of men who settled the colony of Maryland, and formed its political community, at the time the act of 1717 was passed. But it is admitted, that he is a Malay; and the Malays are not white men, and have never been classed with the white race. In Maryland, they were certainly regarded as belonging to one of those races of whom it was lawful to make slaves, and who, according to the laws of England and of the colony, were legitimate objects of the slave trade. This appears by the following case. By the act of assembly of Maryland of 1715, c. 44, § 22, it is declared, "that all negroes and other slaves already imported, or hereafter to be imported into this province and all the children now born, or hereafter to be born of such negroes and slaves, shall be slaves during their natural lives." It became a question, under this act, whether the descendant of a woman who was imported as a slave from Madagascar, could be held in slavery in Maryland. 3 Har. & McH. 501. This case is not fully stated in the report; I have examined the original papers. It was proved that the mother of the petitioner was a yellow woman with straight black hair, and that she was not of the negro race, and the testimony shows that it was upon this fact that the petitioner chiefly relied; she was undoubtedly a Malay, according to the description in the evidence. The court said that as Madagascar was a country where the slave trade is practised, the petitioner must show that her ancestor was free in her own country, in order to entitle her to freedom here. Now, it is well known that the Malay race form a part of the population of Madagascar (1 Maltebrun's Geography, 192, 586; 2 Murray's Geography, 525; McCul. Dict. 786; Wyatt, Nat. Hist. 22, 23; Ives' Voyage, 5; 2 Raynal's East & West Indies, 227); and consequently, under this decision, may be held in slavery in this state, if they were

slaves in their own country, and when imported here as slaves, they are presumed to have been slaves in their own country, till the contrary appears.

It follows, from this decision, that Malays might lawfully be held in slavery in the colony of Maryland, and consequently, are not embraced by the description of white men as mentioned in the act of 1717, and the testimony offered is not excluded by that law. The case before the court, therefore, stands upon the general principles of the common law, and the witnesses offered by the United States are competent witnesses.

It may be proper to say a few words in relation to the cases embraced by the third section of the act of 1717. By that section negroes, mulattoes and Indians were not witnesses against one another, in cases which might affect life or member. The policy of this section obviously stood upon very different principles from that which dictated the total exclusion of their testimony against white persons. It arose from the barbarous and brutal ignorance of the two excluded classes, and their crude and monstrous superstitions, which rendered them incapable of feeling or appreciating the obligation of an oath, as felt and appreciated in a Christian community; and it was not, therefore, deemed safe to receive them as witnesses, even against one another, in the more serious or grave offences, lest they should avail themselves of the privilege in order to obtain revenge for real or supposed injuries. Even the limited extent to which they might be heard was discretionary with the judge, and he might, if he deemed it proper to do so, refuse to hear them; and if he heard them at all, it must be against one another; they could in no case whatever be received as witnesses in behalf of each other.

In process of time, however, when the Indians had disappeared from the state, and the negro and mulatto population had become instructed in the doctrines of the Christian religion, and made aware of the sanctity and obligation of an oath, the reason which had excluded them as witnesses, even in cases where individuals of their own class were concerned, no longer existed; and the act of 1808, therefore, made them competent in all cases for and against one another. In other words, it made them competent in all cases in which they had been disabled by the act of 1717, except in the case where white persons or Indians were concerned; in the case of white persons, the reasons of policy which dictated the exclusion remained unchanged; and in the case of the Indians, the law had no longer any practical operation, as there were no Indians, free or slave, remaining within the borders of the state.

If the third section of the act of 1717 was still in force, we must have regarded it as an implied declaration that negroes or mulattoes, free or slave, were incompetent witnesses, in any case where life or member was at stake, and upon that principle have rejected the testimony now offered on behalf of the United States. But the act of 1808 having restored their competency in all cases except those above mentioned, and the case of the prisoner not being within either of those exceptions, the question must be determined upon common law principles, and the testimony of these witnesses must, therefore, be admitted.

The testimony was accordingly given to the jury, who found the prisoner guilty of murder.

A motion in arrest of judgment was made by the prisoner's counsel, and, after full argument, the court gave the following opinion, arresting the judgment.

TANEY, Circuit Justice. The objection taken to the indictment, upon the motion in arrest of judgment, is, that it contains averments repugnant to one another, in relation to the place where the offence was committed. The first count in the indictment states that "Lorenzo Dow, late of the district of Maryland, mariner, on the 31st day of October 1839, then and there, being on board a certain brig called the Francis, belonging to a citizen of the United States, on the high seas, on the Atlantic ocean, in latitude thirty-three," out of the jurisdiction of any particular state, and within the jurisdiction of the United States, did, then and there, commit the crime charged in the indictment. The objection is, that the word "there," first above mentioned, refers to the district of Maryland; that it is an allegation that the crime was committed within that district, and consequently, that this allegation is repugnant to the subsequent averment, in the same sentence, that it was committed "out of the jurisdiction of any particular state."

We have carefully examined the precedents, and we are satisfied that the words "then and there," as first above introduced, are not to be found in indictments in analogous cases, in any book of approved authority. The words "then and there," which so frequently occur in indictments, mean nothing more than the words "at the time and place aforesaid;" they necessarily imply that a certain time and a certain place have been before mentioned, to which they relate; and if no time and place have been before mentioned, the words "then and there" must be insensible and without meaning.

In the case under consideration, the district of Maryland is the only place, and the 31st of October, 1839, the only time mentioned in the indictment, before the words "then and there," which are now in question. If, instead of using these words, the indictment had said, that "at the time and place aforesaid," Lorenzo Dow, on board the brig Francis, committed the murder, there would be no doubt that the place referred to was the district of Maryland; because it is the only place before mentioned in the indict-

ment. We have already said that the words "then and there" mean the same thing with the words "at the time and place aforesaid;" this clause in the indictment is, therefore, a plain averment that at the date before mentioned, and at the district of Maryland, Lorenzo Dow, on board the brig Francis, committed the crime of which he has been found guilty. But this averment is repugnant to the allegation in the same clause of the indictment, which states that, at the time therein mentioned, he committed the crime on board the brig Francis, "out of the jurisdiction of any particular state;" for if the place at which he committed the murder was out of the jurisdiction of any particular state, it could not be at the district of Maryland.

It has been argued, in support of the indictment, that these words "then and there," which are manifestly out of place, may be regarded as surplusage. But the rule upon this subject is very clearly stated in the case of Rex v. Stevens, 5 East, 244, where Lord Ellenborough says: "I do not find any authority in the law which warrants us in rejecting any material allegation in an indictment or information, which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected."

The rule of law here stated, undoubtedly is the true one, and it must decide the case before us. For here, the averment in question, relating to the place at which the crime was committed, is a material one, because we have no jurisdiction if this averment is true; it is sensible and consistent where it occurs, because such a crime might have been committed on board the brig Francis, within the district of Maryland; it is clearly not repugnant to any antecedent matter; but it is repugnant to the subsequent allegation, that the crime was committed out of the jurisdiction of any particular state; and this latter averment cannot be rejected, because the jurisdiction of this court to try and punish the offender depends upon it. We have no jurisdiction unless the offence was committed out of the jurisdiction of any particular state. The allegations as to place are therefore both material; they are repugnant to one another; and as neither can be rejected, the indictment is fatally defective.

If we were at liberty to look into the evidence given upon the trial, the objection to the indictment might easily be disposed of; for the brig Francis does not appear to have been at any time within the district of Maryland, and all the evidence states that the act for which the prisoner is indicted was done on the high seas, as charged in the latter averment. But the court are not at liberty to look beyond the indictment itself. He has been found guilty of the crime charged in that indictment—according to one allegation, that crime was committed in the district of Maryland; according to another, it was committed out of the jurisdiction of any particular state. In the first case, we have no jurisdiction; in the latter, we have; but we have no right to go out of the indictment, and inquire which of these conflicting allegations contains the truth.

The rules of law applicable to indictments, are undoubtedly in many instances technical and nice; but they have been long and well established, and no court has a right to disregard them, even in the case of the humblest individual, or the most guilty offender.

The case before us, however, is rather matter of substance than one of technical form. Certainly, a court ought not to be permitted to inflict punishment, unless the offence is first found by the jury. The verdict of guilty finds the precise offence charged in the indictment, and none other; and, unless the indictment clearly shows that it was committed within the jurisdiction of the court, the principles of justice, as well as the principles of law, forbid the court to proceed to judgment.

We have spoken, so far, of the first count in the indictment; the same defect is found in the remaining three counts. The judgment must therefore be arrested.

The prisoner was re-indicted and tried, and found guilty. Sentence of death was passed upon him, but he was subsequently pardoned by the president of the United States.

Case No. 14,990a.

UNITED STATES v. DOWDEN.

[1 Hayw. & H. 145.] [1]

Criminal Court, District of Columbia. Aug. 12, 1843.

CRIMINAL LAW—PROSECUTION—EVIDENCE—HANDWRITING—WITNESS.

1. The prisoner has a right to show the spirit and temper with which the prosecution has been conducted, and if it has been brought to bear against the accused he has a right to bring it to the attention of the jury.

2. In the examination of a witness as to the handwriting of the prisoner he must answer from his knowledge of handwriting; he must have seen the writing which the writing in question resembles, and must come to the conclusion in his own mind that he believes it to be the prisoner's handwriting.

3. A witness whose name is on the back of the indictment should be called by the district attorney if he is a material witness, not otherwise.

The prisoner [Raymond P. Dowden] was indicted for stealing treasury notes that were issued by the government under the act of congress of January 31st, 1842 [5 Stat. 469].

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

Philip R. Fendall, U. S. Dist. Atty.
W. L. Brent and Jas. Hoban, for prisoner.

There were several indictments against the prisoner. The counsel for the prisoner asked on which the district attorney intended to try the prisoner, contending that they should be proceeded with in their order. The district attorney stated that he would be tried on the indictment for larceny.

After argument THE COURT directed the trial to proceed on the indictment for larceny.

Mr. Fendall, in opening the case, said there were strong circumstances fixing suspicion on the defendant, which required explanation. He hoped the defendant would be able to explain them, and if he could do so satisfactorily no one would feel a greater degree of gratification than himself. If he could make that explanation to the jury it would be their pleasure to give him a verdict of acquittal.

Mr. Hoban opened the case for the defence. In his remarks he stated the language of the district attorney's distinguished predecessor: "If there was nothing else than a handwriting upon which to convict a man, I would not hang a dog on such testimony, because I could not swear to my own handwriting. I would not believe any man who attempted to swear positively—so much do handwritings approximate to each other, and so difficult is it to distinguish between them." The whole case stands upon the undistinguished handwriting of the accused. I ask for the accused a full trial and an honorable acquittal.

In the course of the trial the following question was put to one of the government witnesses, who was called by the defence on cross examination: "Q. State whether any person or persons engaged in prosecuting the defendant tampered with you before your examination at the enquiring court in this place, the influence used, the threats made, or the rewards held out to you, if you would swear that B. C. Campbell and the defendant were the same person; and by whom such influences were used, such threats made, or such rewards held out, and at what place, and under what circumstances? A. Yes; I was treated in that matter."

The district attorney appealed to the court whether the question was pertinent or not.

"The defence," said Mr. Brent, "we set up is not only that our client is not guilty, but that the investigation of all the facts connected with this case will be to bring to light one of the most infamous conspiracies to destroy the character and standing of an innocent man that ever was attempted in any community. In pursuit of this object I would not stop to inquire who might or might not be implicated. I care not what the standing of a man may be, how distinguished his character, or lofty his station, yet if my duty to my client requires me to bring his conduct before that jury, I will not hesitate to do so."

THE COURT decided that the question could be put, and answered only so as to reach officers of the government of the United States who have been sworn, or whose evidence has been used by consent in this case, but not as to other officers. Exceptions were taken as to this ruling.

THE COURT, on the following day, reversed its decision, and stated that the defendant had a right to show the spirit and temper with which the prosecution had been conducted, and if it had been brought to bear against the accused, he had a right to bring it to the attention of the jury, and, therefore, decided that the testimony might be offered.

THE COURT expressed the opinion that no publication ought to be made of trials in courts of justice while they were pending, as they might produce improper influence.

A witness was examined as to the prisoner's handwriting. He stated that he is familiar with his handwriting; that there is nothing in the writing shown that he could positively identify as his handwriting.

THE COURT remarked that the witness must answer from his knowledge of handwriting. He must have seen the writing which the part on the note resembles, and come to a conviction in his own mind that he believes it to be the traverser's writing. He must be convinced and speak from his conviction. This is the rule of law.

Mr. Brent claimed it as a right that the district attorney should have every witness whose name is on the back of the indictment examined, as he wished to cross-examine them, citing Archb. Cr. Law, p. 141.

THE COURT decided that the witness should be called if he was a material witness, not otherwise.

The case was submitted to the jury without argument.

The jury brought in a verdict of "Not guilty."

Case No. 14,991.

UNITED STATES v. DOWNING.

[3 Cent. Law J. 383.][1]

District Court, D. Kansas. 1876.

INDIANS—SELLING LIQUOR TO—INDIAN COUNTRY.

1. The act of congress (Rev. St. § 2139) which provides that "every person, except an Indian in the Indian country, who sells, exchanges, gives, barters, or disposes of any spirituous liquor or wine to any Indian under the charge of an Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punished," etc., was only intended to prohibit the selling, giving, or bartering of spirituous liquors or wine to an Indian in the Indian country and not elsewhere.

2. The words "in the Indian country," refer to the locality of the offence, and not to the habitation of the Indian excepted from the penalty of the act.

[Indictment for selling liquor to Indians. Heard on motion to quash.]

George R. Peck, U. S. Dist. Atty.
G. C. Clemens, for defendant.

[1] [Reprinted by permission.]

FOSTER, District Judge. The indictment alleges that the defendant did, within the district of Kansas, sell, exchange, give and barter one pint of spirituous liquor to Richard Rice and Peter Burdeaux, both Indians of the Tribe and Nation of Pottawatomies, and being under the charge of M. H. Newlon, an Indian agent duly appointed, etc. The defendant moves to quash the indictment for that it does not charge an offence against him.

The law (Rev. St. § 2139) provides as follows: "Every person, except an Indian in the Indian country, who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of an Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punished," etc. The question at issue involves the construction of the sentence, "except an Indian in the Indian country." Do the words, "in the Indian country," refer to the residence of the Indian excepted from the operation of the law, or do they define the locus in quo of the act prohibited? In other words, does the law only prohibit the traffic of liquor in the Indian country, by any person except an Indian, or does it prohibit (with the same exception) the traffic with any Indian under the charge of a superintendent or agent, whether in the Indian country or not?

Under the law of June 30th, 1834 (4 Stat. 732), the prohibition extended only to the Indian country. By the amendatory act of February 13th, 1862 (12 Stat. 339), the words "in the Indian country" were stricken out, thus making the prohibition apply to any Indian under the charge of a superintendent or agent, whether in the Indian country or not. Now these two acts of 1834, and 1862 have been repealed by the Revised Statutes, and section 2139, which we are called upon to construe, appears to be the only law in existence prohibiting the selling, bartering, or giving of liquor to Indians. There is but little to aid us in ascertaining the intention of the law-making power in this act, except the context and the phraseology of the law itself. The chapter under which this section is found is headed: "Government of Indian Country." The head and marginal notes to this section read, "Penalty for Selling Spirituous Liquors in Indian Country." The first paragraph of this section says: "No ardent spirits shall be introduced under any pretense into the Indian country." By an examination of the various provisions of this chapter, it will be seen, that the whole tenor of the law is to regulate and govern traffic with the Indians in the Indian country. The punctuation of this section also conveys the same idea, there being a comma before and after the words, "except an Indian," and I construe those words as if they were in parenthesis.

It appears to me, that the section under consideration was intended to prohibit the selling, giving, or bartering of spirituous liquors or wine to an Indian in the Indian country, and not elsewhere. That the words "in the Indian country," refer to the locality of the offence, and not to the habitation of the Indian excepted from the penalty of the act. We observe in section 2135, prohibiting other kinds of traffic, a similar exception of an Indian. It was evidently the intention of the legislature to prevent not only the introduction of liquor into the Indian country, but also the selling or giving it to the Indian after it had been introduced, by every person except an Indian. The exception prevents the application of the law to an Indian, except so far as his liquor would be subject to seizure under the provisions of the next section. So it would seem the "untutored child of the forest" might traffic in liquor without limit, subject only to the inconvenience of seizure and confiscation. If the other view is taken of this law, and the words "in the Indian country," be applied to the domicile of the Indian excepted, it would result that a special privilege is granted to an Indian in the Indian country, over an Indian in any other locality. The former could carry on this traffic with all the tribes and nations of Indians, while the latter would be prohibited. And this further question would then arise: Would the Indian residing in the Indian country be limited to traffic in that country, or would he carry this privilege about with him, and have a roving commission to deal in whiskey anywhere he pleased, provided the Indian country was his domicile? In brief, would it except an Indian living in the Indian country, or an Indian selling in the Indian country from the operation of the law? Or must the excepted Indian both reside and carry on the traffic in the Indian country? This law is wonderfully and fearfully made, and like the grace of God "it passeth all understanding." We find ourselves groping in darkness when we accept any other theory than the first one suggested, and upon which we rest our decision. But we are met with the argument that under this construction dealers in liquor may set up in the traffic on the borders of the Indian country with impunity, and thus defeat the object and purpose of the law. Now if we are to look beyond the interpretation of the act of congress to the effect likely to result, there are two answers to this objection. First. If his business introduced or attempted to introduce liquor into the Indian country the penalty of the law would reach him. Whether selling a drink of liquor to an Indian who crossed the border for that purpose would be introducing liquor into the Indian country is a question in metaphysics too abstruse for me to solve, until driven to it by dire necessity. Second. There is a statute law of this state (Gen. St. 524) which in stringent terms prohibits this traffic with the Indians, and which is ample to reach malefactors in the case referred to, and it is eminently proper that the laws of the state should denounce and punish those acts committed within its limits, which tend to do harm to its citizens, and to subvert the peace and good order of the com-

munity. The people of the state lying contiguous to the Indian country, are more immediately affected by this traffic within its borders than are the people of the country at large. It is apparent why congress should legislate against the traffic in the Indian country, which is under the immediate jurisdiction of congress, and yet not interfere when the state jurisdiction intervenes. It is the spirit and theory of the general government to leave to state legislation such matters as are properly cognizable by the local government.

It has been decided by Mr. Justice Miller—U. S. v. Ward [Case No. 16,639]—that the jurisdiction of the court of this state extends over all Indian reservations within the limits of the state, unless by treaty stipulation such reservations were not to be included within the state limits. To use the words of the learned judge: "All territory which was not covered by such treaties, was included within the state within its jurisdiction, and within its territory, and this irrevocably, unqualifiedly and exclusively." Again he says: "It can not be said of the new state of Kansas that she stands upon an equal footing with the original states in all respects whatever, * * * if congress can without her consent exclude her from the right and the power to enforce the laws which she has made for the protection of the lives, persons and property of her citizens, on any portion of her soil." The Indian country, as defined by the act of 1834, was all that vast and boundless territory lying west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas. As the several new states which have been carved out of this vast territory have been admitted into the Union on an equal footing with the original states, under the principle established by Justice Miller in the Ward Case, this expansive territory has been greatly diminished, and from what was originally the Indian country must now be excluded the new states taken therefrom, and all Indian reservations included within the limits and jurisdiction of such states. Under this rule it is not unlikely, that such Indian reservations within the borders of this state, as were by a treaty stipulation to be excluded from states limits and state jurisdiction, are still in the Indian country, and within its jurisdiction. In this case, however, it is not charged that the liquor was sold on such a reservation or on any reservation whatever, and therefore it is not necessary to decide this point. The great body of the Indian tribes have been removed to the Indian country, and there is but little reason to apprehend that the state of Knasas can not amply protect herself from the liquor traffic with the few remnants of tribes still remaining within her borders. The motion to quash the indictment must be allowed.

UNITED STATES (DRAYTON v.). See Case No. 4,074.

Case No. 14,992.

UNITED STATES v. DRENNEN et al.

[Hempst. 320.] [1]

District Court, D. Arkansas. March, 1845.

EXECUTION—FEDERAL JURISDICTION—ADMINISTRATORS — ASSETS — PROPERTY OF DECEASED PERSONS.

1. Suits may be brought in the courts of the United States against executors and administrators, and judgments rendered against them in their representative capacity, and executions issued against the property of the estate unadministered, and a sale thereof, whether it be lands, slaves, or goods and chattels, will pass a valid title to the purchaser.

2. Every court must necessarily possess the power of executing its judgments and decrees.

3. The judiciary act of 1789 [1 Stat. 73] expressly provides for rendering judgments against the estates of deceased persons, and also for issuing executions on all judgments rendered in the courts of the United States.

4. The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws or regulations. [Robinson v. Campbell] 3 Wheat. [16 U. S.] 221; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175.

[Cited in National Bank of Western Ark. v. Sebastian Co., Case No. 10,040.]

5. By the laws of Arkansas, goods and chattels, credits and effects, lands, tenements, and slaves are assets in the hands of an administrator for the payment of debts.

6. Judgments may be rendered de bonis testatoris under these laws, and executions issued against the estate of the intestate, and the same sold to satisfy the execution.

7. Where property will be sacrificed, the officer should not sell, but wait for a venditioni exponas.

8. See notes, as to sale of property of deceased persons on judgments and execution.

Petition to quash execution:

"District of Arkansas—set. To the Hon. Benjamin Johnson, Judge of the District Court of the United States in and for the District of Arkansas: Your petitioners, John Drennen and Elias Rector, as administrators of all and singular the goods and chattels, rights and credits of Wharton Rector, deceased, respectfully represent, that heretofore, namely, on the 12th day of October, A. D. 1844, the United States, by the consideration and judgment of the district court of the United States for the district of Arkansas, recovered against your petitioners, as and in their capacities of administrators as aforesaid, the sum of seven thousand five hundred and twenty-five dollars and ninety-one cents, which were adjudged to them for their damages, with interest on said damages at the rate of six per cent. per annum from said 22d day of October, 1844, till paid, together with the sum of fifty-five dollars and fifty-one cents for costs sustained in said suit, which by the record thereof remaining in said court more fully appears. Your petitioners further represent, that afterwards,

[1] [Reported by Samuel H. Hempstead, Esq.]

namely, on the fourth day of March, A. D. 1845, said United States, for having execution of said judgment, sued out of the office of the clerk of said court a certain writ of fieri facias, directed to the marshal of said district, by which said writ said marshal was commanded that of the goods and chattels and slaves, lands and tenements of the said intestate Wharton Rector, at the time of his death, he should cause to be made the damages and interest aforesaid, together with the costs aforesaid, so that he should have the same before the clerk of said court at his office in the city of Little Rock on the first Monday of April next, to be paid over to said plaintiffs; which said writ afterwards came to and is now in the hands of said marshal, who has, by virtue thereof, levied upon and advertised that the following described lands and tenements, situated in Rector town, Pulaski county, in the district aforesaid, namely, lots 4, 5, 6, 7, 8, 9, 10, 11, and 12, in block or square No. 6; fractional block No. 5, consisting of lots 1, 2, 3, 4, 5, and 6; fractional blocks 12 and 13; blocks No. 8 and 9; fractional blocks 3 and 4, and block No. 16, will be sold on the 29th day of March, 1845, to satisfy said writ of fieri facias; all which by a copy of said writ, with the marshal's certificate thereon, herewith exhibited, marked A, and to be taken as part hereof, will more fully appear. And your petitioners submit and insist, that by the law of the land, no writ of execution could issue against them, as such administrators, upon said judgment. Your petitioners therefore pray your honors to supersede, quash, and set aside said writ of fieri facias, together with all the proceedings had under and by virtue thereof. And your petitioners will ever pray, &c. John Drennen and Elias Rector, as Administrators of Wharton Rector, Deceased."

Exhibit A. "United States of America, District of Arkansas — sct. The United States, to the Marshal of the Arkansas District, Greeting: Whereas, the United States, on the 12th day of October, A. D. 1844, in our district court of the United States for the district of Arkansas, hath recovered against John Drennen and Elias Rector, administrators of the estate of Wharton Rector, deceased, the sum of seven thousand five hundred and twenty-five dollars and ninety-one cents (say $7,525.91), which were adjudged to them for their damages, with interest on said damages at six per centum per annum from the said 22d day of October, A. D. 1844, till paid, together with the sum of fifty-five dollars and forty-one cents for costs sustained in the suit. You are therefore commanded, that of the goods and chattels and slaves, lands and tenements of the said intestate Wharton Rector, at the time of his death, you cause to be made the damages and interest aforesaid, together with the costs aforesaid, so that you have the same before the clerk of our said court at his office in the city of Little Rock on the first Monday of April next, to be paid over to said plaintiff, and then and there certify how you have executed this writ. In testimony whereof, Benjamin Johnson, Esq., judge of our said court, hath caused the seal of said court to be hereto affixed this fourth day of March, A. D. 1845, and the sixty-ninth year of American independence. Wm. Field, Clerk. (Attest) By A. H. Rutherford, Deputy Clerk."

"I, Henry M. Rector, United States marshal in and for the district of Arkansas, do hereby certify that the foregoing is a true copy of the execution now in my hands in the cause therein mentioned, and that I have levied said execution upon lots 4, 5, 6, 7, 8, 9, 10. 11, and 12, in block or square No. 6; fractional block No. 5, consisting of lots 1, 2, 3, 4, 5, and 6; fractional blocks 12 and 13; blocks No. 8 and 9, fractional blocks 3 and 4, and block No. 16,—all in Rector town, Pulaski county, Arkansas. And I do further certify, that I have advertised that said parcels of land would be sold, to satisfy said execution, on the 29th day of March, 1845. Given under my hand this 13th day of March, 1845. Henry M. Rector, U. S. Marshal, District of Arkansas."

Written notice was served on S. H. Hempstead, attorney for the United States for the district of Arkansas, on the 13th of March, 1845, that the above petition would be heard before the Hon. Benjamin Johnson, district judge, at chambers, on the 14th of March, 1845; at which time the matter of the petition was argued by George C. Watkins for the petitioners, and S. H. Hempstead, district attorney, for the United States, who admitted the facts stated in the petition to be true. The application was denied on the merits, but no written opinion was delivered at the time. Subsequently the following was written.

OPINION OF THE COURT (JOHNSON, District Judge). This was an application to quash an execution issued on a judgment obtained by the United States against John Drennen and Elias Rector, administrators of Wharton Rector, deceased, in the district court of Arkansas, on the 22d of October, 1844, and also to quash and set aside all the proceedings under the execution. The judgment substantially pursues the English form, and is against the petitioners in their representative capacity, and its language is that the moneys therein adjudged be "levied of the goods, chattels, slaves, lands, and tenements which were of Wharton Rector at the time of his death, and remaining in their hands to be administered." The execution pursues the judgment, and both are correct as to form and substance. The marshal levied, among other real property, on blocks eight and nine in Rector town, on which there are costly and valuable improvements, as the property of Wharton Rector, deceased, and, it is alleged, has advertised and will

proceed to sell the same, unless prevented from doing so. The application was overruled, on the principal ground that this court had a right to execute its judgments; but no reasons were given at length. As it was a question of interest and considerable difficulty, and time was not then afforded to examine it as fully as it deserved, I have since done so, and am confirmed in the correctness of my decision, and will now proceed to give briefly my reasons for it.

The ground upon which the execution was sought to be quashed was, that in view of the law of the state, none could be issued against administrators; and it was insisted by the counsel for the petitioners, that a judgment against an administrator must be filed in the probate court, according to the laws of Arkansas, classed and satisfied out of the assets of the estate in the regular course of administration, in full if the estate was solvent, and pro rata if insolvent, and that to allow an execution to be issued and levied on the assets of the deceased, and have them sold, would disturb the course of administration, and enable one creditor to obtain an advantage over another, when they should all be on an equal footing. This is a question of delicacy and difficulty, and may in many instances in its practical results produce conflicts of authority between the federal and state tribunals, always to be avoided if practicable. But the jurisdiction of this court is clear, and cannot be surrendered. By the judiciary act of 1789 [1 Story's Laws, 56, § 9], the district courts have cognizance of all suits at common law, where the United States sue, and the matter in dispute exclusive of costs, amounts to the sum or value of two hundred dollars. And by the act of 3d March, 1815 [3 Stat. 244], the jurisdiction of the district and circuit courts is extended to all suits at common law in which the United States, or any officer thereof, under the authority of an act of congress, shall sue, irrespective of the amount in controversy. [1 Stat. 76.] There is no defect in jurisdiction, unless it springs from inability to sue executors and administrators at all. Now that power is clearly vested in the courts of the United States, because the act of 1789 adverted to, expressly provides for rendering judgments against the estates of deceased persons. Gord. Dig. 687. And the same act provides for the issuing of executions on all judgments rendered in those courts. [Ross v. Duval] 13 Pet. [38 U. S.] 60. Besides, the reports of the courts of the United States furnish ample evidence of the constant practice of bringing suits against executors and administrators, and to cite these cases would be a work of supererogation, because it would be to demonstrate what cannot be denied. Nor does it seem to have been thought, in any instance, that judgments thus rendered could not be executed; and certainly an execution is necessary to the beneficial exercise of the jurisdiction. An execution is said to be the end of the law, and it gives to the successful party the fruits of his judgment. [U. S. v. Nourse] 9 Pet. [34 U. S.] 8. If a court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction. 8 Wheat. [21 U. S.] 106. A court without the means of executing its judgments and decrees, would be an anomaly in jurisprudence, not deserving the name of a judicial tribunal. It would be idle to adjudicate what could not be executed; and the power to pronounce necessarily implies the power of executing. Congress has the constitutional power to carry into effect all judgments which the judicial department has power to pronounce. Wayman v. Southard, 10 Wheat. [23 U. S.] 1; Bank of U. S. v. Halstead, Id. 51. And as we have already seen, that power has been exercised in the act of 1789, by expressly authorizing writs of execution to issue on all judgments which the courts of the United States may render.

The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws or regulations. Ex parte Cabrera [Case No. 2,278]; Livingston v. Jefferson [Id. 8,411]; [Wayman v. Southard] 10 Wheat. [23 U. S.] 1, 51, 61. Nor can the local laws of a state confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States. [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175. To allow state laws to affect or impair the jurisdiction of the federal courts, or to arrest the remedies in those courts, would be to virtually abolish them at pleasure. Even then, if it were true, that by the laws of Arkansas a judgment against an administrator cannot be executed or enforced otherwise than by an application to the probate court, it could have no effect in this forum, because, as we have seen, the right of rendering judgments and issuing executions thereon, against the representatives of deceased persons, is clearly conferred on the courts of the United States by acts of congress, and must necessarily supersede any state regulations in conflict with them. The laws of the several states only become rules of decision in trials at common law in the federal courts, in cases where they apply, and where the constitution, treaties, or statutes of the United States do not provide a different rule. 1 Stat. 92; [Livingston v. Story] 11 Wheat. [24 U. S.] 361; [Green v. Lessee of Neal] 6 Pet. [31 U. S.] 291; U. S. v. Duncan [Case No. 15,003]. But the position is not sound; because there is nothing, as I can perceive, in the laws of Arkansas forbidding the execution of a judgment against an administrator in his representative capacity. On the contrary, it would appear to be allowable, because the right of the circuit courts to pronounce judgments de bonis

testatoris is clearly inferable from the provisions of the statute authorizing actions pending against the deceased to be revived against his representative; and also actions generally to be instituted against executors and administrators, in the circuit courts, after the death of the intestate or testator. Rev. St. 81. And then steps in the eighth section of the execution law, which provides, in substance, that when an execution shall be issued against any person as heir, devisee, executor, or administrator, the officer to whom the same shall be directed shall be commended, that of the goods and chattels which were of the ancestor, testator, or intestate at the time of his death, he cause to be made the debt, damages, and costs; for want of goods and chattels, then, real estate which was of the deceased at the time of his death, must be seized to satisfy the execution. Rev. St. 375. It is very clear from this section, that an execution may be issued de bonis testatoris, and of course the property of the deceased levied on and sold. And lands and slaves of the deceased may be sold as well as personal property.

There does not appear to me to be any conflict in the provisions of the administration law and the last quoted provision. Such a construction should be given as that the whole may stand and be effectual. The administration law should doubtless be construed as giving two remedies; one cheap, simple, and expeditious' that is to say, by applying to the administrator or probate court, for the allowance and classification of the claim, and having an order for its payment, either partly or entirely, according to the condition of the estate; the other, more expensive and less expeditious, namely, by bringing an ordinary suit at law in the common law courts, obtaining judgment and execution de bonis testatoris,[2] and which are not affected by the insolvency of the estate, provided there are goods and chattels, lands and tenements, or slaves sufficient to satisfy such debt, remaining unadministered. Whichever remedy a party adopts, he must of course take it subject to all the conditions and limitations peculiar to the particular forum he seeks.

But it is insisted that death has the effect of withdrawing the assets and property of the deceased, of every description, from the influence of an execution, and placing all within the exclusive control of the probate courts. I do not so read the statutes of Arkansas. If that were true, the provisions above quoted authorizing suits against executors and administrators, and executions to issue against the property of the deceased would be nugatory, and would stand a dead letter on the statute-book. Besides, it is well settled that if land be levied on in the lifetime of the judgment debtor, the sale may proceed after his death. The levy upon the property places it from that time forward in the custody of the law, for the payment of the judgment, and although the judgment creditor does not thereby become the owner, yet the levy may be said to vest in him an interest, or give him a lien not affected by the death of the judgment debtor. Certainly death does not withdraw it from the custody of the law. Massie v. Long, 2 Ohio, 290; Buckner v. Terrill, Litt. Sel. Cas. 29; Sumner v. Moore [Case No. 13,610].[3] Putting the statutes aside, then, here is a case where the property would not be withdrawn from the influence of an execution; and, indeed, the fallacy of the argument is too obvious to need further criticism. and is not sustained by authority.

The law, in allowing judgments and execu-

[2] In Ryan v. Lemon, 2 Eng. [7 Ark.] 79, decided by the supreme court of Arkansas in 1846, the same distinction is substantially enunciated. It was there held that in the collection of claims against the estates of deceased persons, claimants may proceed by action according to the forms of the common law, or before the probate court, in the summary manner prescribed by the administration law; and that if the former is adopted, it must be subject to the qualifications imposed by legislative enactment. And the different provisions with regard to bringing suits against executors and administrators and presenting claims, were discussed and construed.

[3] A fieri facias being issued upon a judgment, was levied on land, and the judgment debtor died. Without reviving the judgment by scire facias a venditioni exponas was issued after his death, and the officer under it sold the land thus levied on; and it was held that the sale was valid, and conferred a good title on the purchaser. Taylor v. Doe, 13 How. [54 U. S.] 287. The court said, "We regard the venditioni exponas merely as a continuation and completion of the previous execution, by which the property had been appropriated, and was still in the custody of the law." A sale under execution without revival of the judgment is not absolutely void, but voidable only, and cannot be avoided collaterally. [Pollard v. Files] 2 How. [43 U. S.] 602; [Taylor v. Benham] 5 How. [46 U. S.] 253; 9 Smedes & M. 216. A sale made under execution, tested and issued after the death of the defendant therein, and without a revival of the judgment, is voidable, but not void. The sale is good until set aside by a direct proceeding, and cannot be attacked collaterally. Shelton v Hamilton, 1 Cushm. (Miss.) 496. A sale of lands under a judgment against an executor de bonis testatoris conveys a good title to the purchaser, and the title of the heirs is thereby divested. Worthy v. Hames, 8 Ga. 234. The acts of congress (3d March, 1797, § 5, and 2d March, 1799, § 65) giving priority to debts due the United States, control all state laws for the distribution of estates of deceased persons. 1 Stat. 515, 676. The law makes no exception in favor of a particular class of creditors, and the priority of the United States does not yield to the claims of any creditors, however high may be the dignity of their debts. U. S. v. Duncan [Case No. 15,003]. Almost every state or sovereignty makes itself, by its own legislation, a preferred creditor, as to debts that may be due to it. Such was the Roman law, and such is the law of England. Statutes giving the government a priority are presumed to be for the public good, and are for that reason to be liberally construed in favor of the sovereign. [U. S. v. State Bank of North Carolina] 6 Pet. [31 U. S.] 29; [Beaston v. Farmers' Bank of Delaware] 12 Pet. [37 U. S.] 134.

tions against the estates of deceased persons, established no new and unheard of doctrine; but rather carried out an ancient rule; because the common law of England enforced claims against estates, by means of judgments and executions de bonis testatoris. Real estate was not subject to sale under execution in any case, against the living or the dead, because it was held to be against the policy of their peculiar system of government. Nor were lands there, as here, assets in the hands of the administrator for the payment of debts Slaves were neither subject to execution, nor assets in the hands of an administrator, because slavery did not and does not exist in England. But goods and chattels which were assets, were subject to execution, seizure, and sale for the debts of the intestate as long as they remained in the hands of the administrator in specie unadministered; and they were so considered until actually sold and applied to the payment of debts. And this, notwithstanding the general subject of administration, was under the authority and jurisdiction of the ecclesiastical courts; and notwithstanding, too, a scale of priority was established and fixed by law among creditors. Toll. Ex'rs, 258. The case of Mara v. Quin, 6 Term R. 5, shows that a debt may be levied of the assets of the deceased in the hands of the executor to be administered. 2 Saund. 219a, note 2. And several cases in state courts are to the same effect. Mitchel v. Lunt, 4 Mass. 654; McCormick v. Meason, 1 Serg. & R. 92; Prescott v. Tarbell, 1 Mass. 204; Weeks v. Gibbs, 9 Mass. 74; Clark v. May, 11 Mass. 233. It is only necessary to ascertain what are assets, because if by the common law goods and chattels might be taken on execution on account of their being assets and unadministered, so here lands and slaves may be taken and sold, if assets by our laws, which they certainly are. Now the law of Arkansas destines the property of the deceased, real, personal, and mixed, to the payment of debts. Real estate, slaves, personal chattels, rights and credits, and property of every nature and description, are declared to be assets for that purpose.[4] Everything is surrendered, nothing withheld. The administrator represents the intestate; and although it is true that by means of an action and judgment de bonis testatoris, the issuing of execution thereon, and levying on and selling specific property of the deceased, unadministered, subject to execution, one creditor may obtain an advantage over another, yet this results from the favor which the law extends to the vigilant creditor. One creditor may obtain priority over another and have his debt satisfied, to the exclusion of others, who, owing to the exhaustion of property, may get nothing, or only partial satisfaction. But this is no greater hardship than may and in fact constantly does occur between the living, because one creditor, by his activity and vigilance, may clothe himself with the right of judicially appropriating sufficient property of the defendant to satisfy the debt, and which may be his entire property, thus shutting out all other claims and debts, and leaving them unpaid. It is difficult to perceive, on principle, why vigilance should not reap its appropriate and accustomed reward, as well after as before the death of the debtor.

It is insisted, that to allow the property of a deceased person to be sold on execution, would be likely to produce a sacrifice of it. But I am not able to perceive why there would be any greater sacrifice than in any ordinary judicial sale. The sale must be public, and every one would have equal opportunities of purchasing; and if the marshal was satisfied that combinations existed to produce a sacrifice, or, owing to other causes, that it would fall so far below its real value as to warrant him, in the exercise of a sound discretion, to return the property unsold for want of bidders, he might, although possibly not absolutely bound so to do, take that course, as in ordinary cases, and wait for a venditioni exponas, and under which he must sell. 3 Camp. 521, 2 Cow 185; 1 Freem. Ch. 470. Allowing, however, the objection in its fullest force, it could not affect the question of power, and would only be a circumstance connected with its expediency, and therefore to have no controlling weight. In this case it appears that the marshal has levied on the lands of the intestate, and as every officer is presumed to do his duty, it must be taken as at least prima facie evidence that sufficient goods and chattels could not be found whereon to levy the execution, and therefore that it was necessary to seize and sell the lands. But even if there was in fact sufficient personal property, still the sale would not be invalid, nor would the title of the purchaser be affected, as the command to take personalty first is merely directory to the officer. 7 Eng. [12 Ark.] 272, 273. And for any omission of duty in that respect, he would be responsible for whatever damage might accrue to the estate; but the sale would be good. 3 Bibb. 219; 3 A. K. Marsh. 281; 4 T. B. Mon. 474; 5 Blackf. 590; 6 Wend. 523.

On the whole, I am clearly of opinion that this application ought to be refused, and that the plaintiffs have a right to proceed to a sale of the property Petition refused.

NOTE. In Adamson v. Cummins, 5 Eng. [10 Ark.] 541, decided by the supreme court of Arkansas in 1850, it was said that our statutes certainly recognize the right of the circuit court to render judgments de bonis testatoris, else why permit any action pending against the deceased at the time of his death to survive and be revived against his executor, or why the recognition of the right to commence actions

[4] Menifee v. Menifee, 3 Eng. [8 Ark.] 47, 48 (decided in 1847), holds that lands and slaves are assets in the hands of the administrator for the payment of debts, and he entitled to the rents and profits and the possession thereof.

generally against executors and administrators after the death of the testator or intestate, or why make provisions touching the conduct of such suits, and the character and effect of judgments in such cases? And it was also said that the 8th section of the statute of executions was an express recognition of the right of the circuit court to issue executions de bonis testatoris; and moreover, that the right of the circuit courts to execute their own judgments was, upon general principles, clearly maintainable, and that all the analogies of the law were in favor of it. But the court held that an execution which was levied on the slaves of the intestate was irregular merely, not void, and was quashable by the administrator after sale; but that the purchaser, without notice of the irregularity, would hold the property purchased, and that the sale would not be set aside. The lands of a deceased debtor may be seized on execution and sold, under a judgment rendered against the executors of such deceased debtor for a debt due from him. Landes v. Perkins, 12 Mo. 260; Landes v. Brant, 10 How. [51 U. S.] 376.

Case No. 14,993.

UNITED STATES v. DREW.

[5 Mason, 28.] [1]

Circuit Court, D. Massachusetts. May Term, 1828.

INSANITY—DEFENCE TO MURDER—DELIRIUM PRODUCED BY DRINK.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors.

[Cited in Hopt v. People, 104 U. S. 633.]

[Cited in Boswell v. Com., 20 Grat. 871; Cline v. State, 43 Ohio, 335, 1 N. E. 24; Evers v. State (Tex. Cr. App.) 20 S. W. 748; Fisher v. State, 64 Ind. 440; Hutchins v. Ford, 82 Me. 372, 19 Atl. 834; O'Grady v. State, 36 Neb. 322, 54 N. W. 556; O'Herrin v. State, 14 Ind. 422; Peck v. Cary, 27 N. Y. 24; People v. Garbutt, 17 Mich. 19; People v. Rogers, 18 N. Y. 17. Cited in dissenting opinion in Spencer v. State, 69 Md. 46, 13 Atl. 816; State v. Robinson, 20 W. Va. 734.]

Indictment [against Alexander Drew] for the murder of Charles L. Clark on the high seas on board of the American ship John Jay, of which Drew was master, and Clark was second mate. Plea, general issue.

At the trial the principal facts were not contested. But the defence set up was the insanity of the prisoner at the time of committing the homicide. It appeared, that for a considerable time before the fatal act, Drew had been in the habit of indulging himself in very gross and almost continual drunkenness; that about five days before it took place, he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterwards began to betray great restlessness, uneasiness, fretfulness and irritability; expressed his fear that the crew intended to murder him; and complained of persons, who were unseen, talking to him, and urging him to kill Clark; and his dread of so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said, that whenever he laid down there were persons threatening to kill him, if he did not kill the mate, &c. &c. In short, he exhibited all the marked symptoms of the disease brought on by intemperance, called delirium tremens.

Upon the closing of the evidence, the court asked Blake, the district attorney, if he expected to change the posture of the case. He admitted, that unless upon the facts, the court were of opinion, that this insanity, brought on by the antecedent drunkenness, constituted no defence for the act, he could not expect success in the prosecution. See 1 Hale, P. C. 29, 36; 1 Russ. P. C. 11; 19 State Tr. 946; 3 Paris & Troutt. 140; Haslam, Ins. 50; Coates, 34; Arms. 372; Coop. Med. Jur. 10; Arn. Insan. 67.

D. Davis and Mr. Bassett, for prisoner.

STORY, Circuit Justice. We are of opinion, that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion, that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an absti-

[1] [Reported by William P. Mason, Esq.]

nence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it. Many species of insanity arise remotely from what in a moral view is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.

Verdict, "Not guilty."

Case No. 14,994.

UNITED STATES v. DRISCOLL.

[1 Lowell, 303.] [1]

District Court, D. Massachusetts. Feb., 1869.

EMBEZZLEMENT FROM MAIL — AUTHORITY TO RECEIVE—ERRAND-BOY—MASTER AND SERVANT.

1. An errand-boy who is authorized to call for and receive his employer's letters arriving by mail, and who, after receiving such a letter, containing an article of value, embezzles it, cannot be convicted under section 22 of the Act March 3, 1825 [4 Stat. 108], of taking from the mail and embezzling the letter, because his taking was lawful.

[Cited in U. S. v. Thoma, Case No. 16,471; U. S. v. McCready, 11 Fed. 230. Quoted in U. S. v. Safford, 66 Fed. 944.]

[Cited in State v. Concord R. R., 59 N. H. 86.]

2. Nor can he be convicted, under another clause of the same section, of opening a letter, not containing an article of value, before it shall have been delivered to the person to whom it was directed, if he took it in pursuance of his duty as errand-boy, because the delivery to him was a delivery to his employer within the meaning of that clause.

[Quoted in U. S. v. Safford, 66 Fed. 944.]

3. It is not the purpose of the post-office acts to regulate the conduct of masters and servants, but only to protect the mails.

[Cited in U. S. v. McCready, 11 Fed. 230; Re Burkhardt, 33 Fed. 27.]

[This was an indictment against John T. Driscoll for embezzling and destroying letters.]

M. F. Dickinson, Jr., Asst. U. S. Dist. Atty.

J. E. Bates, for defendant.

LOWELL, District Judge. The defendant is an errand-boy employed by the firm of Hallet & Davis, of Boston, whose duty required him to take from the post-office all letters arriving by mail to the address of his employers. He has been convicted of having embezzled or destroyed two such letters so received by him, one containing, and one not containing, an article of value. The two indictments are framed under two clauses of section 22 of the act of 3d of March, 1825 (4 Stat. 108). By the first clause, it is made penal for any person to take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and to open, embezzle, or destroy any such mail, letter, or packet, the same containing any article of value; and by the second clause, the offence is committed if any person shall take any letter not containing an article of value out of any post-office, or shall open any letter which shall have been in any post-office, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence or pry into another's business or secrets. The question in this case is, whether the agent or servant of a person to whom a letter is addressed is within the meaning of the above clauses of the twenty-second section.

The scope and purpose of these clauses, and of the whole section, appear to be to protect the mails from every kind of danger while in the custody of the United States. Some of the language is broad enough to include within its literal meaning every letter that has ever been in a post-office, and every person that can deal with any such letter before it reaches the manual possession of its owner. Taken literally, the first clause is broad enough to cover even the person to whom the letter is addressed. But the law must have a reasonable construction, and one in accordance with the subject-matter, which is the due and proper custody and delivery of the mail. It must be taken to refer to letters with which the United States have concern under their power and duty to transport and deliver the correspondence of the country. It cannot be that the owner of a letter would be liable for such an act, and it is clear that the same rule applies to the agent. The first clause refers to an unlawful taking, whether with or without the connivance of an officer of the department, and without such a taking the offence is not complete. Here the taking was lawful.

The second clause of the section is not so clear. Under this clause the taking is not an essential element of the offence. The law reads "take or open," &c.; the language is disjunctive. But I think the delivery means in this, as in the other clause, delivery to the person or to his authorized agent. When such a delivery has been made, the government is discharged of further responsibility, and its functions cease to operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authority of the state, whose laws regulate such agencies. If those laws make the act an embezzlement, there will be a remedy; if they do not, it would not be becoming in congress to do so if it could, which may be doubted. These letters had been delivered to the persons to whom they were directed, because they had been delivered to a servant duly authorized by them to receive their letters.

Two cases have been cited by the defend-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

ant's counsel,—U. S. v. Parsons [Case No. 16,000], and U. S. v. Sander [Id. 16,219],—in the latter of which it was held, that if a letter had been delivered to an authorized person, and the opening took place afterwards, this statute did not apply, because delivery to the agent or servant is delivery to the person to whom the letter is addressed; and in the former, the judgment was that the United States was discharged from further responsibility in the premises, after a bona fide delivery, though to the wrong person, himself innocent, when the offence was begun and consummated by a stranger, after the delivery had been perfected. The views of the judges in these cases were fortified by considerations derived from the natural functions, so to speak, of the federal government, it not being probable that the United States would attempt to regulate the relation of master and servant. I am informed upon good authority that Judge Sprague has made a similar decision. I have considered this question once before. A letter had been left at a shop where the letters of the person to whom the particular letter was addressed were, with his knowledge and consent, usually left. A stranger, the defendant, intermeddled with such a letter after such delivery, and was indicted under the latter clause above cited, and the case being, by consent, submitted to me in a somewhat informal way, I ruled upon it, and the result was a nol. pros.

The government has cited only one case,—U. S. v. Pond [Case No. 16,067],—but it is one of high authority, though, I suppose, not actually binding on this court, which has concurrent jurisdiction of all criminal cases, not capital. The point there came up on a motion to quash. Such a motion is always addressed to the discretion of the court, and I understand the decision to go only to this extent, that it is not necessary to allege in the indictment that the letter was in the custody of the United States at the time it was opened. This is undoubtedly so. The remarks of Mr. Justice Curtis go further, no doubt; still, I do not consider them to go to the length necessary to support this prosecution, because they do not refer to a delivery of the letter to one authorized to receive it. Judge Sprague's opinion was given after the decision of U. S. v. Pond [supra], had been made, and that case was called to his attention, and he must have considered, as I do, that it was not an authority to the point now in controversy.

One of the indictments here attempts to meet the difficulty by alleging that the defendant took the letter and unlawfully opened it, but the defect is not in the indictment, but in the law; which does not meet the case. The word "unlawfully" is not often of much value in an indictment; it only asserts a conclusion of law, which, if it arises out of the facts set forth, is unnecessary, and if it does not, is insufficient. The opening may have been unlawful, but it is not made so by any act of congress. New trial ordered.

Case No. 14,995.

UNITED STATES v. DRY OX AND COW HIDES.

[2 Int. Rev. Rec. 34.]

District Court, D. Massachusetts. July 15, 1865.

CUSTOMS DUTIES — INVOICE — UNDERVALUATION — FOREIGN DEPRECIATED CURRENCY.

This was an information to enforce the forfeiture of certain hides seized for an alleged violation of the revenue laws of the United States.

The claimants [Pickman & Silsbee], in 1862, imported from Buenos Ayres, by the barque Emma Cushing, a cargo of four thousand two hundred and sixty-one hides, and entered them at the custom house upon an invoice from E. H. Folmar & Co., their Buenos Ayres correspondents. This invoice was made out in the paper currency of Buenos Ayres, and contained the consular certificate for reducing the amount to American currency. They had also received from their correspondents another invoice made out in gold doubloons. The government maintained that the goods should have been entered upon this last invoice, and that, because they were not so entered, the government was defrauded of duties.

The information alleged: 1st. That the hides were invoiced at less than their actual cost, with intent to avoid a part of their proper duty. 2d. That the invoice was made up with intent, by a false valuation, to evade the revenue. 3d. That the invoice was falsely made up with intent to evade the revenue in this: that it represented the hides as bought in paper money, whereas they were in fact bought in gold; that it was well known that by this mode of stating the purchase, as in paper and not in gold, the hides would pay less than their proper duties on entry here, and that this invoice was made up in paper with the intent that this result should follow. The claimants pleaded the general issue.

Upon the trial of the cause, the government showed that Mr. B. H. Silsbee, one of the claimants, upon the arrival of the vessel which brought these hides, entered them at the custom house in Boston, and produced on their entry an invoice from the shipper, E. H. Folmar, of Buenos Ayres, stating the price in the paper money of Buenos Ayres, and representing the hides as costing in this currency $345,278 78; that attached to the invoice was a certificate of the United States consul at Buenos Ayres, that twenty-seven paper dollars were equal to one Spanish dollar; and that, upon his entry, the importer had stated the cost of the hides in federal money, in accordance with the rate given in this certificate, at $12,788 07. It was also proved that, shortly after this entry, difficulties arose with reference to importations from Buenos Ayres, which led to an examination of Mr. Silsbee by the appraisers, and that upon this examination he produced another invoice of these hides, made out in specie, and repre-

senting their cost as $14,376 75, accompanied by a letter from Folmar, in which he spoke of this as "the real invoice," and stated that there was "an advantage in having the invoice for the custom house made out in paper, the consular certificate placing the currency at $27 per Spanish dollar, whereas estimating as worth $16 (fuertes) we would calculate it at about $25 to the hard dollar;" but also saying that our custom house regulation required the invoice to be made out in the paper money; and that this letter and the specie invoice were in the possession of the importer before the arrival and entry of the hides in Boston.

It was also shown in evidence that Buenos Ayres is a province of the Argentine confederacy; that there is in that province paper money issued by the government of the province known as moneda corriente, which is a legal tender for all government dues; is employed in the payment of all the ordinary expenses of daily life, and in the purchase of Mestiza wool for exportation; that it is not received in any other province of the confederation; and that dry and salted hides for export, tallow, and Cordova wool, are always bought and paid for in doubloons.

The claimants on this state of facts contended, as matter of law, that they were obliged by the statute of the United States, requiring all invoices of goods subject to ad valorem duty imported into the United States from any foreign country to be made out in the currency or currencies of the place or country whence they were imported, to have the cost of their hides expressed on their invoice in paper money, even though the purchase was actually made in doubloons. They also contended that the statement of the cost of the hides in the invoice in another currency than that actually employed in their purchase, if the reduction from the one currency into the other be truly made, even though such a reduction would probably effect their entry at less than their actual value, and was made with this intent and for this purpose, was not a violation of the laws of the United States. But on these points the court ruled otherwise, as appears in the instructions to the jury given below; and the claimants then offered evidence tending to show that the United States consul at Buenos Ayres had insisted on having the invoices of all goods exported from Buenos Ayres to the United States made out in paper money, and refused to certify to invoices in which the price was expressed in specie; that the merchants in Buenos Ayres believed the law to require that the invoices should be made out in paper money, and understood the consul to insist upon this being done; and that this was the reason why Folmar made up his invoice in this way; and, in support of this view, they relied much on Folmar's own statement in his deposition, taken in the case, and on a passage in his letter to the claimants, inclosing the specie invoice of these hides, in which he said: "Hides in this market are generally bought in gold, but the custom house regulations of the United States requiring all invoices from Buenos Ayres to be made out in paper currency, we always accompany each shipment with a certified invoice reduced to paper, corresponding in value to the cost of the merchandise in hard money." It was admitted that the amount of paper money stated in the invoice as the cost of the hides was the exact equivalent of the doubloons actually paid for these hides at the market rate of doubloons to paper on that day.

The government introduced evidence tending to show that the consul had never refused to certify to specie invoices of exports from Buenos Ayres; that no such certificates had ever been required at the custom house; and that, prior to the entry of these goods, no entry had ever been made of an invoice of dry ox and cow hides from Buenos Ayres, in which the cost was stated and the transaction represented in paper alone, and the actual coin used in payment wholly suppressed.

R. H. Dana, Jr., U. S. Atty., and T. K. Lothrop, for the United States.

Wm. M. Evarts, C. L. Woodbury, and M. E. Ingalls, for claimants.

LOWELL, District Judge (charging jury). The law intends that the invoice, by which goods, purchased abroad and imported into the United States and subject to an ad valorem duty, are entered at the custom house, should state accurately the true transaction between the buyer and the seller; and, as part of this statement, that it should be made out in the currency in which the purchase was made, if that is a currency of the country from which the goods are imported; and the statement of the currency in an invoice of such goods is, by intendment of law, a statement that the goods were purchased in that currency, it being a currency of the country.

If the invoice is made out in a currency different from that of the purchase, and that mode of statement would, by the usages of the treasury officers, be likely to result in a payment of less duties than would have been lawfully exacted by the statement of the currency actually used; and the merchant makes out the invoice with the knowledge of this result, and with the design and for the purpose by that mode of statement to obtain this result, then the invoice is falsely made up under the fourth section of the act of May 28, 1830 [4 Stat. 410], although the currency actually used is another currency of the same place or country, and although the statement is an equivalent statement to a person acquainted with the relative values of the currencies. If in this case the invoice was so made up, with such purpose and intent by the agent of the claimants, and entry of the goods was made upon that invoice by the claimants, their innocence of the purpose and result will not prevent a forfeiture, but will

be proper evidence to be weighed by the jury in considering the intent and design of the entire transaction.

The fourth section of the act of May 28, 1830, so far as the points involved in this case are concerned, applies to invoices of goods imported in bulk, as well as to goods imported in packages, and to an entry for warehouse as well as to an entry for consumption. If any appraisement is necessary in case of an invoice falsely made out with intent to evade the duties under the fourth section of this act, the appraisement in this case is sufficient.

If the jury find that doubloons were in common use at Buenos Ayres, at the time of this purchase, as a medium of purchase and sale, between merchants of Buenos Ayres, and between such merchants and traders from the interior provinces of the Argentine republic (of which Buenos Ayres is one), and in which accounts were often kept by merchants and bankers, then the jury may properly find that doubloons were a currency of the country within the meaning of the act of March 3, 1801 [2 Stat. 121], although the paper money of the province of Buenos Ayres was also in common use in that province, in purchases and sales, and was a legal tender in that province; and although the doubloon was not of the coinage of Buenos Ayres or of the Argentine republic.

If the jury find that invoices in doubloons were in fact sent forward by the consul without any certificate of the value of the doubloon, and were accepted at our custom houses at a rate satisfactory to our officers and nearer the true value of our money than were the paper invoices as reduced by the consul's certificate, that practice is to be considered, for the purposes of this case, to have been a lawful practice, and would be binding on Folmar, if he was aware of it; and if, knowing of this difference, he made out the invoice as he did, for the purpose of taking advantage of it, and thereby evading duties, his action would be within the statute.

If the jury find that Mr. Folmar did not make out the invoice for the purpose of evading the duties, as above explained, but for another and different purpose, then the goods are not liable to forfeiture. For instance, if he honestly believed, after due inquiry, whether of our consul or of other persons likely to be informed upon the subject, including his partner in New York, that our custom house regulations required the invoice to be made out in paper; and he in good faith made it out in order to meet that supposed requirement, then the goods would not be liable to forfeiture, although he knew that by that mode a less duty would be paid than by some other mode, which he thought inadmissible, and though no such regulation in fact existed.

On this issue, the burden of proof is on the claimants,—that is, they are to show what the transaction really was. Whichever party has made out his case by the preponderance of the evidence will be entitled to the verdict. If the evidence appears entirely equal on each side, the government must prevail. Very few cases are decided by the burden of proof, because the jury usually finds that one side or the other has made out the best case. There is no evidence in the case upon which the jury can find a false valuation of the goods under either of the statutes upon which this information is framed.

The jury returned a verdict for the claimants.

Case No. 14,996.

UNITED STATES v. DUANE.

[Wall., Sr., 5.] [1]

Circuit Court, D. Pennsylvania. May 12, 1801.

CONTINUANCE — CRIMINAL LAW — COMMISSION TO EXAMINE WITNESSES.

Where the execution of a commission to examine witnesses, has been prevented by the acts or omission of the prosecutor or his agents, the defendant is entitled to a continuance, even if he be guilty of laches in taking out the commission.

[Cited in brief in Fisher v. Greene, 95 Ill. 95.]

This was a motion to put off the trial on the affidavit of William Duane. Upon the whole it appeared, that the indictment was found against him for a libel on the senate of the United States in October term, 1800, and continued on his affidavit that he was not prepared and had material witnesses who were absent, &c. In the same term, he applied to the attorney of the United States for the district, (Ingersoll,) to consent to a commission for taking the depositions of his witnesses, which was immediately assented to. The witnesses proposed to be examined were Wm. Bingham, Jacob Read, Uriah Tracey, Humphrey Marshall, James Gunn, Benjamin Goodhue, James Hillhouse, Nathaniel Chipman, Charles Pinckney and James Ross, all members of the senate of the United States. The defendant, however, took out no commission until about the middle of February, 1801, when a new application was made to Ingersoll, to assent to the issuing of the commission. This consent was given in writing, and commissioners named on each side, to wit: Charles Lee and Harrison G. Otis, for the United States, and John Mason and John Thomson Mason, for the defendant. The attorney for the district declined filing interrogatories on behalf of the United States. The commission was accordingly made out, and arrived at Washington about the 20th of February, and notice thereof given to the commissioners. Those for the defendant accepted, and Otis for the United States; (Lee declining to act.) The commissioners met and agreed upon a form of summons to the several witnesses, which, together with a copy of the interrogatories, and a request that they would de-

[1] [Reported by John B. Wallace, Esq.]

liver their answers in writing, and attend at a time and place fixed in the summons, was served on each of the aforesaid gentlemen of the senate. At the time appointed, none of the witnesses attended except Humphrey Marshall; and at the request of Mr. Otis, another time was agreed on for receiving the witnesses; but it did not appear that any notice of this second meeting was given to any witness, except Gunn and H. Marshall. The commissioners for the defendant attended according to the adjournment, but Otis did not; and on inquiring, it was found he had left Washington that day. The defendant then proposed to his commissioners, that they should request the witnesses to send their answers in writing to them; one of whom, (John Mason,) observed that this might be done, but he thought it would be ineffectual, as he conceived the commission could not be executed without one commissioner on each side. The defendant, however, waited on Marshall and Gunn, and requested them to send their answers to the commissioners or to seal them up, and intrust them to him to be delivered in court. They declined either, and Gunn declared he would not attend as a witness, unless compelled; and observed that as neither of the commissioners for the prosecution attended, the commission was no longer obligatory. The defendant waited in Washington until all the witnesses had gone. He further swore, that all those witnesses were material; in particular Gunn, Bingham and Pinckney; that he had intended to serve process on Bingham as a witness, but before process served, he unexpectedly embarked on board ship, and sailed to parts beyond sea. It appeared further, that many of the witnesses who had refused to attend the commission at Washington, came afterwards to Philadelphia; and that in particular, it was known to the defendant that U. Tracey was in Philadelphia, and yet no subpœna served.

Dickerson & Cooper, for defendant, insisted that Duane had used due diligence; and being deprived of the evidence necessary for his defence, by the refusal of the witnesses to attend, and the commission failing by the act of the commissioners for the prosecution, he ought not to be forced to trial this term.

Mr. Ingersoll, for United States, contended that the commission was a mere courtesy, assented to by him freely; and however defeated as to its object, the prosecution ought not to stop. That Duane had not proceeded on it for three months after October session. Had he taken it out in time, and the commissioners for the United States declined, a new one might have been sent to willing commissioners; but he delayed to the very rising of congress.

[See Case No. 14,997.]

Before TILGHMAN, Chief Judge, and GRIFFITH and BASSETT, Circuit Judges.

GRIFFITH, Circuit Judge. This indictment found in October last against William Duane for a libel on the senate of the United States, was then ready to be tried on the part of the public prosecutor. The defendant professed to be unprepared, and on his affidavit proving the allegation, the trial was postponed in his favor until this term. The public prosecutor is now ready to proceed, and the defendant again asks that the prosecution may be suspended until October next. His counsel have insisted with much earnestness upon some topics which are immaterial in law or unfounded in fact. His situation was represented as a hard one, owing to the obstacles in the way of procuring his evidence, such as the limited jurisdiction of the court not affording him compulsory process—the remoteness and dispersion of the witnesses, who, he alleges, will justify the truth of the libel—the improbability of his being able to bring the members of the senate, implicated in the libel, into court to criminate themselves. As to all these representations, whether true or false, they furnish no grounds upon which this court, sitting to try crimes committed, and found by a grand-jury within their jurisdiction, can act. The editor of a paper who deliberately publishes to the world a charge which immediately affects the character of an individual, or brings the government into hatred or contempt, should be prepared to prove an accusation voluntarily made, and, whilst subsisting, followed with private distresses or public calamity. He acts at his peril—he knows his authority. He knows, or should know, what aid he can have by law, to procure his evidence; he can foresee the hardship, (if there be one,) of his not being able to get witnesses from other states, or authorised to compel men to furnish evidence against themselves. An offender would seldom be brought to trial, if his swearing to the materiality of witnesses out of the reach of the court, and showing some pains to procure their attendance, were grounds for its postponement. Where witnesses are out of the jurisdiction of the court, and there is no well-grounded expectation of procuring their testimony at another time, a trial is not to be deferred; for it is a standing requisite in such cases, and must appear on oath, that the party has a reasonable expectation of procuring their testimony at the next court. Now the defendant's affidavit is, in this particular, defective; and his counsel have said, that they do not expect the attendance of these witnesses. The defendant then, had he used the utmost diligence to procure the evidence of these witnesses, all residing beyond the process of the court, and not bound to answer interrogatories on a commission, must have failed in his application; but in fact there appears the greatest negligence even on this point. Mr. Ingersoll, the attorney for the United States, on the suggestion of the defendant that he was desirous of examining a number of senators, (the witnesses now

sworn to be material,) immediately, and at the last October term, consented he should take out a commission for that purpose. This was mere matter of favour, and certainly very liberal in the prosecutor. The congress met at Washington on the 17th of November, 1800. The defendant, instead of sending down the commission to take the answers of the witnesses, delayed even the issuing of it until the 16th of February, 1801, four months after it was agreed to, and three months after the meeting of the senate, and when they were about rising. At this time, his counsel made a new application to Mr. Ingersoll, to assent to the commission's then issuing, which he immediately complied with, and each party nominated two commissioners. The commission issued directed to the four commissioners, or any two of them, "one however being of each nomination." From this history, it is evident that the defendant did nothing to insure the success of his commission until the last moment. If the question then turned, in my idea of it, upon the general facts of the witnesses being beyond the process of the court and the diligence of the party, I should think there was not a shadow of right in favor of the motion. But I am of opinion that this application must prevail, because the commission which did issue on the 15th of February, was rendered abortive by the acts of the commissioners named on the part of the prosecutor. Those for the defendant accepted; Mr. Lee, one of the commissioners for the United States, declined; Mr. Otis, the other, took on him the commission, and met once; all the witnesses were summoned before them; none attended except Mr. H. Marshall, and an adjournment was agreed upon. Mr. Otis left town on the very day to which the business was adjourned; of consequence, the commission being joint, and requiring one of each nomination, could not be executed by the two commissioners for the defendant. It has been said the defendant lost no evidence by this; for the senators had refused to attend on the first summons, and it was well known, they did not mean to subject themselves to answer the defendant's interrogatories, and so well convinced was he of it, that he did not summon them to appear on the adjournment. The truth of this inference is not clear. Had Mr. Otis met the other commissioners, they might have executed the commission, at least in part; the senators might have been prevailed on to give in their answers. The act of the commissioner in departing, defeated any further prosecution of the commission. But the defendant's affidavit goes to establish a strong probability that he lost the testimony of General Gunn, by the departure of Mr. Otis. He swears General Gunn was a very material witness, and had promised to give in his answer, but that on waiting upon him to attend the commissioners on the adjourned day, he declined, and assigned as one of his reasons, "That the commissioners had no authority to proceed now that Mr. Otis was gone." If this representation be true, it does appear that the non-execution of the commission arose from the non-attendance of the commissioner on the part of the United States, and that too after he had accepted the office. On this ground, and on this only, I am of opinion the cause ought to be continued. In this view of it, it is evident that the requisites usually called for in the affidavit to postpone a cause, are not in question, as here the case turns not on the conduct and circumstances of the party calling for a postponement, but upon the omission and acts of the prosecutor or agents of the prosecutor, who insists on a trial. If I doubted in a case of this sort, that would determine me to allow the continuance, because attended with no inconsiderable inconvenience, and avoiding even the appearance of hardship; but the delay must be on the terms of the offer made by the defendant's counsel, to take a trial in October at all events.

BASSETT, Circuit Judge. I feel myself bound on this occasion, though with regret, to disagree with my brother. He has stated the facts relative to the conduct of the defendant, and admits that he has not only used very little diligence to get the commission executed, but on the contrary is chargeable with the greatest neglect. It is said, indeed, that from and after the 15th of February, he took some pains and was disappointed in the effect of his commission, by the departure of Mr. Otis from the seat of government. But why did he postpone it so long? He knew congress must rise on the 3d of March. Had he gone earlier in the winter, the commissioner for the United States would have been under no necessity of leaving the city; or if he did, another might have been substituted. A party who has once postponed a cause should not come again with such a story as this. He should show that he has done every thing in his power to perform. There will never be a trial of an offender, if such excuses are received. Besides, the affidavit is radically defective. It wants the asseveration that the party expects to be able to procure the attendance of the witnesses at the next court. This is an indispensable requisite; it is reasonable, and sanctioned by long usage, for if he does not expect to have their testimony, why delay the trial for their absence at this time; and his counsel have said they do not expect it. I think there is not sufficient ground for further delay, and therefore am against the motion.

TILGHMAN, Chief Judge. The defendant certainly has used very little foresight or diligence in getting the commission executed, which was with so much candour agreed to by Mr. Ingersoll in October term last. He delayed for several months; the only reason assigned for it is, that his counsel, Mr. Dal-

las, was to be at Washington in February, and he wished to avail himself of his attention on the execution of it. This may be so. It appears, however, that he took out the commission and had the commissioners nominated on the 15th of February, and from that time no laches are imputable to him; and in fact, he found all the witnesses whom he proposed to examine, at Washington. The commission is not executed or returned, and it appears that this has happened from the non-attendance of Mr. Otis, one of the commissioners for the United States. For this reason, I am of opinion a continuance should be ordered. Had the defendant not relied on the execution of the commission, he might possibly have used other means of procuring testimony, if he had any; and therefore ought now to have that opportunity. The ground on which I go, is the conduct of the commissioner for the United States, in defeating the commission, unintentionally no doubt, but with all the possible consequences of designed dereliction. It will be seen that I do not go upon the ground of the conduct of the defendant. His affidavit would be insufficient had he not shown irregularity in the proceeding of the other party. Much has been said relative to the hardship of drawing his justification from the lips of his prosecutors, the members of the senate. I deliver no opinion, whether they can be compelled to give evidence on this indictment. But the defendant has no right to complain of this. If he will libel men without any other means of proving the matter than from themselves, he takes the risk on himself. The defendant's counsel must take their motion, upon the condition, however, of a peremptory trial next term. Without this offer, I should be against the motion, as the commission was not of right.

Case No. 14,997.

UNITED STATES v. DUANE.

[Wall., Sr., 102.] [1]

Circuit Court, D. Pennsylvania. May 22, 1801.

CONTEMPT — PUBLICATION REFLECTING ON COURT AND PARTIES—JUDGMENT.

[Cited in U. S. v. Jacobi, Case No. 15,460, to the point that contempts are crimes and may be prosecuted as such.]

[This was an action on the case for a libel on the plaintiff in the case of Hollingsworth v. Duane, in the Aurora, a newspaper published by William Duane, the defendant. A motion to postpone the trial was denied. Case No. 6,614. The trial then proceeded, the main question being as to whether the defendant was a citizen of the United States or an alien. The verdict of the jury was to the effect that the defendant was not a citizen of the United States, but an alien, and subject of the king of Great Britain. Id. 6,615. Subsequently the counsel for the defendant moved to set aside the verdict because the foreman of the jury was an alien. The motion was overruled. Case No. 6,618. See Cases Nos. 6,616, 6,617, 14,996, and 16,654, all on questions as to contempt of court during the proceedings in this case.]

The attachment ordered in the preceding case [Case No. 6,616] being immediately served, and the defendant taken into custody, he was admitted to bail on his own recognizance in 500 dollars, to appear tomorrow morning to answer to the contempt.

He appeared accordingly, and was asked whether he desired interrogatories; his counsel said he did not. Being therefore in contempt on the proofs before the court, Mr. Dallas, his counsel, was heard in extenuation of the offence. He made a long and ingenious commentary on the paper, not by way of vindicating it, for he confessed it was indecent and contemptuous, and unauthorized by the proceedings on the trial; but with a view to extenuate. He undertook to show that the defendant had been provoked and irritated into this imprudent step, by a publication in Wayne's Gazette of the United States, the day after the trial.

TILGHMAN, Chief Judge. A motion was made by the counsel for Levi Hollingsworth, for a rule to show cause why an attachment should not issue against you, grounded on an affidavit of your having made a publication in the newspaper called the Aurora, which was supposed to be a contempt of this court. You appeared in court, on the day appointed for showing cause, and when the prosecutor was about to offer evidence in support of the rule, you voluntarily declared that you confessed yourself the author of the publication in the Aurora. The counsel for the prosecutor were then heard in support of the rule, and your counsel made an elaborate and ingenious argument against it. The court delivered their opinion yesterday, that you had been guilty of a contempt, and made the rule absolute. You were then informed, that if you wished to answer interrogatories, it was your right and your privilege to have them exhibited by the prosecutor; and that if, by your answer on oath, you cleared yourself of the contempt, it would be received as the truth, notwithstanding the evidence that had been produced against you, and you would be discharged from all further proceedings. You requested time to consider of it, which was granted you; and you have this day declared that you do not wish the interrogatories to be exhibited.

Before I pronounce the judgment of the court, I will briefly mention the circumstances of your case. Levi Hollingsworth

[1] [Reported by John B. Wallace, Esq.]

brought an action against you for a libel. You pleaded, that both he and you were citizens of the state of Pennsylvania, and therefore the circuit court of the United States had no jurisdiction. The plaintiff replied, that you were not a citizen of the state of Pennsylvania, but a subject of the king of Great Britain; and on that point issue was joined. The cause came to trial this term. The jury were sworn, and evidence offered on both sides, after which it was agreed between the counsel, that the cause should be submitted to the jury, under the charge of the court, without argument. In consequence of this agreement, after premising that the court were always desirous of receiving information from the arguments of learned counsel, and that if your counsel on reflection were dissatisfied with the court's decision, they might either take a bill of exceptions, or move for a new trial, I delivered their clear and unanimous opinion, that upon the evidence produced, taking it in the most favourable point of view for you, you were to be considered a British subject. The jury, having received this charge, retired for a few minutes, and returned with a verdict in conformity to it. The court have already declared, and I now repeat it, that though your plea was put in on oath, the verdict of the jury against you is no imputation on your moral character. The truth of your plea depended on matter of law, and supposing that the law was in your favour, you might very innocently have sworn to it as you did. In pursuance of an agreement between the counsel, the jury did not assess the plaintiff's damages. The counsel then made another agreement, that the damages should be assessed by a special or struck jury next term, and that you should have liberty to offer any evidence in mitigation of damages, which might legally be given in evidence on the general issue joined Your counsel have candidly declared, that in the whole course of these proceedings, you received from the court that liberal and impartial treatment, which we do not consider as matter of favour, but the strict right of every one who appears before us. Under these circumstances, the action being still depending, the damages (the great object of the suit) remaining to be assessed, you made a publication in your own paper, the Aurora, in which, after mentioning the decision which had recently taken place, you endeavored to draw public odium on the plaintiff, by representing him as a man who had been guilty of treason, and saved from the gallows by the lenity of the late chief justice of Pennsylvania. You asserted that the respectable jury who tried your cause had given a most infamous verdict; and you made insinuations, too plain to be misunderstood, that no justice was to be expected by citizens of republican principles, in a trial by struck jury, and under the system for the administration of justice, established by the existing law of the United States, which you indecently styled "Mr. Adams's judiciary law." The evident tendency of your whole publication was to vilify and degrade the character of the plaintiff, and thereby to lessen his damages; to deter the counsel of the plaintiff, the clerk of the court, and the future jury, from doing their duty; and to intimidate the court themselves, if they were susceptible of intimidation, which most surely they are not, from whatever quarter or by whatever means it may be attempted. All the world must be sensible that proceedings of this kind tend to subvert the foundations of justice. If judges and jurors, parties and their counsel, be subjected, during the pendency of suits, to the aspersions and unrestrained publications of the press, what, but the destruction of the trial by jury, must ensue? I mean the impartiality, the purity, the independence of that trial. Some men may be found so fortified by nature or habit, as to be above all influence of that kind. But how many honest and honourable minds will either wholly withdraw themselves from taking any part in the administration of justice, or shrink from the free and unbiased discharge of their office, if it be permitted that they should be held up to the world as degraded, corrupt, and infamous? Jurors are not volunteers; they are called here by compulsion of law, and generally give their attendance to the great detriment of their private affairs. They are therefore more strongly entitled to protection. If they remain unprotected, they will soon learn to despise the process of a court which will be itself contemptible, and relinquish an inconvenient duty, subjecting them to calumny and disgrace. These consequences will follow, in a greater or less degree, with reference to the judges, the jury, the counsel, the officers concerned in returning jurors, and all who may be necessarily employed in the administration of justice. If therefore the trial by jury is to be preserved; if the rights of suitors are to be protected touching their dearest interests, of property, life, or character; courts of justice must prevent all discussions, all interference, or reflections in newspapers, while causes are depending. This is equally the privilege and security of both parties; and the support of it is the common cause of every virtuous man in the community. In order to afford complete security, it is absolutely necessary to restrain and punish offences of this kind in a summary manner, and in a summary manner they have been punished, from the earliest times to the present day. There is nothing contrary to this mode of proceeding in the constitution of the United States, though it declares that the trial of all crimes shall be by jury. By fair construction this is only to be intended

of those crimes which by our former laws and customs had been tried by jury. This construction has been universally received by the courts of the United States, and by the courts of the several states, whose particular constitutions contain a similar provision. It was determined very solemnly in the supreme court of Pennsylvania, in the case of Com. v. Oswald [1 Dall. (1 U. S.) 317]. The present governor of Pennsylvania was then chief justice. He is well versed in the general principles of the law, as well as the usages and customs of the United States, and cannot be supposed to have favored constructions unfriendly to true liberty, or unwarranted by the genuine sense of the constitution. The principles established in Oswald's Case, are too strongly founded to be shaken; and I can say with certainty, that for the last seven years, they have been considered and acted upon as the undoubted law of Pennsylvania. The statutes of the United States expressly give to their courts the power of punishing contempts by fine or imprisonment at their discretion, and whoever attends to the expressions in those statutes, will easily perceive that they recognize a summary mode of proceeding. We confine ourselves within the ancient limits of the law, recently retraced by legislative provisions and judicial decisions. You have alleged, by way of extenuation of your offence, that you were provoked to it, by an abusive publication in Wayne's paper. But, if you were ill-treated by Mr. Wayne, you should have applied to the law for redress, and not have revenged yourself, by attacking Mr. Hollingsworth, the jury, the counsel, the officers, and the court. To give your apology its utmost force, it amounts but to this; that you acted under the impulse of passion. The court have taken that circumstance into consideration; at the same time, I think myself bound to declare, that passion is no justification of an offence, and cannot go far, even in extenuation. If a plea of that kind were allowed, men of violent tempers would have no inducement to restrain them I am satisfied that on reflection, you yourself must be sensible that you have acted with extreme impropriety. Your case is attended with circumstances of far greater aggravation than Oswald's. But though the court have power to punish at discretion, it is far from their inclination to crush you, by an oppressive fine, or lasting imprisonment. They hope and believe offences of this kind will be prevented in future by a general conviction of their destructive tendency, and by an assurance that the court possess both the power and the resolution to punish them. Upon the whole, the judgment of the court is, that you be imprisoned for thirty days including this day, that you pay the costs of the prosecution, and that you stand committed till this judgment be complied with.

Case No. 14,998.

UNITED STATES v. DUFFY et al.

[1 Cranch, C. C. 164.] [1]

Circuit Court, District of Columbia. June Term, 1804.

CRIMINAL LAW—CONFESSIONS—LARCENY—PROPERTY IN GOODS STOLEN.

1. A confession upon oath, before a magistrate, cannot be given in evidence against the prisoner.

2. Possession is prima facie evidence of property.

Indictment [against Thomas Duffy, alias Rustick, and Christopher Duffy] for stealing a cable.

Mr. Taylor, for United States, produced Mr. Hoffman, the magistrate, to prove what the prisoners had testified before him on an examination of John Duffy, on a charge of stealing the cable; to show that they, being examined separately, had given opposite and inconsistent accounts of the cable, and to show their confession upon oath before the magistrate.

THE COURT refused to admit the testimony, upon the authority of 1 McNally, Ev. 47, rule 12; Buller, N. P. 242; Leach, Crown Cas. (1st Ed.; Irish) 248.

The indictment charged the cable to be of the goods and chattels of one Andry.

Mr. Swann, for defendants, contended that the jury must be satisfied that Andry had a general or special property, and that its being in Andry's boat, is not sufficient evidence of property.

THE COURT directed the jury, that a qualified property was sufficient, and that the testimony of its being taken from Andry's vessel is competent to go to the jury, and that they must decide whether Andry had a qualified property in the cable.

Case No. 14,999.

UNITED STATES v. DULANY.

[1 Cranch, C. C. 510.] [1]

Circuit Court, District of Columbia. Nov. Term, 1808.

CRIMINAL LAW — INDICTMENT — INDORSEMENT OF PROSECUTOR'S NAME.

When a presentment for a misdemeanor is found by the grand jury without the name of a prosecutor, the court will order an indictment to be sent up without the indorsement of a prosecutor, upon the suggestion of the attorney of the United States.

On motion of Mr. Jones, the attorney for the District, to send up an indictment [against Benjamin Dulany] to the grand jury upon a presentment made by them, no person being indorsed as prosecutor, THE COURT (DUCKETT, Circuit Judge, absent) said that in such cases, upon the motion of

[1] [Reported by Hon. William Cranch, Chief Judge.]

the attorney for the United States, they would order indictments to be sent up without a prosecutor's name being indorsed, upon the attorney's suggesting that in his opinion the cases require such interposition.

Mr. Jones replied that he could not undertake to give any opinion, but he should never make a motion in any case which should appear to him to be malicious or trifling.

Case No. 15,000.

UNITED STATES v. DULANY.

[1 Cranch, C. C. 571.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

CRIMINAL LAW—SECURITY FOR COSTS.

The prosecutor must give security for costs.

Mr. Youngs, for defendant [John Peyton Dulany], moved to stay the trial until the prosecutor give security for costs according to rule No. 29, in the rule-book: the prosecutor (Dr. Spohn) having removed from the District and having no property. Granted.

Case No. 15,001.

UNITED STATES v. DULUTH et al.

[1 Dill. 469 [2] 10 Am. Law Reg. (N. S.) 449.]

Circuit Court, D. Minnesota. 1871.

NAVIGABLE WATERS — POWERS OF NATIONAL AND STATE GOVERNMENTS OVER—INJUNCTION.

1. The United States may bring an injunction bill, in the proper circuit court, to protect improvements, which she is making under the authority of congress, in navigable waters, from injury which will be caused by works of internal improvement within state limits, and by state authority. The power of the federal government, when called into exercise, is, in such cases, not only paramount but exclusive, and cannot lawfully be interfered with to any extent.

[Distinguished in U. S. v. Beef Slough Manuf'g, etc., Co., Case No. 14,559. Cited in Louisiana State Lottery Co. v. Fitzpatrick, Id. 8,541; U. S. v. Mississippi, etc., Boom Co., 3 Fed. 552.]

2. Whether the work prosecuted under state authority will have the effect to interfere with that prosecuted under the federal authority, is a question of fact upon which the opinions of the government engineers, while entitled to great consideration, are not conclusive.

3. Where the injury threatened is of a character not easily remedied, if the injunction be refused, and there is no denial that the act charged is contemplated, a temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted.

[Cited in Wilkinson v. Tilden, 9 Fed. 684; Lee v. Simpson, 37 Fed. 15.]

[Cited in Pioneer Wood-Pulp Co. v. Bensley, 70 Wis. 482, 36 N. W. 321.]

The United States, by her attorney for the district of Minnesota, who acts under the direction of the attorney general, brings this bill in chancery in the circuit court for that district, for an injunction against the defendants. The facts stated in the bill are briefly these: That the government of the United States, by means of appropriations made by congress, is making certain improvements at the mouth of the St. Louis river, intended to keep open and to deepen the channel at that point, between the western end of Lake Superior and the body of water called Superior Bay. This bay is separated from the main body of the lake by a narrow tongue of land, a few hundred yards in width, starting from the Minnesota shore on the north, and projecting itself south toward the Wisconsin shore about six miles. Between the southern extremity of this narrow strip of land, called Minnesota Point, and the Wisconsin shore of the lake, the St. Louis river and the waters of Superior Bay make an outlet into Lake Superior, and through the outlet or channel (for the St. Louis river here makes a current), vessels navigating the lakes, make their way to the harbor of Superior city, Wisconsin, and to the inner harbor of the city of Duluth. This latter city is situated in the state of Minnesota, at the upper end of Minnesota Point, and has not only its harbor in Superior Bay, but has its wharf on the lake, where vessels receive and discharge their cargoes. The improvements on which the United States have been at work for two or three years, are at the mouth of the St. Louis river, between the south end of Minnesota Point and the Wisconsin shore, and, as the bill alleges, are intended to narrow the channel at that point, by piers on each side of it, that the body of water carried by the St. Louis river and the Bay of Superior, through the channel, may be increased in velocity so as to deepen the channel and keep it free from the deposits which have a tendency to fill it up, and thus obstruct the entrance and exit of vessels into and from Superior Bay. The bill then alleges that the defendants are engaged in cutting a canal across the upper end of Minnesota Point, near Duluth, through which the waters of Superior Bay will flow into Lake Superior, and by which the current of the St. Louis river, now flowing through the outlet already described, will be diverted into the canal, and that the result will be to render ineffectual the efforts of the United States to protect and deepen the natural channel at the mouth of the St. Louis river, and to cause it to be filled up, so as to become incapable of navigation. To prevent this result, the court is asked to enjoin the defendants from the further prosecution of work on the canal.

Mr. Davis, U. S. Dist. Atty., for Minnesota, with whom was Mr. Barlow, Atty. Gen., of Wisconsin, and Mr. Spooner, for the United States.

Mr. Cornell, Atty. Gen., for Minnesota, and Mr. Masterson, for the city of Duluth.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

MILLER, Circuit Justice. While the defendants do not deny the right of the United States to come as a party plaintiff into her own courts, to seek protection for her own interests, they claim that the real plaintiffs in this suit are the state of Wisconsin and the city of Superior, while the United States are mere nominal parties, and that the proceeding is instigated by rivalry and jealousy, and has for its purpose the injury of Duluth by impeding the growth of her commerce, by checking the improvement of her harbor, to which the canal is essential.

Of all this the court can know nothing, judicially. The present suit was authorized by the proper officer of the government, namely: the attorney general, and, in doing so, he appears to have acted on the request of the engineering bureau having in charge the work threatened with injury. This injury, if the allegations of the bill be true, is a direct interference by the defendants, with the operations of the federal government in the improvement of the navigation of the lake at that point.

We cannot assume that the government of the United States, or its officers who bring this suit, are governed by a spirit of hostility to Duluth, nor can we make that the subject of inquiry on this occasion.

If the allegations of the bill be true, we have no doubt of the right of the officers of the federal government to bring this suit in the name of the United States, to protect her rights, and deem it a much more appropriate mode of doing so than by the physical force of the war department.

That the protection, improvement, and general control of the navigable waters of the United States are within the constitutional competency of congress, there can be no doubt. This power has been so often asserted, both in congress and in the supreme court, that reference to adjudged cases would be an affectation of learning. No one has denied this for many years past, and it is not denied by counsel on the present occasion.

It is, however, asserted that the states have a concurrent right to authorize improvements on the navigable waters of the United States in which their citizens are interested, so far as these waters lie within their territorial limits; and it is shown by affidavits, and by the statutes of Minnesota, that the canal here complained of is authorized by said state, and is important to her commerce, and is within her territory. That such a power can be exercised by the states may be admitted, when it does not injure the general interest of commerce, and when it does not conflict with any control assumed by the federal government over the same locality.

But all the reported cases which concede this power in the states agree that it exists only while the congress of the United States refrains from the assertion of its authority, and that, when the latter is called into exercise, it is not only paramount, but exclusive. Such is the principle asserted by the supreme court in Crandall v. Nevada, 6 Wall. [73 U. S.] 35, and in Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, and in Cooley v. Board of Wardens, 12 How. [53 U. S.] 299, in all of which the question is thoroughly examined.

Nor can any doubts be entertained, from the facts before us, that the congress of the United States has called into exercise the federal power in the improvement of the navigation between Lake Superior and Superior Bay. They have made appropriations for this purpose more than once, one of which is so recent as the month of March last, which is yet unexpended, and the mode of expending this money, being confided by congress to certain officers of the government, it must be held that whatever is done by them in furtherance of that purpose, is done under the authority of congress. It is, however, claimed that inasmuch as congress, in the same bill which contains the last appropriation referred to, also appropriated a like sum for the improvement of the harbor of Duluth, it is to be inferred that congress thereby recognized the canal now complained of as a legitimate work.

In support of this view, reference is made to a joint resolution of the Minnesota legislature, in response to which it is claimed this latter appropriation was made. But we can draw no such inference from the action of congress; for, while that joint resolution does mention this canal, with other matters, as one mode of improving the Duluth harbor, and declares that the system under which congress was seeking to improve the entrance to Superior Bay (which was supposed to be as useful to Duluth as to Superior city) is a failure, it does not appear that congress adopted these views, for it left both appropriations under the control of the engineer corps of the war department, which, both then and now, continue to assert that the work at the mouth of St. Louis river is the true mode of improving the entrance to Superior Bay, in which are the harbors of Superior city and of Duluth. We must hold, then, that this work is authorized by the congress of the United States, and is prosecuted under their authority, and that the canal is not.

The remaining question to be considered is, whether the allegation of the bill, that this canal will seriously interfere with that work, is sustained by the evidence before us.

In this aspect of the case it is to be understood that although no answer to the bill is filed, we have admitted counter affidavits.

The complainant supports the bill by the reports of the engineer bureau, and by the affidavits of the officers of that corps engaged on the work, and by those of other civil engineers.

The defendants have a large number of

affidavits showing that no such effect on that work will follow the opening of the canal, as is alleged in the bill.

It is urged by counsel for complainant that the reports of the engineers and their statements, made as is claimed on accurate surveys, should be held conclusive. But while we concede that their action in determining the best mode of improving the entrance to the bay cannot be questioned here, we cannot give such effect to their opinions on the question of the influence of the canal on that improvement, though we concede to their opinion the value which their station and character merit.

The affidavits on both sides are numerous. They demonstrate what all courts and juries have so often felt, that where the question is one of opinion and not of fact, though that opinion should be founded on scientific principles or professional skill, the inquiry is painfully unsatisfactory, and the answers strangely contradictory.

In this emergency I am relieved by a principle which has generally governed me, and which, I believe, governs nearly all judges, in applications for preliminary injunctions. It is that, when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. In this case I am not satisfied that it is so refuted. I am inclined, personally, to believe that the effect of opening the canal without the breakwater, or some other protection to the natural action of the flow of water through it, will tend to fill up the channel at the mouth of the river.

It is said in answer to this, that no irreparable damage can ensue from making the canal, and that more injury will result to defendants from stopping the work, than can arise from its completion. But I do not agree that the damage, if there shall be any from the canal, can be repaired without immense difficulty, and probably, not at all. While the canal might be closed with great expense, the deposits which may have accumulated at the mouth of the river, before the question is settled, may never be removed, or the removal may be too costly to justify the attempt. And, in a case of interference with the authority of the federal government, the court cannot consider the relative amount of injury to accrue to the party thus interfering, and to the government. Such a principle would tend to encourage interference with federal authority, when it ought to be repressed.

On the other hand, if, on the final hearing, it shall be made to appear that complainants are mistaken, the injunction can be dissolved, and the work completed. And the truth in the matter can, in the meantime, be ascertained by accurate surveys, and calculations impartially made, either by officers of the government, or by competent engineers appointed by the court, or by depositions subject to cross-examination, so that when the court comes to decide, it will have the subject within its control, and will have something more than ex parte affidavits, some of which are, by no means, clear or precise in their statements. Or if, before the final hearing, it shall be made to appear in the manner indicated, or in any other manner satisfactory to the court, that the canal can be protected by a breakwater, so as to prevent the too rapid diversion of water from the bay, or can, in any other manner, be completed without injury to the government works, and the complainants put their work in that condition, the injunction may be modified or dissolved.

In conclusion, I take the liberty of saying that, since congress has taken this matter in hand by appropriating money for the improvement of these harbors, it should cause the adoption of some comprehensive plan for the improvement of both harbors, and not leave it to the conflicting interest of the two cities, or to the adverse action of the state and federal authorities.

Nor can I doubt, if the defendants here should ask of the department in charge of these improvements, a careful inquiry into the plan which they believe essential to their interests, that some mode of prosecuting such improvement would be found which would meet the approval of that department, and obviate the necessity of a final decision by this court.

I am happy in the assistance of Judge DILLON, of this circuit, on the hearing of this application, and in his concurrence in these views.

An injunction according to the prayer, will be allowed. Ordered accordingly.

NOTE. At the June term, 1871, by consent of the war department, and of the attorney general, the injunction was dissolved on the filing of a bond by the city of Duluth, in the sum of $100,000, conditioned that the city should complete and maintain a dyke across the Bay of Superior, from Minnesota Point to Rice's Point, by the first day of December, 1871, and complete the canal according to plans to be approved by the chief of engineers or the war department. The bond was filed, the injunction dissolved, and further proceedings in the suit stayed.

United States may bring injunction bill to defend its rights in state limits—Cited, U. S. v. Beef Slough Manuf'g Co. [Case No. 14,559; U. S. v. Mississippi & R. R. Boom Co., 3 Fed. 552; Wilkinson v. Tilden, 9 Fed. 684; Louisiana State Lottery Co. v. Fitzpatrick [Case No. 8,541].

Case No. 15,002.

UNITED STATES v. DUNCAN et al.

[4 McLean, 99.] [1]

Circuit Court, D. Illinois. June Term, 1846.

DOWER—PROVISION IN WILL IN LIEU OF DOWER—ELECTION—RENUNCIATION—WHEN TO BE MADE.

1. Dower is a clear legal right, and can not be divested except upon full knowledge of the widow's rights.

2. If she accept what by the will is given in lieu of dower, not knowing the extent of the estate, she may renounce under the will, and claim, after the lapse of years. And in some cases, where it shall be necessary, she may bring a suit to ascertain the true condition of the estate, to enable her to make a proper election.

[Cited in Cribben v. Cribben, 136 Ill. 609, 27 N. E. 71; Valentine v. Mutual Ben. Life Ins. Co., 79 Wis. 585, 48 N. W. 856.]

3. The statute of Illinois, declaring "that any provision in the will bars dower," must have a reasonable construction.

4. To bar dower, the amount must be such as to afford a reasonable presumption that it was given in lieu of dower.

5. Unless the will shall be express on the subject, a small amount of personal property, the estate being large, not sufficient.

[Distinguished in Warren v. Warren, 148 Ill. 647, 36 N. E. 611.]

In equity.

Mr. Butterfield, for United States.

Mr. Harden, for defendant.

BY THE COURT. This bill was filed by the United States to subject the lands of Gen. Duncan, deceased, to the payment of liabilities incurred by him as a security for Linn, who was a receiver of public moneys at Vandalia, and who was a defaulter to a large amount, for which a judgment was obtained against Duncan. And this bill was brought to investigate the title to the lands of Duncan's estate, ascertain the extent of his interests, and remove all embarrassments. The question now raised and discussed, and which we are to decide, is, whether the widow of Gen. Duncan is entitled to dower. That the statute gives her dower in all the real estate of her deceased husband, as well that which he held by contract as that which he held by deed in fee simple, is not disputed; but it is alleged that she is barred under the will. By the will, Mrs. Duncan received a considerable amount of personal property, and, it seems, she has not renounced this right to claim her dower under the statute. On the part of the government, it is contended that where at common law a devise is made in lieu of dower, in a reasonable time, the widow must make her election to claim dower, or she will be barred. 8 Paige, 328; 4 Kent, Comm. 57. He says, "It is likewise settled, that a collateral satisfaction, consisting of money or other chattel interests, given by will and accepted by the wife after her husband's death, will constitute an equitable bar of dower." She may make her election to claim dower, some years after her husband's death, and where she has received that which was intended to be in lieu of dower, if she acted in any degree in ignorance of her rights. But where she has acted with a full knowledge of her rights, in the acceptance of the testamentary provision instead of her dower, she will be bound by her acceptance.

But the question is, whether the bequest referred to, was given, or intended to be given, in lieu of dower. Certain real estate had been conveyed to Mrs. Duncan, to secure her against contingencies, which was greatly below the estate she brought to her husband. This can in no sense be considered operating against her claim of dower. It was only returning to his wife a part of the estate which she had in her own right, and which he came into the possession of by marriage.

It is argued that it was the intent of the testator to give personal property in lieu of dower. But there is no expression in the will which authorizes such an inference, unless it be the simple fact, of bequeathing the personal property. In deciding this question, regard must be had to the condition of the parties. Gen. Duncan was a man of large property, and at the time of his death, in all probability, expected to be relieved, in some form, from a part of his suretyship. He seems only to have been embarrassed on this account. It is true, the Revised Statutes of Illinois of 1833, p. 624, "declare that any provision by will bars dower, unless it be otherwise expressed in the will, and unless the widow in six months renounces the provision." Now this provision must have a reasonable construction. Will it be contended that any bequest in the will to the wife, however small, will bar dower? Such could not have been the intention of the legislature. And if this construction be not sustainable, is there any other rule than that the bequest should be such as would be a reasonable compensation for dower in the real estate? Can the wife be divested of her dower, which is a legal right, on any other principle? Is she barred of her dower, if she accept a gift of five or twenty dollars, or some piece of furniture under the will from her dying husband, as an evidence of his affection? Certainly she is not. Where any property was bequeathed to the wife, which from the amount, might be presumed under the statute to be in lieu of dower, and there was nothing in the will to contradict this presumption, she would be bound by it, ordinarily, unless her election of dower were made in six months. This appears to be a reasonable construction of the statute, which will effectuate the intention of the legislature. In treating upon this subject, Mr. Justice Story, in his treatise on Equity (section 1088), says: "If a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of her dower, it would create a case of election. But such an intention must be clear and free

[1] [Reported by Hon. John McLean, Circuit Justice.]

from ambiguity. And it would not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own, subject to dower. There is no repugnancy in such a bequest." "Besides," he says, "the right to dower being in itself a clear, legal right, an intent to exclude that right by a voluntary gift, ought to be demonstrated, either by express words, or by clear and manifest implication." This is the substance of the authorities on this subject. In Birmingham v. Kirwan, 2 Schoales & L. 452, in the clear language of Lord Reddesdale, the above doctrine is forcibly illustrated. 10 Pick. 510. In Clark v. Sewell, 3 Atk. 97, it is said, "What is given by a will, ought, from the character of the instrument, ordinarily be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument," "or, as it has been well expressed, whatever has been given by a will is prima facie, to be intended as a bounty or benevolence." But there seems to have been a renunciation under the will after the lapse of eighteen months, which, it is contended, is too late, as the statute requires it to be done in six months. Here, too, the statute must receive a reasonable construction. Suppose the widow remains in utter ignorance of the estate of her husband, and has no means within the time limited, to ascertain the facts which would enable her to make an election. It has often been held, that years, under certain circumstances, may be allowed for this election. That the widow may file her bill to obtain a knowledge of the estate. That where she has been in possession of the bequest for years, under an ignorance of the estate, she may renounce under the will and claim dower.

From the nature of the case, it must be perceived that there are cases in which the election could not be made in six months, and it would not be extending the principles of equity beyond their legitimate limits, in such cases of hardship, to relieve the widow. The estate of Gen. Duncan was large, and by the suretyship named, much embarrassed. It was impossible to understand the extent of the property and the nature of his liabilities, it would seem, in six months, so as to determine this matter. Upon the whole, when we consider the small amount of the personal property bequeathed, one-third of which belonged to the widow, the presumption can not arise, that the bequest was given in lieu of dower. And no fair construction of the statute would bring such a case within it. We think Mrs. Duncan is indowable of the lands of her husband, and commissioners will be appointed to set it off, unless an arrangement on the subject shall be made.

[The value of the widow's dower was agreed upon and amicably settled. See Case No. 15,003 for a settlement of the priorities of the various creditors, including the United States.]

Case No. 15,003.

UNITED STATES v. DUNCAN.

[4 McLean, 607.] [1]

Circuit Court, D. Illinois. Dec. Term, 1850.

JUDGMENT—LIEN ON REAL ESTATE—PARTNERSHIP—APPROPRIATION OF ASSETS TO PAY INDIVIDUAL DEBTS—UNITED STATES—PRIORITY OF CLAIM—JUDICIAL SALE.

1. The judgments at law and charges in chancery of the circuit court of the United States for the district of Illinois, institute a lien throughout the state, on the real estate of the party against whom they are rendered. This doctrine treated as the law of this court until the supreme court shall establish a different rule.

2. A person who, at a judicial sale, purchases a tract of land as the property of the party against whom the judgment is obtained, and pays the purchase money to the plaintiff, can not as a general thing, call on him for re-payment.

3. A sale of real estate of D had taken place under a decree of this court. O became the purchaser of a piece of land and paid the purchase money to the plaintiffs, but discovering that D had no title to the land, made application to the court to have the purchase money reimbursed out of moneys of the plaintiffs in court. *Held*, that in the absence of fraud and unfair dealing, this could not be done, but that being a judicial rule, O must take the consequences of a defect or failure of title; and that the remedy was in equity against D or his legal representatives.

[Cited in Brunner v. Brenan, 49 Ind. 100.]

4. If one partner withdraws funds from the partnership and pays the taxes on his private estate, the creditors of the partnership do not, in general, thereby acquire a lien on the land. The estate of the partner is still his own private property, and in case of his death, passes to his heirs or devisees, subject to that debt as to others; and if his executors make a similar appropriation of the partnership funds, the rule is the same.

5. Where it was alleged that A & B were partners, and after A's death his executors appropriate partnership property to the payment of taxes on his estate, and in expenses of administration, he being at the time of his death insolvent and indebted to the United States, in judgments and otherwise, which judgments were a lien on the real estate of A, the lien of the United States and their priority of payment were not thereby affected, but they could enforce their judgments notwithstanding the acts of the executors.

6. Where the partnership property is not sufficient to pay the debts of the firm, the priority of the United States does not reach the undivided interest of one of the partners in the partnership effects, if he is indebted to the United States, but when it has become his separate, individual property, the rule would be different. The true test is, whether the property belong to the partnership or the individual.

7. The creditors of a partnership applied to the state court by bill, to declare the partnership and decree the payment of the partnership debts out of assets in the hands of the administrator of one of the partners who had died insolvent, indebted to the United States. The administrator denied the partnership and took an objection based on the debts of the United States and their priority. The state court decreed in accordance with the prayer of the bill. The United States

[1] [Reported by Hon. John McLean, Circuit Justice.]

were not parties and did not appear in the state court. *Held*, that the proceedings in the state court did not impair the rights of the United States, and that they were not bound by them, but that notwithstanding the decree in the state court, the priority of the government attached and that whenever the proceeds of any real estate, or any personal estate came into the hands of the administrator, he became a trustee for the United States, and they must first be paid.

8. The acts of congress giving the United States a priority of payment supersede all state laws upon the subject of the distribution of those estates that come within their provisions. The law makes no exception in favor of a particular class of creditors, and the priority of the United States does not yield to the claims of any creditors, however high may be the dignity of their debts.

[Cited in U. S. v. Drennan, Case No. 14,992.]

9. In June, 1841, the United States reversed judgments in this court against D, subsequently in 1841 and 1842 other creditors obtained judgments in a state court against him. These last judgments were liens only on the real estate of D, situate in the county where the judgments were rendered. In 1846 the United States obtained a decree in this court directing all of D's real property in the state, to be sold to pay an indebtedness to the United States independent of the judgments of 1841. D died in 1844, his whole property not being sufficient to pay the debts due the government. Under the decree of 1846, various sales took place of real estate out of the county in which the other creditors had their judgments, and there was a fund in court arising from these sales sufficient to pay the judgments of the other creditors. The United States having made out executions on the judgments of 1841 and levied them on lands situate in the county where the other creditors held their judgments, these creditors made application to this court to compel the United States to go on lands out of that county to satisfy their judgments, or for the proceeds of the lands sold, out of that county. *Held*, that however it might be in the case of private individuals, the United States having an older lien, made perfect by a levy, were entitled to return it and sell the property to satisfy the judgments of 1841, and that the other creditors had no claim upon the proceeds in court.

[Cited in brief in U. S. v. Lewis, Case No. 15,595.]

10. It is a rule well recognized and understood, that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has the double fund to resort in the first instance, for payment, to that fund upon which the other party has no lien. But this is never done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund.

11. But this rule does not affect, under the circumstances of this case the priority of the United States, neither is that priority affected by the suit settled in New York, that lands consisting of different parcels, subject to a general incumbrance, are, in equity, to be charged in the inverse order of the alienation of the several funds.

12. The case of Schryver v. Teller, 9 Paige, 173, examined and distinguished from this.

13. It has been uniformly held in all the cases that the priority of the United States does not disturb any specific lien, nor the forfeited lien of a judgment, that is, it does not supersede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on real estate. But in the case of a general lien it is not so clear.

14. The laws of the United States giving a priority to the government, are of general application in the cases therein stated, and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception to show it.

In equity.

Mr. Williams, U. S. Dist. Atty.

Smith & Brown, for petitioners.

DRUMMOND, District Judge. In the year 1835, Joseph Duncan, whose representatives are the defendants in this case, became one of the sureties of William Linn, receiver of public monies at Vandalia, in this state. The principal having failed to comply with the duties imposed on him by law, the sureties became liable in the bond given to the United States. At the June term, 1841, of this court, the United States recovered three several judgments at law against the sureties. Duncan, among others, for the aggregate sum of $29,191 05. At the time these judgments were obtained, none of the sureties, except Duncan, had any available property, and Linn, the principal, was insolvent. On the 22d of December, 1843, the United States realized on these judgments the sum of $23,532 65. In January, 1844, Joseph Duncan died, disposing by will, of his real and personal estate, but making no provision other than the usual one for the payment of his debts, for the amount due the United States. At the time of his death, he was seized of a great many tracts of land lying in different counties of this state, and in Morgan county, his place of residence. The judgments of 1841, in this court, not covering the defalcation of Linn, the plaintiffs instituted suit at law, to the December term of this court, 1844, against William Thomas, as administrator, etc., of Joseph Duncan, the executors having resigned or ceased to act; and at that term recovered judgment against the administrator, de bonis testatoris, for the sum of $48,151 61. In February, 1846, the United States filed a bill in this court, setting forth most of the facts detailed above, and asking for a discovery of the title papers and estate of Duncan; insisting upon the priority of the plaintiffs; and praying for an account of the money due the United States; of the personal estate of Duncan; and of the value, rents and profits of the real estate; and that if the personal estate was not sufficient, the real estate might be sold to pay the debt due the plaintiffs. To this bill, the widow, heirs, executors, devisees, etc., of Duncan were made parties. During the progress of the cause, the value of the widow's dower was agreed upon and amicably settled, and she relinquished. [See Case No. 15,002.] Answers were put in by the defendants, and at the June term, 1846, a decree was rendered in favor of the United States for the sum of $49,156 15 (that being all that was due except what had not been collected under the judgments of 1841), and ordering the real estate of Duncan to be sold, and the proceeds to be paid to the United States, "first paying prior liens, if any." Un-

der this decree, various sales of real estate out of Morgan county have taken place, under the direction of a commissioner, for which very considerable sums have been realized, part of which have been paid over to the United States, but there remains the sum of $4,052 subject to the order of the court. [See Case No. 15,005.] Personal property to the amount of $300 was sold under the judgment of 1844.

There were two judgments recovered against Duncan in his life time, in the circuit court of Morgan county, of this state, one by McConnell and others for $333 76, in November, 1841, and the other by Matthews for $497 35 in March, 1842. On the 10th of November, 1845, Doremas, Suydam & Nixon filed a bill in the same court against William Thomas, administrator, etc. of Duncan's estate, alleging that certain personal property which the executors of Duncan had sold, and the proceeds of which, amounting to $960 60, it seems they had applied to the payment of taxes on real estate and expenses of administration, belonged to a firm of which one James M. Duncan and Joseph Duncan, in his life time, were partners, and that the plaintiffs were creditors of that firm, and claiming that they (Doremas, Suydam & Nixon) should be re-paid the money so used by the executors, and that they should be substituted in their place; insisting it was a former claim. James M. Duncan, also one of the sureties of Linn, was a party to this bill, but he was insolvent. The administrator in his answer denied the partnership, and referred to the claim of the United States and their priority, and to the proceedings in this court, which he set forth at length; but the circuit court of Morgan county, by a decree rendered on the 17th November, 1847, found that the partnership did exist, as stated in the bill; that at the death of Duncan, the goods and chattels referred to, and the proceeds of which had gone into the hands of the executors, were liable for the partnership debts, wherever traced, and ordered that the plaintiffs should be paid out of the estate of Duncan. To Doremas & Nixon, $766 48; to Wm. A. Ranson & Co., $194 12. The latter had been made parties and Suydam had died pending the suit. The court further adjudged that inasmuch as it did not appear the administrator had any assets in his hands, he should pay the above sums out of assets thereafter to come into his hands, or which might remain in his hands after the settlement of his accounts as administrator. It is proper to add, that an objection was made in the answer of Thomas, because the United States were not made parties, but the court decided that it was not necessary to make them parties.

It was conceded that the judgments of 1841, rendered in this court, were a lien on all the real estate of Duncan within the state; that the decree of June term, 1846, operated to the same extent, upon the real estate in the hands of the heirs, devisees, executors, etc., of Duncan;[2] and that the judgments of the Morgan circuit court operated only upon real estate within the county of Morgan. The judgments and decrees rendered in the circuit court of Morgan county, are yet in force, not being paid or satisfied, except some partial payments hereafter mentioned. The judgments at law of this court recovered in 1841, being only paid in part, the United States in 1847 issued alias executions on those judgments, and the marshal levied them on lands lying in Morgan county of which Duncan had been seized, and they were sold by the plaintiffs.

Joseph Duncan, at the time of his death, did not possess sufficient property, including real and personal, to discharge the debt he owed the United States, the lands out of Morgan county not being of value enough to satisfy the decree of June term, 1846. And it does not appear that there was more than sufficient property in Morgan county, to meet the balance due on the judgments of 1841 of this court. In this condition stood the case, when, on the 15th of June, 1847, McConnell et al. and Matthews filed their petition in this court. The petition of McConnell et al. alleges that under the decree of 1846, sales of lands without the county of Morgan had taken place, upon which had been made $3,555 20, which, it insists ought to be, as to the lien of their judgment, a credit on the judgments at law of the United States of June, 1841—that there are lands out of the county of Morgan more than sufficient to satisfy those judgments, and that the United States are proceeding to sell real estate in Morgan county. The petition calls for the interposition of the court to arrest the sale; to marshal the securities so as to give them the benefit of their lien, by throwing the judgments of the United States of 1841, upon lands out of Morgan county and that the sum made $3,555 20 be applied upon those judgments. The petition of Matthews is, in all respects, similar to that of McConnell et al. A fi. fa. had issued on the judgment of McConnell, and $60 00 had been obtained on it. A fi. fa. had also issued on the judgment of Matthews, and real estate had been levied on, and $393 00 made by the sale of it. The executions in each case were issued within a

[2] The opinion of the profession in Illinois is so general in favor of the doctrine that the liens of judgments of the United States court is co-extensive with its jurisdiction, as stated in the text it was not controverted in the argument. See the question discussed in a report which was confirmed by the circuit court of the United States, for the Eastern district of Pennsylvania, contained in the case of Bayard v. Lombard, 9 How. [50 U. S.] 530. The supreme court of the United States held that the decision of the circuit court was final and conclusive under the circumstances, and could not be reversed; consequently no opinion was given as to the lien of judgments obtained in the circuit court of the United States. Lombard v. Bayard [Case No. 8,469.]

year after the judgments were obtained respectively. On the 23d of December, 1847, Doremas & Nixon, and A. Ranson & Co., likewise filed a petition setting forth most of the facts heretofore mentioned, and alleging that this court had taken full administration of the estate of Duncan—that their decree of the Morgan court of November, 1847, had been rendered useless—that there was no priority of payment to the United States, till the estate was ready to be disbursed—that taxes and costs of administration were to be first paid—that under the circumstances they stand as the state and individuals, and were clothed with their rights—that there was more real estate to be sold, and their partnership fund had increased the amount to be disbursed in this cause—and asking that their decree be paid out of money received from the sale of real and personal estate, or, if that be not proper, that the commissioner of this court be ordered to sell land enough to satisfy the sum named in their decree, and pay it over to them.

Various supplemental petitions were filed by all the parties, from time to time, bringing before the court the proceedings that have since taken place in this cause, and particularly stating that other lands, out of Morgan county had been sold, under the decree of June, 1846, and the money received, and that the sum of $3,789 56 was made by sale of land in Morgan county under the judgment of 1841. The petition of O'Donoghue, which was filed on the 10th of January, 1849, states that he had purchased a lot of land at a sale made by the commissioner in this cause, which lot was sold as a part of the estate of Duncan; that he paid the commissioner for it, and that Duncan had no title to it, having before his death by deed duly recorded, conveyed it to the Illinois College, and he seeks to have the sale by the commissioner annulled, and to have the money paid by him reimbursed out of the fund in court. When these petitions were presented, this court, without determining the questions sought to be raised by them, ordered that a sufficient fund should be reserved to satisfy their claims, which was to be paid to the petitioners, provided the court should be of opinion upon the final disposition of the cause, that the parties were entitled to receive the amounts they sought. And there is now a fund of more than four thousand dollars awaiting the decision of the questions presented by these petitioners.

These are the material facts: The applications were once heard before the former judge of this court, but no decision was given or order entered. They have therefore been fully argued before me, and it now becomes my duty to announce my opinions upon the different questions presented. The counsel of the United States, not denying the allegations contained in the petitions, insists that the petitioners are not entitled to the relief they seek, nor to any relief. As the petition of O'Donoghue stands upon a footing entirely different from the others, it may be convenient to consider that first. The sale under which he purchased the lot was made by the order of this court, and it is well settled that in all judicial sales there is no warranty; but that the rule of caveat emptor applies. Owings v. Thompson, 3 Scam. 502. If there be fraud or concealment or any unfair dealing, that may be a ground for an application to a court of equity; otherwise the purchaser must look to the soundness of his title. This is the established rule in England and throughout the United States, and it should be peculiarly applicable here, where it is so easy to trace the title to real estate, the sources, in nearly all cases, being the public records of the country. It is true where a plaintiff in an execution purchases a tract of land, belonging apparently, or which he supposes to belong to the defendant, and there is, in fact, no title, a court will interpose and place the parties in their former condition. But that is because it is a matter between themselves; the purchase having neither benefited nor injured any third person: and it has been decided, that where there was no fraud and a stranger to the execution purchased a piece of land as the property of the defendant, where he had no title, a court of equity would compel the judgment debtor to refund the amount to the purchaser, on the ground that his purchase had paid the debt. But no case has been shown in which, under such circumstances, the purchaser could call upon the plaintiff in the execution to refund the amount. Indeed the case just mentioned is conclusive that he could not, for it is because the sale must so far stand as to enable the plaintiff to retain the money paid, that the defendant is liable. It could make no difference, that the money, instead of being in the hands of the party, was held by the officer or paid into court. In either case, it would seem, the right of the party to the fruits of his judgment could not be contested.

But conceding that this last position may be questionable, still after the money has actually been paid to the party, it is beyond the reach of the purchaser. Here the money paid by the petitioner has been received by the plaintiff, and he seeks to make another fund, now in court, arising from the sale of other property belonging to the estate of Duncan, liable to the claim.

On the part of the petitioner the court was referred to Lansing v. Quackenbush, 5 Cow. 38, a case where the defendant had represented he was the owner of lots, which the party purchased, and it turned out he was not. On application to the court, they said there was a remedy but that it was in equity. Here was a false statement, and if the plaintiff were not a party to it, the remedy would be against the defendant. Adams v. Smith, Id. 280, was also referred to. In this case the sheriff had sold personal property which

did not belong to the defendant, and the real owner sued the sheriff and plaintiff jointly and recovered. The court allowed the amount made on the sale and indorsed on the execution, to be stricken out and an execution to issue for the amount of the original judgment. In this case it was personal property, and the owner resorted to the remedy which the law gave him, the property remaining with the purchaser. Both cases are very shortly reported and clearly distinguishable from the present. But the supreme court of Illinois have held, under somewhat similar circumstances, there was no remedy against the plaintiff in the execution. A party purchased some property under an execution. A stranger sued for and recovered the property from the purchaser. The latter then brought suit against the plaintiff in the execution to recover back the purchase money. The court decided that the plaintiff was not liable. England v. Clark, 4 Scam. 486. These were all cases of personal property, but in a sale of real estate under execution, no action is brought, because if the property of A is sold on an execution against B the title to the property is unchanged, and A ordinarily suffers no wrong. In a very recent case, however,—Dunn v. Frazier, 8 Blackf. 432,—this question was directly decided. That was a much stronger case than this. A judgment had been obtained and an execution was issued and returned nulla bona, and afterward the judgment creditor filed a petition alleging that the judgment debtor was the owner of certain real estate in fee simple. On the application of the petitioner the court ordered the real estate to be sold on execution. It was sold accordingly, and Frazier became the purchaser. One of the administrators of the judgment debtor was present at the sale, and solicited Frazier to buy, assuring him that the title was good. Various proceedings took place, during which Dunn, the judgment creditor, transferred the judgment to one Adams, and Frazier refused to pay the purchase money. Another execution was issued which was enjoined. Finally Frazier paid part of the money to Adams and the remainder into court, (to the clerk). The judgment debtor had no title to the property. These facts being made to appear to the court below, by bill in chancery, it ordered the money to be paid back to Frazier, but the supreme court of Indiana reversed the decree, on the distinct ground that a purchaser who buys land and pays the money, the judgment creditor receiving it, can not recover it back from the creditor, either at law or in equity, merely because the judgment debtor had no title to the land. The proper course in such a case was to proceed against the judgment debtor or his estate by bill in equity. And even in relation to the money in court, it depended altogether upon the fact whether there was anything due on the judgment, or it was an overplus, in which last count it might be paid over to the purchaser. And see Warner v. Helm, 1 Gilman, 220. It will be seen, therefore, from these principles and authorities, the petitioner, while he has no claim upon the fund now in court, has a remedy against the estate of Duncan. That it may be unavailing is his misfortune. If the petitioner obtain the money he has paid, it must be by the voluntary act of the plaintiff, and not by the order of this court.

Let us now proceed to consider the petition of Doremas & Nixon, and A. Ranson & Co. They insist that, inasmuch as there was a partnership between James M. and Joseph Duncan, and the executors of Joseph Duncan had used the partnership goods to pay the taxes on his real estate, and the expenses of administration, they, as creditors of the partnership, have a right to be repaid out of the fund in court. There can be no doubt that the partnership effects are primarily liable for the partnership debts, and that those effects ought not to be appropriated to the payment of the separate liabilities of one of the partners. And if the executors knowingly diverted them in the manner charged in the bill filed in the circuit court of the state, they acted illegally. But conceding this, it does not follow that the partnership creditors thereby obtained a lien upon the separate property of Duncan. No authority has been referred to which shows that if one partner withdraws funds from the partnership, and pays the taxes on his private estate, the creditors of the firm thereby acquire a lien on the land, unless, indeed, the decree on which the application now under consideration is founded may be so regarded. All that can be said is, that the estate of the partner becomes liable to the creditor of the firm. The estate of the partner is still his own private property, and, in case of his death, passes to his heirs or devisees, subject, if he has used the partnership funds for the purpose mentioned, to that debt as to others. Story, Partn. §§ 97, 326, 358–361. Neither would the use of the partnership funds by the executors, in the expenses of administration, create any lien upon the estate. It would still be a debt due from the estate. And, if the creditor of the firm were placed in the condition of those individuals to whom those expenses had been paid, it is doubtful whether that circumstance, for reasons presently to be given, would affect the question.

It has been decided that the priority of the United States does not reach the property of a partner in partnership effects, so as to pay the separate debt of one of the partners (he being the debtor of the United States) when the partnership property is not sufficient to pay the debts of the firm. U. S. v. Hack, 8 Pet. [33 U. S.] 271. But that proceeds upon the presumption that they are partnership effects. It is plain, if they had ceased to be such, and had become the separate property of the one indebted to the United States, the doctrine would be differ-

ent. The true test would seem to be whether the property belonged to the firm or the individual. Now it is to be remarked that these petitioners did not ask the court of Morgan county to do more than to declare the partnership, and to decree the payment of the partnership debt out of assets which were at that time, or thereafter to be, in the hands of the administrator. They claimed, at most, not a lien on the estate, but a priority of payment out of the estate. And the court, though it expresses the opinion that the funds of the partnership effects were liable to the debts of the petitioners where ever they could be traced, decides they were to be paid out of the estate of the testator. Accordingly, in whatever light we may regard this decree of the circuit court of Morgan county, it is clear it intended that payment of the debts was to be made out of Duncan's estate, when there should be sufficient assets for that purpose in the hands of the administrator. The court does not even decree that the petitioners shall be first paid, but there is an alternative that they may be paid, when the administrator, upon the settlement of his accounts as such, shall have money then remaining in his hands. The decree did not create any lien, specific or general, upon any fund, nor upon the real estate of the testator, as it probably could not; and it does not vary essentially from the usual judgment against an administrator for the debt of a deceased party. Though an objection was taken to the proceedings in Morgan county, because the United States were not made parties, it is said that the decree is binding on them in this court in this application, on the part of the petitioners. Let us now examine this position, and endeavor to ascertain whether this is so.

At the time of Joseph Duncan's death, his indebtedness to the United States, except the balance due on the judgments at law of this court, of 1841, did not constitute a lien upon his real or personal estate. The plaintiffs had only a right to a priority of payment. And it may be admitted, for the purpose of this argument, that their priority did not extend, in point of law, so as to operate upon the real estate of which Duncan died seized, in the hands of heirs or devisees. But at the time the petitioners filed their bill in the circuit court of Morgan county, there was a judgment of this court against William Thomas, as the administrator with the will annexed, etc., of Duncan, and at the time the final decree was rendered in the circuit court of Morgan county, there was and had been for more than a year, a decree standing in this court, which took effect upon all the real estate of Duncan within the state, and directed it all to be sold for the payment of the debts of the United States, first paying prior liens. When this decree was rendered in June, 1846, the claims of the petitioners were certainly not a prior lien binding the estate. If, then, we give effect to the decree in the state court, we are not the less bound to give full effect to the judgments and decree in this court; and we will now proceed to show that it must be considered subject to those of this court; that under the law and by virtue of the proceedings here, the decree of the circuit court of Morgan county could not become operative until the claims in this court were satisfied. The petitioners have not sought to enforce their decree in the state court; indeed, so long as there is nothing in the hands of the administrator, it would not, by its terms, be enforced. They come into this court and request its action on their claims.

By the 5th section of the act of 3d March, 1797, it is provided, that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied. 1 Stat. 515. This applies to two classes of debtors. Those who are insolvent, and those, whose estates, in the hands of executors or administrators, are not sufficient to discharge all the debts due from the estate. It was intended to reach the property of the debtor, whether living or dead. It has been decided that this section is applicable to all debtors of the United States. Joseph Duncan's estate was the estate of a deceased debtor of the United States, and when it comes within the other requisition of the act, that is, whenever it came into the hands of executors or administrators, then the operation of the law was complete. The doctrine of the supreme court of the United States, as founded on this law and a similar one (Act March 2, 1799, § 65 [1 Stat. 676]), as it respects this point is, that the party, whether assignee, executor or administrator, into whose hands the estate of the two classes of debtors mentioned, passes, becomes a trustee for the United States, and from the fund in his hands, they must first be paid. Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 102; Brent v. Bank of Washington, 10 Pet. [35 U. S.] 596. If it be admitted that the priority of the United States did not extend to the real estate of Duncan, in the hands of heirs or devisees, as already stated, because it does not attach as against them, still when the real estate or the proceeds thereof passed to, or vested by law in, the hands of the executors or administrators, the priority did attach. U. S. v. Crookshank, 1 Edw. Ch. 233. Consequently, whenever the proceeds of any real estate, or any personal estate came into the hands of Thomas, as the administrator, he, having notice of the debt due the government, became a trustee for the United States, and was obliged to pay them first, independent of the judgment of December term, 1844, and the decree of June term, 1846, of this court. These merely determined the amount of the

debt, but in no degree changed his duty in the premises.

It is to be observed that this law of congress supersedes all state laws upon the subject of the distribution of those estates that come within its provisions. The language of the supreme court of the United States, in Thilluson v. Smith, 2 Wheat. [15 U. S.] 396, is, that there is no exception made by the law in favor of a particular class of creditors. And the same court, in Connel v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 444, say, that the priority of the United States does not yield to any class of creditors, however high may be the dignity of their debts. It follows, then, if these principles are correct, that the claims of the petitioners cannot bind any funds in the hands of the administrator, nor any lands sold under the judgments or the decree in chancery of this court, nor the proceeds of the same, notwithstanding the decree of the circuit court of Morgan county; for whatever may be the effect of this last decree, it can not operate, under the circumstances, so as to impair the rights of the United States. Field v. U. S., 9 Pet. [34 U. S.] 182.

The remaining question is as to the effect of the judgments at law of the circuit court of Morgan county. As the rights of the petitioners, whose claims we are now to consider, depend upon the same principle, we will examine them together. This, then, was the position of the parties. The United States had judgments binding all the lands of Duncan throughout the state, prior, in point of time, to the judgment of McConnell and others, and that of Matthews, which last two judgments were binding only on lands in Morgan county; and the United States had a decree subsequent and subordinate to both, but which, in extent, had the advantage of operating, like the judgments of June, 1841, throughout the state. The petitioners insist they have a right to throw the judgments of 1841 upon lands without the county of Morgan. They assert that at the time their judgments became liens upon the real estate in Morgan county, the United States, having also judgments which were liens upon that land, and which were, besides, liens upon lands out of Morgan county, are compelled to go upon these last mentioned lands upon the principle, well recognized and understood, that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has the double fund, to resort, in the first instance, for payment to that fund, upon which the other party has no lien. And it is contended that the circumstance of the United States procuring a decree binding the lands out of Morgan county, before the application is made here, can make no difference. Another principle is also involved, which may be considered settled law in New York at least, that where there is a general incumbrance upon distinct parcels of land, and the owner aliens them at different times to different persons, the parcel last sold is to be first charged to its full value to pay the general incumbrance, and so on backwards. The argument is this: If Duncan had mortgaged all his lands in the state to the United States, for the payment of thirty thousand dollars, and then had mortgaged his lands in Morgan county to these petitioners for the amount of their judgments, and afterward all his lands out of Morgan county to the United States for forty-nine thousand dollars, these lands out of Morgan county, being the last aliened, are, according to the doctrine above mentioned, to be first charged with the payment of the sum first named. And it can make no difference, it is said, if, instead of mortgaging the lands out of Morgan county, he had mortgaged all of his lands in the state over again; because, it will be seen, in order to adapt it to this case, we must include all the land, the decree of 1846 of this court binding the lands in Morgan county as well as elsewhere. It is urged that these being judgments, the principle is the same. This is stating the proposition fully, and carrying the analogy to as great an extent in favor of the petitioners as was contended for by their counsel in the argument.

The doctrine that where a man owns different parcels of land, and transfers some of them, himself also retaining some, all the parcels being subject, before the transfer, to a general incumbrance made by him, the part which he still retains shall be applied to the payment or discharge of that general incumbrance, rather than that which he has transferred, is founded on the plainest principles of equity. It would be manifestly unjust that those persons to whom he had made transfers should be compelled to pay off the incumbrance, when he held land which would satisfy it. Accordingly, it has been held, under such circumstances, that the property transferred is only liable, in the event of the part remaining in the owner not being sufficient to discharge the incumbrance. On the other hand, the doctrine already mentioned as settled in New York, that land consisting of different parcels, subject to a general incumbrance, is in equity to be charged in the inverse order of the alienation of the several parcels, has been sometimes questioned, and Judge Story thinks it is not maintainable upon principle, and inclines to the opinion that there should be contribution, in such cases, according to the relative value of the estates. Story, Eq. Jur. §§ 634a, 1233a. The New York doctrine was pressed very far in the case of Schryver v. Teller, 9 Paige, 173, and as that was cited in the argument by the counsel of the petitioners, and considered conclusively settling the principles which should govern this case, it may not be improper to give it a particular examination. In that case, the owner of two parcels of land—one at Coxsackie, the other at Redhook—having encumbered both by judgments, and each by mortgages, on the 28th of May, 1840, mortgaged the Coxsackie property, and on the 7th of July

following mortgaged it again to another person. On the 9th of June, of the same year, he mortgaged the Redhook property, and again on the 12th of the same month, this last being given to the same persons that held the mortgage of the 7th of July on the Coxsackie property. On the 3d of June, 1840, a judgment was docketed, which was a lien on both. The parties who held the mortgage of the 7th of July on the Coxsackie property, and those who held the mortgage of the 9th of June on the Redhook property, at different times and in different courts, filed bills for foreclosure, and at different dates obtained the usual decrees for sale of the property, the master having reported as to the priority of the several liens. On the 2d of March, 1841, the Redhook property was sold for an amount sufficient to satisfy all the liens on it prior in point of time to the mortgage of the 28th of May, 1840, on the Coxsackie property. On the 23d of March, 1841, this last property was sold for an amount not sufficient to pay the costs of foreclosure and the mortgage of 28th of May, if the previous judgments, as well as the prior specific liens on that property were paid out of such sale. Under these circumstances the holder of the mortgage of the 28th of May, made application to the court for a modification of the original decree, so as to throw the judgments on the surplus proceeds of the Redhook property, after satisfying all liens thereon prior to his mortgage. The court allowed the application on the ground that as the Redhook property was more than sufficient to pay all liens on it prior to the date of the applicant's mortgage, in case the judgment creditors, who held liens at that time, sought to enforce them on the Redhook property, if the applicant paid them, he would have a right in equity to insist on an assignment of them, so that he might have a repayment out of the surplus funds, in preference to those who had liens on that property accruing after the date of his mortgage. For instance, the judgment creditors had liens on both properties, when his mortgage was taken on one. (Coxsackie.) If, in enforcing these liens it would prejudice his mortgage, he would have a right in equity to compel them to go upon the Redhook property, because certainly, he could be in no better position by taking an assignment of the judgments than those who held them. Let us suppose the case put had actually happened—that the applicant had purchased the judgments; then he would be the holder of judgments binding on both properties and of a mortgage on one. The doctrine of the court is that in this condition, he could go upon the Redhook property to satisfy his judgments in preference to one who had a lien on that property accruing after his mortgage. The court illustrated it by saying; if there had been a mortgage on both properties, and it had been foreclosed, the decree would require the property to be sold separately, and the proceeds so to be marshalled as to pay general liens on the whole, out of that part of the fund arising from the sale of the Redhook property, thus far giving the applicant the benefit of his priority on the Coxsackie property over a subsequent incumbrancer of the Redhook property.

In the case just cited there was a general incumbrance binding both parcels, also specific incumbrances binding each, and a transfer made of one and then the other; and it seems to proceed upon the principle, that inasmuch, as at the time when the transfer was made of one of the parcels, the party would have the right to compel the general incumbrancer to go upon the parcel not affected by the transfer, no subsequent act of the owner in relation to that other parcel could change his rights. Whether it would make any difference if the general incumbrance and the transfer of the second parcel were held by the same person, does not appear; but it is certain, he would, in one sense, come within the qualification of limitation of the rule laid down by Judge Story. He says that though the rule—that is if a creditor has two funds he shall take his satisfaction out of that fund upon which another creditor has no lien—is so general, it is never applied, except where it can be done without justice to the person who has the double fund as well as the debtor. It is never done when it trenches upon the rights or operates to the prejudice of the party entitled to the double fund. Story, Eq. Jur. §§ 558–560, 633. The object is to satisfy both creditors. It is apparent, however, whenever the double fund is insufficient to pay all the claims against it, and the same person has the right to proceed against both, and against one alone, it does affect the right of the party entitled to the double fund. For example, in this case, the United States have a general lien upon different parcels of land; creditors—the petitioners—have also a general lien upon some of the parcels; and the United States have a lien which may well be considered specific upon all the parcels. Now it is plain if the creditors turn the general lien of the United States over to the lands not bound by the lien of the creditors, under the facts of this case, it diminishes by so much the fund which is to satisfy the decree of 1846. In other words, whatever is paid to the petitioners is an absolute loss to the plaintiff. Notwithstanding such would be the effect, in this case, upon the party entitled to the double fund, it may be questionable whether the circumstance of taking a subsequent lien, could or ought to place them in a better position; certainly not if the true reason be given for the rule in the case in Paige. To apply the argument of that case to this;—if these petitioners had paid off the balance due on the judgments of the plaintiffs of 1841, they would have the right in equity to insist upon an assignment thereof. The case of Schryver v. Teller, 9 Paige, 173, if he admit it was rightly ruled,

must be regarded as deciding that a general lien will be thrown upon a particular parcel of land so as to give a party having a mortgage the benefit of his priority over subsequent incumbrances either of the whole or a part; that is where the question is dependant upon priority of time alone. But it does not follow that this would be the rule where there is a priority of right—that is in a case where the parties as such, do not stand upon an equality of right.

Let us, therefore, examine how far the character of the parties in this case, affects the question. The plaintiffs constitute the sovereign power of the country, and, according to the jurisprudence of most states, under certain circumstances are entitled as a creditor to peculiar privileges. It was so under the Roman law; is so under the law of England, and under our own. We must bear in mind that the statutes giving the government a priority are presumed to have for their object the public good, and are, therefore, to be liberally construed. U. S. v. State Bank of North Carolina, 6 Pet. [31 U. S.] 29; Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 134. The application was presented in this case, after a levy had been issued by the United States, upon lands in Morgan county, under executions issued on the judgments of 1841. The lands were sold and the money appropriated upon those judgments, subsequent to the filing of the original petitions, as appears by the supplemental petitions. This court did not interfere with the proceedings under the executions, but suffered them to continue, and directed that there should be reserved a sufficient fund to meet the claim of the petitioners, from what might be made by the sale of lands in this case. The rights of the petitioners ought, perhaps, for that reason, to be considered the same as if the money arising from the sale of the Morgan lands, had been paid into court, subject to its order herein. And, apparently, it should be governed by the same principles, as if the petitioners, instead of pursuing the course they have, had applied to a court of equity to restrain the proceedings on the executions—waiving for the purpose of the supposed case all objections on account of sovereignty—and the United States had come and given, in answer, the decree of 1846, the indebtedness of Duncan's estate; in fine stating all the facts and claiming a priority of payments under the law.

It would seem upon principles as well as by the authority of adjudged cases—if we throw out of view the decree of 1846 and the question of sovereignty—there could be no doubt of the right of the judgment creditors to compel the plaintiffs to look to lands out of Morgan county, not bound by their lien, for the satisfaction of the balance due the United States upon the judgments of 1841, for in that case there would be property sufficient to pay both. It is true, technically speaking, the petitioners, if they paid the judgments of 1841, could not compel the plaintiffs to assign those judgments to them, because they could not directly reach the United States. Hill v. U. S., 9 How. [50 U. S.] 386. But if this difficulty were avoided, the question is whether the decree of 1846, which operated specifically upon lands not affected by the judgments of the petitioners, changes the principle. It must be conceded the question is not free from embarrassment in consequence of the difficulty of extracting from the various cases which have been decided, the true rule of interpretation of the acts of congress, laid down by the supreme court. The petitioners had taken out executions on their judgments within a year after they were rendered; on one some real estate—not in question here—had been sold, on the other a small payment had been made, as to the balances due on them respectively, the judgments became general liens. It has been uniformly held in all the cases that the priority of the United States does not disturb any specific lien, nor the perfected lien of a judgment, that is it does not supercede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on land. Thelluson v. Smith, 2 Wheat. [15 U. S.] 396; Cunard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386. But in the case of a general lien it is not so clear.

The case of Thelluson v. Smith, if it is not considered, as in some respects, overruled by the case of Cunard v. Atlantic Ins. Co., certainly establishes the doctrine that the priority of the United States does not yield to a judgment which is a general lien upon real estate. The facts were, that Thelluson and others received a judgment against Crammel, which it was admitted by the court, was a lien upon his lands on the 30th of May, 1805. Afterwards he made an assignment of all his estate, being insolvent, and in debt to the United States so as to bring him within the operation of the acts of congress. The United States subsequently brought suit against him, had judgment, sued out execution, levied on and sold an estate called Sedgely, admitted to be bound by the judgment of May 20th, 1805. The marshal having received the proceeds, Thelluson and others brought suit against him. They had not issued execution nor levied on the estate by virtue of their judgment. One of the questions made in the case was, whether the United States were entitled to be paid in preference to the judgment creditor? This the supreme court decided in the affirmative, concluding by saying, "a judgment gives the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of congress defeats this preference." This was under the act of 1799, but we have already seen that in this respect it is like the act of 1797. This

case was particularly examined and reviewed in Cunard v. Atlantic Ins. Co. It is there said that Thelluson v. Smith was a case where a judgment creditor sought to recover the proceeds of a sale of land made under an adverse execution, on the ground that he had a general lien by judgment on the land; and in such circumstances the action was not maintained. The real ground of the decision, the court says, was that the judgment creditors had never made his lien specific; that he had no title to the proceeds in his property; and if they were to be deemed general funds of the debtor, the priority of the United States attached; that a mere lien on land did not convey the legal title to the proceeds of a sale made under an adverse execution; the case did not establish the principle that a specific lien could be displaced by the priority of the United States, because that priority was not of itself equivalent to a lien. Judge Johnson, in his reported opinion, says, that he never acknowledged the authority of the case of Thelluson v. Smith on the point supposed to be decided by it, the precedence of the right of the United States as to a previous judgment in the case of a general assignment, and that he concurred in it only because of the want of privity between the parties. He thought the sale of the Sedgely estate under the execution was a nullity, because the assignment of Crummond divested all his interest, so as to place it beyond the reach of the execution issued on the judgment of the United States. Suppose, however, the assignees in whom the estate had vested, admitting it had vested, had sold it, notwithstanding the lien, then, according to my understanding of the case of Thelluson v. Smith, also as corrected and explained in Cunard v. Atlantic Ins. Co., the proceeds of the sale, in the hands of the assignees, would have been subject to the priority of the United States. As in this case, if the lands in Morgan county had been sold by the executors or administrator, under the authority of the will or the law, the proceeds would have been liable, not to the judgment creditors (the petitioners), but to the United States; it being understood in all such cases that the executor or administrator in whose hands were the proceeds, had notice of the debt due the government. In Cunard v. Atlantic Ins. Co. the court are careful to say the priority of the United States does not affect any specific lien; but in the case of Brant v. Bank of Washington, 10 Pet. [35 U. S.] 596, the court state that it has never been decided that the priority of the United States affects any lien, general or specific, existing when the event happened which gave them the priority.

Suppose, then, the case of Thelluson v. Smith may be considered as shaken, and, indeed, overruled, about which some doubt may be entertained, so far as it gives a preference to the United States over the general lien of a judgment creditor, it would follow that the judgments of these petitioners would not be affected by the mere force of the statute of 1797; and, possibly, we might go further, and say they would not be affected by any mere judgment or decree in favor of the United States, or the indebtedness of Duncan's estate, rendered after the date of the judgments of the petitioners. But this court is asked to go some further; to say that the United States shall forego their lien of 1841, superior to that of the petitioners, as to the lands in Morgan county, and sell a part of the lands bound by their decree of 1846, out of that county, so that the petitioners may be paid in preference to the plaintiffs. This, it seems to me, can not be done. The United States are entitled to all their legal rights; and, in the case supposed, of an application to a court of equity, to say to the judgment creditors: We will enforce our lien of older date than yours, made specific by a levy before you applied to the court; we will retain our lien under the decree of 1846 upon the lands out of Morgan county; we are not to be regarded as ordinary individual creditors of the estate; your rights must yield to ours. The same answer to the application of the petitioners must be given in this court. If they have a lien, so have the United States; and to decide that, under the circumstances of this case, the latter could not enforce their judgments of 1841, would be to say, in effect, they had no priority of payment at all, but they must stand upon an equal footing with the other creditors; to prevent which was the very object of that portion of the statutes of 1797 and 1799, already referred to.

We have been told their lien can not be displaced by that which is not a lien, the priority of the plaintiffs. It is not. There is not only a priority, but that priority has been perfected into specific liens. If it be said that, discarding the decree of 1846, the United States might be regarded as individuals and thrown on the lands out of Morgan county for the satisfaction of their judgments of 1841, and they ought, consequently, to be treated in the same manner, notwithstanding that decree; if the first could be done, the other would not necessarily follow, and the reason is, in the former case, the United States would be paid, in the latter not; and the law is imperative they shall be first paid when the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased. And certainly the lands of the deceased debtor, when these petitioners made their application to this court, were as strongly bound by the claim of the United States, as the proceeds of them could have been in the hands of executors or administrators. The laws of the United States giving a priority to the government are of general application, in the cases therein stat-

ed, and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception, to show it. I think these petitioners have not satisfactorily established their right to be withdrawn from the ordinary predicament of creditors, when they come in competition with the claims of the government. In all such cases, it is manifest congress intended to give priority of payment to the United States over all other creditors. Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 134.

Admitting that the question is not free from difficulty, yet I have not been able to come at any other conclusion than that which is here announced. It is sometimes a hard rule, undoubtedly, upon individual creditors and upon families, that a man's whole estate should be swept away to pay a debt due to the government, but courts of justice can only expound and apply the law, and if upon a fair and impartial examination of the subject they can ascertain its intent and meaning, their duty is simply to administer it, as it becomes applicable, in the various relations of life, to the rights and interests of the parties before them.

Case No. 15,004.

UNITED STATES v. DUNCAN.

[2 Pittsb. Rep. 328; 4 West. Law Month. 425; 10 Pittsb. Leg. J. 41.]

District Court, W. D. Pennsylvania. 1863.

BAIL — FORFEITURE OF RECOGNIZANCE — RELIEF FROM—SURETY.

1. Act of congress of 28th February, 1838 [5 Stat. 321], authorizing the courts of the United States to relieve bail in certain cases, construed.

2. The courts in England had such power, independent of acts of parliament conferring it, which were held by the judges to be simply in affirmance of the common law.

3. The reasoning of Chief Justice Marshall, in U. S. v. Feely [Case No. 15,082], although delivered many years before the passage of the act of congress, sustains the power of the court to grant relief, as well after as before judgment.

4. A recognizance is a matter of record, and when forfeited, it is in the nature of a judgment of record, and when judgment is given the whole is to be taken as one record.

5. In the courts of the United States, the recognizance is estreated and sued in the same forum, and the court having power over the proceedings from the beginning may grant relief, even after judgment and execution in the hands of the marshal.

Scire facias sur recognisance. Rule to set aside judgment and spare the recognisance as to Duncan.

McCANDLESS, District Judge. A true bill was found at the May sessions, 1861, against Joseph Shoemaker, for making and passing counterfeit coin, in the resemblance and similitude of the coin coined by the mint of the United States. On the 5th day of August, 1861, the defendant, Robert Duncan, and Alexander McGregor, entered into recognisance for the appearance of Shoemaker at the following October sessions. He failed to appear, and the recognisance was forfeited. On the 26th of October, a sci. fa. was sued out, and served on Duncan the same day. No appearance or plea being entered, judgment nil dicit was entered, and the sum liquidated by the clerk at $3,000.

Duncan took out a bail piece, and dispatched a deputy marshal to the camp at Indianapolis, where it was alleged Shoemaker was engaged in the public service. As the military there was more potent than the civil power, the deputy failed to arrest him; but at a subsequent period, and after the date of the judgment, he was captured in this city and committed to prison by his bail, where he now remains in the custody of the United States marshal. An application is now made to relieve Duncan, one of the bail, under the authority delegated to the court, by the act of congress of 28th February, 1839, § 6 [5 Stat. 321]. Brightly, 283. This act provides, that "whenever it shall appear to the court, that there has been no wilful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be exacted or enforced," the court shall have authority in their discretion to remit the whole or a part of the penalty. If the wilful default here mentioned, was applicable to the act of the prisoner alone, the law would fail to extend relief to meritorious sureties, who, trusting in the integrity of the principal, were found in default, without any act or connivance on their part. The true construction of the act would seem to be, that where there is no collusion with the principal, no aid extended him to escape, or no effort made to defeat the ends of public justice, the court shall have power, in their discretion, to relieve the surety from the penalty of the recognisance. Here it appears that Duncan, instead of conniving at the absence of the principal, made every effort to arrest him, and finally succeeding in placing him in the custody of the United States officers. "A trial can be had" in his case; and, although it is alleged on the part of the government, that owing to the absence of material witnesses, it may not be a successful one for the prosecution, yet the bail does comply with the spirit of his undertaking, in placing the prisoner at the bar for trial. The absence of the witnesses on the part of the government is no default of his, but is one of the casualties to which all suits in courts of justice are subject. It is one of the chances which enure to the benefit of criminals, and one of the misfortunes incident to all public trials.

In the examination of this case, the court has entertained some doubt as to its power to extend this relief after judgment, after it

has become a debt of record against the defendant, and in favor of the United States. This power was exercised by the common law courts in England, and statutes were passed extending it, but they were all held to have been simply in affirmance of the common law. In 18 Vin. Abr. tit. "Recognisance," letter D, 167, 168, it is said, "If a recognisance is estreated into the exchequer, because not punctually complied with, yet if the party appears, and takes trial at the next session, he may compound for a very small matter in the court of exchequer, because the effect, though not the exact form of the recognisance is complied with; judges of the oyer and terminer are the proper judges, whether recognisances should be estreated or spared; and it is for the advantage of public justice that they should have such power, if upon the circumstances of the case they see fit." This shows the power exercised before judgment, in the sound discretion of the court. In England, the recognisance was estreated and sued in a different tribunal from that in which it was taken, and an interference after judgment might bring about a conflict of jurisdiction. But in the courts of the United States, the suit is brought in the same forum and subject to the same judicial cognisance. The court has not lost control over its record, and it may extend relief when a proper case is presented for its action. The opinion of Mr. Chief Justice Marshall, in U. S. v. Feely [Case No. 15,082], was delivered in 1813, before the passage of the act of congress heretofore recited, and was an application for relief before the recognisance was estreated, and before judgment, but the whole reasoning of that great chief justice sanctions the exercise of the power as well after as before judgment. In the case of Com. v. Denniston, 9 Watts, 142, the principal is recognised, that a recognisance is a matter of record, and when forfeited, it is in the nature of a judgment of record, and when judgment is given, the whole is taken as one record. The right of the governor, therefore, to remit, cannot be affected by proceeding to judgment on the recognisance, as the nature of the recognisance remains the same, after as before judgment. This being the case the act of congress affords us ample power in the exercise of a sound discretion to afford the relief prayed for. And as we are of opinion that the absence of the principal was no fault of the bail, and that he has done all in his power to repair the public injury by the surrender of the prisoner, he is entitled to the interposition of the court upon payment of costs.

The judgment is set aside as to Duncan, and the recognisance as to him, respited and spared upon payment of all the costs which have accrued upon the scire facias.

See Com. v. Davies, 1 Bin. 97; Com. v. McAnany, 3 Brewst. 292.

Case No. 15,005.

UNITED STATES v. DUNCAN et al.

[4 McLean, 207.] [1]

Circuit Court, D. Illinois. June Term, 1847.

LIENS—APPLICATION OF PROCEEDS.

Where there are two liens on the same land, one being paramount to the other, which also covers other lands in the state, the court will order the lands to be sold, reserving the application of the proceeds for the order of the court.

Mr. Butterfield, for the United States.
Mr. McClure, for defendants.

OPINION OF THE COURT. Judgments were obtained in this court in 1841, which are a lien on the lands of the ancestor of the defendants, throughout the state. In 1846, there was a decree against the same, in favor of the plaintiffs, for forty-nine thousand dollars. Certain judgments have been subsequently entered against the same person, in Morgan county state court, for about six hundred dollars, which create a lien upon the lands in that county. Executions have been issued on the judgments of the United States, and a motion is now made to direct the other lands of Duncan's heirs in the state, to be sold, in satisfaction of the judgments and decrees above stated. 1 Paige, 185; 19 Johns. 493; 1 Stat. 515.

The court order, that should the land in Morgan county sell for more than the amount of the judgments of the United States, entered in 1841, the solicitor or agent of the United States, shall retain in his own hands such surplus, subject to the order of this court. Or, should such lands sell for less than the balance of said judgments, and the other lands subject to the decree shall sell for more money than the amount of such decree, the surplus shall be held by the solicitor and agent of the United States, subject to the disposition of the court.

[See Case No. 15,003.]

Case No. 15,006.

UNITED STATES v. DUNHAM et al.

[Brunner, Col. Cas. 653; [2] 21 Law Rep. 591; 1 West. Law Month. 161.]

Circuit Court, D. Massachusetts. 1857.

APPEAL—RIGHT TO OPEN AND CLOSE—EVIDENCE—BILL OF EXCEPTIONS.

1. Allowing a party to open and close is not the subject of a bill of exceptions.

2. The state laws of evidence are rules of decision in trials at the common law in the United States courts.

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

3. Where the rulings of the court on letters or papers are made the subject of exception, they must be inserted in the bill of exceptions, or the presumption will be that the rulings were correct. [Cited in Merchants' Mut. Ins. Co. v. Baring, 20 Wall. (87 U. S.) 162.]

[Error to the district court of the United States for the district of Massachusetts.

[This was an action by the United States against Josiah Dunham and others.]

Mr. Goodrich, for the United States.
Choate & Hallet, contra.

CURTIS, Circuit Justice. This is a writ of error to the district court in an action of debt on a judgment, brought by the United States. The verdict was for the defendants, and a bill of exceptions was taken.

The first exception is, that the court allowed the defendants' counsel to open and close. This is not a subject for an exception. It was so held by the supreme court in Day v. Woodworth, 13 How. [54 U. S.] 363.

The next exception is, that some of the defendants were admitted as witnesses on their own behalf. Under the statute of Massachusetts (St. 1856, c. 188), I think these persons were admissible as witnesses. It applies to all civil cases, except those wherein an original party is dead, or an executor or administrator is a party; and this case does not come within either exception.

It is argued that no one defendant was competent without calling all the defendants. But I do not find anything in the statute upon which to rest this position.

It is also insisted that statute is not law in this court; and reliance is placed on that part of the thirteenth section of the judiciary act of 1789 (1 Stat. 88), which provides "that the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all courts of the United States, as well in the trial of equity and admiralty and maritime jurisdiction as of actions at common law." But the purpose of this provision was not to introduce a law of evidence respecting the competency of witnesses, but a mode of proceeding by examination, in open court, of such witnesses as should be competent under the appropriate rules of law; and to apply that mode to all the classes of cases over which the courts of the United States have jurisdiction. And I consider it to be settled, that the state laws of evidence are rules of decision in civil trials at the common law, under the thirty-fourth section of the judiciary act. McNeil v. Holbrook, 12 Pet. [37 U. S.] 84; Sims v. Hundley, 6 How. [47 U. S.] 1.

It was also suggested that the United States are not bound by this act. Undoubtedly it would be competent for congress so to provide. But independent of such provision, I know of no prerogative possessed by the United States to be exempt from the rules of evidence, which govern other suitors, in civil actions at the common law. And it must be remembered that this state law confers upon each party the privilege of examining the adverse party; which he did not possess at common law.

The next exception is founded on the rejection of certain letters offered in evidence by the plaintiffs, upon the ground of their immateriality. As the letters are not inserted in the bill of exceptions I cannot determine whether they were material or not, and the presumption is the ruling was correct. Carrol v. Peak, 1 Pet. [26 U. S.] 19; Camden v. Doremus, 3 How. [44 U. S.] 515.

It has been insisted in argument that the solicitor of the treasury had not authority to empower the district attorney to receive satisfaction of the judgment declared on in land or mortgages. But it does not appear by the bill of exceptions that any such point was made or ruled on in the court below; and this court on a writ of error cannot inquire into or determine that question.

The judgment of the district court is affirmed.

NOTE. State laws of evidence are rules of decision in actions at common law in federal courts. See The William Jarvis [Case No. 17,697], citing case in text. Bills of exceptions—what should be stated in. See Merchants' Mut. Ins. Co. v. Baring, 20 Wall. [87 U. S.] 162, citing case in text.

Case No. 15,007.

UNITED STATES v. DUNN et al.

[1 Cranch, C. C. 165.] [1]

Circuit Court, District of Columbia. June Term, 1804.

RIOT—EVIDENCE OF INTENT—WITNESS.

Indictment for a riot. The witnesses for defendants were not allowed by the court to give evidence of their intention in meeting, they having testified that they were of the party concerned in the riot.

Case No. 15,008.

UNITED STATES v. DURKEE.

SAME v. RAND.

[Hoff. Op. 535.]

Circuit Court, N. D. California. Sept. 10, 1856.

CRIMINAL LAW — CONSOLIDATION OF INDICTMENTS AGAINST DIFFERENT PERSONS.

[The provision in the fee bill (Act Feb. 26, 1853; 10 Stat. 161) that, whenever there are "several charges against any person or persons for the same act or transaction," the whole may be joined in one indictment in separate counts, and, "if two or more indictments shall be found in such cases, the court may order them consolidated," does not authorize the consolidation of separate indictments against different persons, although the offence was joint, and they might have been jointly indicted.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[These were separate indictments against John L. Durkee and C. E. Rand for the crime of piracy. Defendants moved the court to consolidate the two cases, under Act Feb. 26, 1853.]

Wm. Blanding, U. S. Atty.

Crockett & Page, Bailie Peyton, and Wm. Duer, for defendant.

Before McALLISTER, Circuit Judge, and HOFFMAN, District Judge.

HOFFMAN, District Judge. In these cases separate indictments have been found against the above defendants for the same offence. It is not denied that the offence charged was committed by the defendants jointly, and that they might have been jointly indicted. Separate indictments having been preferred, the accused pleaded separately. A motion is now made to consolidate the indictments under the power given to the court by the act of February 26th, 1853. The only clause in the act which is supposed to confer this power is as follows: "Whenever there are or shall be several charges against any person or persons for the same act or transaction, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments shall be found in such cases, the court may order them consolidated." The case contemplated by the statute is evidently that of several offences growing out of one transaction, no matter by how many committed. And the provision was partly intended, perhaps, to remove any doubts that might previously have existed as to the right of joining distinct offences in the same indictment. It is observed by Wharton: "How far a defendant may be charged with distinct offences on different counts of the same indictment has received varied adjudication." Whart. Cr. Law, p. 203. The statute therefore provides for the joinder of several charges for the same transaction, or for two or more transactions connected together, or for two or more transactions of the same class of crimes and offences which might properly be joined; and this whether the charges be against one or more persons.

The provision in question occurs in the fee bill of 1853, and was intended to enable the court to expedite proceedings and diminish costs; and the succeeding clause provides that, whenever two or more indictments, suits or proceedings are or shall be prosecuted, which should be joined, the district attorney prosecuting them shall be paid but one bill of costs. There is no reason to suppose that any alteration of the law was intended affecting the right of either the government or the accused. It was merely proposed to remove any doubts as to the joinder of offences, and to oblige the prosecutor to make the proceedings as little expensive as possible. The language of the act is, "whenever there shall be several charges against any person or persons." I think that the term "several" is here used in its popular sense—i. e., meaning more than one. It cannot mean "separate" charges, that is, the same charge separately made against several defendants, for the language is, "whenever there shall be several charges against any person or persons." The fact that the statute contemplates that several charges may be made against one person, shows that the term "several" related to the charges and not to the persons. Had congress meant to provide for the joinder of several defendants in one indictment, they would not have allowed it in cases where charges are preferred for the "same act or transaction"; but when they are preferred for a joint act or transaction, parties can be jointly indicted only when the offence is "joint." But if any doubt remain as to the true construction of this clause, it is removed by the concluding words. It is provided that if there be several charges against any person or persons, the whole shall be joined in one indictment; if two or more indictments shall be found, they may be consolidated. The whole of what? Clearly, the whole of the charges. This language cannot be contrued to mean that all the defendants may be joined where the same charge is made against different persons. But further. How is "the whole to be joined in one indictment"? The statute declares "in separate counts"; still more clearly referring to the case of several charges or offences, and not to that of the same charge or offence alleged against different persons. I think it, therefore, beyond all doubt, that the statute merely meant to direct the joinder of different offences in one indictment in the cases enumerated in the clause above quoted, but had no reference whatever to the joinder of defendants in indictments for a joint offence. On that point the law is undisputed, that where more than one join in the commission of an offence, all or any number of them may be jointly indicted for it, or each of them may be indicted separately. When they are indicted jointly, the court may, in its discretion, give them the benefit of separate trials; but where they are indicted separately, we think the statute gives us no power to order them to be tried jointly, either on the application of the district attorney or of the accused.

McALLISTER, Circuit Judge, said that he thought that it was a question that was left altogether to the discretion of the court; but as there was some doubt about it, and his colleague was of opinion that the cases could not be consolidated, he concurred in the opinion delivered by him.

[The trial of John L. Durkee for the crime of piracy was then commenced, and is reported in Case No. 15,009.]

Case No. 15,009.

UNITED STATES v. DURKEE.

[1 McAll. 196.] [1]

Circuit Court, N. D. California. July Term, 1856.

LARCENY—REQUISITES—INTENT TO APPROPRIATE—PIRACY.

1. The essential requisite of larceny is the lucri causa. *Held*, if the prisoner took and carried away the muskets with intent to appropriate any of them to his own use, or permanently to deprive the owner of them, such taking is larceny.

[Cited in dissenting opinion in People v. Raschke, 73 Cal. 385, 15 Pac. 16; State v. Slingerland, 19 Nev. 135, 7 Pac. 283.]

2. If the taking was with the sole intent to prevent the use of them upon himself or his associates, it is not larceny.

[Cited in Gooch v. State, 60 Ark. 5, 28 S. W. 511.]

This was a case of an indictment [against John L. Durkee] under the 3d section of the act of May 15, 1820 (3 Stat. 600). It arose out of the movements of a body of men known as the "Vigilance Committee," in the city of San Francisco, during the excitement which existed in that city during the summer of 1856. The prisoner was charged with being concerned in making an assault upon a vessel on her way from Sacramento to San Francisco, with arms on board, the property of the state, and carrying them off from those to whom the transportation of them had been confided by the authorities.

William Blanding, U. S. Dist. Atty.

I. B. Crockett and Wm. Duer, for defendant.

McALLISTER, Circuit Judge (charging jury). We approach, we trust, the termination of this case with the single desire to dispense evenhanded justice between the parties. Each of you, placed upon that panel, has called upon his God to witness that he has neither bias nor prejudice in this case. As for myself, though it is my sworn duty to convict him whom the law condemns; yet to convict improperly under the forms of law would fill me with horror as great as if I were to take into my own hands the issues of life and death, and send down to the grave my fellow-creature without the forms, the guards, and the sanctions which the constitution, the laws, and humanity have thrown around him. Animated by this sentiment, I proceed to state to you the law which, in the opinion of this court, must control your action. In order to fix your attention on the only issue you are sworn to try, it is necessary to separate it from all collateral considerations. The defense is rested upon the ground that, in seizing the arms for the taking of which the prisoner has been indicted, he was acting in obedience to the orders of a body which we charge you was unauthorized by and banded together in violation and defiance of the laws. It is our duty to say to you that no orders emanating from such a source can vary the character of the act charged against the prisoner, if it be established that he is guilty of it under the law and testimony in this case.

Again, gentlemen, the prisoner may have been guilty of a crime or crimes other than that for which he is indicted; he may, in what he has done, have acted with those who deserve execration as unfeeling violators of the laws of their country, or merit approbation as patriotic citizens. In a word, he may have transgressed every precept of the moral or municipal law. Those, and all other like considerations, must be dismissed from your minds. He is on trial for a single offense,—piracy. Any other crime he may have committed; but if you shall find he is innocent of the one now charged against him, he must go free. This is demanded by an immutable principle of justice. No man can be held responsible for an act unless, after having been confronted with his accuser and an impartial trial had, he has been found guilty; and then his responsibility must be confined to the specific crime that has been proved against him. This is a right guaranteed even to a malefactor. It has been truly said by a distinguished author that, "the law withdraws its protection from a malefactor while actually engaged in illegal acts; but at any other moment, it protects his person and property as impartially as it does yours or mine. For instance, if a burglar breaks into my house, I may then and there cut him down like a dog. If a pickpocket puts his hand into my pocket, I may knock him down. But if I break into a notorious felon's house, and rob him, I am just as great a felon in the law's eye as if I so robbed an honest citizen; and so, if I attack a burglar's or a pickpocket's person and life at any moment when he is not feloniously engaged, I am none the less a villain in the law's clear eye because my villainy is aimed at an habitual villain. And here the law is not only just but expedient; for were such fatal partialities admitted, we should soon advance from doing acts of villainy upon villains to calling any one a villain whom we wished to wrong, and then wronging him." Thus vigilant and just is law; it views every man before judgment innocent, so far as affording him an opportunity to defend himself surrounded by those guards which the law has prescribed. To deal differently with an accused party, would violate alike the precepts of municipal law and the dictates of natural justice. We repeat, then, your duty is to limit your attention to the single inquiry whether the prisoner is guilty or not of the specific crime for which he is indicted.

The indictment is founded upon the 3d section of the act of May 15, 1820 (3 Stat. 600). So much of it as is necessary to be considered is in the following words: "That if any person shall upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs

[1] [Reported by Cutler McAllister, Esq.]

and flows, commit the crime of robbery in and upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being thereof convicted before the circuit court of the United States for the district into which he shall be brought or in which he shall be found, shall suffer death." The power of congress thus to legislate, is derived from that clause in the constitution which declares, that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction." Originally, the states had exclusive jurisdiction of all crimes committed within the limits of their respective counties. Then came the clause in the constitution referred to. In relation to this, the supreme court of the United States have said, "It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power." U. S. v. Bevans, 3 Wheat. [16 U. S.] 388. The legislation of congress prior to the passing of the act under consideration, has been limited in its enactments to offenses committed on the high seas, and to places the exclusive jurisdiction over which had been ceded to the general government. Finding it necessary and proper, in order to carry out fully the power vested in them in all cases of admiralty and maritime jurisdiction, congress passed the act under which this indictment is framed; which, while it accomplishes the contemplated object, impinges no further upon the jurisdiction of the states than was absolutely necessary to achieve the object which, under the grant by the constitution, it was in their power to effect. The proviso to the act declares, "that nothing in this section contained shall be so construed as to deprive any particular state of its jurisdiction over such offenses when committed within the body of a county; or authorize the courts of the United States to try any such offenses after conviction or acquittance for the same offense in a state court." The jurisdiction of the federal and state judiciary is therefore concurrent in this case, and the familiar principle intervenes, that where there are concurrent jurisdictions the one who first obtains possession of the case must exert it. In the exercise of this jurisdiction, the court has no unwritten criminal code to which it can resort as a source of jurisdiction; nor can it look to the common law, further than as a guide in its exercise of the jurisdiction conferred upon it expressly by statute. The legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense, before cognizance can be taken of it. U. S. v. Hudson, 7 Cranch [11 U. S.] 32. The act on which this indictment is founded declares, robbery committed on the high seas and in certain places shall be deemed to be piracy. To become a pirate under this law, a man must have committed robbery. Of the meaning of the term "robbery," we think there can be no doubt. It must be understood as it was recognized and defined to be at common law. Although the common law is not a source of jurisdiction in the courts of the United States, it is necessarily referred to for the definition and application of terms.

The only inquiry, then, is, what was robbery at common law at the time of the separation of the American colonies from the parent country? U. S. v. Palmer, 3 Wheat. [16 U. S.] 610. In robbery, which is larceny accompanied by intimidation or force, the felonious intent in taking constitutes the offense. Blackstone tells us, the taking and carrying away must be done animo furandi, or, as the civil law expresses it, lucri causa. Lord Coke, in his Institutes, and Hawkins, in his Pleas of the Crown, give the same definition. 1 Hawk. P. C. 93. Archbold states that "larceny, as far as respects the intent with which it is committed, is where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them and to appropriate or convert them to his own use." In Pear's Case, East, P. C. tit. "Larceny," § 2, Baron Eyre defines larceny to be "the wrongful taking of goods with intent to spoil the owner of them causa lucri." The foregoing authorities all include in larceny, as an essential element, what is termed the lucri causa. A similar view is taken by the supreme court of Missouri in the case of State v. Conway, 18 Mo. 321. "The taking (say the court) must be done animo furandi, or, as the civil law terms it, the lucri causa. The felonious intent is the material ingredient in the offense." To constitute this offense, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use. Again, in the state of Delaware it was ruled, that if the party indicted for larceny, where he took a horse for the stealing of which he was indicted, intended to appropriate him to his own use, by selling or retaining him to his own use, it was felony; but if he only took him to aid him in his escape as a runaway slave, it was no more than a trespass. 2 Har. 529. In Alabama, the supreme court considered the doctrine at common law to be "that the criminal intention constitutes the offense, and is the only criterion to distinguish a larceny from a trespass. That, according to the common-law writers, to constitute the offense of larceny it was not sufficient that the goods be taken for the purpose of destroying them to injure his neighbor, and actually destroying

them. Such offense would be malicious mischief; but it would want one of the essential ingredients of larceny—the lucri causa—the intention to profit by the act by the conversion of the property." State v. Hawkins, 8 Port. (Ala.) 461. In that case, although it was evident the prisoner had secreted the slave from her owner with a view to do the owner an injury by aiding the slave to obtain her freedom, still, as there was no intention to convert the slave to his own use, the party was held to be not guilty of larceny. The courts, then, of Missouri, of Delaware, and of Alabama, in the three cases cited, consider the doctrine of the common law to be, that to constitute larceny there must be, as an essential ingredient and a necessary element, the animus furandi or lucri causa. There are decided cases in England which sustain a similar doctrine. Thus, in Rex v. Holloway, 5 Car. & P. 524, decided in 1833, the prisoner was indicted for stealing a gun from the prosecutor, who was a game-keeper. The latter, knowing him to be a poacher, seized him. A companion of the prisoner rescued him; and the latter, getting free, wrenched the gun from the prosecutor and ran off with it. It was proved that the prisoner said he would sell the gun, and it was not afterwards found. The jury returned that they did not think that the prisoner, at the time he took the gun, had any intention of appropriating it to his own use. "Then (said the court) you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not felony; and his resolving afterwards to dispose of it, will not make it such." In Rex v. Crump, 1 Car. & P. 658, the prisoner was indicted for stealing a horse, three bridles, two saddles, and a bag; and the court left it to the jury to say whether the prisoner intended to steal the horse; for if he intended to steal the articles, and only to use the horse to convey the articles away, he would not be guilty of stealing the horse. The case of Rex v. Wright, 1 Burrows, 543, was that of a servant indicted for stealing his master's plate; and it appeared that, after the plate was missed but before complaint was made, the prisoner replaced it. It was in proof that the plate had been pawned, and the pawnbroker testified that the prisoner had, on previous occasions, pawned plate and redeemed it. The court left it to the jury to say, whether the prisoner took the plate with intent to steal it, or to raise money on it and then return it; for in the latter case it was no larceny. The prisoner was acquitted. In Rex v. Van Muyen, 1 Russ. & R. 118, the prisoner, who was master of a Prussian vessel captured by the British and carried into a home port, was indicted for stealing certain articles from the ship. There was no evidence to prove whether the prisoner had taken the articles for his own use or that of his owners. Chambers, J., reserved the point for the opinion of the judges; and a majority of them were of the opinion that if the prisoner had taken the articles for his own use, it was larceny, otherwise it was not. In Reg. v. Godfrey, 8 Car. & P. 563, it was decided, that where a person from curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter (this in the absence of a statute), it is a trespass, not a larceny, even though a part of his object may be to prevent the letter from reaching its destination.

The foregoing decisions embody, in a practical form, the principle enunciated in the definitions given by the text-writers. We will now advert to three or four recent English decisions, which seem to qualify the doctrine. In the year 1815, two decisions were made in England, which were subsequently followed by two others, without comment or discussion. The first is that of Rex v. Cabbage, 1 Russ & R. 292. The principle enunciated was, "that if the intent be to destroy the article taken, it will be sufficient to constitute the offence of larceny, if done to serve the prisoner or any other person, though not in a pecuniary way." The case was this: The prisoner, to screen his accomplice, who was indicted for stealing a horse, broke into the prosecutor's stable and took away the horse, which he backed into a coal pit and killed. A majority of the judges decided this was larceny. At such a decision we are not surprised to find Lord Abingdon exclaiming, in 1838, when that case was cited in his presence, "I cannot accede to that!" The second English case on this point, is Rex v. Morfit, 1 Russ. & R. 307, decided on the authority of the former. There, A and B, servants, opened the granary of their master by means of a false key, and took two bushels of beans to give to their master's horses, in addition to the quantity allowed; and it was held to be larceny. Some of the judges alleged that the additional quantity of beans would diminish the work of the men who had to look after the horses, and this diminution in their labor was considered a lucri causa. The astuteness with which the lucri causa was sought for and discovered in that case, is strong proof of the stringency of the rule which requires it as an essential ingredient in the crime of larceny. This case is referred to by a recent writer as a "singular case on this point." Archb. Cr. Law (Ed. 1853.) Such it undoubtedly is; as in effect it destroyed the distinction which had existed from an ancient period between larceny and trespass, unless we can, with some of the judges, detect the existence of the lucri causa in that case. Looking into the cases last cited, and the grounds on which they were decided, we deem the observations made in relation to them by the supreme court of Alabama, not

inappropriate. "It appears to us (they say) that these cases cannot be considered authority in this country. The shadowy and almost imaginary distinctions upon which they rest, are at war with that precision and certainty which are the boast of the criminal law of England." 8 Port. 465. These cases stand in direct opposition to the numerous authorities, English and American, above cited. They introduced a change into the common law as it existed at the time of the emigration of our ancestors to this country; and we cannot recognize modifications recently made in the common law of England, as controlling this court. If an authority could have been found emanating from an American court, adopting these hair-breadth distinctions, it certainly could not have eluded the search of the profession.

After a careful examination of the law, we give you, gentlemen, the instructions which follow: 1. That if you believe, from the evidence, that the prisoner took and carried away the arms, with the intent to appropriate them, or any portion of them, to his own use, or permanently deprive the owner of the same, then he is guilty. 2. But if you shall believe that he did not take the arms for the purpose of appropriating them, or any part thereof to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty.

Verdict, "Not guilty."

Case No. 15,010.

UNITED STATES v. DURLING.

[4 Biss. 509.] [1]

District Court, N. D. Illinois. Jan., 1869.

WITNESS—RECOGNIZANCE FOR APPEARANCE—TRAVELING EXPENSES.

1. It is the duty of the district attorney, in criminal prosecutions by the government, where he has any doubt whether witnesses will attend, to have them properly recognized.

2. If a witness subpœnaed by the government, has means to travel, it is not necessary for the officer to tender his traveling expenses; and the court will attach a witness who, on that ground, neglects to attend.

[Cited in Norris v. Hassler, 23 Fed. 582.]

3. The officer summoning witnesses should see that those who have no means to travel, are provided with necessary funds.

DRUMMOND, District Judge. I wish to lay down a few rules upon this subject as a guide to the district attorney, upon which I will insist hereafter when this question comes up again. It is always within his power, under the law, where a person is within the jurisdiction of the court, and he doubts whether he will be present on the trial of the cause, to compel him to give security that he will be present at the trial; so that it was competent for the district attorney, when these parties were here and he doubted whether they would be present when the case was called for trial, to have them brought before a competent officer and recognized, and give security that they would be present. The law goes so far even as to declare that, in a criminal case, if they cannot give security they may be imprisoned until the trial, in order that their testimony may be given.

Again, where there is a witness residing in another district, the process of this court goes to that district. It is issued to the marshal of that district, and it is the duty of the person to whom it is addressed, if he has the means, to travel here to give his testimony. If he has not, the proper officer of the government will furnish him with means. It is not necessary, if he has the means, that the fees should be tendered to him before he is required to obey the process. An attachment would issue and the court would punish a man who could pay his expenses and would not come because the money was not tendered. It is only where a man has not the means of paying his expenses, that it is necessary for the money to be tendered to the witness in order to make it incumbent on him to obey the process of the court.

Hereafter, I wish it understood that those witnesses who have not the means of attending court must be furnished with the means when the subpœna is served, and if there is doubt entertained of their being present at the trial they must be compelled to give security; if they fail to do so, they must be held in custody until the trial.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Case No. 15,011.

UNITED STATES v. DUSTIN et al.

[2 Bond, 332.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1869.

CRIMINAL LAW—INDICTMENT—MOTION TO QUASH—CONSPIRACY—ALLEGATIONS OF OVERT ACTS—COUNTS.

1. A motion to quash will not be sustained unless the indictment is bad beyond a reasonable doubt.

2. It is the practice, in the courts of the United States, where an indictment has been quashed, to hold the defendant in custody to answer to a new indictment.

3. In an indictment, based upon section 30 of the act March 2, 1867 [14 Stat. 484], charging a conspiracy to defraud the United States of the taxes due upon distilled spirits, it is not necessary to allege the specific mode agreed upon by which the object of the conspiracy was to be carried out.

4. It is sufficient, in an indictment under this law, to aver that there was a conspiracy to defraud the United States of taxes legally due, and that in pursuance of such conspiracy the defendants committed a stated overt act.

[Cited in brief in U. S. v. Patterson, 55 Fed. 616.]

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

5. Allegations of the overt act are not required to be as full and minute in an indictment for conspiracy as in an indictment for fraud without any conspiracy.

6. If an overt act, in violation of law, is charged as in pursuance of a previous conspiracy, it is sufficient.

[Cited in brief in U. S. v. Patterson, 55 Fed. 616.]

7. One good count in an indictment will sustain a general verdict of guilty, and though there may be different counts, it will afford no reason for quashing the whole indictment.

[This was an indictment against Daniel G. Dustin and others, charging them with a conspiracy, to defraud the government in evading the payment of taxes upon distilled spirits. Heard on motion to quash.]

W. M. Bateman, U. S. Dist. Atty.

James Sloane and H. L. Burnett, for defendants.

LEAVITT, District Judge. In this case the counsel for the defendants have submitted a motion to quash the indictment. A motion to quash will not be sustained unless the indictment is bad beyond a reasonable doubt. This rule has been adopted in view of the fact that nearly all questions involving the sufficiency of the indictment may be available to the defendant, if a conviction follows, on a motion in arrest of judgment. It is true, if the indictment is so palpably defective that no judgment could be rendered on it after conviction, it is the duty of the court to sustain the motion to quash. In this case the decision is not of any great importance to the defendants, as it is now the practice in the courts of the United States, in the exercise of their criminal jurisdiction, where an indictment has been quashed, to hold defendant in custody to answer to a new indictment. If the present motion should be sustained, no reason is perceived why such an order should not be made.

The indictment is based on section 30 of the act of March 2, 1867, providing for the punishment of conspiracies to commit crimes against, or in any manner to defraud, the United States. The first count charges that the eleven persons named, intending to defraud the United States, conspired together to evade the payment of a large amount of revenue due on distilled spirits; and, in pursuance of such unlawful agreement, did aid and abet certain persons named, in the removal to, and concealment of 10,000 gallons of distilled spirits in, a place other than a bonded warehouse. It is averred that such removal was from the distillery where the spirits had been distilled, without payment of the legal tax, and without giving bond as required by law.

The objection to the count is, that it does not set out the specific means by which the defendants proposed to effect the fraud charged, or name or describe the distillery from which, or the place to which, the spirits were to be removed.

The court is aware of no authorities requiring, in an indictment for a conspiracy under section 30 of this statute, that in averring the fact that the defendants agreed together to commit a criminal act or perpetrate a fraud, the specific mode agreed upon, by which the object of the conspiracy was to be carried out, should be averred. The statute referred to is far reaching, and includes every conspiracy to "defraud the United States in any manner whatever." It is sufficient, in an indictment under this law, to aver that there was a conspiracy to defraud the United States of taxes legally due; and that in pursuance of such conspiracy, the defendants committed a stated overt act. It is otherwise where a conspiracy is relied on as the criminal act, without any averment of an overt act, to effect the object of the conspiracy. In that case, all the facts must be averred which constitute the conspiracy. This, too, is the law where the conspiracy alleged is for the purpose of doing an act not in itself criminal or in violation of a statute. 2 Bish. Cr. Pl. §§ 176, 179; 2 Archb. Cr. Law, 1049; 7 Cush. 514, 515. Under these authorities the averments in this indictment, as to the objects of the conspiracy, are sufficient.

The law, as to the description of the overt acts in the indictment, seems to be the same as applicable to the averments of the conspiracy. The indictment alleges that in pursuance of the conspiracy, the defendants proceeded to perpetrate certain acts of fraud in violation of law. These acts of fraud charged are the removal of a large quantity of spirits from the distillery where they were made, to a place other than a bonded warehouse, in violation of law and with intent to defraud the United States of the tax on the same. It is claimed by counsel for the defendants that these allegations of the commission of the overt act are defective for vagueness and want of particularity, for the same reasons urged and before noticed, as applicable to description of the conspiracy.

On this point there seems to be some conflict in the authorities. But the general doctrine is, that the allegations of the overt act are not required to be as full and minute in an indictment for conspiracy as in an indictment for fraud without any charge of a conspiracy. If an overt act, in violation of law, is charged as in pursuance of a previous conspiracy, it is sufficient. U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, 7 Curt. Dec. 281, 293.

In addition to points noticed, it has been strenously argued that this indictment is bad for repugnancy and duplicity. These points are certainly not so clear of doubt as to require that the motion to quash should be sustained. If it shall be necessary, they may be more fully considered and decided hereafter.

The court has not deemed it necessary sep-

arately to consider the grounds of the motion, as applicable to the second count. They are substantially the same as those urged in reference to the first count. One good count in an indictment will sustain a general verdict of guilty; and though there may be defective counts, it will afford no reason for quashing the whole indictment.

Motion overruled.

[See Case No. 15,012.]

Case No. 15,012.

UNITED STATES v. DUSTIN et al.

[15 Int. Rev. Rec. 30.]

Circuit Court, S. D. Ohio. 1872.

CRIMINAL LAW — LIMITATION OF PROSECUTIONS — CONSPIRACY TO DEFRAUD — REVENUE LAWS.

1. An indictment has been pending in the United States circuit court for more than a year, alleging that the defendants conspired to defraud the United States of the taxes upon certain distilled spirits manufactured in the Sixth district of Ohio. A demurrer was filed to the indictment, upon the ground that the prosecution was barred by the two years statute of limitations of the act of congress of 1790 [1 Stat. 112].

2. The demurrer is overruled, and it is *held* that the thirtieth section of the act of congress of March, 1867 [14 Stat. 484], punishing conspiracies, is a "revenue law," and the period of limitation for offences against said thirtieth section is *held* to be five years instead of two.

[This was an indictment against Daniel G. Dustin and others, charging them with a conspiracy to defraud the government, in evading the payment of taxes upon distilled spirits. Heard on demurrer. See Case No. 15,011.]

EMMONS, Circuit Judge. This is an indictment under the thirtieth section of the act of March 2, 1867, which provides that "if two or more persons conspire to commit any offence against any law of the United States, or defraud the United States in any manner whatsoever, they shall be punished," etc. The title of the act is "to amend existing laws relating to internal revenue, and for other purposes." The act is a long one, and all of its many sections, save this and one other, relate solely to internal revenue. This section has reference to violations of revenue and other laws also, and the question is, whether the act of 1804 [2 Stat. 290], limiting the prosecution of offences "arising under the revenue laws" to five years, applies to conspiracies under said section when such conspiracies are solely to violate revenue laws. It is conceded that the act of congress of 1790, requiring prosecutions to be begun in two years, does apply if that of 1804 does not. There is, therefore, no necessity for a forced construction of the latter act in order to prevent the anomaly of a class of prosecutions without any limitation whatever. The court is to decide which of two limitation laws it believes congress intended should govern in prosecutions for violations of said thirtieth section, by conspiring to defraud the revenue.

We have been favored with arguments of great length and elaborateness, and if they are not in detail answered, it is not because they have not received a patient examination. The learned counsel for the defendants relied mainly upon two propositions. First, that the limitation act of 1804 had no application to laws for the protection of internal revenue, and second, if it did, it was to be confined to such offences as were created before its enactment. We find no difficulty in rejecting both assumptions. His third position, which affirms that, within the meaning of the statute, this offence does not arise under a revenue law, is, in our estimation, the only question worthy very serious consideration. No plausible reason is perceived for saying the word "revenue" in this and other laws where it is used broadly and generally, does not include internal revenue, as well as customs laws. The only matter of surprise is that it should ever have been necessary for the court to decide it. But the question has been discussed, and, as often as raised, decided adversely to those who sought to confine the meaning of the word "revenue" to external duties only. In U. S. v. Wright [Case No. 16,770], Judge McKennan, after what he terms a most elaborate argument, decided the precise point and applied the act of 1804 to the limitation of a prosecution under an internal revenue act. In Stevens v. Mack [Id. 13,404], Judge Blatchford, in deciding that the act of 1833 [4 Stat. 632], by its express provisions, referred only to causes arising under the customs laws, took pains to say that such would not be the effect of an act like this thirtieth section under consideration, where the general term "revenue" without qualifying clauses is used. There are several other similar statutes which have received the same reading. It might be shown from a consideration of all the legislation on this subject that to divide arbitrarily the laws into two classes, and decide that all provisions in reference to revenue laws meant customs laws only, would result in most absurd consequences. The absence of all reason for the interpretation asked renders such a labor unnecessary. We have not overlooked the remark of Judge Blatchford in U. S. v. Blaisdell [Case No. 14,608]. It is also said that the limitation act of 1804 is not prospective, but that it is to be confined to the offences created and defined by then existing laws. In Adams v. Woods, 2 Cranch [6 U. S. 336], it was decided that the limitation law of 1790 applied to subsequently created offences. That decision has been followed in Johnson v. U. S. [Case No. 7,418]; U. S. v. Ballard [Id. 14,507]; U. S. v. Mayo [Id. 15,755],—and is obligatory upon this court. Defendant's counsel says these decisions are erroneous and should be followed only in reference to the particular statutes they construed. We do not think so, but on the contrary believe they decide a principle

applicable to all general laws of limitation, including that of 1804. If we did not think so, the decision of the supreme court would still be followed in all its legitimate consequences until it was by the tribunal which pronounced it overruled or questioned.

This is all, under ordinary circumstances, which should be said in reference to this position, but the great length, pains-taking and earnest arguments of defendant's counsel upon this position demand a brief notice. No general statute of limitations in the whole history of our law, in England or here, was ever construed as we are asked by defendant's counsel to read this one. They are, of all others, from their nature and intention, eminently prospective, and the contest has been whether they shall affect at all existing causes of action, and how far they may do so under our American constitution. Every book upon criminal law treats them as applicable to future created offences. Limitation acts in England and in this country have stood for half a century limiting prosecutions under succeeding statutes creating offences of the same class and nature, and nowhere is there a judgment or dictum that they are to be confined to crimes under existing laws, any more than to existing offences under those already enacted.

The following are the judgments cited in support of this extraordinary position, and all of them expressly or by their argument, concede that they are exceptional, and rest upon the peculiarities of the statutes which they construe. In Hall v. State, 20 Ohio, 716, a law made it an offence to sell ardent spirits within three miles of furnaces in certain manufacturing counties, and it was construed to be applicable only to furnaces in existence at its passage. The judgment was delivered by a most able jurist, and were it in the least degree pertinent here we should deem it well to suggest the reasons for our dissent from its conclusions. But it is quite foreign to this discussion. It was a special law, did not create a general rule for the state, and rested expressly on these peculiarities. The learned court which pronounced it, apply no such rule as counsel seek to deduce from it, to the general statute of limitations of Ohio. They would deem it a most extraordinary use of Hall v. State, to apply its exceptional and professedly peculiar canon of construction to a reading of a general statute of limitation. The case of U. S. v. Paul, 6 Pet. [31 U. S.] 141, depended upon its own special circumstances. There are several similar judgments of the supreme court. It adopted the existing punishments of state laws at the time of the passage of an act of congress. These state laws were before congress and approbated. Of course congress did not approbate future punishments of which they knew nothing. Territorial laws of the United States in numerous instances when they adopt the laws of the states have been thus construed because from their nature such must have been the intention of the law-makers. On the other hand, such is not the intention in the passage of statutes of limitation, especially when the same legislative body creates subsequent offences and affixes no different period of limitation. Every presumption of reason and law suggests the application of those which exist, if no new one is created. 5 Mod. 425, was before the supreme court in Adams v. Woods, and regarded, as evidently it should be, as having no reference to a general statute of limitations. If so disposed, as we are not, we have no right to repudiate this criticism of the supreme court. 6 Durn. & E. [6 Term R.] 286, decides only that merely athletic exhibitions or tumbling was not a stage play within a law which required a copy of all plays to be presented to the lord chamberlain for approval. The remark that the act contemplated such kinds of plays as were common at its passage, is undoubtedly true in that case, as in many others, but it has no tendency to show that the limitation act of 1804 applied only to those frauds which the dishonest men of that period had practiced, and which were punished by existing laws. Sedg. St. Const. Law, 276, is cited for a passage from Vattel, affirming the every day principle that fraudulent changes in the condition of property, in violation of the intentions of contracting parties, do not affect their rights. Our American books are full of better illustrations of this familiar doctrine. It is argued that because parties to contracts and treaties are, in the law, supposed to contemplate the condition of things when they are made, therefore a general statute of limitation will be confined to offences created before its passage. No analogy is perceived even if the passage referred to asserted a general rule, but it does not. It is only in that class of agreements or treaties which, from their nature show us such was the intention of the parties, that the interpretation is given. The law is the same in both instances. Treaties, agreements, and laws, and every other form of communication between men, must receive the same rational treatment. Language general in form will be held to contemplate the present or the future, or both, as the circumstances of its use indicate the one or the other to have been in the contemplation of the parties. When such, in justice, ought to be the interpretation, statutes of limitation have been applied solely to new causes of action. A short period of three years on a foreign judgment, although general in its terms, was construed to apply to future judgments only in Murray v. Gibson, 15 How. [56 U. S.] 421, and Boyd v. Barrenger, 23 Miss. 270. We have referred to all the judgments and authorities cited in the extended argument for the defence to sustain the position which we have no difficulty in overruling.

The more difficult question remains, does the offence with which defendants are charged arise under a revenue law? It arises un-

der that law to which we are compelled to refer in order to ascertain its character, and without which no charge can be sustained. In this instance no crime would be described but for those clauses in the revenue law, to violate which the conspiracy was formed. Repeal them and the indictment fails. They, and section 30 of the act of 1867, are both equally necessary for its support. The offence arises equally under both, and if we concede that the section is not itself a revenue law, and that the offence does not arise solely under such law, no violence is done to language by applying the limitation act of 1804, for that act does not require that the offence should. The history of interpretation is full of instances where courts, impressed with the impolicy and public injury of contrary rulings, have gone very far beyond the license of saying that this action arises under a revenue law, if it does so in part, and cannot be prosecuted at all if such law did not exist. But the literal technical reading is even stronger than this, because it is manifest this same section may be deemed a revenue law, an army law, or a naval law, just as the object of the conspiracy is to violate provisions of the statutes for the protection of one or the other of these departments. In such a reading there is nothing novel or anomalous. Let us suppose that instead of a general statute of limitation there was a separate one for the offences against each of those classes of law, and that in these circumstances such a conspiracy act as this under consideration was passed. It is evident the courts would be compelled to rule that the respective statutes of limitation would apply to different offences created by the same section, as the conspiracy might be to violate one or the other of those codes. If not, there would be no limitation to the crime of conspiracy. In such a case as supposed all would concede that different statutes of limitation must be applied to different conspiracies under the same section. Such a construction is now supported by a less pressing necessity than in the case supposed, because there is a general statute which may without violence be made applicable. But the principle is the same, and if there are sufficient urgent reasons to coerce it there is nothing either absurd or untechnical in its adoption. It is fully conceded that if the conspiracy were to fraudulently admit a foreigner to citizenship a different limitation would apply. In no sense, then, would the offence arise under a revenue law. If a revenue law, strictly so called, is the object of violation, the five years would govern, and there is no uncertainty in the rule in either case.

In our former colonial and territorial laws there are many statutes which, by adopting those of other states, and by reference to the common law, in the same section, and by the same words, created offences of far different grades subject to different punishments and limitations. Several recent acts of congress for the trial of state offenders who are denied civil rights by local laws embody the same principle. An act declaring that all offences should be defined and punished as at common law would be what the counsel for defendant says this law is, if we construe it as the counsel for the government asks. Every possible criticism of this technical character which is now made upon the proposed construction would be equally applicable if the law read as follows: "Any persons who shall conspire to commit any offence against the revenue laws, the laws for the protection of commerce, for the postal service, the army, or any law of the United States, shall," etc. Here we should be forced to say it was a revenue law, because expressly so saying, and apply the five years limitation to conspiracy to violate it. At the same time it would also be a piracy law, and an army law, conspiracies to violate which would not be limited to five years. But the statute as it now reads means precisely what it would in the supposed form. The compendious language used cannot alter its character. A law which provided for punishing conspiracies to commit offences against the revenue laws only would, of course, be a revenue law within the statute of 1804. This is conceded. If a law which provided solely for punishing such conspiracies would be so, it could by no reason lose that character because it added also the same penalties for the same offence in reference to other departments of the government. No such imputed absurdity, therefore, no such unheard of anomaly as counsel supposes, is to result from treating this one section now, with its compendious general form, including all laws, as we should be compelled to treat it if it specifically provided for conspiracies against the revenue laws, and added subsequently the general clause in reference to other laws. There may be some difficulty in its interpretation, but there are in the way of carrying out the actual intention of congress and the pressing necessities of the public safety no such literal and technical difficulties as are imagined.

That section 30 of the act of 1867 is found in an act the chief purpose of which is to impose taxes does not certainly make it solely a revenue law; but its location there may be looked to in its interpretation. It suggests connection between it and the condition of things which required its enactment. The conspiracies which called for it were, in the great majority of cases, those to violate revenue statutes. The instances also of its application thus far in nearly every case called to our attention are of the same character. We know as fully as any historical legal fact can be known that the leading object of the statute was to punish these offences. Experience before 1804 demonstrated that the short period of limitation of two years cut off nine-tenths of the prosecutions which public safety demanded.

These crimes it was ascertained then, and known still better now, are oftener than otherwise unknown until after that time has elapsed. Hence it was for them extended to five years, while for others it was still left at two years. Conspiracies to perpetrate crimes against the revenue are, if possible, still more covert and less subject to early discovery. It is an instructive fact, too, that in nearly every case of this character in this entire circuit, and we think all, this limitation statute of 1790, has been invoked to shield the offender. Legislation that permits such a result, more unwise, more at war with the well understood policy demanded by the public safety in this class of cases, can not be imagined. If thus compelled to read it, it will add a practical proviso that under section 30 of the act of 1867, no prosecutions shall take place for conspiracies to violate the revenue laws. Its leading object will be defeated and an intention imputed to congress, we are certain it did not entertain. Looking to the previous condition of the law, the history of the wrongs which demanded this section, the object of its passage, the location of the section in a revenue statute, and the injurious and discreditable effect upon the administration of our criminal law, to send out of court flocks of wrong doers with impunity, we think our duty is quite clear to say that an indictment under it for conspiracy to commit an offence against the revenue laws may lawfully be found after twenty-four months.

Had this same section 30 been inserted in the original crimes act, contemporaneously with the general limitations act of 1790, it would not have been so construed. There would have been no other limitation than the one in that act. The facts and history would not, as now, warrant the interpretation we give it. But long before the act of 1867, that of 1804 had declared a different policy in reference to all offences against the revenue. The court of last resort had said such penal and criminal laws should not be construed in the narrow sense in which many common law judgments had read that class of acts. The onus probandi had, by statute, been changed in a large number of these cases, and this policy further illustrated by a liberal judicial action which had extended the principle much beyond the specific instances named in the letter of the statutes. We feel we have no right to take a step backward in this none too efficient course of legislation and judgment. The frequency and boldness of this class of offences has been partially checked by a vigorous administration of the law. It has been greatly aided by those wise and protective precepts which the court of last resort has established in the ascertainment of guilt. The unnecessary, impolitic and obstructive reading which this defence demands is at war with this course of decisions. An amendment of the existing statutes would not authorize the trial of those now guilty, and there is no necessity in our judgment, for asking it.

The learned counsel for the defendant cited several judgments to sustain the interpretation he asked. We have considered his references, and added a few others, not because they furnish guides for the particular interpretation here, but to suggest only that our courts, state and national, as well as those in England, have, in pursuit of what they thought the intention of the legislature, gone infinitely beyond the limits demanded by our judgment here. They are trammelled by no narrow rules, but so administer the statute as to obey most deferentially and implicitly what they think the law-makers meant. They do not require the most accurate or happy expression for this end, but read the words in a usual or unusual, in a general or limited, a popular or technical and scientific sense, just as, after a full consideration of all the facts which called for the enactments and the consequences of proposed constructions, they believe will best effectuate the objects of the provisions of law. It is most eminently true, in this department of law, that school definitions, and a formal logical nomenclature, are not only useless, but misleading. Judges and commentators have so often repeated this that it is no longer worthy of illustration. Mr. Sedgwick (page 227) says that the attempt to set up formal canons is ingenious and metaphysically "curious, but of no practical utility." Precedents may guide in reference to the right sources and limits of our inquiries in search of the intended meaning, and illustrate the almost unlimited liberty which it is our duty to take with the literalisms of a law, but afford slight aid in determining the meaning of an act in particular instances. 1 Bl. Comm. 59, says: "The signs by which we may seek the intention are the words of the contract, the subject matter, the effects and consequences, or the spirit and reason of the law." In Brewer v. Blough, 14 Pet. [39 U. S.] 178, it is said to be "the duty of the court to restrain the words of the law with narrow limits if satisfied that the literal meaning would extend it to cases not intended by the legislature." By no popular signification does the word "may" mean "must," but they have become to be nearly synonymous in the law of constitutions. See Miner v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 16; Supervisors v. U. S., 4 Wall. [71 U. S.] 435; Galma v. Amy, 5 Wall. [72 U. S.] 705. "The law should be construed so as to effectuate it even if contrary to its letter," says Tonnele v. Hall, 4 Comst. [4 N. Y.] 140. A notable instance of interpretation is that of the supreme court of the United States, and many state tribunals, holding that "beyond seas" in a statute of limitations, means only "without the state." Murray v. Baker, 3 Wheat. [16 U. S.] 341; Shelby v. Guy, 11 Wheat. [24 U. S.] 361. The words

here can hardly be said to have been interpreted, but others have been supplied. Defendant's counsel cited 7 Mass. 306; 4 Cush. 214; 12 Mass. 383; 11 Ohio, 252. The points they adjudge are sustained by numerous other decisions. Garnishee laws referring to all debts are held not to reach those due by promissory notes, because the consequences would be so impolitic that the courts knew that such was not the intent of their makers. One of them held "all ships" did not include government ships, and the others are but illustrations of a familiar rule that general words, where the intention as adduced from the subject matter requires it, will be restrained to par ticular instances. The duty performed in these cases requires a similar one here to seek the intention, even, although a slightly less literal meaning may result. In 15 Johns. 358, 380, and which has been approved by the supreme court, it is said: "A thing within the intention is as much within the law as if within its letter, and that which is within the letter is not within the statute unless within the intention. Such interpretation should be put upon it as not to suffer it to be eluded." A two years' limitation upon section 30 of the act of 1867, will practically repeal it. The English stock-jobbing acts refer to all stocks. It was held, looking to their object, not to apply to foreign stock. Salkeld v. Johnston, 1 Hare, 196.

General clauses in usury laws declaring all contracts void are construed to make them voidable only at the election of the party injured. Under the head of waiver the most important constitutional and statutory provisions are construed to be applicable only at the election of the party, and that he must elect the very first opportunity. The statute of frauds positively declares certain agreements void. By what rule have courts held under so many such laws that part performance, the admission of the contract, etc., took it out of the statute, but that leading one applicable in all instances, that the presumed intention must be followed even at the expense of the letter? Pennsylvania and other states have said that clauses even in their constitutions in reference to the passing of laws are directory. The judgments disregarding the letter of statutes by holding them directory when no mere interpretation could effectuate legislative intent, are still more numerous. Among the most learned discussions of this subject, resulting in as extensive assumption of judicial liberty as any to be found in modern books, are those by the courts of New York in relation to the word "corporation," and in reference to which it was held that, although certain organizations were such, they were not so within the meaning and spirit of the constitution. 3 Const. [3 N. Y.] 485; 4 Hill, 384; 23 Wend. 103; 7 Hill, 510; 3 Seld. [7 N. Y.] 328. They come within the letter but not the intention. Far within the limits of these and numerous other precedents, we are authorized to interpret the language of the thirtieth section of the act of 1867, as we propose, if such interpretation embodies the legislative intention. The letter and form will not stand in the way. It is said finally, these are criminal and penal laws, and must be construed in favor of the defendant if possible. If applicable this rule is in our way, for with much plausibility, to say the least, these laws might be differently rendered. We should be prepared to say, if necessary, however, that so far as statutes of limitation are concerned, and all the processes to bring an offender to trial, to ascertain his guilt, the old and irrational and frequently misapplied rules for the interpretation of penal and criminal acts have no application. It is only when the degree of punishment and the character of the offences are concerned, that they have been recognized. For the supreme court has said that all these laws intended to prevent fraud and protect the public revenue, should be liberally construed to effectuate the remedy and secure trial. That they must not be construed with other criminal and penal laws within the rule relied on. Cliquot v. U. S., 3 Wall. [70 U. S.] 115; Taylor v. U. S., 3 How. [44 U. S.] 197; 2 Am. Law Reg. (N. S.) 614; 7 Int. Rev. Rec. 6, and the earlier United States cases cited in these judgments. We should do violence to the reasons of these decisions were we to go back for maxims to the period when counsel and witnesses were denied to prisoners, in order to adopt a limitation which, in nine cases in ten, would enable this law to be evaded and the guilty to escape trial.

We should be quite satisfied with a judgment in conformity with this opinion, but when the cause was argued my Brother LEAVITT was on the bench. It is, therefore, pronounced by one member of the court as then constituted. He has now retired and cannot participate in it or dissent. My Brother SWING has not heard the arguments, and I am unwilling that these accidents shall deprive the defendant of the only opportunity he has under the laws to test the rectitude of this ruling. Had I no doubt, I would not take the step proposed, for it is by no means conceded that defendants have in all cases a right to what is called a full bench. Yet in no case, when after all available diligence, there remains such a condition of opinion as we find in this, have I failed when hearing the cause alone, at the request of defendant's counsel, and his undertaking in case of disagreement to follow the case to the supreme court to confer with my brethren, the district judges, and if the result create the occasion, unite in a certificate of division. If counsel ask it, such course will be taken in this cause. If so, they will submit additional copies of the briefs to the district judge, unless he is already supplied. I will add that two of the judges in other districts before whom similar questions are pending, concur in this judgment,

and should Brother SWING also concur, it is likely to constitute the law of this circuit until congress affords—what we all deem highly impolitic to withhold—a review of our judgments by writ of error.

Case No. 15,013.

UNITED STATES v. DUTCHER.

[7 Int. Rev. Rec. 122; 1 Am. Law T. Rep. U. S. Cts. 60.]

District Court, N. D. Illinois. April, 1868.

INTERNAL REVENUE—RECTIFIER'S BOOKS—NEGLECT TO KEEP.

It is not the intent of the internal revenue law [of 1866; 14 Stat. 98] that rectifiers or distillers shall be furnished with copies of the regulations and requirements thereof.

This was a libel for forfeiture of a rectifying establishment at Amboy, Ill., for neglecting to keep a book as required by the 26th section of the act of July 13, 1866. The claimant's counsel admitted that it was clearly proven to the jury that the book kept did not show all the spirits received and purchased, and sold or delivered; and Hon. Geo. C. Bates, on behalf of the defense, asked the court to charge the jury as follows: That if the jury believed from the evidence adduced that no rules and regulations for the keeping of a rectifier's book were ever prescribed, and furnished to the claimant by the commissioner of internal revenue as are provided for in section 26 of the act of July 13, 1866, they must find for the claimant, even though the books were not kept in accordance with the statute. That if the jury believed from the evidence adduced that the claimant has actually paid the excise tax of $2 per gallon "on every proof gallon so purchased or received by him, or sold or delivered" into the office of collector of that district, so that the United States has not been injured or defrauded in its revenue by the irregular entries in his book, that then they must find for the claimant, as they must be satisfied that his intent and purpose was, by irregular books, to defraud the revenue.

Before DRUMMOND, District Judge. The charge of the judge was against the positions above taken. His honor said to the jury: "The simple question is, has there been a failure on the part of the claimant to comply with the law in section 26 of said act, in regard to keeping his books as rectifier? It is clear that it is not the intent of the law that each rectifier or distiller shall be furnished with copies of the regulations and requirements. He must take proper pains to ascertain what the rules and regulations are. He must keep the book showing the facts required in the section referred to, even though the commissioner has prescribed nothing on the subject; and that a failure to keep a correct book under circumstances which indicate that it was through intent or gross negligence, would subject the party to the penalties of both fine and forfeiture prescribed in said section."

Verdict for the government.

Case No. 15,014.

UNITED STATES v. DUTCHER.

[2 Biss. 51;[1] 8 Int. Rev. Rec. 161; 1 Chi. Leg. News, 57.]

Circuit Court, N. D. Illinois. Oct. Term, 1868.

INTERNAL REVENUE—DISTILLERS' BONDS—PENALTY—MISTAKE OF OFFICER—TAX RATE.

1. The claim of the government under distillers' bonds for the payment of a tax, is not a penalty, nor in the nature of a penalty.

2. A bond given under the act of July 13, 1866 [14 Stat. 163], is not a penalty, but a contract and security, and is not affected by the repealing act of January 11, 1868 [14 Stat. 483], nor are suits or prosecutions instituted upon such a bond abated.

[Distinguished in U. S. v. Singer, Case No. 16,292.]

3. A distiller cannot avail himself of any mistake of the officer in overgauging the spirits. The law is imperative.

4. The tax must be paid at the rate prescribed by the law in force at the time the bonds were given.

Suit upon a distiller's bond given to the United States under the act of July 13, 1866 (14 Stat. 163).

Three cases were submitted to the court under the following state of facts: In November, 1866, the defendant Dutcher, who was a distiller, had certain highwines in a bonded warehouse at Amboy, Ill., and desired to remove them to New York, and thereupon made application to the proper authorities for leave to remove them, and in accordance with the law and practice, he gave bonds under which he was authorized to remove them from Amboy to a bonded warehouse in New York. Prior to their removal, in conformity with law, the highwines were inspected, and on their arrival in New York were again inspected, and it was ascertained that there was a deficiency in the quantity, as compared with what the inspection showed at Amboy, and there being three different bonds given, and a deficiency under each, on the 20th day of May, 1868, suit was brought upon the three separate bonds against Dutcher and the sureties, to recover for the deficiency.

Jesse O. Norton, U. S. Dist. Atty.
George C. Bates, for defendants.

Before DAVIS, Circuit Justice, and DRUMMOND, District Judge.

DRUMMOND, District Judge. Various objections have been made on the part of the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

defendants, which I will proceed to consider in their order.

In the first place, it is claimed that the law under which these bonds were given, has been repealed by the law of January 11th, 1868 (14 Stat. 483). The law under which the bonds were given, was passed on the 13th of July, 1866. It is claimed that the repeal of the law of 1868 deprived the government of the right to institute suits upon these bonds, and also prevented the government from prosecuting them after suits had been instituted; in other words, that the repeal of the law puts an end to all proceedings connected with these bonds, and all right or claim to sue upon them—and on the ground that this is a penalty—the rule being that unless there is a saving clause all penalties under the law fall with the repeal of the law. This rule is not disputed and is well established. The only question connected with this part of the case is whether this is a penalty. We think it is not. The highwines were in the bonded warehouse at Amboy, for the purpose of securing the government in the payment of the tax. They were permitted to be removed to a bonded warehouse elsewhere (in this instance to New York), upon giving sufficient security. When they arrived at the bonded warehouse in New York, they were held there for the payment of the tax; they were taken out of the custody of the government and given to the owner, in order that they might be transferred, and, of course, the government losing all control of them, the bonds stand as security to the government for the payment of the tax and for nothing else. When the parties executed the bonds, they made a contract with the government, not in the nature of a penalty, but for the purpose simply of paying the tax which was due to the government. The only question is whether the repeal of the law, by the act of January 11th, 1868, which declares that thereafter the tax should be paid before distilled spirits should be removed from a bonded warehouse, destroyed the contract which the parties had previously made with the government for the payment of the tax. This contract was lawful when it was entered into. It was for the payment of a sum that was due to the government, and it is difficult to see how the mere repeal of the law can destroy the contract, and put an end to a right on the part of the government, which was absolute—namely, the payment of the tax. It is not a penalty. It is a sum claimed to be due the government for its support, like any other tax, and is not in the nature of a penalty. But independent of this, the repealing law, it is clear, was not intended to prevent the operation of such contracts as this. By virtue of prior laws the owner of highwines had a right to remove them from a bonded warehouse, upon giving a bond under such regulations as the commissioner of internal revenue might prescribe without the payment of the tax, and this law merely says that hereafter it cannot be done, but before the removal of the highwines from a bonded warehouse, all taxes must be paid, and then comes in the clause that, "All acts, and parts of acts, inconsistent with the provisions of this act be and are hereby repealed."

The contract that was thus made was not inconsistent with the provision. It was voluntarily entered into by the parties with a view of paying the taxes which were due the government. Therefore, it is clear—and both of us concur in this—as we do in all the conclusions given in deciding these cases—that the repealing law did not destroy the contract entered into between these parties and the government for the payment of the tax.

The next question is whether the parties are bound by the bonds which they have given, in which is stated the quantity of highwines, as by the inspection of the proper authority at Amboy. The evidence of the officer in New York and the officer at Amboy who inspected the highwines has been taken, and it appears from the evidence that the inspector at Amboy certified that the wines were of greater quantity than was the fact; in other words, that he gauged the casks of highwines too high.

The question is, whether the defendants can avail themselves of this difference, on the ground that there was a mistake made in gauging the liquors. We think they cannot. The 40th section of the act of 1866 provides that all distilled spirits which had been inspected, gauged, proved and marked by the inspector, according to the provisions of law, might be removed, without the payment of the taxes, from a bonded warehouse, under such rules and regulations and on such bond or security as the commissioner of internal revenue, subject to the approval of the secretary of the treasury, might prescribe, and that they might be transported to any general bonded warehouse; that after their arrival there they were to be inspected, and that "the tax shall be paid on the difference between the number of proof gallons stated in the bond given at the place of shipment and the number received at the warehouse, less the allowance for leakage as established by the regulations of the commissioner of internal revenue." Observe, the tax shall be paid on the difference between the number of gallons as stated in the bond and the number received at the warehouse less the allowance for leakage, etc., "and, except for actual destruction by unavoidable accident, by the elements or by the public enemy, no other allowance for loss shall be made." Now we think the language of this section imperative, and too explicit to allow us to admit any evidence tending to show that there was a mistake made in the gauging of the liquors, the language of the section being that the tax must be paid on the difference between what the bond states as inspected and the amount as received at the place of

transfer, and that no other allowance shall be made except of a particular character, and the claim here not coming within the exception. That exception, of course, was intended to provide for any destruction without any fault or neglect on the part of the owner in the transit of the property from one bonded warehouse to another, as by fire, by breakage of cars, and everything of that sort. It is a hard rule, undoubtedly, for I am satisfied that there was a mistake made, but it is a mistake that we cannot remedy. They must, therefore, pay over the tax for the difference in the quantity after making all such allowances as the regulations prescribe, and as, after such allowance, there is a deficiency, which is admitted, for that deficiency the defendants are liable upon their bonds.

Another objection has been made, that, conceding the defendants are liable, they are liable only to the extent of sixty cents per gallon, and not for two dollars, as the law then was; and it is claimed that the bond stands in the place of the highwines, and if the wines were in the bonded warehouse in New York, the government could only have now what is the present tax, and could not recover or have what was the tax by the law of 1866. What has become of these highwines we do not know, whether they are there or have been sold, but the theory of the case proceeds upon the ground that the defendant, who owned these highwines, and in whose custody and control they were, has abstracted from the casks, without the payment of the tax, a certain quantity of liquor. Whether he has done so in fact or not, is not material, that is the theory upon which the cases proceed, and, of course, we must take it just as it exists, and decide upon the principle which there is in the cases, and that being so, the defendants must pay the tax which was due under the law in force at the time, namely, two dollars per gallon. However, as I am satisfied that there was a mistake, as I have already said, in the quantity of highwines as certified, it would afford me pleasure, and I have no doubt it will also my brother judge, to certify to the proper authority that the evidence does establish this conclusion, in order that the parties may apply there for a reduction of any sum which may be recovered against them. In this way the defendants may obtain the relief they ask from the court, and which we think the court is not competent to give. I have been told that the commissioner of internal revenue has in some instances taken sixty cents a gallon under similar circumstances. If that has been done, it shows (I understand it is now repudiated) an inconsistency which ought not to exist. But the courts of the country, while treating the decisions of a bureau at Washington with due respect, must decide all legal questions arising before them according to their own views of the law.

Judgment for the United States.

Case No. 15,015.

UNITED STATES v. DUVAL et al.

[Gilp. 356.] [1]

District Court, E. D. Pennsylvania. June 3, 1833; Dec. 13, 1833.

USAGE—INDIAN AGENT—EXTRA COMPENSATION—DISCRETION—DISALLOWANCE OF CLAIM—NEW TRIAL.

1. A usage, which is to govern a question of right between parties, must be so certain, uniform, and notorious, as to be understood and known by them.

[Cited in Pierpont v. Fowle, Case No. 11,152; U. S. v. Buchanan, 8 How. (49 U. S.) 102.]

[Cited in Blake v. Stump, 73 Md. 172, 20 Atl. 788; Carter v. Philadelphia Coal Co., 77 Pa. St. 291; Cope v. Dodd, 13 Pa. St. 35; Potts v. Aechternacht, 93 Pa. St. 142.]

2. The usage of a department of the government, in settling its accounts, can have no effect on those of an individual unless it is certain, uniform and notorious.

[Cited in brief in U. S. v. Ingersoll, Case No. 15,440.]

3. Although the salary of an Indian agent is fixed under the provisions of the act of April 20, 1818 [3 Stat. 461], at a certain sum, yet he has a right to an allowance in addition, for such services or expenditures as are authorised by a general usage of the department of war.

4. Where a charge, not prohibited by law, is supported by a clear equity arising from a bonâ fide performance of service by a public officer, or a bonâ fide expenditure of money for the public service, a discretion is properly vested in the head of a department of the government to allow it, although there is no express authority for it, and it is not a subject of strict legal right.

5. In all cases where a discretion is confided to the head of a department of the government, to allow or disallow a charge of a public officer, a court and jury have the same discretion over the charge, when it comes before them for revision and examination.

6. Where a public officer, at the request of the head of a department, performs other public duties than those properly belonging to his office, he is entitled to extra compensation.

[Cited in U. S. v. Ingersoll, Case No. 15,440.]

7. Expenditures made by an Indian agent, for the benefit of the Indians, and on a tract of land reserved and held by themselves, are not to be charged to the United States.

8. Under the provisions of the act of March 3, 1797 [1 Stat. 512], no claim of a public officer for a credit, can be admitted on a trial, unless it has been presented to and disallowed by the accounting officers of the treasury.

9. A suspension of a claim for a credit, by the accounting officers of the treasury, is not a disallowance, although no particular form of allowance or disallowance is required.

10. Where a controversy consists chiefly of questions of fact, the objections to a verdict must be very cogent to induce the court to grant a new trial.

[Cited in Briscoe v. Bronaugh, 1 Tex. 326.]

11. Where a jury render a verdict against the plain principles of law, as laid down by the court, and against clear and unquestioned evidence, the court will grant a new trial notwithstanding the particular circumstances or general justice of the case.

[Cited in U. S. v. Five Cases of Cloth, Case No. 15,110; Fearing v. De Wolf, Id. 4,711; Macy v. De Wolf, Id. 8,933.]

[1] [Reported by Henry D. Gilpin, Esq.]

On the 25th of January, 1833, suit was brought in this court by the United States against the representatives of Edward W. Duval [Ellen Duval, and William Duval], to recover eleven thousand five hundred and thirty-eight dollars and fifty-four cents, for that sum of money alleged to have been received by him in his life time, and to be still due and unpaid. To this suit the defendants pleaded the general issue. The case came to be tried before HOPKINSON, District Judge, and a special jury, on the 3d of June, 1833, when the material facts established were as follows:

On the 7th of October, 1824, Mr. Duval was appointed Indian agent to the Cherokees on the Arkansas, and gave bond to the United States with two sureties, in the sum of ten thousand dollars, for the faithful discharge of the duties of the office. There being no agency house, he was authorized to build one at an expense not exceeding two thousand dollars. Finding, however, on his arrival there, that the other duties of his station prevented his attention to this object, and having a house of his own, such part of it as was necessary was occupied for the public use, and a rent of one hundred and twenty dollars per annum, allowed by the government. In 1826, however, it being considered absolutely necessary, he was directed to purchase a house at the cost first specified. This he did on the 31st of March, 1827, but the building requiring much alteration and repair, was not completed till the end of December, 1829, though partially occupied in June preceding; the entire cost of purchase, alterations, and repairs having amounted to two thousand six hundred and seventy-nine dollars and sixty cents. Mr. Duval was also directed to build, for the use of the Indians, a cotton gin, but limited to seven hundred dollars; the Indians themselves wishing a better one, offered him five hundred dollars more from their own funds, and ultimately agreed, should it cost above twelve hundred dollars, to supply the excess; it was finished in 1829, for eighteen hundred and seventy dollars and ninety-four cents. Immediately after his appointment, and with these instructions as well as others in regard to the general discharge of his duties as agent, Mr. Duval went to Arkansas. He remained there until January, 1828, acting to the entire satisfaction of the government, and obtaining much influence among the Indian tribes. He devoted himself especially to carry through the plan of removing the Indians over the Mississippi, and was entrusted with large disbursements for that object. His accounts appear to have been regularly rendered up to this time. In the winter of 1827, the Cherokees, urged on as they represented by the pressure of heavy grievances, determined to send a delegation to Washington, without the usual previous permission to do so, and with some difficulty prevailed on Mr. Duval to accompany it, on the 3d of January, 1828. This visit led to negotiations of importance, in which he acted as the principal negotiator for the government. They ended in a treaty with the Cherokees, on the 6th of May, 1828, for the cession of their territory lying within the boundaries of Arkansas, and removal beyond its western limits. By the fourth article, however, a small tract, on which various improvements had been made, was reserved from the general cession, and agreed to be sold by the United States, who were specially to apply the proceeds to erect a mill and other works, for the benefit of the Cherokees, in their new country. On the 6th of June the delegation left Washington to return home. Mr. Duval remained until the month of November following, up to which time he settled his accounts. He then returned to Arkansas, entrusted with carrying into effect the treaty made in the spring; and was also appointed agent for the Choctaws west of the Mississippi, though without any allowance for additional compensation. He was besides directed to receive the emigrant Indians from Georgia and the adjoining states, at the mouth of White river, and to provision and transport them west of Arkansas. On the 22d of April, 1829, the reservation, above referred to, was sold by the United States with all the improvements made upon it; the proceeds were two thousand and fifty dollars, and were applied to the benefit of the Indians on the new territory to which they removed. The reservation in question was purchased by Mr. Duval himself, and remained in his possession and that of his representatives, until the 26th of April, 1832, when the sale was cancelled by the secretary of war, on the ground that such a purchase ought not to be made by an Indian agent. To this decision his representatives assented, and the sum given by Mr. Duval was repaid. After his return to the agency, for a period of fourteen months, Mr. Duval received and disbursed very large sums of money in the performance of his various duties. He failed, however, to render any account during the whole of that time, by reason, as was afterwards alleged, of his constant engagement in the public service. After waiting till the 15th of January, 1830, the secretary of war informed him that the provisions of the law of January 31, 1823, relative to punctual settlements, being positive, and the accounting officers of the treasury having reported his failure to comply with them for so long a period, no other course was left than his removal. On the 15th of September, 1830, Mr. Duval died in Arkansas, no adjustment of his accounts having been made. In the spring of 1832, his representatives presented an account of the disbursements made by him, and his various claims for expenditures, allowances, and compensation, which resulted in a balance alleged to be due to him from the United States, of three thousand nine hundred and sixty-five dollars and fifty-one cents. On an

examination of this account by the accounting officers of the treasury, numerous items of charge were rejected, as inadmissible, or not sufficiently proved, and on the 26th of April, 1832, according to their report, he was at the time of his death actually indebted to the United States in the sum of eleven thousand five hundred and thirty-eight dollars and fifty-four cents, the debt to recover which this suit was brought.

The difference between the two accounts, amounting altogether to fifteen thousand five hundred and four dollars and five cents, was made up of numerous charges which were classed under the following general items; viz.

1. The rent of his house for the agency, from October 1, 1826, to December 31, 1829.....	$ 390 00
2. His expenses and compensation at the treaty of May 6, 1828..	1,064 01
3. Expenses of the Indian delegation	2,429 13
4, 5. Horses and steamboats for transporting emigrating Indians	1,158 00
6. Loss of his horse and his expenses at an Indian council...	147 50
7. His compensation as Choctaw agent	500 00
8. A sum paid T. Graves under the treaty of 6th May, 1828.....	1,125 00
9. Purchasing looms for the Indians	54 46
10. Sending a special messenger to Washington	250 00
11. Services of an interpreter to the Indian delegation	300 00
12. Forage for his own horses.....	466 64
13. Expenditures on the agency house above $2,000.....	679 60
14. Expenditures on the cotton gin above $700	1,170 94
15. Expenditures on the Cherokee reservation before its sale....	270 35
16, 17. Expenses and provisions to Indians visiting the agency...	177 00
18. Provisions to emigrating Indians	891 24
19. Expenses at the agency for the Indians	1,017 50
20. Provisions for and charges on account of emigrating Indians.	1,861 93
21, 22, 23. Special services and expenditures required at the agency	123 00
24. Expenditures on the reservation while it was in his own possession	1,427 75
	$15,504 05

Mr. Gilpin, U. S. Dist. Atty.

The amount in dispute in this case is large, but it is also important from the circumstances connected with it. Nearly three years have elapsed since the death of Mr. Duval, so that the fullest opportunity has been afforded to elucidate and explain every part of the transactions. The whole accounts have been thoroughly investigated by the accounting officers of the treasury, with the aid of his representatives, and under the immediate inspection of those officers of the government, who have long been versed in all the minutiæ of such accounts, and are well acquainted with the expenditures necessary for an Indian agent. We are to consider in the outset the duties of the agent, his compensation, and the disbursements he can lawfully claim allowance for. His duties, as defined by law, are to receive and dispose of goods to the Indians on public account, to carry into effect the various provisions of the treaties with them, and to account regularly every quarter. His compensation was at first a salary and certain rations, but in 1818 it was fixed at fifteen hundred dollars, to embrace all allowances for himself, his clerks, and every service connected with his office. His disbursements are either those necessary to his place, or such as are extra and contingent; before he can claim allowance for them, all, even the most necessary, must be accurately vouched; when, however, they are extra or contingent expenditures, a mere voucher of their having been made is not sufficient, they are not left to his own discretion, they must be sanctioned by the secretary of war, or proper officer of the department. These rules are to govern us in admitting or rejecting the claims that are now made by Mr. Duval's representatives; such as are strictly within the duties of his office must be satisfactorily proved; such as are not must have the sanction of the department.

The first two items are evidently contingent, and are expressly refused by the treasury for want of the proper sanction. Nor are they just. In the first, rent is charged for his own house long after one had been purchased by the United States, or at least long after Mr. Duval had received the money to purchase one; and in the second, he was performing the duties of his office at a distance from his agency, but certainly not with more labour, and for this he was receiving his salary. The next three items depend entirely on vouchers of the sufficiency of which the jury must judge. The sixth, however, is clearly within the provision for compensation fixed by law, and to authorise its allowance in addition, the sanction of the department even would scarcely suffice; yet this is entirely wanting. The claim for compensation for the Choctaw agency, is directly at variance with the terms entered into on his appointment, which were, that there should be no additional allowance. The payment to Graves is provided for by the treaty, and was to be made by the United States; it was actually paid at the treasury; and this payment by Mr. Duval was without authority, which he ought first to have obtained. The next item is a matter of proof, the object of the expenditures being within the duties of the agent. The three which follow are altogether contingent, altogether such as an agent ought not to make without previous authority; to send a messenger to Washington at a heavy expense, when the documents could have been transmitted by mail; to employ an additional interpreter when there was one attached to this tribe, and regularly in the service and pay

of the United States; and to charge the United States with the keeping of his own horses, when his compensation is fixed by law, and limited to a sum which is expressly to include all the charges for his official acts and services; these are expenditures which, if allowed on the mere discretion of the agent, and without the sanction of those officers whom the law authorises to control him, would lead to the most lavish system. The thirteenth item is an expenditure by an agent directly contrary to his instructions, which limited him to two thousand dollars. The fourteenth and fifteenth are charges that never should have been made to the United States; in their cession the Indians made a "reservation" of a small tract of land for their own use; on this a cotton gin was erected for them, towards which the United States agreed to contribute seven hundred dollars and no more; certain improvements which the Indians wanted were also made for them; the disbursements were made by the agent, but were entirely for the benefit of the Indians; any additional ones, therefore, on the house, on the gin, or on the reservation itself, were chargeable to them; they knew the limitation fixed on the buildings; they expressly retained the reservation as their exclusive property; the agent was equally acquainted with both circumstances; the former never expected these payments to be made by the United States, and the latter had no right to charge them with them. Most of the charges embraced in the eight following items are matters of proof for the jury, but among them are found some, contingent in their character, and being without the sanction of the war department, inadmissible. To the last or twenty-fourth item, there is an evident and unanswerable objection; it has never been disallowed by the treasury; it is not included among the rejected items making up the balance claimed from Mr. Duval. The fourth section of the act of March 3, 1797, expressly declares, that in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial, but such as have been presented and disallowed by the accounting officers, which is not the case with this item. In fact, the treasury have given the defendants time to produce their proof; they are not disposed to reject it; it is not the subject of controversy now as to its principle; there is nothing that makes it yet a proper matter for the investigation of this tribunal. 1 Story, Laws, 464 [1 Stat. 512]; 2 Story, Laws, 1189, 1191 [2 Stat. 653, 654].

J. R. Ingersoll and Mr. Sergeant, for defendants.

The existence of a suit does not in any degree authorise the inference that there is any, the smallest, amount unaccounted for by the public officer. It does not necessarily imply that the accounting officers of the government ever thought that such was the case. It is perhaps deemed a convenient mode of settling an account which must be settled somewhere, and justice is not anticipated in her results by any of the preliminary proceedings. The argument on behalf of the United States seems to presume, that the decision here is to be controlled by what the public officers at Washington have done, or have refused to do. This is not so. The whole matter is before the court and jury, and on the broadest equitable principles. It is no doubt true, that in settling accounts at the treasury, the accounting officers require the sanction of the head of the department for an expenditure evidently contingent; but this court and jury do not require his sanction; they have the same power to make the allowance that he has, and so the supreme court has expressly decided. More than this, if the accounting officers or the secretary should reject a claim because not authorized by law, this court could allow it, should they deem it equitable. It has been alleged, that, as the claim for many of these expenditures rests on the usage of the department in allowing them, and the sanction of the secretary has been always given to such allowances, consequently his sanction forms part of the usage; but to this it is answered, that the sanction of the secretary is not a constituent part of the usage, which is limited to the thing done and the circumstances necessarily attendant on it; if it has been usual for the secretary to allow a charge, and he shall refuse to do so in a particular instance, the court and jury are to do what he ought to have done. These principles have all been clearly established by the supreme court. U. S. v. Macdaniel, 7 Pet. [32 U. S.] 1; U. S. v. Ripley, Id. 18; U. S. v. Fillebrown, Id. 28.

The first item of charge hardly admits of a question; the United States agreed to furnish an agency house, and one fit to live in was not finished till December 31, 1829; of course they must pay the rent till that time; nor did Mr. Duval receive any money until he bought the new house; he was merely authorised to draw it before; it was a credit, not a payment. To his compensation in effecting the treaty he is justly entitled; his great services are proved; it was not part of his duty as an Indian agent; he was expressly requested to act by the government; and similar allowances have been made in cases exactly similar. The third, fourth and fifth items were rejected for want of vouchers, which have been furnished at this trial, and of course remove the objection. The expenses of Mr. Duval, at the council, have been admitted by the accounting officers, but the item has been rejected because it includes a charge for the loss of his horse: we have proved this loss to have been in the service of the United States, and occasioned by duties he was performing for them; a circumstance giving him an unques-

tionably equitable claim. His charge as Choctaw agent is for his expenses; the agreement that he was not to receive additional compensation, never was intended to deprive him of the repayment of expenses, expressly occasioned by his assuming gratuitously a new duty. The double payment to Graves is an error which ought not to fall on Mr. Duval; he was authorised to make it under the general agency connected with the treaty; he did so; after he had actually paid it in Arkansas, the treasury pays it, without inquiring, at Washington; the blame is there, and Mr. Duval must not be made to suffer. We have fully proved the expenditures in the ninth item. Those in the tenth and eleventh are of the most equitable character; important accounts and vouchers were to be transmitted through the wilderness; they related to the fulfilment of an interesting treaty; the expenditure of thousands of dollars depended on them. So in the employment of an interpreter, surely in adjusting an important treaty, it was no extravagant exercise of discretion for Mr. Duval to have his own interpreter, in addition to the one belonging to the Indian delegation; the United States were the sole gainers by it, and to throw the expense on their authorised agent would be manifestly unjust. Mr. Duval was allowed to purchase two horses at the expense of the United States; he did not do so, but employed his own in their service; to pay him for their forage is surely most equitable; and it never was intended that, under such circumstances, it should be deducted from his compensation. The limitation of two thousand dollars for the agency house was applicable to the cost of the building; this excess has arisen from the land, and that land has since become the property of the United States: will they make the agent pay from his own pocket for property they hold themselves, especially when he has proved the bona fide expenditure of the sum in a purchase directed by them? The expenditures on the reservation were made by Mr. Duval; no doubt at first for the Indians, but by the treaty the United States agreed to sell this reservation and give the proceeds to the Indians; they have done so, and paid them the whole sum it brought with the improvements; but at the time of sale these improvements had not been paid for, and the United States were bound either to deduct their cost from the sum received and pay it to Mr. Duval, who made them, if the treaty meant the net proceeds; or if it meant that the Indians were to receive the whole for a gift as it stood, then they were to pay off the cost of the improvements besides; in either case, as the sale of the property was entrusted to them, Mr. Duval has a right to look to them for this payment. The remaining items, except the last, depend entirely on the sufficiency of the proof, and that offered on this trial seems in most respects amply sufficient. In fact, the only cases not almost indisputable, are those of the allowance to the blacksmith, McDavid, for his assistance in the nineteenth item, and to Flower, for his services as a commissary in furnishing provisions: it is alleged that these are included in the general payments of their respective contracts, but the evidence appears sufficient to show that they were extra expenditures, and entitled to a separate allowance. The twenty-fourth item ought to be submitted to the jury; it is part of the same transaction which should be definitively closed by their verdict; the charge itself is very just: Mr. Duval purchased the land without any idea that the government would disapprove of it; he expended this money on it when it was his own; the United States took it from him and now retain it; they have the benefit of all he did, and of course ought to pay for it. It has, however, been submitted to the treasury and there suspended, which is tantamount to a disallowance; it therefore forms a set-off, such a one as would be indisputable between man and man; such a one as the act referred to by the district attorney never meant to exclude; the intention of that law was, to give the United States an opportunity of examining, through its officers, the claims presented, before they were submitted to a judicial investigation; this has been done, and the accounting officers have not been satisfied of their correctness; in no respect, therefore, will the United States suffer any injustice by its admission, while the defendants will be subjected to great hardship by a refusal.

Mr. Gilpin, U. S. Dist. Atty., in reply.

It has not been contended that the jury are to be bound by the decisions of the accounting officers; but merely that their reasons in rejecting many of the claims are entitled to great weight, as persons well acquainted with the usages in regard to such agencies, and the nature of the vouchers, and having no interest whatever. This ought especially to weigh in the present case, because these accounts have been all made up since the death of Mr. Duval, and every rejected item is presented for the first time since that event, though the actual disbursements took place before. It is to be remembered too, that though the amount in dispute is large in itself, yet it is not so in comparison with the aggregate of Mr. Duval's disbursements, which was probably more than a million of dollars. The principles which govern the allowances here are simple. First, to allow Mr. Duval the specific sum for his own compensation and expenses which the law authorises. Secondly, to require adequate proof of all his disbursements. Thirdly, where the disbursements have not been specifically authorised by law or settled usage, to require the sanction of the secretary of war. To the last, which embraces most of these disputed

charges, the defendant's counsel object. They deny the necessity of the allowance of the secretary in contingent expenditures, and assert that if the jury think them proper, that is sufficient. To this it is answered that the law means to require the secretary specially to superintend all contingent expenditures, he is held responsible for the disbursement of the contingent fund for Indian affairs, he is obliged to report annually every payment made from it, he knows what an agent in remote districts, in Arkansas for instance, ought to apply it to, which surely a jury in Philadelphia cannot. The allowance therefore of the secretary converts what is contingent into a specific expenditure. The appropriation by law is general when first made; this sanction makes it specific; it does what congress have done in many points, and would have done in all, could they have known every want of the agency. When the defendants rest their claim on a usage of the department, they seem to admit this principle; for that usage is itself an implied sanction. It is in their application of the usage to their particular claims that they fail; a uniform or general admission of the very same allowance must be proved, which they have failed to do; in the Case of Macdaniel, the express approval of the same services for which he claimed compensation was proved on previous and repeated occasions, and the question was as to the amount of compensation; in the Case of Fillebrown there was an implied contract to do the act previously ascertained, the amount of compensation alone was left unsettled.

It is contended therefore that in regard to all disbursements, falling within the class which is to be paid from the appropriation for "contingencies," the following rules are to govern the allowance: (1) That the appropriation is made by law, to be applied only to such cases as the secretary of war sanctions, and consequently, that all claims for "contingencies" not sanctioned by him, must be allowed by the legislature, not by the courts. (2) That if such claims could be the subject of judicial allowance, still, in the absence of any express contract between the government and Mr. Duval, as to the services performed or the amount to be paid for them, the evidence of the implied contract must rest upon the usage proved in the cause; that according to such usage the allowance for contingencies, both as to the necessity of the services and the amount to be paid for them, has been invariably governed by the decision of the secretary of war in each particular case; that therefore no claim for contingencies ought to be allowed to the defendants, which has not been specifically sanctioned by the secretary of war. (3) That there was an implied contract between Mr. Duval and the government, to take such sum for every contingent service performed by him, as might be allowed by the existing head of the department at the time of settling his account; that therefore his representatives can claim nothing for contingent services without such allowance. These principles are not in opposition to the decisions of the supreme court, which have been cited; they place the judgment on an officer who is well fitted by his situation to form a correct one, and whom congress have obliged to report annually and made responsible; to do otherwise would be to submit to the uncontrolled discretion of a subordinate agent, in a remote place, who is amenable to no one whatever.

If these rules be correct, then the claims of Mr. Duval for allowances for the rent of his own house from April 1, 1827, to December 31, 1829; for his services at Washington, in procuring the acceptance of the treaty of May 6, 1828, by the Cherokees; for the loss of his horse in going to an Indian council; for forage of his own horses from January 1, 1826, to August 1, 1830; and for special services rendered by himself at the agency; not having been sanctioned by the secretary of war ought not to be allowed. They were all services of his own, rendered in the performance of those duties for which he received by law a specific compensation. and if the secretary, who knew all the facts and circumstances, did not consider them as extraordinary, they ought not to be paid for from the contingent fund. The same remark may be made as to his employment of expresses and an additional interpreter; they are expenditures in relation to the ordinary duties of his agency, of the propriety of which the head of the war department could best judge, as well as of the fund from which they ought to be paid. As to the claims of Mr. Duval, for allowances for disbursements made by him on the property and improvements called the "Cherokee Reservation," mentioned in the fourth article of the treaty of May 6, 1828; viz. for building and repairing the agency house, over and above the sum of two thousand dollars, either before or after the sale of the reservation; for erecting a cotton gin, over and above the sum of seven hundred dollars; and for expenditures charged by him to the "Cherokee Reservation," and made previous to the sale, they ought not any of them to be allowed, because they are not legally chargeable against the United States. In the first two expenditures Mr. Duval was allowed certain sums by the United States, which he received and expended; he has no right to ask more from them; the land belonged to the Cherokees; all that Mr. Duval expended on it, whether on the buildings in addition, or in improvements, was for them and they must pay him; he had no lien on the land; it was sold by the United States under the treaty and the proceeds paid over to the Cherokees; if the sale was incorrect or imperfect it is to be sold again, and if it brings more the surplus must be paid to them also; but until actually sold it was or is the property of the Indians, and to them Mr. Duval must look for repayment. The same principles are to be applied by the jury in

considering all the other items, except the last, which falls under the class of contingencies; the rest, which are matters of proof, must depend entirely on the evidence. As to the twenty-fourth item, the law is too clear to admit of doubt; it requires expressly that every credit claimed shall have been disallowed; this has not been done; a suspension is not a disallowance; a suspension followed by a suit for a balance which includes the sum suspended, might be an implied disallowance; but a sum presented, suspended, and not embraced in the amount claimed on suit by the United States, is not a disallowance either express or implied; on the contrary, it leaves the inference that the claim is believed to be just, and will be admitted on proper proof being produced, for which time is now given.

HOPKINSON, District Judge (charging jury). It is more than two weeks, that your attention has been closely and patiently given to this interesting and complicated cause, in which an endless variety of facts, intermixed with questions of law and usage, is involved. The long account which has been spread before you, contains twenty-four principal items which are disputed, and which again are subdivided so as to amount to nearly one hundred subjects of controversy. It is now my duty to present to your consideration such views of the case, as I may believe will assist you in making up your verdict. I might, perhaps, perform this duty with more order and in a better shape, by postponing the charge until to-morrow; but I have determined to proceed with it at once, while the evidence and arguments are more fresh in our recollection than they may be twenty-four hours hence. The items for which the defendants now claim a credit have been rejected by the officers of the treasury at Washington, and, as to some of them, the refusal is justified by insisting upon the usage of the department in settling such accounts. You will understand that an usage, which is to govern a question of right, between parties in this court, must be so certain, uniform, and notorious that you may say that it was understood and known to the parties. In such a case we cannot say that it is allowed to change or control the contract between them, but rather that it is a part of the contract, and was so understood, and, of course, is as binding upon them as any other stipulation in it. The usages of a department of the government in settling an account with an individual, unless it be such a one as I have described, can have no influence here.

There is another question of somewhat the same character, upon which it is proper I should be very explicit with you, and if I am mistaken in my view of it, the dissatisfied party has the means of correcting my error. It has been repeatedly and ardently urged upon us, by the district attorney, that as to certain charges in this account, that is, those which are embraced in or applicable to what is called, "the contingent fund," the decision upon them by the secretary of war is final and conclusive, that his decision may not be reversed and disturbed here, and that in case of hardship or injustice in the refusal to make allowances to a public agent for such charges, congress only can grant relief. I entirely and distinctly dissent from this doctrine, although we are assured that such is the understanding and practice of the war department, and the treasury officers at Washington. If this cause comes to this court and jury trammelled, nay decided, by the judgment of the secretary of war, to what purpose has the party a right to bring it here; the trial is an unreal mockery, and you and I are the mere automata of a stronger hand, the agents to execute the decree of a higher power. I say to you, that in every case where the law of congress allows or refuses a charge in the account of a public agent, the secretary, as well as you and I, are bound by that law and must conform ourselves to it; but that in the cases where the law is not imperative, but confides to the secretary an authority, a discretion to allow or disallow a charge, as he may deem it to be just and equitable, or otherwise, then when the cause comes to this court for revision and examination, the court and jury have the same discretion and authority over such charges as the secretary had in the first instance, and we may exercise our judgments upon them in allowing or disallowing them, as we may think justice and equity demand. The opinion of the secretary will have the influence to which his character and station entitle him and no more. As an authority it is nothing.

I should be diffident of using this language to you if I were not supported in it by the highest judicial tribunal of our country. I understand the doctrine of the supreme court to be such as I have given it to you. Let me repeat it. When a certain charge is prohibited to a public agent by the law under and by which he is appointed, the allowance of such a charge would be a violation of the law, which is not permitted either to the court or the head of a department. But when there is no such prohibition, but the objection or defect is the want of an express authority for it, and it is therefore not a subject of strict legal right, yet nevertheless if it is supported by a clear equity arising from a bona fide performance of a service, or the bona fide expenditure of money for the public service, there a discretion is properly and indeed necessarily vested in the head of the proper department to allow the charge. If it were not so the consequence would be, either that the service and interests of the government would often suffer, or that a meritorious officer would be ruined by his fidelity and zeal. Whenever and wherever the head of a department may exercise his discretion upon such a charge, and in the use of that discretion, has refused

the allowance, and the court and jury before whom the case shall come for trial, think that the secretary ought to have made the allowance, they may do it. This doctrine is sustained by the supreme court in the cases of U. S. v. Macdaniel, 7 Pet. [32 U. S.] 12, in that of U. S. v. Ripley, Id. 25, 26, and in that of U. S. v. Fillebrown, Id. 48. I hold then that you are not bound by any thing the secretary, the comptroller, or the auditor has done with the charges in this account, be they contingent or not contingent.

We must now make a review as brief as possible, of the particular subjects of controversy in this cause. The treasury transcript, which is primâ facie evidence of the indebtedness of the defendant, shows a balance due from him to the United States of eleven thousand five hundred and thirty-eight dollars and seventy-five cents. This stands good against him, unless he can extinguish or reduce it by showing that he has just claims or is entitled to credits which have been refused in the settlement of his account at the treasury. He has presented to you certain claims and credits which were not allowed at the treasury, and you are now to decide whether they ought to have been allowed; whether they are such as the justice of his case entitled him to. (The judge took up the several items in their order, recapitulated the evidence, and made his remarks on each of them. It is only as to some of them that it is thought now necessary to repeat his observations.)

Item 2. This is for charges of an Indian treaty at Washington. It consists of two parts: (1) His expenses. This was allowed at Washington. (2) For his services in negotiating the treaty. He had no appointment as a commissioner for that purpose; but did he render the service of one? It is proved that he did, and that his services were indispensable to the success of the negotiation. Did he volunteer his services? If he did. he is not entitled to this charge; but it is proved that he acted by the request of the secretary of war, and that he did the duties of a commissioner. It was an extra service, not within the line of his duty as an Indian agent. His compensation should be what is allowed in similar cases, for the same services. If he did the duties of a commissioner, he is entitled to the compensation of one.

Item 8. This is a charge of eleven hundred and twenty-five dollars, paid by the defendant to one Thomas Graves, for damages for spoliations. The treaty appropriated eight thousand seven hundred and sixty dollars, for spoliations committed on the Cherokees; also a further sum of twelve hundred dollars for Graves; also five hundred dollars for one Guest, and five hundred dollars for one Rogers. All these sums were put into the hands of the agent to be distributed according to the terms of the treaty. The agent, it is not doubted, paid to Graves the money due to him; but it appears that the government also paid it to Rogers, on an order drawn by Graves. It has thus been twice paid. Who is to bear the loss? The party on whom the fault rests; the party who incautiously made the payment. The money was given by the government to Duval as their agent, to be paid by him to Graves; he therefore not only had the authority to pay it, but it was his duty. He did pay it honestly and in good faith, on the order of Graves, in several sums at different times ending in 1830, and part of it was paid by Mr. Murray after the death of Mr. Duval. After Graves had thus given orders on Mr. Duval for the whole amount due to him, which orders were paid without a suspicion of fraud, he most dishonestly gave an order on the government to Rogers for twelve hundred dollars, which was presented by Rogers and paid to him by the government. Now is there any doubt where the fault, the want of due caution, was? When this order was presented, the government well knew that the whole amount to be paid for spoliations, of course including that due to Graves, had been put into the hands of their agent, Mr. Duval, to be by him distributed to the persons entitled to it. Yet without making any inquiry why this order was drawn on them, why Mr. Duval had not been applied to, or if he had, why he had not paid it, or whether it was or was not paid, they accept and pay the order thus fraudulently drawn, and as to which the fraud would have been detected by the exercise of the most ordinary prudence. This is not all; Graves had another claim for one hundred and seventy-five dollars, under the general appropriation for damages, by the same treaty, but the specific appropriation only was put into the hands of Mr. Duval. The claim for one hundred and seventy-five dollars, which if due was properly drawn for on them, was refused, while the other was paid. The only ground taken now for refusing to Mr. Duval the allowance, is that the payments made by him, on the orders of Graves, were not presented in the settlement of Mr. Duval's account of 1830 and 1831. This is doubtful. Mr. Murray swears that they were then presented; the auditor says they were not; of the fact you will judge; but whether they were or were not, the defendant has a clear right to the allowance.

Item 13. This is a charge of six hundred and seventy-nine dollars and sixty cents for erecting the agency house. Some important questions are involved in it. In 1827 a house was purchased by Mr. Duval for seven hundred and fifty dollars, with the site. It was but a log cabin with a frame store house. The new building, erected about two miles and a half from the old one, cost with the seven hundred and fifty dollars paid for the old one, the sum of two thousand six hundred and seventy-nine dollars and sixty cents. The agent had distinct orders not to exceed the sum of two thousand dollars for this object; he was expressly limited to that amount. He now presents a charge against the United States for six hundred and seventy-nine dollars and six-

ty cents, the excess of his expenditure beyond his orders. The disbursements are said, by the witness, to have been made with economy. But will this justify the agent for disregarding his orders and exceeding his authority? Nothing can be more dangerous than the admission of such a principle. It is like any other case of principal and agent. The agent of the United States stands bound by the same law, as the agent of any individual. In both cases the question is: has he exceeded his instructions clearly and distinctly given, in which there is no equivocation, and nothing left him but to obey? If he has, he must answer for it; all he has done beyond his authority is of himself and for himself, and he must take it upon himself. It is not like the case where an agent, having no specific instructions, and being called upon to act, exercises a sound and honest discretion. In the face of clear and positive orders, there is nothing for discretion to decide. It is pretended that the limitation of two thousand dollars had reference only to the building of the house, and not to the purchase of the land. The purchase of the house necessarily included the land on which it stood. The whole expenditure for an agency house was not to exceed two thousand dollars. In purchasing the reservation, on which this house stood, the log cabin and frame store were valued at four hundred dollars, and the ground at three hundred and fifty. To this seven hundred and fifty he had a right to add thirteen hundred and fifty for bettering the accommodation, and no more. He has exceeded this amount by the sum of six hundred and seventy-nine dollars and sixty cents, which he now claims from the United States. I think he is not entitled to it.

Item 14. This was a charge for expenditures in erecting a cotton gin and gin house. These improvements were erected partly in 1827, partly in 1828, and not completed until 1829. The government had allowed the agent to expend the sum of seven hundred dollars; but he had expended beyond that amount eleven hundred and seventy dollars and ninety-four cents, which he now charges to the government. He was allowed the seven hundred. The witness, Mr. Murray, testified that the sum allowed was not sufficient to erect a suitable house. The cotton gin was in the reservation, and was included in the sale of that land. This excess of his authority and orders can hardly be justified. If he found the sum allowed too small, he should have so represented it to the government and waited for new instructions. The excess was not trifling; it was nearly three times the amount allowed. The defendant did not claim this allowance, but gave it up as not chargeable to the government. But there is another view of this charge, which seems to me to exclude the defendant from any claim upon it. By a treaty with the Indians on the 6th of May, 1828, they made a cession of certain territory to the United States, with a special reservation of a part of it. By this reservation, the part reserved with all the improvements on it, was agreed to be sold by the United States, and the proceeds of the sale were to be applied to the benefit of the Indians on the new territory to which they removed. The cotton gin and improvements in question were erected upon this reserved part, and of course were to be sold with it. The sale was accordingly made. The proceeds were the sum of two thousand and fifty dollars, which were fully and faithfully applied to the use of the Cherokees, in conformity with the agreement. This sum was the proceeds of the land and of all the improvements on it, and of course, when the United States paid over this sum to the use of the Indians, they paid the value of those improvements as well as of the land. It is now contended that the government must pay the defendant for these same improvements; thus paying for them twice; once to the Indians, for whom they were erected on their own territory, and again to the defendant, who had erected them at his own hazard, so far as he exceeded his authority in their cost. Nor has the defendant any reason to complain: he is only sent back to the persons for whom and on whose credit, to wit, the Cherokees, he made these improvements. He had no idea that the United States were answerable to him for them: so he says in his memorandum of the 20th of May, 1828. If he were living we cannot suppose he would make this charge. Mr. Duval was himself the purchaser of the land, with the improvements, at the public sale. It is true that this sale was afterwards cancelled by an agreement between his representatives and the United States, by which he transferred his right to them, on the ground that he, being the Indian agent, could not be the purchaser at such sale; but I do not see that this circumstance gives any equity to this charge which can address itself to this court and jury. If his purchase was illegal and void, by reason of his agency, he gave up nothing by cancelling it, or by the transfer of his right to the United States. If his purchase was legal, the surrender was voluntary and without condition. If his representatives intended to charge the United States, on account of this transfer, with this debt, in addition to the amount which the land sold for, they should have said so, and made it a condition of the transfer. The only consideration which appears to have been given by the United States, or asked by Mr. Duval's representatives, is the repayment to them of the sum of two thousand and fifty dollars, which he had given for it at the sale. Now they would add nearly twelve hundred dollars to this consideration, without any notice of any such intention or expectation. Suppose this sale or transfer by them had been made to one of you; would you expect to be called upon to pay, not only

the stipulated price or consideration, but also to discharge an old debt, not charged upon the land, which the Cherokees owe to Mr. Duval for the very improvements included in your purchase and paid for by you? I am very clear that this charge ought not to be allowed, but that the Cherokees, the original debtors, at whose request, on whose credit, and for whose use the improvements were made, must be looked to for payment. They have indeed received compensation for them in the price paid to them on the sale of the land with them.

Item 15. This charge must also be disallowed. These expenditures were made on the land, when it belonged to the Indians, or at least they had the beneficial interest in it. They were on the tract reserved for the benefit of the Indians. Mr. Murray, the witness of the defendants, who was connected with the agency as the clerk of the agent, and a member of his family, expressly says, that he believes Mr. Duval considered the Cherokee Nation as responsible to him for this expenditure; that he considered the whole matter to be between the Cherokees and himself, and not with the government. Indeed the charge is not to the United States, but to the "Cherokee Reservation." Mr. Duval never presented the charge to the government in his life time.

Item 24. This is a charge of fourteen hundred and twenty-seven dollars and seventy-five cents, for expenditures on the Cherokee reservation. The counsel for the defendants states that these expenses were made on the land, after the purchase of it by Mr. Duval, and while he thought it his own; afterwards the sale to him was cancelled, and the land, with these improvements, transferred to the United States, the secretary of war saying that Mr. Duval, being the agent of the government, was prohibited from purchasing. The United States having thus taken these improvements ought to reimburse Mr. Duval for them; he made them believe that he had a right to the land. But we are precluded from taking this charge into our consideration. We need not therefore take into our consideration the objections that are made to it, to wit, that it has no date, no signature, no bills or receipts, nor any thing to prove the expenditures for which a reimbursement is claimed. The preliminary difficulty is that this charge has never been presented to the department for their allowance or disallowance. It has of consequence never been rejected by the accounting officers of the treasury. By the fourth section of the act of congress of March 3, 1797, it is enacted that in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial, but such as shall appear to have been presented to the accounting officers of the treasury, for their examination, and by them disallowed, in whole or in part. This has not been done, at least it does not appear that it has. No disallowance of this item appears any where here. It has been assimilated to some items which have been suspended though not absolutely disallowed, and yet have been the subject of examination on this trial. I answer: (1) That no objection was made to them by the officer of the United States, who has appeared for them on this trial, and has their rights in his charge; and at most the argument could only prove that the suspended item ought not to have been inquired into, but does not prove that this may. (2) But I think that it does now appear that these items, although at first only suspended, are now disallowed, because the suit brought by the United States, claims a balance which necessarily excludes these items. No particular form of allowance or disallowance is required by the act. It is enough if it appears that they are disallowed.

The jury found a verdict in favour of the United States for the sum of three hundred and forty-eight dollars and twenty-nine cents. At the time of giving their verdict they presented a paper to the court, in which were stated those items of account in dispute that were allowed, and those that were rejected by them. From this it appeared that they had refused Mr. Duval a credit for items 7, 13, 14, and 24, altogether; and also for that part of item 2, which consisted of a claim for compensation; that part of item 19 which consisted of the materials used by McDavid, the blacksmith; and that part of item 20 which consisted of an allowance to Flower for his services as a commissary. All the remaining items claimed by the defendants were allowed.

On the 24th of June, 1833, the district attorney moved for a new trial, and filed the following reasons: (1) Because the jury allowed the claim of the defendants for one hundred and forty-seven dollars and fifty cents, including one hundred and ten dollars for the loss of a horse of the said Edward W. Duval, although the defendants were not entitled by law to such allowance; although there was no evidence that the loss of the horse was occasioned by his being employed in the service of the United States; and although the court charged that they were not entitled to such allowance unless such loss was so occasioned. (2) Because the jury allowed the claim of the defendants for three hundred dollars, for disbursements made by the said Edward W. Duval to an interpreter at Washington, although the defendants were not entitled by law, to such allowance; although there was evidence, that the said interpreter was not entitled to the same for any services rendered by him, that the allowance was not claimed by the said Edward W. Duval in his life time, and that it was not paid till after his death; and although the court charged the jury unfavourably to such allowance. (3) Because the jury allowed the claim of the defendants for

four hundred and sixty-six dollars and sixty-four cents, for forage of horses of the said Edward W. Duval, for four years and upwards, although the defendants were not entitled by law to such allowance; although there was evidence that the said Edward W. Duval never claimed the same in his life time; and although the court charged the jury unfavourably to such allowance. (4) Because the jury allowed the claim of the defendants for two hundred and seventy dollars and thirty-five cents, for disbursements made by the said Edward W. Duval on the property called the "Cherokee Reservation" before its sale, although the defendants were not entitled by law to such allowance; although there was evidence that the disbursements were made at the request of the Cherokees for their own benefit, and on the understanding by the said Edward W. Duval that they were to be paid for by them; and although the court charged the jury against such allowance. (5) Because the jury allowed the claim of the defendants for eight hundred and thirty-seven dollars and fifty cents, including disbursements made by the said Edward W. Duval to James McDavid for the board and wages of a striker, although the defendants were not entitled by law to such allowance; although there was evidence that the same had been included in previous payments; and although the court charged the jury unfavourably to such allowance. (6) Because the jury allowed the claims of the defendants for thirty dollars and twenty dollars, for travelling expenses of the said Edward W. Duval, although the defendants were not entitled by law to such allowance; although there was evidence that the said Edward W. Duval never claimed the same in his life time; and although the court charged the jury unfavourably to such allowance. (7) Because the verdict of the jury was against law. (8) Because the verdict of the jury was against the evidence. (9) Because the verdict of the jury was against the charge of the court.

On the 10th of September, 1833, the motion for a new trial was argued by Mr. Gilpin, District Attorney, for the United States, and Mr. Sergeant, for defendants.

Mr. Gilpin, U. S. Dist. Atty.

It is unnecessary, and would be improper in this stage of the cause, to renew the argument on the points of law submitted to and decided by the court, after so full an opinion as that expressed in the charge to the jury. This application is, therefore, limited to those items on which the verdict was in opposition to the opinion or direction of the court; in which it was against the law as laid down in the charge, or against the weight of evidence. The statement presented by the jury, at the time of rendering their verdict, enables us to discover these without difficulty, and to ascertain exactly in what points their final decision was erroneous, on either ground. The first objection arises from their allowance to Mr. Duval for the loss of his horse in going to an Indian council, which forms part of the sixth item. This was against law, because it was not established by the evidence that the horse was lost on account of its employment in the service of the United States, and no allowance is lawful except for such a loss. The law fixes the entire compensation of the agent at fifteen hundred dollars per annum, in which his necessary expenses are included, and all the evidence of any customary allowance goes at most to cases where the horses are specially employed for the public service. The charge of the court was in accordance with this view, declaring expressly that the loss must be occasioned, not merely in such service, but by it. The second objection is to the allowance of the eleventh item, for the services of an interpreter to the Indian delegation. This is altogether illegal; it is for services rendered to the Cherokees, and as long since as 1828, there was a regular interpreter to the delegation who was paid by the United States; and this charge never seems in any manner to have been contracted for or allowed by Mr. Duval himself in his life time. Though undoubtedly questions of fact are to be left to the jury, yet this is a decision so much against the weight of evidence, that it affords quite sufficient ground for the exercise of the right to grant a new trial. Kohne v. Insurance Co. of North America [Case No. 7,921]; Smith v. McCormick, 2 Yeates, 164; Swearingen v. Birch, 4 Yeates, 322. The third objection is to the allowance of the twelfth item for the forage of Mr. Duval's horses, which was never claimed by him at all during his life, and is now brought forward by his representatives in one general charge, extending back several years before his death. The evidence of Messrs. Stewart and McKenney, adduced by the defendants to prove the usage of the war department, at most, sustains allowances for a special or temporary employment of horses by an agent, never an annual allowance. This is a regular charge per annum for nearly five years. It is in direct opposition to the charge of the court, and is unsupported by any evidence. The fourth objection is to the allowance of the fifteenth item, the expenditures on the Cherokee reservation before its sale. These expenditures were incurred on the property while it belonged to the Indians; the improvements were made at their request, charged to them in the accounts of Mr. Duval, and, as he himself stated to the department, were to be paid by them. The fifth objection is to the allowance of that part of the nineteenth item, which embraces the board and services of the assistant or striker of the blacksmith, employed at the agency. This was clearly against the evidence. It was proved that the assistant was his own slave, and that the claim was carried back for several years, though intermediate bills had been paid, but

this charge was included in none of them. The last objection is to the allowance of the twenty-third item, which consists of a charge for Mr. Duval's own travelling expenses. This, like the preceding claims of a similar kind, is properly embraced in the salary of an agent; it was for ordinary expenses on official and necessary business; it was not charged by Mr. Duval during his own life; and no evidence has been produced that he ever considered it as a ground for a special credit.

(THE COURT intimated to the counsel for the defendants that it was unnecessary to argue the first, second, fifth and sixth objections; and, understanding that they were willing to give up the verdict so far as it allowed the amount of the fifteenth item, for expenditures on the Cherokee reservation, he was directed to confine his reply to the third reason on behalf of the United States for a new trial.)

Mr. Sergeant, for defendants.

The argument in support of this objection involves the point of law asserted by the district attorney on the trial of the cause, that the sanction of the secretary of war is necessary to authorise the allowance by the court and jury of the claim presented. The court have already overruled that ground, and the only question which the jury had to consider, in regard to this allowance, was, whether these horses were necessary to the service of the United States. It never could be the rule of the department that, where an emergency arose, the agent was not to meet it; that he was first to send to Washington; on the contrary, it is necessary and proper that he should be at liberty to exercise a reasonable discretion. It appears from the evidence of Col. McKenney, that there was no positive rule on the subject, but that where an agent was called on to perform unexpected but necessary services, an allowance was made suitable to the circumstances; he adds that horses are necessary for the agent; that when kept for the use of the United States, the expense was allowed, and that two, the number for which this forage is claimed, are reasonable. The defendants have proved, by the evidence of Mr. Murray, that these horses were used only for the public service; if, therefore, the expense of keeping them is refused, the indispensable business of the United States will have been performed, at the expense of Mr. Duval and his representatives. But this, at any rate, is not a ground for a new trial; the whole matter, as to law, usage and fact, was fully submitted to the jury; it was contested at large by the district attorney; and it was specially discussed by the court in the charge. It was allowed because it was an expense bonâ fide incurred, of which the United States derived the benefit; and believing this, the jury were right in allowing it. It is immaterial whether it was claimed or not during the lifetime of Mr. Duval; if the jury were satisfied that he was justly entitled to it, they acted as properly in giving it to his representatives, as they would have done in giving it to himself, had he lived.

Mr. Gilpin, U. S. Dist. Atty., in reply.

The verdict of the jury on this item is sustained, because, as is alleged, the usage of the war department admits such an allowance, because these horses were for the express service of the United States, and because it is altogether immaterial whether the claim was made before or after the death of Mr. Duval. The evidence of Messrs. Stewart and McKenney, officers long in the Indian department, does not establish an allowance under circumstances exactly similar; the instances they cite differ from it in a material point; they refer to horses used on special occasions, on emergencies, and for particular objects, while this is an annual and permanent charge. It is true they were employed in the service of the United States, but all the agent's expenses, as such, were equally incurred in their service: this is not enough, it must be shown that they were in some unusual, extraordinary service, which has not been done. This fact makes the time and manner of presenting the charge material: had it been a subject of special expense or charge, it would have been presented by Mr. Duval; and his omission to do so, during his life, affords strong ground to conclude that he did not consider the case as one falling within the line of special allowance, to which the witnesses above named have referred, and which undoubtedly was well known to Mr. Duval.

HOPKINSON, District Judge. When a controversy, consisting almost entirely of questions of fact, has been fully and fairly tried by an impartial and intelligent jury, each party having produced all the evidence in his power, and no expectation being entertained by either of furnishing any additional facts, a court would yield, with extreme reluctance, to an application to set aside the verdict. The cause now before us occupied the attention of this court, and such a jury as I have described, for more than ten days, and every part of it was laboriously examined and discussed. There is no hope that anything can be added to it, either in the way of argument or evidence, on another trial. In such a case the objections to the verdict should be cogent indeed, before the court would allow them to prevail against it. In addition to this general principle, there are circumstances in this case which make me very unwilling to disturb the decision of the jury. The controversy arose on a long and old account, in relation to transactions in a distant wilderness, in part with savages, and in part with men not much above them in education and a knowledge of the forms of business. The

transactions themselves were sometimes the result of sudden emergencies, when the public service required a prompt action, and an observance of exact regularity was impossible without danger to the service. It is obvious that in such an agency, it would scarcely be just or reasonable to call for, at this distance of time as well as place, a full and satisfactory explanation of all the doubts and difficulties which may present themselves here, in the investigation of these complicated affairs, and of the various items, some of them very small, which are brought into the account. Unfortunately one of the parties, from whom such explanations might have been received, is dead, and his representatives have been obliged to make up his case from his papers as they found them. Such a case seems to be peculiarly fitted for the broad and equitable jurisdiction of a jury over the evidence of a cause, and the belief they will give to it. It should not be altogether overlooked, too, on a question of granting a new trial, addressed to the discretion of the court, which discretion takes for its guide the justice or injustice to the parties that will follow the allowance or refusal of a second trial, that, in this case, the defendants have relied, and must always rely, on the knowledge and testimony of a single witness; that he lives at an immense distance from this place of holding the court, and was, probably, brought here at a great expense; that his presence can hardly be expected again; and that his evidence was of a nature to require a personal examination at the bar, and could not be taken with satisfaction to either party in any other way. Such circumstances would strongly dispose me to let this verdict stand, although in some instances the jury have not drawn the same conclusions from the evidence that I should have done, and have made some allowances to the defendants, which I should have refused, were I not, on a careful review of the disputed items of this account and the decision of the jury upon them, constrained to say that I find some in which the jury have, in my opinion, rendered their verdict against the plain principles of law, or against the clear and unquestioned evidence of the case. Such errors I am bound to correct, and must be governed by higher considerations even than those which I have stated in support of the verdict. The court must never suffer its controlling power over a verdict to be prostrated, nor the particular circumstances or even the justice of any case, to overthrow the general principles established for the adminstration of the law, and the security of the rights of all.

The motion for a new trial in this case is made on the part of the United States. The reasons filed, exclusive of the general or formal ones, are six in number. The first, second, fifth, and sixth, relate to the allowance by the jury of certain disputed credits claimed by the defendants in their account, as to which there was evidence given both for and against them, and they were left by the court to the jury on their evidence and equity. Upon these I shall say no more than that I cannot interfere with the opinion of the jury in such cases. As to the fifth, the most important of them in amount, I will remark that the disbursements here charged to the United States were actually made and paid by Mr. Duval to the blacksmith James McDavid. The objections made on the part of the United States to the right of McDavid to this money, or, at least to that part of it which he charged for his striker, are very strong and have not been well answered or explained; but, on the other hand, as no pretence is made of any fraud or collusion between Mr. Duval and McDavid, and the propriety of the charge itself is not so absolutely disproved as to fix upon Mr. Duval an imputation of gross and culpable negligence, and he actually paid the money, I cannot say that the jury were wrong in allowing it. Why should Mr. Duval have paid this money to McDavid if he did not think it honestly due to him? He knew he took the hazard on himself of its being allowed to him or not in the settlement of his account. To the general remark I have made on the first reason, which relates to the loss of a horse, I will add that the witness said he knew the horse died in the service which brought the charge within Mr. Stewart's rule of allowance: but I told the jury that if they thought the horse died in consequence or by reason of the service, the charge should be allowed, but not if the loss was owing to the fault or negligence of the owner, even if the horse was in the service at the time. As to the three hundred dollars paid to Pierre Perra as an interpreter at Washington, which is the subject of the second reason for a new trial, I am free to say that I should not have allowed it, and I gave my reasons for this opinion to the jury; but they have thought otherwise, and I cannot say that they had not a right to do so. It was, in my mind, a strong circumstance against this charge, that the money was not paid by Mr. Duval to Perra, nor, as far as I recollect the evidence, ever demanded of him by Perra. It was paid since the death of Mr. Duval, one may almost say gratuitously by his administrator, and three years after the service was performed for which it was demanded. The service was in 1828, the payment in June, 1831. Such things certainly cast a shade over the charge, but the jury have been satisfied that it is correct, and their decision upon it must stand.

The two items, on which I have not been able to find a satisfactory support for the verdict, are the third and fourth. The fourth has not been argued on this motion, because it is understood that the defendants will con-

sent to correct the verdict by adding to it the amount of this item, to wit, two hundred and seventy dollars and thirty-five cents. It arose on a claim made by Mr. Duval for disbursements for improvements on the property called the "Cherokee Reservation," before its sale. Such a charge upon the United States for disbursements on property not belonging to them, but of which both the title and possession were in the Cherokees, was directly contrary to every principle of law, charging one party for improvements on the property of another. Nor did Mr. Duval himself ever consider this an expenditure chargeable to the United States, or introduce it into any account against them. The charge was to the "Cherokee Reservation." Mr. Murray, the defendants' witness, who was the confidential clerk of Mr. Duval, and from whom we have derived all our knowledge of the transactions of his agency, says expressly, that he believes Mr. Duval considered the Cherokee Nation as responsible to him for these improvements; that he considered the whole matter to be between the Cherokees and himself, and not with the government. This allowance of this charge against the government, is as much against the evidence as the law of the case. As the counsel for the defendants have given up this part of the verdict on my suggestion, at the argument, I owe it to them to explain more fully the reasons of my opinion. By the treaty of the 6th of May, 1828, the Cherokee Indians made a cession of territory to the United States, with a special reservation of a certain part of it. In relation to this it was stipulated that the part reserved, with all the improvements on it, should be sold by the United States, and the proceeds of the sale be applied to the benefit of the Indians on the new territory to which they removed. The sale was made. Mr. Duval was the purchaser at the price of two thousand and fifty dollars; this he paid to the United States, and they appropriated it, according to their agreement, for the benefit of the Indians on their new territory. This sum, so received and so applied by the United States, was the whole proceeds of the sale as well of the lands included in the reservation as of all the improvements made thereon, for which improvements the sum of two hundred and seventy dollars and thirty-five cents, now claimed by the defendants, was expended by Mr. Duval, while the land belonged to the Indians, at their request and on their credit and responsibility. It is now contended, or was so at the trial of this cause, that the United States must not only pay to the Indians the proceeds of their land and improvements, but must further pay a debt they owe to Mr. Duval on account of those improvements, that is, in fact they are to pay twice for them, once by handing to the Indians the whole amount they brought at a public sale, and now again by paying for them to the person at whose cost they were made. When Mr. Duval made these improvements he did so on the credit of the Cherokees, and had no idea of having any claim on the United States for them.

When Mr. Duval made the purchase of this reservation he was the agent of the United States to these Indians. It was, since his death, on a suggestion of the illegality or impropriety of his being a purchaser at this sale, surrendered by his representatives to the United States, and they received back the money he had paid for it. Does the agreement with the United States to cancel this purchase, and the transfer of his right to the United States, raise an equity to support this claim, because the land and the improvements thereby became the property of the United States? I can see nothing in this arrangement which raises an equity against the United States for the charge in question. If the purchase made by Mr. Duval was illegal by reason of his agency, his representatives gave up nothing when they cancelled it, and made the transfer to the United States. If, on the other hand, the purchase was legal and their right to the land complete, the surrender of it was a voluntary act, made freely and without condition, or any intimation of receiving any thing more from the United States than a return of the money Mr. Duval had paid for it, which, it may be, was better for them than the land. If it was the intention of the representatives to claim any more, either directly or as a credit in their account with the government, they should have said so, and the United States, the other party to the bargain, could have said whether they would assent to it or not. The only consideration that appears in the agreement, the only one that was recognised by both of the parties, or even thought of, as far as we know, by either of them, was the repayment of the sum of two thousand and fifty dollars, which Mr. Duval had given for the land. If an individual, instead of the government, had made this agreement with Mr. Duval, and had paid him the stipulated consideration, could he have been afterwards charged with an old debt which the Cherokees owed to Mr. Duval, for the same improvements on the land which were paid for in the sum of two thousand and fifty dollars, given for the whole? I told the jury that I was very clear that this item ought not to be allowed, on any principle of law or equity, and it is as clearly against the evidence.

The matter alleged for a new trial, in the third reason, requires a fuller explanation of the evidence which relates to it. It is thus stated: "Because the jury allowed the claim of the defendants for four hundred and sixty-six dollars and sixty-four cents for forage of horses of the said Edward W. Duval for four years and upwards, although the defendants were not entitled by law to such allowance; although there was evidence that the said Edward W. Duval never claimed the same in his lifetime; and although the court charged the jury unfavorably to such allow-

ance." The charge or credit, claimed by the defendant in this item, is for foraging two horses from the 1st of January, 1826, to 31st of August, 1830. In the examination of Mr. Murray, the witness of the defendants, to support this charge, he says, that these horses were employed in the service of the United States, and were necessary for it. He thinks the charges are moderate. They were Mr. Duval's horses; he had his farm horses besides; these were kept for public service, such as travelling through the Nation, and to send expresses. He says, he knows of no such allowance to other agents. Mr. Duval had not the same horses all the time. He knows of no authority from the secretary of war to Mr. Duval to keep these horses.

On this evidence, given by the defendants to support this claim, these observations present themselves: (1) That the charge is for a period of four years and eight months; during which period, nor, indeed, at any time in the lifetime of Mr. Duval, was any charge for keeping these horses introduced by him into his accounts sent to or settled with the department, nor any claim made for it in any way by Mr. Duval. This circumstance affords some ground, I might say strong ground, to presume that he never considered it a charge which he had a right to make, or intended to make, against the government, and it stands, in this respect, on a similar footing with the charge for the improvements on the Cherokee reservation. (2) If these horses were really kept for the public service, and were necessary for it, and were so thought and intended by Mr. Duval, the cost or purchase of them would have been, at least, as fair a charge upon the government as their forage; but they were Mr. Duval's horses, bought with his private funds, and no reimbursement of their price was ever asked by Mr. Duval, or is even now asked from the United States. This is another circumstance to show how this transaction has been understood by Mr. Duval himself. (3) The same horses were not kept through the whole period, but no account is raised with the United States for the sale or the loss of the horses he parted with, nor for the purchase of their substitutes. (4) This is a regular, continued charge for a long period, and not for horses required or employed, from time to time, in the public service, on emergencies which allowed no opportunity to consult the department at Washington, and obtain the permission of the secretary for the expenditure; nor do they appear to have been procured or wanted for any such emergencies, but to have been used for travelling through the Nation or in sending expresses, in the performance of the ordinary duties of the agent.

Before we take up the evidence of Mr. Stewart and Col. McKenney on this subject, let us turn to the act of congress which has a direct bearing upon it, and whose provisions, we must presume, were found to be necessary to prevent or restrain abuses upon the treasury, in the undefinable shape of extra allowances, which might grow out of these agencies without the means of detecting or checking them in detail. By the first section of the act of April 20, 1818, the salaries of the several Indian agents are appointed; and by the third section it is enacted: "That the sums hereby allowed to Indian agents and factors shall be in full compensation for all their services; and that all rations, or other allowances made to them, shall be deducted from the sums hereby allowed." The legal rights or claims of an agent upon the United States are thus circumscribed by the law, but there exists in the war department a power to make allowances to an agent, unprovided for by law, when the secretary shall think them to be just and equitable, and not forbidden by any law. Under this power, certain usages have grown up in the department, which have become the law of the department, and on which an agent has a right to rely, in the exercise of his functions. That which has been uniformly allowed to others, he may presume will be allowed to him, and if he performs a service, or makes an expenditure of this description, he has a right to expect an allowance for it. The defendants have endeavoured to bring the charge we are now considering, within the protection of the usage of the war department. To effect this they have produced the testimony of William Stewart and Col. McKenney. Mr. Stewart has been a clerk in the war department from 1818 to 1832; he says it has been invariably the custom to allow salary officers extra for services not within the scope of their offices. He mentioned the case of Governor McMinn, who received eight dollars a day and other allowances, as a commissioner to value the improvements of the Cherokees, and received at the same time his salary as governor. In this case it is evident that the appointment as a commissioner was entirely distinct from that of governor; the duties of the stations were wholly independent of each other. The service as a commissioner was clearly not within the scope of his office of governor. It is no example or precedent in this case. So of the case of Col. McKenney. In 1827, this gentleman, then at the head of the Indian bureau of the war department, whose office and duties were at Washington, was sent by the government among the Indians to make treaties, and to reconcile some differences among the Creeks. He acted as a commissioner in forming a treaty, and received pay as a commissioner for the time he was treating, and his travelling expenses, and, at the same time, his salary as superintendent of the Indian bureau. This case is analogous to that of Governor McMinn, but not to the charge made on behalf of Mr. Duval. I am aware that this part of Mr. Stewart's testimony was applied more particularly to other charges in the defendant's account than to this; but as it may have some bearing on

this also, I have made this reference to it. In relation to this item, to wit, the foraging the horses, this witness says, that no allowance was made for keeping horses, unless specially agreed upon by the secretary. If a horse is wanted for an emergency requiring prompt execution, as expresses, there is a discretionary power with the agent to employ one, but, in general, no allowance was made for horses, unless specially authorized. When this witness gives the example of expresses, he must be understood to mean an express on an emergency requiring prompt execution, and not an ordinary message sent on ordinary business.

In the case of Col. Crowell, given by this witness, the question was deliberately considered. He was the agent of the Creek Indians, and brought a charge of two hundred and fifty dollars a year for horses, for the use of the agency, for four or five years. It was allowed by the then acting secretary of war. This was in 1828. He was also allowed for the cost or purchase of the horses. Thus he carried the whole thing through as the concern of the government, charging them for keeping what he alleged to be their horses, bought and kept for the use of the agency; and not, as in this case, for keeping horses admitted to be his own. The comptroller, in settling Col. Crowell's account, refused to pass this charge; and so it remained suspended, until it was finally, within the last eighteen months, rejected by the secretary of war. This seems to have settled the practice or usage of the department, or to have been in conformity with it, for, the witness says, several agents brought in similar claims, but they were all rejected. What this witness says about allowances being sometimes made on honour, on the character of the officer, clearly relates to a deficiency in the vouchers, and not to the admissibility of the charge. The whole bearing of this testimony is opposed to the credit claimed for Mr. Duval. He had no special authority from the secretary for the purchase or keeping of these horses; no evidence has been given to show that they were procured or kept or employed for any emergency in the public service so sudden and pressing that no application could be made for them to the secretary, consistent with the service. On the contrary, they were kept for nearly five years, not only without any request to, or permission from the secretary to warrant it, but without any intimation to him that such horses were in the employment of the government, or in the possession of their agent.

The testimony of Col. McKenney does not change this aspect of the case. He says, that an agent in the Indian country was not obliged to conform in all respects to the voucher system, and he gives a good reason for it. In speaking of the discretionary power, which, Col. McKenney believes, was vested in an agent, he explains himself by putting a case of emergency in which it would be impossible to get the instructions of the government; and he says, "under such circumstances it was expected of him to exercise a sound discretion, and to move in the case." He would then be allowed in his account "a reasonable expenditure in such an enterprise." This, the witness says, applies to any extraordinary occurrence within or without the agency, as if horses or canoes are wanted, they are allowed for. He says, the agent has to pay Indian annuities in specie; that horses are wanted to transport it; and adds, that a horse, sometimes two, is allowed for the use of the agent in his own personal intercourse with the different divisions of his agency; that two horses were generally considered to be a reasonable allowance for an agent; the horses to be bought by the government, and to be their property. This general allegation of such an allowance was qualified by the witness, in his answer to a question of the court, in which he said, an agent would not be allowed for keeping horses, unless it was specially allowed by the secretary of war, by which I understand that, when he said before that "two horses were generally considered to be a reasonable allowance for an agent," he meant that the allowance must be first obtained from the secretary, except in cases of emergency, and not that the agent might procure and keep the horses at his discretion, and afterwards make them a charge, as a matter of right, against the government.

I have looked through the evidence, in vain, for something by which I could, judicially, support the verdict of the jury in this particular. The charge of the court was very explicit against it, and, on a careful review of the case, I see no reason to change the opinion I had at the trial. By admitting this charge, we should introduce a new rule and principle in the settlement of the accounts of Indian agents, which may be very extensive and mischievous in its consequences. If the defendants had a right to this credit, I should not regard its disallowance by the accounting officers of the government, who necessarily transact their business by established rules, which cannot always conform to the right and justice of every case; but these defendants have tried to justify this charge, not by any positive law or legal right, but in the equity of an alleged usage of the department of war, when it is clear no usage exists there to countenance the claim.

After the delivery of the above opinion, the defendants' counsel appeared in open court, and agreed that judgment be entered for the United States of America, for one thousand and eighty-five dollars and twenty-eight cents, in conformity with the opinion of the court. Judgment accordingly for the United States of America, for one thousand and eighty-five dollars and twenty-eight cents.

Case No. 15,016.

UNITED STATES v. DUVALL.

[2 Cranch, C. C. 42.] [1]

Circuit Court, District of Columbia. June Term, 1812.

CRIMINAL LAW—BILLIARD ROOM WITHOUT LICENSE.

A person who hires out his billiard room for two days, is liable to the penalty of Act Md. 1798, c. 113.

Indictment for keeping a billiard table for use without license.

THE COURT (FITZHUGH, Circuit Judge, absent) decided that the defendant, who had hired a room in the county of Washington, out of the jurisdiction of the corporations of Washington and Georgetown, and set up his billiard table in it, and rented it to Scott, for two days, for $30, was liable to the penalty of $150, under the act of assembly of Maryland of 1798 (chapter 113), and that it was immaterial whether he received the rent all at once, or by sixpence a game. Verdict, guilty. Fined $150.

Case No. 15,017.

UNITED STATES v. DUVIVIER.

[12 Blatchf. 449.] [2]

Circuit Court, S. D. New York. Feb. 19, 1875.

CUSTOMS DUTIES—WAREHOUSE BOND—REDUCTION IN RATE—SALE—ACTION FOR DEFICIENCY.

1. On the 1st of December, 1866, a warehouse bond was given to the United States, for the payment of the duties then existing, or to be thereafter enacted, on certain brandy. The condition of the bond was, that the obligors should, after the expiration of one year, and before the expiration of three years, from the date of the bond, withdraw the brandy and pay to the collector the amount of the penalty of the bond, or the true amount, when ascertained, of duties imposed by law on the brandy, and an additional sum equal to ten per centum of the said duties. From a date prior to December 1, 1869, until January 1, 1871, the duty on brandy was $3 per proof gallon. By the twenty-first section of the act of July 14, 1870 (16 Stat. 262, 263), which went into effect January 1, 1871, the duty was reduced to $2 per proof gallon. The twenty-sixth section of the same act provided, that all imported goods which might be in bonded warehouses on January 1, 1871, should be subject to no other duty, upon the entry thereof for consumption, than if the same were imported after that day. After January 1, 1871, the brandy was sold at auction by the United States for non-payment of duties, and a suit was brought on the bond to recover the amount of duties due beyond the proceeds of the sale. *Held*, that the proper rate of duty on the brandy was the rate imposed by law at the expiration of three years from the date of the bond, namely, on the 1st of December, 1869, which was $3 per proof gallon, and an additional duty equal to ten per centum thereof.

2. Whether the twenty-sixth section of the act of July 14, 1870, applied to goods which are, by statute, regarded as abandoned to the government, for having remained in warehouse three years without the payment of the duties and charges thereon, quære.

[This was an action by the United States against Charles A. Duvivier.]

George Bliss, U. S. Dist. Atty., and Edmund H. Smith, Asst. U. S. Dist. Atty.

Stephen G. Clarke and Addison Brown, for defendant.

SHIPMAN, District Judge. This action was upon a warehouse bond, dated December 1, 1866, which was given for the payment of the duties then existing or to be thereafter enacted, upon a large quantity of brandy. The condition of the bond was, that, "if the above bounden principles shall, after the expiration of one year, and before the expiration of three years, from the date aforesaid, so withdraw the same and pay to the said collector the sum aforesaid, or the true amount, when ascertained, of duties imposed by such law thereon, and shall pay an additional sum or duty equal to ten per centum of the said duties, then the bond is to be void." The goods remained in the warehouse until they were sold for non-payment of duties. It was agreed, upon the trial of the case, that, if the jury returned a verdict for the plaintiff, they should find the number of gallons of brandy upon which duty was payable, and that the court should determine, as matter of law, the amount of duty which was properly assessable. The jury found for the plaintiffs, and that there was due upon the bond the amount of duty upon 223 gallons, less the amount which had been realized from the auction sale of said liquors for non-payment of duties. The sale was after January 1, 1871. Prior to that date, the duty was $3 per proof gallon. By the twenty-first section of the act of July 14, 1870 (16 Stat. 262, 263), which went into effect January 1, 1871, the duty upon brandy was reduced to $2 per proof gallon. The twenty-sixth section of the same act (16 Stat. 269), provided, that all imported goods which might be in bonded warehouses on January 1, 1871, should be subject to no other duty, upon the entry thereof for consumption, than if the same were imported after that day.

The question is, whether, the goods having been in warehouse since December 1, 1866, when the act of July 14, 1870, went into effect, and having been sold thereafter for non-payment of duties, the proper amount which was due upon the bond was $2 per gallon, or the pre-existing duty. The defendant, at the time of the importation of the brandy, desired credit, and gave security which was satisfactory to the government, for the payment of the duties within three years. The condition of the bond was, that if, before the expiration of three years from its date, he should pay the true amount of duties imposed by law, and an additional sum equal to ten per cent. of the said duties, the bond was to be void. The duty of the obligor was to pay before the expiration of three years from the date of this bond. If the duties were not then paid, the condition of the bond

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

was thereupon broken, and the principal was in default, and, with his sureties, was thereupon liable upon the bond to pay to the government the amount of unpaid duties which were then due. The amount to be paid was the amount due at the time of default, with interest.

Goods which remain in warehouse beyond three years, without payment of duties and charges thereon, are, by statute, regarded as "abandoned to the government." I am not certain that the twenty-sixth section of the act of July 14, 1870, was applicable to goods which, having remained in warehouse more than three years, had been, in contemplation of law, abandoned to the government. But, a decision of that question is not required in the present case. It is not material to ascertain what was the amount of duty which was due upon the goods on January 1, 1871. In an action to recover the amount due upon this bond, it is material to ascertain what was the amount of money which, by the bond, the obligor promised to pay. That amount was the amount of duties existing at the date of the bond, or to be thereafter enacted, prior to the expiration of three years, with the addition of ten per cent. in case the goods were not withdrawn until after the expiration of one year.

Judgment should be entered upon the verdict according to these principles

UNITED STATES (EAKEN v.). See Case No. 4,235.

Case No. 15,018.

UNITED STATES v. EARHART et al.

[4 Sawy. 245;[1] 1 Pac. Law Rep. 257; 9 Chi. Leg. News, 304.]

Circuit Court, D. Oregon. May 7, 1877.

PUBLIC OFFICER — MISAPPROPRIATION OF FUNDS — PRESUMPTIONS — ACTION UPON BOND — SURETY.

H. was appointed superintendent of Indian affairs to succeed himself, and at the date of the execution of his second bond there was a balance due the United States of the moneys received by him under his first bond. *Held*, that there could be no presumption that this sum had been illegally appropriated by the officer, but the fact must be proved by the party claiming or alleging it; and that in the absence of such proof, the presumption is that this balance was then in the hands of the officer, to be applied and accounted for under his second bond.

[Cited in Board of Sup'rs v. Pabst, 70 Wis. 367, 35 N. W. 337.]

Action [by United States against R. P. Earhart, administrator, and others] on bond of superintendent of Indian affairs.

Rufus Mallory, for the United States.

Walter W. Thayer and William H. Effinger, for defendants.

DEADY, District Judge. This action is brought against the administrator and sureties of the late J. W. Perit Huntington, superintendent of Indian affairs for Oregon, to recover the sum of $22,966.65, as and for moneys received by him as said superintendent, between March 28, 1863, and January 8, 1868, and not accounted for, with interest thereon.

By the stipulation of the parties it was tried by the court without the intervention of a jury. From the pleadings and the evidence the facts appear to be as follows:

(1) On March 28, 1863, Huntington, having been appointed superintendent of Indian affairs, gave bond to the United States, in the sum of $100,000, with the defendants Long, Heatherly, Coffin, Griswold and Miller as sureties, conditioned for "the careful discharge" of his official duties, and that he would "faithfully expend all public moneys and honestly account for the same," which might come into his hands, without fraud or delay; and on January 8, 1868, said Huntington, having been re-appointed as such superintendent, gave a second official bond to the United States with other persons as sureties.

(2) On September 11, 1867, the acting commissioner of Indian affairs, C. E. Mix, wrote Huntington an official letter, advising him of his re-appointment, which, among other directions, contained the following: "You are required to make out and forward here your accounts up to the date of your new bond, and in doing so transfer in due form to yourself all public moneys and property on hand belonging to the superintendency, the same to be accounted for under your new bond."

(3) On January 8, 1868, Huntington, in obedience to the foregoing direction, stated and returned an account current between himself and the United States for the "fractional part of month ending January 8, 1868," which he certified "embraced all public moneys received by him and not heretofore accounted for," and from which it appeared that of the various appropriations for the Indian service in his superintendency he had "on hand from last month" the aggregate sum of $34,607.90, and that there was due Huntington, for moneys expended by him in excess of the appropriations for "general and incidental expenses," and "for treaty stipulations with the Klamaths and Modocs," the sum of $11,600, making the balance due the United States $23,007.90.

(4) Upon the statement of differences made in the final settlement of Huntington's accounts under his bond of March 28, 1863, in the office of the second auditor on November 20, 1875, it was ascertained and determined that on account of errors in calculation and otherwise the amount thus reported to be due the United States should be reduced by the sum of $41.25, leaving the net balance due the United States on January 8, 1868, $22,966.65.

(5) On June 3, 1869, Huntington died, and on June 16 the defendant Earhart was duly

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

appointed administrator of his estate, and is still such administrator; and on January 19, 1876, said account was duly presented to said Earhart for allowance, and by him rejected.

The only evidence received or offered upon the trial was the transcript of the treasury books and proceedings concerning the accounts under the first bond, together with certified copies of said bond, Huntington's return of January 8, 1868, and the letters from the acting commissioner of Indian affairs, and therefore it does not appear whether the above mentioned balance was carried forward into the superintendent's accounts under the second bond, and there charged to himself, or not.

Upon these facts it is claimed by counsel for the United States that it appears Huntington was a defaulter for the sum admitted by him and found by the accounting officers of the treasury to be in his hands on January 8, 1868, and as such default occurred during the period covered by the first bond, the sureties therein are liable as well as the principal. The argument is, that there being no direct evidence upon the question whether or not Huntington carried this balance forward into his accounts under the second bond, the presumption is that he did not, and therefore he failed to account for it. But it is admitted that if it appeared that such balance had been so carried forward, it could not be said that there was a default unless the plaintiff showed further that, as a matter of fact, the money was not on hand as reported by Huntington.

But in my judgment it is immaterial, so far as this case is concerned, whether Huntington carried this balance into his accounts under the second bond or not. If on January 8, 1868, the date of the execution of said bond, he had the money on hand, the sureties therein became bound for his future conduct concerning it. It was then money received by him under his second appointment and bond, and to be accounted for accordingly, just as if it had then first come to his hands from the treasury. The liability of the sureties in the first bond then ceased, and they cannot be charged with the consequences of any subsequent misconduct or neglect of Huntington's concerning moneys then in his hands.

The evidence introduced by the government consists of the transcript of the treasury books and proceedings and the statement of Huntington. According to the latter, this balance was then "on hand." Upon this point it is explicit. The government having introduced this statement, is bound by it until it is shown to be false or incorrect. Nor do the accounts and proceedings in the treasury show anything to the contrary. According to them, the money constituting the balance had been received by Huntington from the United States during the period covered by the first bond, and on January 8, 1868, was due the United States—that is, so far as appeared, remained in his hands unexpended, and to be disposed of as provided by law and directed by the department of the interior. In this case the superintendent was directed by his superior to turn over the amount to himself as his own successor. Whether he did so or not does not appear. Probably, according to the familiar rule, that official duty is presumed to have been done, it ought to be assumed that he did, until the contrary appears. But this is altogether immaterial. For aught that would appear the turning over to himself, if done at all, might have consisted of a mere naked entry upon the books of the superintendency without the money being actually on hand. As a business transaction he should have been required to deposit the money with a United States depositary and return the certificate as a voucher to the department, and afterwards have received back the amount under his second bond.

However, the simple question here is, was the money "on hand" when the second bond was given and the liability of the sureties in the first terminated.

The government, in effect, alleges that it was not, and that there was a default to this amount. The defendants deny the allegation. The burden of proof is upon the party making the allegation. Now, so far from the evidence introduced by the government tending to prove that the balance sued for was not on hand when the second bond was given, it rather proves that it was. Before it can be said upon this evidence that Huntington was a defaulter on January 8, 1868, it must be presumed that the unexpended balance, which appears to have been, and should have been, in his hands at that time, had in fact been misapplied or appropriated to his own use. This fact, if it be a fact, the government might prove. But there is no presumption in any case that an officer has violated his duty or misappropriated funds intrusted to his care, but the contrary. In the case of two bonds given by a public officer for his conduct during two successive terms of the same office, the government is not entitled to recover of the sureties in the first bond any balance which appears from the accounts to have remained undisbursed in his hands at the expiration of the first term, unless it is satisfactorily proven that in fact such balance was not on hand, but had in some way been misappropriated. This has not been done or attempted in this case.

The case of Bruce v. U. S., 17 How. [58 U. S.] 437, appears to be in point, and decisive of the question. Bruce had held the office of Indian agent for two terms, from 1840 to 1848. The action was brought against him and his sureties in the second bond. and the breach assigned was that at the close of the second term there was a balance in his hands which he refused to turn over to the United States when required. One of the defenses was that the balance had accrued, or the default occurred, under the first bond, and,

therefore, the parties to the second bond were not liable. The court below instructed the jury: "That if, when Bruce was re-appointed agent, in 1844, he had moneys in his hands of the United States which he received as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on. But if Bruce had appropriated the moneys received under the previous commission to his own use, when this bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and the defendants are not liable, and the burden of proof is on the defendants to show that Bruce had illegally appropriated the money before the bond sued on was given."

On error to the supreme court, this ruling was affirmed, Taney, C. J., saying: "When Bruce received his second commission, if any money or property which he received in his former term of office still remained in his hands, he was bound to apply and account for it under the appointment he then received;" and again: "Undoubtedly, the sureties in the second term of office are not responsible for a default committed in his first. But if any part of the balance now claimed from him was misapplied during that period, it was incumbent on the plaintiffs in error to prove it. No officer, without proof, will be presumed to have violated his duty; and if Bruce had done so, Steele had a right, under the opinion of the circuit court, to show it, and exonerate himself to that amount; but it could not be presumed merely because there appears, by the accounts, to have been a balance in his hands at the expiration of his first term."

Here, the government asks the court to presume that the moneys which appear by the accounts to have been in Huntington's hands at the close of his first term of office, had in fact been illegally appropriated by him before that time. This, the supreme court say, cannot be done, and the reason is apparent. Such a presumption, instead of being founded on fact, would be against evidence, besides being contrary to the well established rule that official duty is presumed to have been duly performed.

There must be a finding of fact and law for the defendants.

Case No. 15,019.

UNITED STATES v. EBERT.

[1 Cent. Law J. 205.] [1]

District Court, W. D. Missouri. March Term, 1874.

INFORMATION—OFFENCES UNDER INTERNAL REVENUE LAWS.

Offences arising under the internal revenue laws being misdemeanors merely, and not "infamous," may be prosecuted by information filed by the district attorney.

[1] [Reprinted by permission.]

E. L. King, for the motion, relied on the fifth amendment to the constitution.

Jas. S. Botsford, U. S. Dist. Atty., relied on and cited 1 Bish. Cr. Proc. 604, 611; Com. v. Waterborough, 5 Mass. 257; Adams v. Woods, 2 Cranch [6 U. S.] 336; Ex parte Marquand [Case No. 9,100]; Walsh v. U. S. [Id. 17,116]; Levy v. Burley [Id. 8,300]; Parsons v. Hunter [Id. 10,778]; U. S. v. Mann [Id. 15,717]; Territory v. Lockwood, 3 Wall. [70 U. S.] 236; U. S. v. Shephard [Case No. 16,273]; U. S. v. Waller [Id. 16,634]; 1 Stat. 119, § 32; 13 Stat. 305, § 179; 14 Stat. 145, § 179.

KREKEL, District Judge. This is an information filed by the district attorney, alleging that defendant was a manufacturer of cigars, and as such had failed to execute bond as required by law. To this defendant files his motion to quash, alleging, in substance, that cases of the kind cannot be prosecuted by information, but must be by indictment. This brings up the question, first, is the case here presented within the act of July 13, 1866, which provides that "all fines, penalties, and forfeitures which may be imposed or incurred shall and may be sued for and recovered, when not otherwise provided, in the name of the United States, in any proper form of action or by any appropriate form of proceeding before any circuit or district court"? The provision cited is found in the revenue act, and there can be no doubt that the intention of congress was to sanction or provide for a class of cases most frequently occurring under the revenue laws. Looking at the language employed, "a proper form of action," it is obvious that congress here had reference to existing forms of action; and, when using the terms immediately following, "or by any appropriate form of proceeding," it intended to enlarge the former by giving authority to provide new and suitable forms and proceedings to meet cases as they might arise. It is well known that, at the time of framing and adopting the constitution, fines and penalties could be and were largely recovered by information; and there can scarcely be any doubt but that congress had reference, when speaking of "a proper form of action," to that practice which, at the time of the enactment of the law cited, prevailed in a number of the states. It must, then, be taken that the case under consideration, and the class of cases to which it belongs, comes within the provisions of the statute cited.

The second question is, had congress the power to pass the act of 1866, and especially the provision cited, thereby doing away with the necessity of a grand jury passing upon cases arising under internal revenue laws? The fifth article of the amendments of the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand

jury." It will be observed that this provision covers infamous crimes only. It is not necessary to define what is here meant by "infamous," for it is an undisputed point that misdemeanors, such as the one for which the information under consideration is filed, cannot, by any construction or interpretation given by courts, be brought within the term "infamous." At the time of the adoption of the amendment cited, attention was, no doubt, called to existing constitutional provisions; and, had the requirement that all classes of crimes should be passed on by grand juries before trial been intended, suitable language for that purpose would have been employed. Indeed, by the use of the words "capital or otherwise infamous crimes," it may be readily inferred that a grand jury was to pass upon such, and such only; and, while the legislature was not bound to limit the holding to answer to that class of cases, but might extend the requirement to any offences, yet the decision of a grand jury was secured only to the person or persons charged with the higher classes of crime specified. The act of March 30, 1790, passed by congress soon after the adoption of the constitution, strongly supports the view here taken. In the thirty-second section of said act, providing the time within which prosecutions shall be commenced, it enacts: "Nor shall any person be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall have been found or instituted,"—thus affirming that there existed the distinction between crimes and other offences contended for. As sustaining these views, see U. S. v. Shephard [Case No. 16,273], and U. S. v. Waller [Id. 16,634].

Upon these views of the court, the case under consideration may be prosecuted by information, and the motion to quash is overruled.

Case No. 15,020.

UNITED STATES v. EBNER.

[4 Biss. 117.] [1]

District Court, D. Indiana. Dec. Term, 1867.

INTERNAL REVENUE—INDICTMENT—ACTION OF DEBT.

1. Under the internal revenue laws, when the punishment prescribed is a pecuniary penalty or fine only, and the act fixes the exact amount of it, the action of debt will lie to recover it.

2. Where the punishment provided is a fine only, and the amount of it is not fixed, but left to the discretion of the court, the prosecution for it must be by indictment.

3. In all cases in which the law provides that imprisonment either may or must be any part of the punishment, the prosecution must be by indictment.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[This was an action against John Ebner.]

McDONALD, District Judge. This is an action of debt on the thirty-first section of the internal revenue act [of 1864 (13 Stat. 235)].

The defendant demurs to the declaration on the ground that debt does not lie for a violation of the provisions of that section.

The section in question, among other things, provides that every person making or distilling spirits shall from day to day make true and exact entry, in a book to be kept in such form as the commissioner of internal revenue may prescribe, of the number of pounds or gallons of materials used for the purpose of producing spirits, the number of gallons of spirits distilled, the number of gallons placed in warehouse and the proof thereof, and the number of gallons sold with the proof thereof, etc. And the section provides that "Any person who shall violate the provisions of this section shall, for every such offense, be liable to a fine of five hundred dollars."

The declaration charges a violation of the provisions above cited, and demands judgment for $500.

Confining our inquiry to this section alone, I would suppose that a proceeding by indictment is the only remedy for a violation of its provisions.

But pursuing the rule that, in construing a provision in a statute, all its parts must be considered, I am led to a different conclusion.

This act has many requirements on the subject of internal revenue, the violations of some of which are, in terms, punishable by pecuniary penalties, some by fine only, and some by fine and imprisonment. It would be tedious to examine here the numerous sections of the act which relate to these matters. It seems certain, however, that the word "penalty" and the term "fine" are in some parts of the act, used convertibly. Thus, the fourteenth section declares that every person who shall violate its provisions "shall be liable to a fine or penalty not exceeding five hundred dollars." Here the two terms are evidently employed as meaning the same thing.

The forty-first section of the act provides that "it shall be the duty of the collectors," etc., "to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties, and forfeitures which may be incurred or imposed by law shall be sued for and recovered in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise." A like provision is found in the 179th section of the act. Here is express authority to sue for "fines" arising under this law. The term "sue" is employed in both these sections; and it is inapplicable to a prosecution by indictment. We do not say that a man is sued for a crime. The term always supposes a civil action. Then, for some "fines" imposed by the in-

ternal revenue act, it is clear that a man may be sued in a civil action—in any "appropriate action." Now, in my opinion, where the act fixes the amount of a pecuniary punishment, whether it calls it a penalty or a fine, an action of debt is an "appropriate action." And for our future guidance in relation to violations of the internal revenue act, I venture to lay down the following rules:

1. Where the punishment prescribed is a pecuniary penalty or fine only, and where the act fixes the exact amount of it, the action of debt will lie to recover it.

2. Where the punishment provided is a fine only, and the exact amount of it is not fixed by the act, but is left to the discretion of the court trying the case,—as where the language is that the party shall be fined in any sum not exceeding a certain amount,—there the action of debt will not lie, nor can any other civil action be the "appropriate" remedy, but the prosecution must be by indictment.

3. In all cases in which the act provides that imprisonment either may or must be a part of the punishment, there no civil action will lie, and the only remedy is by indictment.

The demurrer is overruled.

NOTE. Debt is the appropriate action whenever a demand is for a sum certain, and is capable of being reduced readily to a certainty. 1 Chit. Pl. 108. If a statute prohibit the doing an act under a penalty or forfeiture to be paid to a party aggrieved, and do not prescribe any mode of recovery, it may be recovered in an action of debt. Id. Whenever a statute gives a right to recover damages which are ascertained by the act itself, an action of debt lies and is proper, if no specific remedy is provided. Blackburn v. Baker, 7 Port. (Ala.) 284. It has been held in Ohio that debt is the proper remedy for a penalty imposed by a statute, though the amount is uncertain, and is to be fixed by the court between five and fifty dollars. Rockwell v. State, 11 Ohio, 130. Consult, also, U. S. v. Morin [Case No. 15,810].

Case No. 15,021.

UNITED STATES v. The ECHO.

[4 Blatchf. 446;[1] 20 How. Prac. 517.]

Circuit Court, N. D. New York. Sept. 1, 1860.

SHIPPING—PUBLIC REGULATIONS—CARRYING PASSENGERS WITHOUT LICENSE—EXEMPTIONS—TUG BOAT.

1. Where a steam vessel usually employed as a tow boat, transported passengers from Buffalo to Canada, and back, a distance of 12 or 15 miles each way, for pay, *held*, that she was liable to the penalty imposed for a violation of section 2 of the act of July 7, 1838 (5 Stat. 304), in transporting passengers without a license, and that she was not entitled to the benefit of the exemption created by section 42 of the act of August 30, 1852 (10 Stat. 75), in favor of a steamer used as a tug boat or a towing boat.

2. Such exemption applies only to a steamer while engaged in towing, or in the business of towing, and not to a steamer usually engaged in towing.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and nere reprinted by permission.]

[Appeal from the district court of the United States for the Northern district of New York.]

This was an appeal from a decree of the district court, adjudging against the propeller Echo a penalty of $500 for a violation of the acts of congress of July 7, 1838 (5 Stat. 304), and August 30, 1852 (10 Stat. 75).

NELSON, Circuit Justice. It appears, from the proofs, that the propeller was usually employed as a tow boat in and about the harbor of Buffalo, but that, on the 10th of June, 1857, she transported some one hundred passengers from Buffalo to Point Albino, Canada, on Lake Erie, and back, a distance of twelve or fifteen miles each way, and took pay for the same.

By the second section of the act of 1838, it is provided that it shall not be lawful for the owner, master, or captain of any steamboat or vessel, etc., to transport any goods or passengers upon the bays, lakes, etc., of the United States, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by that act. The forty-second section of the act of 1852 exempts from the operation of that act steamers used as ferry boats, tug boats or towing boats.

It is insisted, on the part of the defence, that the propeller, in the present case, comes within the exception in the above section, inasmuch as she is usually employed in the business of towing. But, the plain answer to the objection is, that the exception does not apply to steamers usually engaged in ferrying or towing, but to steamers while thus engaged, or while engaged in that business. If they leave that business and engage in transporting passengers, even for a single trip, they are, while thus engaged, out of the exception, not only in words, but in the spirit, intent, and mischief of the act, and are within the conditions and penalties therein prescribed. The question is not, whether the steamer has been usually employed in the towing business, but, what was her employment and service at the time complained of. If it was the transportation of passengers, then she is responsible for a full compliance with all the conditions required of vessels in that service, whatever may have been, or whatever may subsequently be, her employment. Any construction of the acts short of this, would but open the way to an evasion of their requirements.

Decree affirmed.

Case No. 15,022.

UNITED STATES v. ECKEL.

[Cited in Case of Lange, Case No. 8,065. Nowhere reported; opinion not now accessible.]

Case No. 15,023.

UNITED STATES v. The ECLIPSE.

[See The Eclipse, Case No. 4,269.]

Case No. 15,024.

UNITED STATES v. EDDY.

[1 Biss. 227.] [1]

District Court, N. D. Illinois. Jan. Term, 1858.

POST OFFICE—INDICTMENT FOR OPENING LETTER—LETTERS OF CRIMINALS—CONFLICT OF LAWS.

1. A letter once placed in the postoffice is in the custody of the law, and no one except the writer and the person to whom it is directed, or some one authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents.

[Cited in U. S. v. McCready, 11 Fed. 231.]

2. Neither postmasters nor other officers have any authority to open it under the pretext that there might be something improper or even criminal therein.

3. The letter of a criminal is under the full protection of the law. The violation by a criminal of an agreement that the sheriff was to inspect all letters written by him before they left the jail, would not authorize the sheriff to open a letter after it was in the postoffice. Nothing but his consent in regard to that particular letter would so authorize him.

4. When a letter is placed in a postoffice it is within the legal custody of the officers or agents of the government, and while it so continues, the laws of the United States operate upon it to the exclusion of state laws.

Indictment [against John Eddy] under the twenty-second section of the act of March 3, 1825 (4 Stat. 109). That section declares: "And if any person shall take any letter or packet not containing any article of value or evidence thereof, out of a postoffice, or shall open any letter or packet which shall have been in a postoffice, or in custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle or destroy any such mail, letter or packet, such offender upon conviction shall pay for every such offence a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months." During the summer of 1857, a man by the name of White was arrested on a criminal charge and placed in the custody of the defendant, who at the time was sheriff of McHenry county. While in jail, White expressed a desire to write to some of his friends, asking for assistance, which the defendant said he might do, but that he, the defendant, must have the inspection of all the letters. To this White assented. Some time afterwards, White wrote a letter addressed to a person in Iowa, and gave it to a man who had called on him at the jail. The latter deposited it in the postoffice at Woodstock, and paid the postage, and the letter was duly stamped. The sheriff, being informed of this, went to the postoffice and called for the letter, and it was handed to him by the postmaster, for the reason, as he states, that he supposed that Mr. Eddy only wished to look at the direction. While the letter was thus in the defendant's possession, he opened it, read it, took a memorandum of its contents, resealed it, and returned it to the postmaster, who duly mailed it. From all the facts in the case, it appeared that the defendant's motive in the act was to prevent the prisoner from having any improper communication with any one by means of the letter; and he seemed to suppose he had the right to do what he did.

DRUMMOND, District Judge (charging jury). 1. If the letter was in the postoffice in the usual way, and for the ordinary purpose for which letters are deposited, and it was opened by the defendant before its delivery to the person to whom it was addressed, with the design to pry into the business of White or ascertain his secrets, then the offence was complete.

2. When a letter is once placed in the post-office, it is in the custody of the law, and no one except the writer or the persons to whom it is directed, or some person authorized by him, has the right while it is there to open it for the mere purpose of ascertaining its contents.

3. Neither postmasters nor postoffice agents, nor officers of any kind or grade, have any authority to open letters while in the postoffice, under the pretext that there might be something improper, or even criminal, written therein.

4. The letter of a criminal, when once placed in the postoffice, is just as much under the protection of the law, as the letter of the most honest man in the community.

5. Even if it was the agreement between White and the sheriff that the latter was to inspect all the letters written by the former before they left the jail, and White violated the agreement, still that would not authorize the sheriff to open the letter after it was in the post-office, in order to ascertain its contents. Nothing could authorize him, except the consent, expressed or implied, of White, to open the letter which was deposited in the office.

6. In this case the party who was under arrest was afterwards tried and acquitted of the charge for which he was in custody, and we are therefore to presume him innocent. But that makes no difference in the principle applicable to such a case as this. If he had been found guilty the rule would be the same.

7. There is no conflict between the laws of the United States and the laws of the state. A state officer having a prisoner in his custody may exercise a certain discretionary power over his written correspondence with others, so long as that correspondence is out of the jurisdiction or control of the post-office department, but when it is placed within the legal custody of the officers or agents of the department, and while it continues there, the laws of the United States operate on it, and not the laws of the state. In what has been said, the court refers of course to letters

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

while in such custody and on deposit, or in transit to the places or persons addressed, which was true of this letter.

Verdict, guilty.

The court being of opinion that the defendant had been only technically guilty, without criminal or wrongful intent, imposed a nominal penalty.

NOTE. It is an offence against this section to open a letter which has been in the postoffice before delivery to the person to whom it is directed, though the letter is not sealed, and was not at the time in the lawful custody of any person, and even though it was written by the defendant himself. U. S. v. Pond [Case No. 16,067]. See, also, U. S. v. Tanner [Id. 16,430]; U. S. v. Parsons [Id. 16,000]; U. S. v. Marselis [Id. 15,724].

Case No. 15,025.

UNITED STATES v. EDWARDS.

[17 Int. Rev. Rec. 126.]

District Court, D. Massachusetts. April, 1873.

INTERNAL REVENUE—SELLING UNSTAMPED CIGARS.

[1. The punishment imposed by the act of 1868 for selling unstamped cigars is not confined to importers and manufacturers, though they alone are required to pack the cigars and affix the stamps.]

[2. An indictment for selling cigars "not properly boxed and stamped as required by law" will not be *held* defective merely because it fails to state that the sale was not for importation or exportation, so as to dispense with the necessity of paying the tax, provided it points out the sale as having been at a given time and place, the words "as required by law" being an argumentative allegation that the sale was not within the excepted classes.]

Indictment [against L. C. Edwards] under section 89 of the act of July 20, 1868 (16 Stat. 162), which enacts "that all cigars which shall be removed from any manufactory or place where cigars are made, without the same being packed in boxes as required by this act, or without the proper stamp thereon denoting the tax, or without burning into each box with a branding iron the number of the cigars contained therein, and the name of the manufacturer, and the number of the district and the state, or without the stamp denoting the tax thereon being properly affixed and cancelled, or which shall be sold or offered for sale not properly boxed and stamped, shall be forfeited to the United States. And any person who shall commit any of the above described offences shall, on conviction, be fined for each such offence not less than one hundred dollars, nor more than one thousand dollars, and imprisoned not less than six months, nor more than two years." The charge in the first count was that the defendant, at Boston, on a certain day, "did sell and offer for sale to Frank C. Humphreys, a certain number of cigars, to wit, one hundred thereof not properly boxed and stamped as required by law, to wit, did then and there, as aforesaid, sell and offer for sale said cigars in a certain box without any stamp thereon denoting the tax on said cigars." The second and third counts were like the first, except in the number of cigars said to have been sold or offered for sale. The fourth count averred that the cigars had been imported from a foreign country, but this was abandoned. After a verdict of guilty on the first three counts, the defendant moved for a new trial, and in arrest of judgment.

E. P. Nettleton, for the United States.

J. W. Richardson and G. W. Searle, for defendant.

LOWELL, District Judge. It was argued that the manufacturer of domestic cigars, and the importer of those that were brought from abroad, are the only persons liable to the penalties of section 89 of the act of 1868. By section 81 the manufacturer is to pay the tax; by section 82 he is to give bond conditioned, among other things, to pay it by stamps; by section 93 importers of foreign cigars, besides paying the import duties upon them, are to affix to the boxes the like stamps as are required to be affixed to domestic cigars by the manufacturers, and importers are made subject to the penalties applied to manufacturers; by section 87 stamps are to be furnished only to manufacturers and importers, and it is they who are to pack them in certain kinds of boxes. The argument is, that the punishment for selling or offering to sell cigars not properly boxed and stamped is intended for those persons only whose duty it is to pack them and affix the stamps, and who alone can be certain that they are in all respects duly packed, and to whom only the officers are to make sale of stamps.

There is much force in this argument. But on the other hand the words of the law include all persons who sell or offer for sale cigars not properly boxed or stamped; and by section 85 retail dealers are expressly excepted under certain circumstances, showing that congress considered that they were within the general language of that section, which is no broader than section 89. There is an obvious and very strong motive for including dealers in the prohibition, so as to make it for their interest to see that the manufacturers comply with the law. If the statute had punished them for buying unstamped cigars, there might be some danger of injustice, because purchases are often made by letter, and the cigars are not seen until delivery is made of them; but by making it criminal to sell, there is no danger of surprise or accident, and the same result is reached, because the dealer will take care to return to the manufacturer all boxes that do not appear to conform to the rules. Indeed it is not easy to see that the statute could be effectually worked in any other way. If the manufacturer should fail to brand his boxes with his name and district, as a fraudulent manufacturer would be very careful to do, there would be no hold upon any one, and no way of tracing the wrong to its source. Such

an argument as this would not, perhaps, have much weight if the statute were ambiguous on its face, because a criminal statute ought to be clear and explicit; but the law being clear on its face in favor of the government, and the doubt being raised only from a careful examination of other parts of the act, and only by an inference of intent derived from those other sections, the argument that such an intent is improbable and that the obvious meaning of the section may have many reasons of general policy to support it, is legitimate, and not without much value. I hold, therefore, that the words of the charge are not to be restrained by implication.

Another objection is, that the crime is not set out with sufficient fulness. There is no statement of circumstances to show that a stamp should have been affixed to the box containing the cigars that are said to have been sold or offered for sale. Under the strict rules of criminal pleading there seems to be a defect here. Selling or offering for sale cigars contained in a box not stamped, is not necessarily a breach of the law, because an importer of cigars may enter them in bond and may re-export them without paying any tax, and he may sell them for the same purpose, and they may be sold any number of times within the period allowed by the warehousing laws, and no stamp need be affixed unless some one should change his mind and make a sale of the goods for domestic use or consumption. So by the amendments to sections 73 and 74 of the statute now under consideration, passed June 6, 1872 (17 Stat. 254), manufacturers of cigars may export them or sell them for export under certain circumstances, and by complying with certain forms, without paying any tax or duty upon them. If, therefore, the defendant were an importer selling cigars in bond for re-exportation, or a manufacturer selling for exportation, or a dealer whose title was derived, however remotely, from either of them, and who honestly sold for the same purpose, no crime was committed by the sale. The indictment does not negative such a sale. But the supreme court and other courts of the United States have gone so far in permitting statute misdemeanors to be laid in the very words of the statute, that after much consideration I do not feel at liberty to set aside this indictment. The statute crime here is selling cigars not properly boxed or stamped. This is fully set out in the indictment. What remains is to point out the overt acts, so to say, with sufficient distinctness to put the defendant on his guard as to the acts really intended to be passed. This is done by alleging that it was a sale to Frank C. Humphreys, at a given time and place. Then there is an argumentative allegation that it was such a sale as could not properly be made without a stamp being affixed to the box. This argumentative allegation is found in the words "as required by law," which, though bad as pleading, may be held sufficient as notice, and would require the government to prove affirmatively that the sale was made under such circumstances as to bring it within the prohibition. Upon the whole, therefore, I think the indictment may be upheld.

I have carefully considered the affidavits filed in aid of the motion for a new trial. They tend to show that all the cigars made by Mr. Climie are stamped; and the evidence at the trial tended to show that those cigars were made by Climie Such evidence is defective in this, that it fails to show how the cigars came to be sold without a stamp, if they had once been stamped. The history of the cigars was before the jury. They were traced from Climie to Humphreys, and no one admitted or now admits that he removed the stamps. The only theories consistent with the defence are that Randall, who bought of Climie, and for whose account the defendant sold the cigars, removed the stamps, and he denied it on the stand; or that Humphreys removed them, and he denied it. No motive is shown for Humphreys to do it, unless to ruin the defendant, against whom he was not shown to have any cause of quarrel or complaint. I can think of no motive that Randall should have, unless to sell the cigars as smuggled, and it does not appear that he did sell them as smuggled, but the contrary appeared. Section 90 enacts that the absence of the proper revenue stamp on any box of cigars sold or offered for sale shall be notice to all persons that the tax has not been paid thereon, and shall be prima facie evidence of the non-payment thereof. In this case we have that evidence, and positive evidence besides, and I am of opinion that even if the cumulative evidence now offered had been before the jury they would have been well warranted in finding a verdict of guilty, and I do not consider that I have any right to order a new trial in order that a second jury may decide on the probabilities of the case.

The other objections are overruled. Motions denied.

Case No. 15,026.

UNITED STATES v. EDWARDS et al.

[1 McLean, 467.] [1]

Circuit Court, D. Illinois. June Term, 1839.

EVIDENCE — TREASURY TRANSCRIPT — ORIGINAL ITEMS—RECEIVER OF PUBLIC MONEYS—COMMISSIONS—SALARY.

1. A transcript from the treasury which contains sums charged in gross, as balances, is not evidence, as to such balances.

[Cited in U. S. v. Case, 49 Fed. 271.]

2. The original items on which the accounting officers acted must be stated.

[Distinguished in U. S. v. Harrill, Case No. 15,310.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

3. A receiver of public moneys is entitled to his commissions or moneys received, though he resigns or is removed from office at the termination of the first six months of the last year, covered by his appointment.

[Cited in U. S. v. McCarty, Case No. 15,657.]

4. This allowance cannot be graduated and paid quarterly, as an annual salary.

[Cited in U. S. v. McCarty, Case No. 15,657.]

At law.

Mr. Forman, U. S. Dist. Atty.

Mr. Baker, for defendant.

OPINION OF THE COURT. This action was brought on a bond given by the defendant as receiver of public moneys, to recover a balance of fifteen hundred and seventy dollars, which by the books of the treasury appeared to be due to the plaintiffs. A certified transcript from the books of the treasury department showing this balance was offered in evidence by the plaintiffs, which was objected to by the defendant's counsel, because several items in the account, amounting to more than the balance claimed, were charged as balances found due by the officers of the treasury department, and the court sustained the objection and refused to admit the transcript as evidence. The treasury officers seem to pay more regard to their own peculiar forms than to the requisites of the law or the decisions of the courts of the United States. It has long since been decided by the supreme court—[U. S. v. Jones] 8 Pet. [33 U. S.] 383—that the "act of congress in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department." In this account several balances were charged, not as reported by the receiver, but as found to be due, at different periods, on the adjustment of his accounts at the treasury. These items then are not the evidence on which the accounting officers acted, but the result of their judgment on the accounts.

Controversies frequently arise on treasury adjustments, because certain items claimed as credits are disallowed or certain debits are charged; and how can the court decide on these items if they be not stated in the transcript. The transcript must present the accounts to the court, as they stood before the accounting officers, and the judgment of the court must be given on this evidence. This transcript therefore so far as regards the sums charged as balances, is not evidence. It being suggested that there were other questions in the case, which both parties were desirous of bringing before the court, the defendants consented that the above transcript should go in evidence to the jury. From the transcript it appears that the defendant ceased to be receiver at the end of the first six months of the year in which his term of office expired; and that he received during that period between four and five hundred thousand dollars. And the question is whether the defendant shall receive the commission of one per cent. allowed by law, on the moneys received, under the limitation provided, or whether the commission shall be graduated so as to extend over the whole year. This construction, it appears, has been given to the law by the secretary of the treasury, and consequently, the defendant having served but half of the year, he has been allowed but the sum of twelve hundred and fifty dollars for his commissions.

The first section of the act of April 20, 1818 [3 Stat. 466], provides, that "the receivers of public moneys for the lands of the United States, shall receive an annual salary of five hundred dollars each, and a commission of one per centum on the moneys received, as a compensation for clerk hire, receiving, safe keeping and transmitting, such moneys to the treasury of the United States; provided, always, that the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed, for any one year, the sum of three thousand dollars." This act adopts two modes of compensation; the one an annual salary, and the other a per cent. on moneys received, provided the commission shall not exceed twenty-five hundred dollars per annum. The salary is paid quarterly, and is limited to the time the service is performed. But the commissions depend not on the time of service, but on the amount of moneys received. And how this allowance in the present case can be graduated so as to pay the defendant only the sum of twelve hundred and fifty dollars, when the law allows him twenty-five hundred dollars, it is not easy to see. The law limits the commission to twenty-five hundred dollars within the year, but the limitation applies to the receiver who receives the commission. He shall not receive within any one year, including his salary, for his services, a sum exceeding three thousand dollars. But the law makes no provision imposing a further limitation for a fraction of a year.

There is no evidence before the court that the successor of the defendant received a dollar for the last six months of the year, covered by the defendant's appointment. He had received a sum which entitled him to the commission of twenty-five hundred dollars, and this he has a right to claim. On the resignation of the defendant he pays over the four hundred thousand dollars received within the last six months, and he is refused a credit for the commissions which the law allows him. And this is done under the supposition that his successor may receive money enough for the remaining six months of the year, to entitle him to claim the sum of twelve hundred and fifty dollars as commissions. But suppose he should receive the sum of ten, twenty, or fifty thousand dollars, what is then to be done. Shall he receive

one per cent. upon the sum thus received, and shall the balance of the commission be paid to his predecessor? This would be unjust as regards the services compensated, and in violation of the law. Why shall one individual receive one per cent., and another about one quarter per cent., on moneys received within the year. If the law admits of any graduation of the commissions, it should be made on the sums respectively received, and not in reference to the time of service. The salary has reference to the time, the commission to the amount of moneys received.

The year of the new receiver commences from the date of his appointment. And suppose that he should not receive a dollar for the first six months of the year, but for the last six months should receive a sum which would give him the full limit of the commissions allowed in any one year, could he not claim them? He is not appointed to fill a vacancy, but for the term of four years, under the law. And he is as much entitled to twenty-five hundred dollars as commissions, should one per cent. on moneys received amount to that sum, for the first year of his service, as for either of the three remaining years. And it is matter of surprise that a different construction should have been given to the law.

If the construction contended for be correct, the compensation of the successor of the defendant, as to his commissions for the first six months, must be fixed by the amount of moneys received by him within that period, and not by the sum received within the year. By graduating the allowance of commissions to quarterly payments, and giving it the character of a salary, injustice is done and the law is misconstrued.

The other items of credit claimed by the defendant, which were refused by the treasury department, were proper items of expenditure, and the jury will allow them, if the proof of disbursement be satisfactory.

The jury found a verdict for the defendant.

Case No. 15,027.

UNITED STATES v. EGGLESTON et al.

[4 Sawy. 199; 23 Int. Rev. Rec. 113; 9 Chi. Leg. News, 218; 15 Alb. Law J. 493.] [1]

Circuit Court, D. Oregon. March 5, 1877.

EVIDENCE—TREASURY TRANSCRIPTS—PRIORITY OF UNITED STATES—ADMINISTRATORS—ASSETS—CHARGES UPON ESTATE—EXPENSES.

1. The transcript of the books and proceedings of the treasury department, provided for in section 886 of the Revised Statutes, in relation to the accounts of persons accountable for public money, is prima facie evidence of the facts stated therein, so far as the same are authorized by law.

2. Nothing is assets in the hands of an administrator, applicable to the payment of a demand against the estate, within the meaning of section 1103 of the Oregon Civil Code, but money—something which is a legal tender.

3. Semble, that under section 1140 of the Oregon Civil Code, even money in the hands of an administrator is not assets applicable to the payment of a claim, until its payment has been directed by the county court.

4. A debt due an estate from the administrator thereof, and returned on the inventory as solvent, is presumed to have been collected, and is, therefore, assets in his hands, applicable to the payment of a debt due from the deceased to the United States.

5. The priority given to the United States by section 3466 of the Revised Statutes in the case of insolvent debtors, is not a lien upon the property of the insolvents in the hands of the assignee or administrator, but only a right to a priority of payment out of the proceeds of such property after notice of the claim.

6. Taxes and funeral charges are not "debts due from the deceased," within the meaning of section 3466, supra, but charges imposed thereon by the law of the state, which the administrator is bound to discharge before satisfying any claim of the United States as creditor of the deceased.

7. Expenses of last illness are a "debt due from the deceased," and under section 3466, supra, a debt due the United States is to be preferred to them, but if duly paid by the administrator without notice of the claim of the United States, the priority of the latter is lost.

8. The priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of the administration are first to be paid; but this does not include the costs and expenses of defending an action like this, where the claim was prima facie just, and ought to have been allowed.

Action on paymaster's bond [by the United States against Virgil S. Eggleston and others].

Rufus Mallory, U. S. Atty.

Walter W. Thayer and Richard Williams, for defendant.

DEADY, District Judge. On July 10, 1873, the defendant Eggleston, being a paymaster in the army of the United States, gave a bond to the plaintiff, with the defendant Robie and the deceased Alexander Miller as his sureties therein, in the sum of $40,000, conditioned, among other things, that said Eggleston would account for all moneys received by him as such paymaster, and, when thereunto required, would refund any such moneys remaining in his hands unaccounted for.

On December 15, 1875, upon a statement and adjustment of Eggleston's accounts at the treasury department, it was ascertained and certified that there remained in his hands unaccounted for, of the moneys received by him under the bond aforesaid, the sum of $12,413.45.

On October 6, 1875, Miller, one of the sureties aforesaid, died, and on December 7, 1875, the defendant Nurse was appointed administrator of his estate by the county court of Lake county, Oregon; and on February 20, 1876, the demand was duly

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 15 Alb. Law J. contains only a partial report.]

presented to said Nurse for payment, and by him disallowed.

Subsequently this action was brought by the United States upon Eggleston's bond, to recover the sum aforesaid. Neither Eggleston nor Robie have appeared or been served with the summons. The complaint alleges that Nurse "has in his possession, as such administrator, property belonging to said estate applicable to the payment of the money above mentioned."

Nurse, answering the complaint, admits the execution of the bond, but denies the remaining allegations of the complaint, and particularly that he has in his hands property of said estate applicable to the payment of the plaintiff's demand. The case was tried by the court without the intervention of a jury.

The transcript from the books and proceedings of the treasury department shows that the defendant Eggleston, by his own account current, is in arrear to the amount of $12,319.40, and that in addition to this sum, $94.05 of the credits claimed by him in such account are unlawful or inaccurate, making the whole indebtedness under the bond of $12,413.45.

By section 886 of the Revised Statutes, this transcript is made prima facie evidence of the facts stated therein, so far as the same are authorized by law. Walton v. U. S., 9 Wheat. [22 U. S.] 655; U. S. v. Buford, 3 Pet. [28 U. S.] 29; U. S. v. Jones, 8 Pet. [33 U. S.] 384; Gratiot v. U. S., 15 Pet. [40 U. S.] 369; U. S. v. Eckford's Ex'rs, 1 How. [42 U. S.] 263; Hoyt v. U. S., 10 How. [51 U. S.] 132; Bruce v. U. S., 17 How. [58 U. S.] 438.

Nothing appearing to the contrary of this, the plaintiff is entitled of course to judgment against the defendant Nurse, as administrator of the estate of Miller, for the said sum of $12,413.45, to be satisfied out of the goods of his intestate. But the plaintiff also claims that it appears from the evidence that at the commencement of this action, there was $4,950.33 in Nurse's hands as such administrator, applicable to the satisfaction of this demand, and therefore there should be judgment against him personally for that amount, with interest from the date of the inventory. This conclusion is based upon section 1103 of the Oregon Civil Code, which provides that the effect of a judgment against an administrator is only to establish the claim, so as to require it to be satisfied in due course of administration, "unless it appear that the complaint alleged assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted or found to be true, in which case the judgment * * * may be enforced against such * * * administrator personally."

As to the facts, it appears from the inventory and the testimony of Nurse at the time of his appointment as administrator, he was indebted to the estate of Miller in the sum of $6,665, less sundry set-offs amounting to $1,759.67, and a claim to recover $800 damages for the failure of title to twenty pack-mules which he had purchased from Miller in his life-time, leaving a balance due said estate of $4,105.33. This debt was returned as solvent by the administrator, and so appraised by the appraisers. The whole amount of property on the inventory was appraised at $4,605.33. The other $500 consists of personal property, debts due the estate from third persons, and interests in mining claims.

Counsel for the plaintiff maintains that all property upon the inventory is "assets" applicable to the payment of this demand within the meaning of that term as used in section 1103, supra, and therefore insists upon a judgment to that extent against Nurse, to be satisfied de bonus propriis.

No authority has been cited by counsel upon this point, and I have not found any directly bearing on it. My own conclusion is, that the personal property or choses in action in the hands of an administrator is not assets applicable to the satisfaction—payment—of a demand against the estate within the meaning of this section; and that nothing is such an asset but money—that which is a legal tender, and with which a debt can be discharged.

This cannot be done with property or choses in action. If the administrator neglects to convert the property in his hands into money, so as to be able to satisfy the claims against the estate, he is guilty of negligence, and may be removed, and is also liable upon his bond. But I think it would be impracticable and unsafe in this action to inquire into the probable money value of the property mentioned in the inventory, and then charge the administrator personally with that sum, as money in his hands applicable to the payment of this claim. Upon an actual sale of the property, the amount realized might fall far short of this supposed value, to the irremediable loss of the administrator. Such money assets must also be at the time subject to be applied to the payment of the demand in question.

This action was commenced March 24, 1876—less than six months after the appointment of the defendant Nurse as administrator. Now, section 1140 of the Oregon Civil Code provides in effect that the county court, after the filing of the first semi-annual account of the administrator, shall "ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed" by the administrator within the first six months after notice of his appointment, "after paying the funeral charges and expenses of administration," and shall then order and direct payment to be made in full, or pro rata, as the case may be.

From this it seems that even money in the hands of an administrator is not technically assets applicable to the payment of a claim, unless the county court in which the letters were granted has ascertained the fact and made an order to that effect.

This point was not made by counsel, and will therefore be considered waived. Yet it is stated to show that if the administrator is not authorized to pay any claim against the estate until directed by the county court, as provided in section 1140, supra, then section 1103, supra, ought not to be construed so as to charge him under any circumstances with assets in his hands applicable to the payment of a particular claim until its payment has been authorized and directed by the county.

But waiving the effect of this section (section 1140) had Nurse any money in his hands as administrator at the commencement of this action, applicable to the satisfaction of the plaintiff's demand? At the date of the letters he was solvent, and owed the estate $4,105.33. This sum it was his duty to collect from himself as debtor of the estate by transferring it to himself as administrator thereof. It is but reasonable to presume that this duty was duly performed, and that such sum was then, and still is, in his hands as administrator.

Was it then applicable to the payment of this claim? By section 3466 of the Revised Statutes, it is provided that whenever the estate of a deceased person in the hands of his administrator "is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied." The language of this section is absolute. The debts due the United States are to be satisfied, to the exclusion of any other debt due from the deceased.

The constitutionality of this act, and that it gives no lien upon the property of the debtor, but only a priority of payment out of the proceeds of such property upon the debtor's dying insolvent, and therefore does not overreach or affect a bona fide transfer of the same, was settled by the supreme court in U. S. v. Fisher, 2 Cranch [6 U. S.] 390, 396.

It does not appear that the administrator had any notice of this claim prior to February 20, 1876, when it was presented to him and disallowed. At that time, according to the evidence he had paid out for expenses of Miller's last illness, $370; for funeral charges, $45, and for taxes on the estate, $40; in all, $455.

In U. S. v. Fisher, supra (note, p. 390), it was said by Chief Justice Marshall that the administrator is only liable to the extent of the assets in his hands, after notice of the claim of the United States; and in U. S. v. Clark [Case No. 14,807], it was held that the administrator is to be considered a trustee, and only liable after notice or the knowledge of such circumstances as would put a prudent man upon inquiry.

This being so, it follows that the administrator is not personally liable to the plaintiff under section 3466, supra, for the assets which he had disbursed in good faith before notice of its claim.

The two items of taxes and funeral charges are "not debts due from the deceased," but charges imposed by the law of the state which the administrator is bound to discharge in the performance of his trust before satisfying any claim of the United States as a creditor of the deceased. The title to the property of this estate not being affected by section 4366, supra, and being therefore in the administrator, it is private property and subject to taxation by the state, and this charge is paramount and prior to any claim which the United States may have against the proceeds as creditor of the deceased.

In U. S. v. Hunter [Case No. 15,427], Mr. Justice Story held that the right of priority of the United States only attaches to what remains of a debt due to an insolvent debtor, or of his estate, after the proper charges and expenses of collecting, or administering it, as the case may be, are satisfied. Upon appeal to the supreme court, the decree in this case was affirmed without this question being mooted. [Hunter v. U. S.] 5 Pet. [30 U. S.] 173. The expenses of Miller's last illness are a "debt due from the deceased," and therefore the claim of the United States is entitled to a priority of payment. Waiving the question, because not made by counsel, whether this payment is to be considered as made in good faith because made without the order of the county court, as provided in section 1140, supra, it was otherwise duly made and without notice of the prior claim of the United States. Deduct then the sum of these payments from the $4,105.33 of assets presumed to be in the defendant's hands, and there is left $3,650.33.

In addition to this, there must be deducted the expenses of administration. These are, so far as appears, the compensation of the administrator and the fees of printers and officers. The administrator's ordinary compensation is "a commission upon the whole estate accounted for by him." Civ. Code Or. § 1146. For the purposes of this action, assuming that to be the sum due from the administrator to the deceased, and treating the rest of the estate as merely things in action, this commission amounts to $202.10. Add to this $100 for fees of printers and officers, and the remainder, $3,348.26, is the sum for which the plaintiff is entitled to a personal judgment against the defendant Nurse.

The defendant claimed in his evidence that the expenses of administration would amount to a much larger sum than this. The only item he mentioned was the expense of defending this action. But as this claim ought to have been allowed by him when presented, and this litigation thereby avoided, it is difficult to see on what ground he can be allowed anything on this account. If the estate is to pay the expenses of this litigation, the effect

will be that the United States maintains the administrator in his apparently improper resistance to the collection of its lawful claim.

The plaintiff is entitled to judgment against Nurse, as administrator, for $12,413.45, with interest on the same at the rate of ten per centum per annum from the adjustment of the accounts, December 15, 1875, until this date, and also against said Nurse, personally, for $3,348.23 of said sum, and the costs and expenses of this action.

Case No. 15,028.

UNITED STATES v. EIGHT BARRELS OF WHISKEY.

[6 Int. Rev. Rec 124; 15 Pittsb. Leg. J. 4.]

District Court, E. D. Wisconsin. Oct., 1867.

INTERNAL REVENUE — FORFEITURE — DISTILLED SPIRITS — REMOVAL FROM INSPECTED PACKAGES—RECTIFICATION.

[The provisions of Acts 1866, c. 184, § 43, providing for the forfeiture of spirits, removed from the original packages in which they were inspected and gauged, into other packages, for purposes of rectification, redistillation, or change of proof, unless they are again inspected, gauged and properly branded, does not apply to spirits merely poured from the original packages into an open vat for rectification.]

MILLER, District Judge. The information is brought against two thousand one hundred and twenty-eight gallons of spirits, of different names and descriptions, seized in the rectifying establishment of John R. Hodson, in the city of Janesville, in this district. Article 1 propounds that on the 25th of April, 1867, the liquors enumerated were found in the possession and custody of said John R. Hodson, for the purpose of being sold and removed by him with design to avoid payment of taxes. Article 2 propounds that on the 1st day of April, 1867, at Turtleville, in this district, the said liquors being distilled spirits, were removed from the original packages in which they were inspected and gauged as required by law, into other packages for purposes of rectification and change of proof, and were not again inspected, and gauged and properly branded, contrary to the act, etc. Article 3 propounds that on the 1st day of April, 1867, at Turtleville, the said liquors were drawn off in casks or packages and inspected, gauged and proved, and were afterwards removed to the rectifying establishment of William Hodson, at Turtleville, and removed from the casks or packages in which they were inspected and gauged into other packages for purposes of rectification and change of proof, and were not again inspected and gauged and properly branded, nor was the United States inspector's brand put on the packages into which the liquors were removed. And they came into the hands of John R. Hodson at his rectifying establishment at Janesville before they were seized, having been so removed, rectified and changed, contrary to the act, etc.

The hearing was had upon a written stipulation—as to eight barrels of whiskey containing 288 proof gallons—which, it is agreed, were rectified by William Hodson, at his rectifying establishment at Turtleville, and branded by him, "William Hodson, Rectifier, Turtleville, Wisconsin, Rectified," and were not inspected and branded otherwise. The highwines and distilled spirits from which the whiskey was obtained by the process of rectification were poured, as is usual in rectifying, into an open vat, stationary and fixed, and were not inspected after rectification. The whiskey contained in the eight barrels was sold by William Hodson to claimant, and by him poured into the vat in his store and rectifying establishment at Janesville, and were seized in the vat.

This information is brought on this provision of section 43, c. 189, of the act of 1866 [14 Stat. 162]: "And all spirits, after being removed from the original package, in which they were inspected and gauged, into other packages for purposes of rectification, redistillation or change of proof, shall again be inspected, and gauged, and properly branded; and the absence of the inspector's brand shall be taken and held as a sufficient cause or evidence upon which any spirits so found may be forfeited." It is conceded that the wines had been inspected and gauged before rectification at Turtleville; and the first article of the information is abandoned. The law provides for the forfeiture of inspected and gauged spirits removed from the packages in which they were inspected and gauged, into other packages for the purpose of rectification, redistillation, or change of proof, without again being inspected and gauged, and properly branded by the inspector. This provision is for the purpose of identification in the second packages of the same spirits that had been inspected, gauged and branded in the former packages and thereby to prevent fraud. But the stipulation does not support the information. It is agreed that the eight barrels of whiskey containing 288 proof gallons, had been rectified by William Hodson in his establishment at Turtleville, and branded by him with his private brand. The highwines being inspected, gauged, and branded by the inspector, were poured as is usual in rectifying, into an open vat, stationary and fixed, and were rectified. They were not poured into other vessels or packages as highwines, from one set of packages into other packages. Their identity as highwines ceased, upon being poured into the open vat and rectified. The vat is not a package within the meaning of the law. Pouring the wines into the vat was the first act towards rectification, which was followed by the rectifying process, thereby changing the wines into whiskey.

The next sentence of the section (which is repealed by the act of March 2, 1867 [14

Stat. 471]) illustrates clearly the position here taken. It provides for a forfeiture for changing the character of spirits that have been duly inspected and marked, either by rectification, mixing or otherwise, and placing the same in packages for consumption or sale, without first stamping or branding upon such packages in such a manner as the commissioner of internal revenue may prescribe, the word "Rectified." William Hodson at Turtleville, not knowing of the repeal of this provision, marked the barrels or packages of rectified whiskey in the manner directed by the commissioner. The provision under which the information is brought, relates to the transfer of inspected spirits from one package to another before rectification. The repealed sentence relates to the marking of whiskey after rectification.

The whiskey contained in the eight barrels was sold by William Hodson to the claimant, John R. Hodson, who removed them to his rectifying establishment in Janesville where they had been poured into his rectifying vat for further rectification and where they were seized. This transfer does not change the nature of the case, nor does it make an additional cause of forfeiture. The government had been paid the taxes, and William Hodson at Turtleville had a right to pour the contents of the inspected packages of spirits into his rectifying vat, and John R. Hodson had a right to purchase the rectified article and rectify it in his establishment at Janesville.

Case No. 15,029.

UNITED STATES v. EIGHT CASES OF LAMPS.

[1 Hunt, Mer. Mag. 252.]

District Court, S. D. New York. Jan., 1839.

CUSTOMS DUTIES—FRAUDULENT INVOICES—BURDEN OF PROOF—PROVINCE OF JURY.

[1. If the government shows that the invoice price is far below the market price, this is sufficient to place the burden on the importer to show what price he actually paid, and, if he does not do so, the jury are warranted in inferring that the invoice was falsely made up.]

[2. If the evidence shows that the market price is not much above the invoice price, the jury may consider whether the difference is greater than the ordinary fluctuations of the market, or what might arise from the necessities of the seller, the state of the times, etc.]

[This was an action for the forfeiture of eight cases of lamps imported from France in June, 1838, per the ship Louis Phillip, and consigned to Augustine Draconi.]

Forfeiture of goods for undervaluation.

The articles were what are called mechanical lamps, having in the interior of the lamp a machinery and movements similar to those of a clock, by which the oil is at all times so forced up to the wick, that the lamp gives a much brighter and more beautiful light than ordinary lamps. The bodies of the lamps were entered in the invoice at 30 francs each, and the suspension frames, globes, and other appendages, were all entered in the invoice at various specific prices, all of which, it was alleged, were 100 per cent. below the appraised value and the current price of such articles, and that therefore the invoice had been fraudulently made up to defraud the revenue of the United States.

In support of these allegations, several appraisers and other attaches of the customhouse testified that they had examined the articles, and that the value put upon them in the invoice was from 70 to 100 per cent. below their current price. But it appeared that not one of the customhouse officers who had examined the articles had any practical knowledge of the value of or price of such articles, and had formed their opinion only from inference, founded on information they obtained from others. There were also some witnesses called who dealt in lamps, but not in the peculiar sort of lamps now in question, which have been rarely imported into this country. The witnesses could therefore decide upon their value inferentially, and in this way they set a much higher value on some of the articles than they had been set down in the invoice. On the part of the claimant, witnesses were produced who are practically acquainted with the value of such lamps and they valued some of them below the invoice price and others a little above it.

THE COURT charged the jury it would be necessary for them to take the invoice and the appraisement, and compare them together, and then compare these papers with the testimony, and see how far the evidence supported and upheld the invoice or the appraisement. After the jury had done this, they would apply the facts, and draw the proper inferences. It was necessary for the court to lay down the principles of law by which the jury were to be guided in giving their verdict, in order that they should know what they had to decide. It was said that the property in question had been imported in violation of the revenue laws, inasmuch as that the importer, in making out his invoice, had entered the articles at a false valuation. The question, then, for their inquiry was, simply, was the invoice made up with intent to defraud the revenue, by charging the property under its value?

The government had given no direct evidence on the subject. It was competent for them to have shown what the articles cost the importer abroad; and, if the price in the invoice was shown to be less than the purchase price, this would have been direct testimony to show that the invoice was false; and if the party was to have derived advantage from it, the jury would be necessarily called in to say that he had committed a fraud to cheat the revenue. There had been, however, no direct evidence given by the government, and they had endeavored to show that the market value was more than the in-

voice; and, if that had been shown, it was ground for a fair inference that the party had bought them at the current market value, and it would be then incumbent on him to show at what price he had actually purchased them, and, if he did not so do, it would be fair for the jury to infer that the invoice was falsely made up. The case rested mainly on whether the invoice was charged below the fair market value, and the government had endeavored to prove this in various ways. First, they showed the value set upon it by the appraisers; and, although this was, in the first instance, prima facie evidence, to a certain extent, it was not, invariably, evidence of the highest character, as it was not to be supposed that the appraisers were acquainted with the value of all articles which came into this port. And in the present instance it appeared that the appraisers had never been engaged in the sale or manufacture of such articles, or had any practical knowledge of their value, and made it up only from general inquiries. And supposing that the judgment formed from such sources showed a different value to that in the invoice, still that would not be sufficient to prove a fraud. For, if the market or adjudged value of the articles was not much greater than what was in the invoice, then the jury had a right to consider whether the deviations were greater than the ordinary fluctuations of the market, or what might arise from the necessities of the seller, the state of the times, or any other occurrence incidental to mercantile affairs. And, if the testimony showed that the invoice was as nearly right as wrong, then it was the duty of the jury to consider that the importer intended to act rightly towards the government, and they should not impute a fraud to him which the testimony had not clearly established.

Verdict for the claimant.

Case No. 15,030.

UNITED STATES v. EIGHT CASKS OF WHISKEY.

[7 Int. Rev. Rec. 4; 14 Pittsb. Leg. J. 11.]

District Court, E. D. New York. 1867.

INTERNAL REVENUE—SPIRITS FOUND OUT OF WAREHOUSE—BURDEN OF PROOF—BRANDS—PAYMENT OF TAX.

[1. In the case of the seizure, for violation of the internal revenue laws, of distilled spirits found elsewhere than in a bonded warehouse, the burden of proof under section 45, Act 1866 (14 Stat. 163), is upon the claimant to show that the requirements of the law have been complied with.]

[2. Proof by the claimant that proper brands were upon the barrels is insufficient. He must show, in all cases where the payment of tax is a prerequisite to the removal from a bonded warehouse, that such tax has been paid.]

This was a case where a quantity of rectified spirits was seized while being transported from the rectifying establishment of W. O. Tyler, West street, New York, to Brooklyn. The evidence on the part of the government showed that the spirits were rectified; that they were made of a barrel of new spirits and the remainder rectified spirits which were properly branded. It was claimed by the district attorney that the burden of proof to show that the tax on these spirits and the spirits from which they had been made was paid, devolved upon the claimant [J. Hexseimer].

BENEDICT, District Judge, said that the question had been reduced to a construction of the forty-fifth section of the act of 1866 [14 Stat. 163], providing that spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not being paid, the burden of proof shall be upon the claimant to show that the requirements of the law have been complied with.

Mr. Hollis, counsel for claimant, asked the court to direct the jury to find a verdict for the claimant, upon the ground that no probable cause of seizure was shown by the government other than that the spriits were found elsewhere than in a bonded warehouse, and that the claimant was not called upon to prove anything concerning them; that, assuming the burden of proof to be upon the claimant, he was entitled to judgment, having shown that the spirits were marked as the law requires.

District Attorney Tracey requested the court to direct a verdict for the government, under the construction given section 45 by Mr. Justice Nelson, in the case of U. S. v. 508 Barrels of Spirits [Case No. 15,113], inasmuch as no evidence was offered by claimant showing that the tax had been paid.

Judge BENEDICT, in deciding, said that he considered the propositions of the law to have been disposed of in the Case of 508 Barrels; that these spirits had been removed for transportation from Illinois to the Third district, New York, and were found in the Third district out of a bonded warehouse, and that the higher court held that the burden was upon the claimant to show that the law was complied with, and that the fact that proper brands were upon the barrels was insufficient. This case differed from that only where these spirits purported to be rectified spirits removed from a bonded warehouse upon payment of tax instead of spirits removed for transportation upon bond. Proof of the payment of tax upon removal of the spirits from the bonded warehouse must also be given. The words "requirements of the law in regard to the same" referred to the removal from the bonded warehouse according to law, and payment of tax when that was necessary to a removal.

In concluding, Judge BENEDICT said that he had consulted with Judge NELSON, who concurred with him in his opinion with regard to the case. A verdict for the government must accordingly be entered condemning the property.

Case No. 15,031.

UNITED STATES v. EIGHT CASKS OF WHISKEY.

[See Case No. 15,030.]

Case No. 15,032.

UNITED STATES v. EIGHTEEN BALES OF BLANKETS.

[7 Int. Rev. Rec. 69.]

District Court, S. D. New York. 1868.

CUSTOMS DUTIES—FORFEITURE—UNDERVALUATION.

This was a case brought to forfeit the goods for alleged undervaluation. The goods were manufactured at Piermont, near Paris, by T. A. Sollier, and by him shipped to this country, one invoice in December, 1861, and one in January, 1862. He stated the value in the invoices at 11 francs a pair. On appraisal at the customhouse their value was raised to 15 francs a pair. A reappraisement was demanded, and the reappraisers valued them at 16 francs. Thereupon the goods were seized as forfeited for the undervaluation. The claimant gave testimony by witnesses examined on commission, that the goods though shipped in December and January, were actually manufactured by him in September previous, and that the invoice stated their value correctly at that time, while the appraisers had taken their value at the time of shipment.

Mr. Allen, for the United States.
Mr. Choate, for claimant.

THE COURT held that under Act 1823, § 8 [3 Stat. 729], the market value at the time of manufacture was the proper value to be stated by the manufacturer in his invoice, instead of the value at the time of shipment. The government witnesses were recalled and testified that the value was higher than 11 francs even at the time of manufacture, the price of blankets having risen very much after the battle of Bull Run, and the indications of a long war in this country. The question of fact as to the value at that time was left to the jury, and they found a verdict for the claimant.

Case No. 15,033.

UNITED STATES v. EIGHTEEN BARRELS HIGH WINES.

[8 Blatchf. 475.] [1]

Circuit Court, N. D. New York. June 20, 1871.

INTERNAL REVENUE — DISTILLER — NEGLECT TO MAKE ENTRY AND RETURN—PENALTY—FORFEITURE—WITNESS—EVIDENCE.

1. The penalty for a violation of the thirty-first section of the act of July 13, 1866 (14 Stat. 157), in the neglect, on the part of a distiller, to make entry and return, as required by that section, is not merely the penalty imposed by that section, but also the forfeiture of spirits, &c., provided for by the twenty-fifth section of the act of March 2, 1867 (14 Stat. 483).

2. Where, on the cross-examination of a witness, collateral facts are called out from him tending to create distrust of his integrity, fidelity, or truth, it is competent for the adverse party to ask of the witness an explanation which may show the consistency of such facts with his integrity, fidelity, and truth, although circumstances may thus be proved which are foreign to the principal issue, and which, but for such previous cross-examination, would not be permitted to be proved.

[Cited in U. S. v. Quantity of Tobacco, Case No. 16,106.]

3. Where some, though slight, evidence is given on the part of the United States tending to show a failure to make the true and exact entries and returns required by the said thirty-first section, the burthen is cast upon the claimant to show a compliance with the statute.

[Cited in U. S. v. Quantity of Tobacco, Case No. 16,106.]

4. Where property is seized as forfeited for a violation of the internal revenue law, and is bonded, and returned to the claimant, it becomes subject to forfeiture for causes subsequently arising; but the fact of a condemnation for such subsequent forfeiture cannot affect the question of its liability to condemnation in the suit in which it was so bonded.

[Error to the district court of the United States for the Northern district of New York.]

William Dorsheimer, U. S. Dist. Atty.
C. Carskadden, for claimants.

WOODRUFF, Circuit Judge. It is quite manifest that, under the decision of this court in U. S. v. 36 Barrels of High Wines [Case No. 16,468], all the spirits and other property in the place or building, or within the yard or enclosure, where the same were found, were liable to condemnation, under the forty-eighth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866 (14 Stat. 111); and, inasmuch as the jury found, as to certain of the spirits, that they were in the possession, custody, and control of the claimants, for the purpose of being sold by them in fraud of the internal revenue laws, it follows that they were rightly condemned. In this respect, the charge of the court was too favorable to the claimants; and it would seem useless to try the cause a second time, when, upon the facts found, the condemnation must be certain, according to the construction, heretofore given in this court, of the effect of placing the spirits in the distillery warehouse, namely, that, although in such warehouse, the spirits are, nevertheless, in the possession, custody, and control of the owner, within the meaning of the said forty-eighth section.

But the case was tried upon the contrary view of the meaning of that section, and of the effect of placing the spirits in the warehouse. As to the spirits there stored, the actual condemnation was adjudged under the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

thirty-first section of the act of July 13, 1866 (14 Stat. 157), and the twenty-fifth section of the act of March 2, 1867 (14 Stat. 483); and, in my judgment, these are entirely sufficient to sustain such condemnation. The thirty-first section of the act of 1866 required the claimants, from day to day, to make, or cause to be made, true and exact entry, in a book kept in such form as the commissioner of internal revenue might prescribe, of the number of pounds or gallons of materials used, the number of gallons of spirits distilled, the number of gallons placed in warehouse, with various other particulars specified, and, on the 1st, 11th, and 21st days of each month, to render an account containing these particulars to the assessor. The twenty-fifth section of the act of 1867 makes the neglect to do this a cause of forfeiture of all the spirits made by or for the distiller, and of all vessels used in making the same, and of all materials fit for use in distillation, found on the premises. The fourth count in the information charges, that the spirits seized were made, manufactured, and distilled by the claimants in certain stills, &c.; and that the owner, agent, and superintendent of such stills did neglect and refuse to make true and exact entry and report of the same, and did neglect and refuse, from day to day, to make, or cause to be made, true and exact entry, in a book kept in such form as the commissioner of internal revenue had theretofore prescribed, of the number of pounds or gallons, etc., following, in detail, the particulars specified in section 31. This count the jury found proved, and condemnation, of course, followed. The counsel for the claimants erroneously insists, that the consequence of a violation of this thirty-first section is only fine and imprisonment. The penalty of forfeiture of the spirits, vessels, stills, boilers, and materials is added by the twenty-fifth section of the act of 1867.

If, therefore, there was no error in the reception or rejection of testimony, nor in the instructions to the jury in other particulars than are above referred to, the judgment should be affirmed. Evidence of other acts occurring a month before and a month after the seizure in question, indicating an intent to sell and dispose of spirits distilled by the claimants in fraud of the United States, and without the payment of the tax thereon, was objected to as too remote. I do not think it necessary, on this point, to add anything to what was said in U. S. v. 36 Barrels of High Wines [Case No. 16,469]. There, the same point was urged, and the evidence held admissible.

There is nothing, I think, in the objection to the testimony given by way of explanation of the conduct of the witness Avery. It was not given as evidence in chief, to affect the claimants on the questions in issue, but only to avoid the effect of facts elicited by the claimants on their cross-examination. When cross-examining counsel see fit to call out from the witness collateral facts which tend to create distrust of his integrity, fidelity or truth, it is entirely competent and proper for the adverse party to ask of the witness an explanation which may show that the facts thus elicited were, in truth, wholly consistent with his integrity, fidelity and truth, although they thereby prove circumstances foreign to the principal issue, and which, but for such previous cross-examination, they would not be permitted to prove.

On the question whether the hogs and pigs seized were within the place or building, or within the yard or enclosure, where the articles, spirits or materials were found, the jury, upon the distinct question being submitted to them, have found in the affirmative. They might properly so find. The shed or pen in which they were kept, itself formed a part of the enclosing fence surrounding the premises; and it was not for the court to say that the exterior line or side of that shed or pen was not the exterior line of the enclosed distillery yard or premises. I think the finding of the jury must be held conclusive upon that question.

The observations of the court on the state of the proofs were not erroneous. Evidence had been given in behalf of the government, tending to show that the claimants had not made true and exact entries and returns, and the opinion of the court was expressed, that this cast the burthen upon the claimants, to show that they had complied with the statute. From the nature of the case, the proof on this subject was in the possession of the claimants. They knew just how many pounds or gallons of materials they had used, how many gallons they had distilled, and all the other particulars required to be entered and returned. The government had, presumptively, no such knowledge, and were struggling to prove a negative. In such cases, the rule is familiar. Slight proof given by the party who is under such disadvantage, is sufficient to call upon the adverse party, who has the proof in his own hands, to show what is the truth concerning the matter in question.

The subsequent forfeiture and condemnation of certain of the same property, for a subsequent violation of the law could have no effect to defeat the claim of the government in this proceeding. When the property was bonded and returned to the claimants, the lien of the government thereon, for the cause of forfeiture assigned in this proceeding, was gone. The property then remained in the claimants' hands, for all purposes, their own, as much as any property theretofore or thereafter acquired, and it was entirely free from liability to further seizure for the causes herein alleged. But, like any other property, it might be forfeited, if subsequent cause therefor arose, and such forfeiture would be solely by reason of such subsequent cause.

The judgment must be affirmed, with costs.

Case No. 15,033a.

UNITED STATES v. EIGHTEEN PIPES DISTILLED SPIRITS.

[20 Niles Reg. 346.]

District Court, D. Massachusetts. 1821.

CUSTOMS DUTIES—COLLECTION LAWS—SEIZURE OF DISTILLED SPIRITS—EVIDENCE.

[1. Certain casks of distilled spirits were seized under the collection act of March 2, 1799, §§ 41, 43 (1 Stat. 659, 660), on the ground that they were unaccompanied by the certificates required by law. At the time of seizure the claimant stated to the officer that he had the certificates at his house, and would at once bring them to the customhouse, where the goods were taken. He never produced them at the customhouse, but some time afterwards presented them to the district judge, when making an application for delivery of the goods on giving bond. *Held*, that these facts were sufficient to sustain an averment that the casks were "found unaccompanied with the proper certificates," so as to justify the seizure, and raise a legal presumption of the liability of the goods to forfeiture, which could only be repelled by the production of satisfactory proof that the spirits contained in the casks at the time of seizure had been actually imported and the duties paid.]

[2. If a person having in his possession for sale a cask of distilled spirits which has once passed from the customhouse, accompanied by the marks and certificate required by law, change essentially the contents of the cask, without first obliterating such marks, and surrendering the certificate, this act must be regarded as fraudulent, and debars him from ever after resorting to the certificate as evidence of his rights.]

[This was an information of forfeiture against 18 pipes of distilled spirits, claimed by T. R. Rix, charging the violation of sections 41 and 43 of the act of congress of March 2, 1799, "regulating the collection of duties on imports and tonnage."]

George Blake, Dist. Atty., for the United States.

Jas. T. Austin and Daniel Webster, for claimant.

BY THE COURT. It appeared in evidence, first, that the casks of distilled spirits in question were of such description as were required by the act to be marked and accompanied with the usual certificates; and, secondly, that on the 29th day of April last, they were found by the seizing officer in the possession of a person unaccompanied by such certificates. It was shown, by the testimony of sundry witnesses that the casks in question were filled at the time of the seizure with a species of distilled spirits, and that each of them had been regularly marked at the customhouse in Boston in conformity with the requirements of law, as containing foreign gin of the first proof, imported in ship Packet, Turner, master; all the original marks and numbers remaining as at first, without any change or obliteration. It was furthermore proved that the claimant, being present at the seizure, was requested by the seizing officer to produce the certificates which were required to accompany the casks; that, in answer to this demand, the claimant declared that he had the proper certificates, and that he would go to his house for them, and bring them down to the customhouse for the inspection of the collector. The seizing officer requested him to do so, assuring him, at the same time, that he would go immediately to the customhouse, in order to meet him there. The casks were accordingly removed by the seizing officer to the store commonly used by the collector as a place of deposit for merchandise under such circumstances, and thereupon the seizing officer went to the customhouse, according to the arrangement which had been previously made with the claimant, as above stated, in order to wait there his arrival with the certificates. It appeared, however, that the claimant did not, on that day, nor at any time afterwards, produce the said documents at the customhouse, as he had proposed to do, and in fact that nothing further was heard of any such documents, either by the collector or any other representing the United States in behalf of the prosecution, until they were produced before the district judge on the second day of June following, when an application was made to the said judge by the claimant for the delivery of the merchandise, upon giving bond for the appraised value thereof, in conformity with the provisions of the law in such cases.

It was further shewn on the part of the United States, very clearly and satisfactorily, that, notwithstanding the apparent conformity between the casks and certificates, yet that the contents of the former at the time of the seizure were essentially different from what they were at the time of their being marked, and at the issuing of the certificates; that the spirits now contained in the casks, instead of being genuine Holland gin of first proof, according to the purport of the marks and certificates, were in fact a species of mixed, adulterated spirit, composed (in the opinion of the witnesses) partly of foreign and partly of domestic manufacture; and, although not much reduced merely as to proof, yet so affected by the mixture as to have lost about fifty per cent. of the market value of the article as at the time of its original importation.

The opinion of the judge, upon the several points which had arisen at the trial, was expressed to the effect following, viz.:

1. That, even if the certificates now produced were genuine, and found, in every respect, to comport with the marks and contents of the casks, still that the circumstance of their nonproduction, upon the demand of the seizing officer, and their being kept back, for such a length of time by the claimant, must be deemed sufficient, in point of law, to maintain the "averment that the casks were found unaccompanied with the proper certificates," so as to justify the seizure, and to raise a legal presumption of

their liability to forfeiture, which could only be removed by the production of satisfactory proof on the other side "that the distilled spirits contained in them at the time of seizure, had actually been imported into the United States, and the duties thereupon paid or secured."

2. That a person having in his possession for sale a cask of distilled spirits, which has once passed from the customhouse, and is accompanied by the marks and certificates required by the law in that case, has no more right, without first obliterating such marks, and surrendering the certificate, to change, essentially, the contents of such a cask, than he has to alter the marks, or to erase and falsify the certificate itself; that to do this, in either case, is to tamper with an important public regulation; that it must be regarded as a fraudulent act of the party, and, like the forging or falsification of a deed, or any other instrument, must forever debar him from the privilege of resorting afterwards to the original voucher as affording the evidence of his rights.

3. As a conclusion from the foregoing positions, it was laid down distinctly by the judge that if, from the strong proofs which had been produced on the part of the prosecution, it should be the opinion of the jury that any part of the spirits contained in these casks were of foreign manufacture, or, in other words, were such as were required by law to be marked and certificated, and that the contents of the casks, at the time of the seizure, were essentially different from what they were when the certificates were issued, then that the certificates ought to be rejected as wholly inapplicable, as affording no evidence whatsoever that the spirits had been legally imported and the duties secured. In fine, that, whatever might be the inconvenience or injury resulting to the claimant from this construction, it was such, and such only, as had been brought upon him by his own indiscretion or fraud, in attempting to pervert the purposes of an important public document; and that he had therefore no reasonable grounds for complaining of any hardship.

Case No. 15,034.

UNITED STATES v. EIGHT HUNDRED AND FIFTY-FIVE BOXES OF SUGAR.

[11 Int. Rev. Rec. 63.]

District Court, D. Louisiana. 1870.

CUSTOMS DUTIES—FALSE INVOICES.

In this case the sugar was libelled as having been imported under false invoices, with a view to defraud the revenue. The case was given to the jury February 5th, and a verdict was rendered in favor of the government.

P. H. Morgan, U. S. Dist. Atty., and Hudson & Fearn, for the United States.

Billings & Hughes, J. L. Tissot, and W. R. Whittaker, for importers.

Case No. 15,035.

UNITED STATES v. EIGHT HUNDRED BARRELS OF SPIRITS.

[10 Int. Rev. Rec. 126.]

District Court, D. Missouri. 1869.

INTERNAL REVENUE — WHISKEY — FORFEITURE — FAILURE TO PAY TAX—RECTIFIER—BOOKS.

About a year ago there arrived at this port, first the steamer W. R. Arthur, then the Great Republic, then the Frank Pargoud, each of which steamers were loaded to the guards with New Orleans spirits, all of which was seized as contraband. The first seizure was instituted at the request of the district attorney. The other seizures followed in rapid succession for several days, until some eight hundred barrels had been gobbled. The claimants of the first lots were C. S. Mattison & Co., a firm composed of a son of Ex-Gov. Mattison of Illinois, and R. E. Goodell, son-in-law of the same distinguished capitalist. Another lot was claimed by J. S. Clark, of New Orleans, with whom Thos. E. Maurice was interested. Another lot was claimed by Thomas H. Walker, son of a prominent distiller and whiskey dealer of New Orleans.

Gen. Noble, the district attorney, went to New Orleans in January and February to take evidence in these cases, and was prepared at the present term of the court to try all of them, but most of the claimants had their cases continued. Walker had the audacity to bring the issue before a jury, and the case has been tried.

The evidence on the part of the United States was that of an official of New Orleans, Ben Jacobs, who showed that the rectifier of the whiskey had his establishment in the same building with the distillery known as "Walker's Distillery," and run in the name of L. C. Clark, and that he had observed various matters of suspicion, which indicated a connection between the two establishments.

The evidence for the defence, which was highly favorable for the government, showed that Mr. Hart, rectifier, was a party connected with the Walkers, and had had money advanced to him by the elder Walker; that he had kept his books in a very unsatisfactory manner; lost sheets of paper which, in his testimony, he endeavored to show had been torn up by his servants. It further appeared that Clark, the distiller, had shipped the same high wines by Hart to St. Louis for the benefit of the younger Walker; that Walker had accompanied them in the Great Republic; that at the same time the Great Republic brought up some 300 other barrels of spirits, and it was these spirits, or some of them, which had some connection with the murder committed on the Great Republic on the morning of her arrival here, and of which the captain, W. B. Donaldson, was accused, and is to be tried shortly in the criminal court. Thomas H. Walker testified that he was a law student, having studied law for three years, and had left his father's planta-

tion in the South with this spiritual endowment from the old man, and with the object "to travel and speculate as a traveler." He further testified that after the seizure his hopes had been blighted. There was no proof that the tax had been paid, and as this burden was upon the claimant, the court instructed the jury that it was his duty to satisfy them fully upon this point.

It was further clearly shown that Mr. Hart, the rectifier, had not kept the book required by section 6 of the revenue law, and therefore the spirits were also forfeited. It was also shown that the rectifying-house of Hunt was in the distillery of Walker, though in the name of Clark; that Walker had advanced money to Hart; that Clark had shipped the spirits for Hart to Walker the younger, and that the younger Walker had come up on the boat with the spirits, and that an old and close intimacy existed between the parties, and that they were bringing spirits from a market where they were at least as high as at St. Louis, paying extra expenses, etc., and at the same time there were whole steamboat loads coming from the same place, etc.

The jury retired, and after a short absense, returned with a verdict for the United States on the first, second, third, fourth, fifth, sixth, tenth and eleventh articles in the information, either one of which was sufficient to forfeit the spirits. They found the seventh, eighth and ninth articles untrue.

Case No. 15,036.

UNITED STATES v. EIGHT HUNDRED CADDIES OF TOBACCO.

[2 Bond, 305.] [1]

District Court, S. D. Ohio. Oct. Term, 1869.

INTERNAL REVENUE—TOBACCO—FALSE RETURN—FALSE BRANDS—INNOCENT PURCHASER.

1. In an information, claiming a forfeiture of tobacco, in two distinct charges, based on two provisions of the internal revenue laws, the district attorney may claim a judgment on either or both, as the evidence may justify, and the court will not require him to elect on which he will rely.

2. Tobacco, as an article subject to taxation, is included in section 9 of the act of July, 1866 [14 Stat. 101], and may be forfeited for fraud perpetrated by the manufacturer, even in the possession of a purchaser, without knowledge of the fraud.

3. This is a stringent but necessary provision in the internal revenue system.

4. The title of the government to the property infected with fraud, vests from the time of its commission, and the taint of fraud inheres in it, even in the possession of an innocent purchaser.

5. If false brands were placed upon the caddies by a revenue officer, indicating that the legal taxes had been paid, when in fact they had not been paid, without any complicity in the fraud by the claimant, it would not be a ground of forfeiture, and if the jury find a forfeiture, it must be for the original fraud of the manufacturer in failing to return, or making false returns of the quantity manufactured.

Durbin Ward, Dist. Atty., and Henry Hooper, for the United States.

H. C. Whitman, Jacob D. Cox, C. W. Moulton, and H. L. Burnett, for claimant.

LEAVITT, District Judge (charging jury). The United States, in this proceeding, claim the forfeiture of eight hundred caddies of plug tobacco, as manufactured and sold in violation of the internal revenue statute. George Atkins has made himself a party to the suit, by his appearance and answer, in which he claims to be the owner of the tobacco, and denies the allegations of fraud, set forth in the information. This tobacco, it appears from the evidence, came into the possession of Atkins, the claimant, by purchase from Diehl & Anderson, a business firm in Cincinnati. Immediately after the purchase it was transferred to the warehouse of a Mr. Wall, in the city, where it has since remained and where the seizure was made. On the 12th of October last, on the complaint of Hoagland, a detective employed by the revenue department, and a witness for the government in this case, the tobacco was seized by order of Harris, collector of the first collection district of Ohio. It was brought within the jurisdiction of this court by the proper proceedings, and the question on which the jury are now to pass, is whether it is forfeited to the United States on the ground of fraud, as alleged in the information.

There are two distinct charges in the information, based on two different provisions of an internal revenue statute. Both provisions are embraced within section 9 of the act of July, 1866. The first, so far as it is necessary now to advert to it, provides, in substance, that all articles subject by law to tax, found in the possession or custody of any person, for the purpose of being removed, or sold, in fraud of the law, and with intent to evade the payment of the tax, shall be absolutely forfeited to the United States. It is also claimed by the district attorney, that the tobacco is forfeited also under the second charge in the information, based on the other provision of the act of 1866, which, in substance, is that all articles subject to tax, which shall be removed, deposited, or concealed, with intent to defraud the government of the tax, shall be forfeited. The information is so framed as to meet both provisions of the section of the law referred to.

And here it will be proper to notice a point of law presented and argued by the learned counsel for the claimant, namely, that the district attorney can not claim a forfeiture of the tobacco under both provisions of the statute on which the charges in the information are based. In other words, the claim is that the district attorney must be required to designate the particular provision on which he relies for a judgment of forfeiture, and can not rely

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

on both. The information does not refer in terms to the section of the law on which a forfeiture is claimed. In the first count or charge, it recites, with nearly literal accuracy, that part of section 9 on which the claim of the government is based, and the counsel contends that the district attorney can not rely on the second provision of section 9 as a basis of forfeiture, but must be restricted to the first. While it may have been proper for the counsel for the claimant, at the inception of the trial, to have moved the court for an order requiring the district attorney to elect on which of the two provisions of the law he would insist as the ground of forfeiture, the court will not, at this stage of the proceeding, make such an order. I am quite clear, however, that it is the right of the government, under this information, to claim a forfeiture under either provision of section 9, if the fraud charged is within either or both.

It is also strenuously urged by the counsel for the claimant, that tobacco is not included in the designation of articles subject to forfeiture under the first provision of that section, and that therefore the eight hundred caddies in question can not be forfeited under the information in this case. The argument in support of this position has been able, but the court cannot concur with counsel in the views which have been urged. I can not entertain a doubt that the article of tobacco, by a fair construction of section 9, is included in its terms, as forfeitable for any fraud contemplated and punished by it. The language of that section is, and was intended to be as comprehensive and far reaching as language could make it. It clearly includes all goods, wares, and merchandise, and every article subject to taxation. And although there may be other sections of the law apparently in conflict with this construction, they can not set aside the explicit provisions of section 9 yet unrepealed and in full force. The jury will have observed that the ground on which the claim of the government for the forfeiture of this tobacco is based, is that it was infected by fraud on the part of the manufacturer, subjecting it to forfeiture wherever it might be found, and into whose possession it may have passed. It is claimed by the United States, that Gaines, the manufacturer of this tobacco, failed to make returns of the quantity manufactured by him, as required by law. The statute, in plain words, requires the manufacturer to return under oath, from time to time, the quantity made, and to pay the tax imposed on it. And a failure to comply with this requirement is a gross fraud, subjecting the tobacco to forfeiture.

It will be obvious to the jury that their first inquiry will be, whether Gaines, the manufacturer, was guilty of the frauds charged? I do not propose to detain the jury by any detail of the evidence on this question, but shall leave it exclusively for their consideration. It is proper to remind the jury, that the foundation of the government's claim to a forfeiture rests on the proof of Gaines' fraud. If the fraud by him is not sustained by the evidence, there is no ground for a verdict of forfeiture of the tobacco. The title of Atkins, the claimant, in the absence of such evidence, would be clear and indisputable.

It is an important question in this case, whether, if the fraud by Gaines is established, the property is subject to forfeiture in the possession of Atkins, an innocent purchaser, without knowledge of the fraud of the manufacturer. This is an important inquiry, the answer to which may be decisive of this case. I shall present the views of the court very briefly, and without detaining the jury by a labored exposition of the character or policy of revenue laws. It is clear, however, that under the existing statutes, the property rights and interests of individuals may suffer, while the person in possession may not be chargeable with any fraud, or have any knowledge of, or complicity in it. As an illustration of this principle, I may refer to section 9 of the statute, on which the charges in this information are based. The first charge alleges substantially that the tobacco in question was held by the person in whose possession it was found "in fraud of the law," or, in other words, it was sold illicitly, without the payment of the tax, with the intent to defraud the United States. Now, upon the hypothesis that Atkins, the claimant, who was the purchaser of the tobacco, was ignorant of the fraud perpetrated by Gaines, that does not relieve the tobacco from the taint of fraud, or protect it from forfeiture, if the fraud is proved. By the words of the statute, the tobacco was forfeited to the United States from the time of the commission of the fraud, and the lien or claim of the government attaches from that time, so perfectly and so effectually, that the person guilty of the frauds has no title which he can transfer to a purchaser, though he may have no knowledge of the fraud. The fraud, by operation of law, attaches to and inheres in the property, subject to taxation, wherever it may be found. This doctrine may seem to partake of harshness and severity; and, doubtless, in its operation it may work injury to persons innocent of any intentional wrong. Yet, in all efficient systems of internal revenue, there is a necessity for its adoption and enforcement. The power of taxation is a necessary appendage of every enlightened government; and it becomes a paramount duty resting upon those administering it, when necessary, to impose taxes for the purpose of sustaining the public credit, and enabling the government to perform its constituted obligations. And laws for raising revenue for these purposes must necessarily be stringent, or if not so, they will not be efficient. Tax impositions are not ordinarily looked upon

with favor by those who are required to bear the burden. And the experience of our government, in reference to revenue laws, proves a sad laxity in the morals of the country on this subject. Men often ignore their legal and moral obligation to the government, and tax their ingenuity by resorting to all kinds of crafty devices to evade the payment of taxes imposed by law. Even those who, in other transactions, observe the obligation of honesty and fair dealing with their fellow-men, do not scruple to defraud the government. If the jury find this tobacco to be infected with fraud, I am constrained to instruct them that it is subject to forfeiture, even if Atkins, the claimant, was ignorant of, and had no participation in the fraud. Such must be the fair construction of the statute. The government has been defrauded of the legal tax on the tobacco, and it was held by the claimant "in fraud of the law."

It is, however, insisted by the district attorney, that Atkins can not be regarded in the light of an innocent purchaser of this tobacco, and that the circumstances brought to the notice of the jury, will justify them in the conclusion that he had at least an intimation of the frauds committed by Gaines. If the jury assent to this view—if they find that Atkins had just ground to presume the existence of the fraud—he would not have any, even an equitable claim to this tobacco, as an innocent purchaser; and the jury, without scruple or hesitation, would return a verdict for the United States.

It is not necessary to advert specially to the fraud charged by the government, in the use of false brands upon the caddies containing this tobacco. There is, perhaps, evidence sufficient to justify the jury in finding that false brands were used, and there can be no question that the use of such brands knowingly is a criminal act, and would constitute a ground of forfeiture. But it would seem probable that these brands were put on by McDonald, a revenue official, acting in collusion with Gaines. There is no claim, however, that Atkins had any agency in, or knowledge of, this criminal act, and he ought not to be held responsible for it. The criminality attaches to the corrupt and unfaithful officer, in putting on brands falsely indicating the payment of the just taxes, knowing they had not been paid. If the claim of the government to a forfeiture rested solely on this ground, it would not be sufficient to justify a verdict against the claimant. If the jury find for the United States, their verdict must be based on the charge of the original fraud by Gaines.

The jury will have noticed there is a good deal of conflict in the evidence in this case. The credibility due to the testimony of witnesses being exclusively for the jury, I have only to remark it will be their duty, if practicable, to reconcile the testimony consistently with the truthfulness of the witnesses, and if this can not be done, they are to decide to whom credit is due.

Case No. 15,037.

UNITED STATES v. EIGHTY-FIVE HOGSHEADS OF SUGAR.

[2 Paine, 54.] [1]

Circuit Court, D. New York. Dec., 1830.[2]

CUSTOMS DUTIES—FALSE ENTRY—DRAWBACK ON EXPORTATION—REFINED SUGAR.

1. The 84th section of the act of congress of March 2, 1799 [1 Stat. 694], declaring a forfeiture for the entry in the office of the collector, by a false demonstration, of goods, wares or merchandise, for the benefit of the drawback or bounty on exportation, has not been repealed.

2. Sugars entitled to drawback on exportation must have been refined in the United States.

3. What are refined sugars within the meaning of the act of congress, and such as entitle the claimant to the drawback allowed by law upon sugars refined within the United States, and exported therefrom, must be gathered from the commercial sense in which the distinguishing qualities and properties of this commodity are known and understood.

4. The proviso to the act which declares that the forfeiture shall not be incurred if the false denomination happened by mistake or accident, is restricted to mistake of some matter-of-fact, and does not include mistakes as to the construction or application of the law.

5. If the entry was by design, the legal consequence is that it was done to defraud the revenue.

[Cited in U. S. v. 146,650 Clapboards, Case No. 15,935.]

[Appeal from the district court of the United States for the Southern district of New York.]

Between the 24th December, 1829, and 2d January, 1830, entries were made at the custom-house, in New York, by the claimant, of a shipment of about 300 hogsheads and casks of sugar, for the benefit of drawback thereon, as allowed by law upon the exportation of sugar refined in the United States, and made out of foreign sugar. A part of these sugars had been laden on board of the brig Spartan, for Leghorn, and were, by order of the collector, seized and relanded, but all restored except the eighty-five hogsheads in question, which were libelled and tried before the district judge of the Southern district of New York, who denied the claimant's right to enter them for drawback, but decreed their restoration [case unreported], to which cross appeals were taken to the circuit court.

W. Q. Morton, for claimant.

J. A. Hamilton and W. M. Price, for the United States.

For the claimant it was argued as follows: That the phraseology of the various acts of congress, allowing "a drawback upon

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Affirmed in 7 Pet. (32 U. S.) 404.]

sugar refined in the United States and exported therefrom," referred to a condition of the commodity answering to the description of "refined sugar," anterior to its being made to assume the appearance of loaf, lump, or bastard sugars. That any of these three descriptions of sugar are produced from "refined sugar," which refined sugar, in the aggregate, constitutes what the law has in view for the allowance of drawback upon exportation; and no matter what subsequent appearance the refiner may cause any portion of that aggregate to assume, whether loaf, lump or bastard, so long as he can show it to retain those properties entitling it to come within the description of "a refined sugar," any and all of those products are without discrimination entitled to the drawback as "refined sugar." As fully sustaining these positions, the case of U. S. v. Pennington [Case No. 16,026], was cited. That bastard sugar is "refined sugar," in point of fact, was contended to have been established by the testimony of a majority of sugar refiners, examined in the present case, and corroborated by the commercial legislation of England, from the year 1765 to 1829. Together with the statutes, the following authorities were cited: Nodin's British Customs, p. 373; Pope, Cust. tits. 221, 225; Commercial Dig. 139. If, however, it should be determined that the sugars in question had been entered by a "false denomination," then, for the claimant, it was contended that he was "mistaken as to the denomination" by which they were entered. But that the evidence produced was sufficient to show that he honestly believed such "denomination" to be "true," and from this conviction, and not from any intention to defraud the revenue, the "mistaken entry" was made. That under the proviso to the 84th section of the act of March 2, 1799 [1 Stat. 695], whenever evidence is offered, the question of "forfeiture" can only be a question of "fact" (turning as it does upon "fraudulent intentions") for the jury to answer to; if before a court in the place of a jury, must be decided by the court as a "question of fact." That the "court" might reserve the question, whether the commodity entered for drawback be of the description within the purview of the legislative acts of congress, as one of "law," wholly separated from "intention," and not involving "forfeiture." That the term "mistake," as contained in the law, of necessity covered as well mistake of law as of fact. That an act may properly be said "to happen by mistake," though done advisedly and with deliberation. U. S. v. Riddle, 5 Cranch [9 U. S.] 312; Riggs v. Taylor, 9 Wheat. [22 U. S.] 483; Rex v. Smith, 2 Show. 153. That the proceedings on the part of libellants were void "ab initio;" because the subject of exporting sugar refined in the United States with benefit of drawback, was not within the purview of the 84th section of the act of March, 1799, the same having been impliedly repealed "quoad," sugars refined in the United States, by the acts of July 24, 1813 (chapter 549, §§ 8, 9) 4 Bior. & D. Laws, 565 [3 Stat. 35]; of April, 1816, §§ 6–8, c. 172 [3 Stat. 340]; by section 11, Act April 20, 1818, c. 365, 4 Bior. & D. Laws, 314 [3 Stat. 444]; and by the act of January 21, 1829, c. 11 [4 Stat. 331].

THOMPSON, Circuit Justice. The two questions presented to the court below, were (1) Whether the sugar in question was refined sugar within the meaning of the law? (2) If not, is the owner excused from the forfeiture under the proviso in the 84th section of the act of March 2, 1799? This sugar was entered at the custom-house for exportation as refined sugar, with the view of obtaining the drawback allowed by law in such case. Shortly after it was laden on shipboard, the collector caused the eighty-five hogsheads to be seized and libelled, as forfeited for having been entered under a false denomination. The 84th section of the act of March 2, 1799. 3 Bior. & D. Laws, 219 [1 Stat. 694], declares, that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, for the benefit of drawback or bounty upon exportation, shall be entered by a false denomination, and all such goods, wares, or merchandise, or the value thereof, to be recovered of the owner or persons making such entry, shall be forfeited. The allegation in the libel, upon which the forfeiture is claimed, is: That the entry was made by a false denomination of the sugars, with intent thereby to defraud the revenue of the United States. The answer of the claimant denies that the sugars were entered by a false denomination, or with intent to defraud the revenue of the United States, but insists that they were refined sugars within the meaning of the act of congress. The libel does not purport to be founded upon any particular act of congress; but unless it can be sustained under the 84th section of the act of 1799, no law has been referred to, or pretended to exist, upon which it can be sustained. It has been contended on the argument here, that this section of the act, so far as relates to refined sugars, has been repealed. This question was not made in the district court, and I do not think it has been sustained in this court, by any references to the laws of congress. I do not deem it necessary to go into a very minute notice of the various changes of the legislation upon the subject of drawback upon refined sugar.

The first act, allowing a drawback upon sugar refined within the United States, was passed in the year 1794. 2 Bior. & D. Laws, 431, § 19 [1 Stat. 389]. This act was to continue for two years. But by the act of the 3d March, 1795 (2 Bior. & D. Laws, 496, § 20 [1 Stat. 438]), it was continued until the 1st of March, 1801. It was permitted to expire at that time; but the allowance of the drawback was again renewed in 1813 (4 Bior. &

D. Laws, 565, § 8 [3 Stat. 35]), under some different modifications, and continued from time to time by act 1816 (6 Bior. & D. Laws, 160 [3 Stat. 340]), by act of 1817 (6 Bior. & D. Laws, 249 [3 Stat. 401]), and made perpetual by act of 20th of April, 1818 (4 Bior. & D. Laws, § 11 [3 Stat. 444]); and by the act of 21st of January, 1829, the drawback is increased from four to five cents per pound. But in all these various changes and modifications, there is certainly no express repeal of the 84th section of the act of 1799, nor do I discern anything that can be considered an implied repeal, and the objection that there is no act of congress upon which the libel can be sustained, falls to the ground, and the case must rest upon the two questions made and decided in the district court.

1. Were the sugars entered under a false denomination, or, in other words, were they refined sugars within the meaning of the act of congress, and such as entitled the claimant to the drawback allowed by law upon sugars refined within the United States, and exported therefrom? The act of congress has not attempted in any manner to define the distinguishing qualities or properties of this commodity. It is spoken of as an article of merchandise, embraced within the trade and commerce of the country, and presumed to be known and understood by dealers in the article. All laws of this description are made for practical purposes, and are to be construed according to the commercial sense in which they were known and understood. It is not probable that the process of refining sugars entered at all into the consideration of congress; but they legislated upon the subject under a denomination known as an "article of commerce." This necessarily leads to the examination of witnesses, to ascertain whether the sugars in question are refined sugars in this commercial sense; and upon this point a great number of witnesses were examined in the district court, and their testimony has again been brought under the consideration of this court, on the argument here. I deem it unnecessary, however, to go into a critical examination of this evidence. There is, undoubtedly, some contrariety in the opinion of the witnesses; but I think the weight of evidence is decidedly in favor of the conclusion, that the sugars in question were not refined sugars in a commercial sense; and as this is the conclusion to which the district judge came, I am satisfied with adopting the view taken by him, of the evidence upon this branch of the case, by barely remarking, that in all the acts, from the year 1794 down to the present day, the same phraseology is used. The commodity entitled to drawback on exportation, is sugar refined in the United States. We must, therefore, construe the law as applying to an article as understood at that early day, which may in some measure account for the difference of opinion among the witnesses. It is fairly to be collected from the testimony that, as far back as the year '94, the sugars known in the market as loaf and lump, were those denominated "refined sugars," whether they remained in the loaf or were crushed. But, more recently, an opinion among many seems to have grown up, that every product of raw sugar that has gone through the process of refining, and which can be again converted into sugar, is to be considered as refined sugar; and hence they include, under this denomination, what are usually called "bastars," or "bastard sugars." These, in a certain sense, may be considered refined sugars. But in my judgment, it is very clear, that in a commercial sense, and within the meaning of the law, they cannot be considered refined sugar. The sugars in question were, therefore, entered under a false denomination, and thereby became forfeited, unless the case is brought within the proviso to this same 84th section, which declares that the forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the court, in which a prosecution for the forfeiture shall be had, that such false denomination happened by mistake or accident, and not from any intention to defraud the revenue.

2. The next inquiry, therefore, is, whether the respondent has made out a case, which under this proviso will save the forfeiture. The district court was of opinion that such a case had been made out, and the sugars were acquitted on this ground; as I have not been able to arrive at the same conclusion, it will be necessary that I should give this part of the case a more particular consideration. It is proper here to notice, that further, and as I think, material testimony, has been taken in this court; and the cause is now to be decided under a different aspect, in some respect, from that presented to the district court. The material facts on this part of the case are few and undisputed. The claimant does not pretend to deny but that the sugars in question are what are called "bastars" or "bastards"; and that he knew them to be such when he entered them for exportation; and his answer and claim asserts that they are refined sugars, entitled to the drawback, and were shipped as such, and without any intention to defraud the revenue. He does not set up in his answer that there was any mistake as to matter of fact, with respect to the quality of this sugar; but with full knowledge of what the sugars were, he assumes the broad ground that they were refined sugars within the meaning of the law. In this he was mistaken in the judgment of the district court, as well as of this court; and the effect of such mistake upon his rights is presented for consideration. A brief notice of the evidence, however, may be necessary in order rightly to judge of the character of the alleged mistake, and to determine how far the claimant is chargeable with an intention to defraud the revenue.

It appears from the evidence that the claimant was repeatedly informed by the surveyor

of the port, and the deputy collector, before this shipment, and, also, by a direct correspondence with the comptroller of the treasury, that he would not be entitled to receive a drawback upon his brown bastars, or bastard sugars, specimens of which he had furnished the collector, and had also sent to the treasury department at Washington; and other specimens had been shown to him at the custom-house, greatly superior in quality to the sugars seized; and he was informed by the custom-house officers that he must conform to those specimens as standards in the exportation of sugars, as refined. The claimant had been exporting large quantities of this article, and disputes and difficulties had arisen between him and the custom-house officers in relation thereto. He was perfectly aware that the sugars he was shipping were of an inferior quality to the specimens which had been shown him at the custom-house, and that he was acting in opposition to the instructions there given, and he well knew that he would not be allowed the drawback if the quality of the sugar should be discovered. It is true that Mr. Phillips, one of the inspectors of the customs, superintended the packing and shipping of the sugars, and gave his permit for the shipment; but this was very properly considered by the district court as having very little influence upon the cause, either as matter of law or as matter of fact; as matter of law, it is only a precautionary measure, but it is no way conclusive. If such permit settled the question as to the quality of the goods, there would be no such thing as a seizure for an entry by a false denomination, when such entry agrees with the permit of the inspector; and as matter of evidence, it afforded no excuse or justification to the claimant; for the inspector, who superintended the packing and shipping of the sugar, was confessedly inexperienced in the article, and allowed it to pass as refined sugar only because he thought it corresponded with the specimens he had seen at the custom-house. But the claimant knew it did not, and he was not in the least influenced or governed by the opinion of the inspector as to the quality of the sugar; he acted with a full understanding that the drawback would not be paid if the quality of the sugar was discovered at the custom-house. The permit of the inspector was, therefore, not only no justification or excuse, but, under the circumstances, might warrant the suspicion that the claimant intended thereby to elude any further examination from the custom-house officers; and the course pursued by the claimant, when the sugars were sent on shipboard, clearly manifested an intention and determination to avoid a more close inspection of those sugars, knowing, from what had taken place, it must result in a denial of the drawback. When he found the inspectors on board the vessel, taking samples of the sugars, under the orders of the collector, he ordered them off. It is true, that after they left the vessel, he told them they might go back and take as many samples as they pleased, which they declined. This circumstance might not be entitled to so much weight, if nothing afterwards of a suspicious character had occurred, particularly as the inspectors returned the next day and proceeded in the examination. But at the close of the day, (being the 31st of December,) it was agreed between the claimant and inspectors, with the consent of the captain, that the vessel should be locked, and no more cargo taken on board until after 9 o'clock on the 2d of January. Before that hour, however, one of the inspectors went on board and found the vessel broken open, and they were taking on board more sugars claimed by Mr. Barlow, who was then present; and on the inspectors' complaining that he was acting in violation of their agreement, he said that they had gone illegally to work, and that he intended to make the collector and all of them sweat for it, (or words to that effect,) and that he should continue loading the vessel until he was stopped by proper authority. On this being reported to the collector, he ordered the seizure to be made.

It is also in proof that the inspectors had laid aside a hogshead of sugar, which they had rejected, as not equal to the specimens furnished them at the custom-house, and by which they were to be governed. Mr. Barlow was not present, but soon after came down, and the inspectors showed him the rejected hogshead. He said: "Very well; let it be." Some time after, on the same day, he said to the inspectors: "I sent that cask down on purpose to try you, to see whether you would pass it." It is fairly to be collected from the evidence, that the rejected cask was one that had been passed by Mr. Phillips.

These are the material and leading facts upon which the protection claimed by the respondent rests. In deciding upon this part of the case, it must be considered as settled that the sugars were entered by a false denomination, and that the forfeiture follows as matter of course, unless the claimant has made out, on his part, that such false denomination happened by mistake or accident, and not from any intention to defraud the revenue. The first inquiry that seems naturally to arise is, what is the nature and character of the mistake which will save the forfeiture? Is it restricted to some matter of fact, or does it include mistakes as to the application of the law to the subject, thus falsely denominated, the qualities of such sugars being fully known to the person making the entry? I cannot think that upon any sound construction the proviso can cover mistakes of the latter description. Such are purely mistakes of law, and it is a principle too well settled to admit of being drawn in question, that ignorance or mistake of law furnishes no excuse in any case, civil or criminal. No good reason is perceived why this maxim should not be applied to the present case as well as to any other. A doubt as to the construction

of a law has never been understood as taking a case out of the application of this rule; and it appears to me that such a doctrine would lead to consequences extremely injurious. There are but few statutes that may not admit of some doubt as to their construction, and it surely cannot be maintained that all who act under a mistaken construction of such doubtful statutes, are irresponsible for their acts. The claimant was fully apprized of the construction given to this act at the custom-house, and knew that the drawback would not be allowed upon the sugars he was shipping if the quality was discovered. But he professed to believe, and probably did believe, that the construction at the custom-house was wrong. And he meant to maintain that bastards were refined sugars, and entitled to the drawback. And he now insists that he is not bound by the custom-house construction, but has a right to have that construction judicially settled. There can be no doubt but that his right, in this respect, stands upon the same footing with other rights protected by law. No man is bound to take the law from the opinion of his adversary. He may appeal to the judicial tribunals of the country to construe the law, and settle his right under it. But he must abide by the consequences if he happens to be mistaken in his view of the law. He cannot claim the right of setting the law at defiance until such judicial construction can be obtained. Such a doctrine is entirely inadmissible. He has a right to have the judgment of the court in the last resort, before he is concluded; but it would be a most extravagant pretension that the operation of the law must be suspended in the meantime. If he chooses to act upon his own construction, and in opposition to that of the custom-house officers and the treasury department, he has a right to litigate this question before the judicial tribunals; but, as in all these cases, he litigates at his peril. And, whether the stake is great or small, can make no difference in principle. It may, perhaps, in some measure, serve to show either his confidence in his own opinion, or his boldness in resisting that of the executive officers of government. A mistake is an error in judgment or opinion, a misconstruction, and may be applied to some matter of law as well as fact; and the intention of the legislature is to be discovered from the subject-matter to which it is applied, and its connection with other words. It is here coupled with the word "accident," "mistake or accident." And as the two words may not import exactly the same thing, there is no more reason to conclude that the former was intended to be applied to matters of law than the latter, which certainly can have no application except to some matter of fact; and both terms, as here used, are properly applied in the same sense. It is very clear that this false denomination did not happen by accident: there was no casualty or any unforeseen or unexpected occurrence which caused the entry by this denomination. It was done deliberately, and by design, and with full knowledge of all the parts and circumstances that attended the transaction. And if the term "mistake" does not include error of judgment as to matter of law, (as I think it does not,) I am unable to discover any ground upon which the false denomination can be said to have happened, by mistake or accident. And the only remaining question is, whether this was done with an intention to defraud the revenue, within the sense and meaning of the proviso; and it appears to me that it follows as matter of course, that if the entry was by design, and not by mistake or accident, the legal consequence is, that it was done to defraud the revenue.

The excuse is to be made out by showing that the false denomination happened by mistake or accident, and not from any intention to defraud the revenue. The evidence shows very clearly that he intended to obtain from the government the drawback, and if he was not entitled to it, he intended to obtain what he had no right to, to the injury of the revenue. The obtaining or withholding wrongfully from another that which is his right, either by deception or artifice, or without his knowledge and consent, is defrauding him of his right. It is possible that he had so firmly persuaded himself that his sugars were entitled to the drawback, that he may acquit himself of any moral turpitude. But the manner in which he attempted to get the sugars on board the vessel, and his declaration to the inspectors, that he sent down the rejected hogshead to try them, manifested a disposition to practice upon what he believed to be the ignorance of the inspectors, and a resort to artifice and deception to elude a full and fair examination of his sugars. A false denomination in the entry happening under such circumstances, surely could not have been considered by the legislature as entitled to favor. Mr. Barlow was not dealing in an article of which he was ignorant. He states in his answer, that he is a sugar refiner, and had been for many years past, and that he himself refined about one half of these sugars. He was not, therefore, in this matter, acting under the advice or representations of others; he was not himself deceived in any respect as to the article. But with full knowledge of the qualities of the sugar, and with full knowledge that he was acting in opposition to the opinion of the collector and comptroller, through whom he must obtain the drawback, and that some artifice must be resorted to in order to effect this, he enters these as refined sugars which, in the judgment of the district court and of this court, was a false denomination. Admitting that he himself honestly believed that his sugars were refined sugars within the meaning of the law, and that he was entitled to the drawback, still it amounts to no more than a mistake or error of judgment upon the law, and does not protect the sugars from

forfeiture. I am, accordingly, of opinion that the case is not brought within the proviso of the 84th section of the act of March 2, 1799, and that the decree of the district court must be reversed, and a decree of condemnation entered.

[On appeal to the supreme court, the decree of this court was affirmed. 7 Pet. (32 U. S.) 404.]

See the following cases: U. S. v. Nine Packages of Linen [Case No. 15,884]; U. S. v. One Case of Hair Pencils [Id. 15,924]; U. S. v. Four Part Pieces of Woollen Cloth [Id. 15,150]; U. S. v. Six Hundred and Fifty-One Chests of Tea [Id. 12, 916]; U. S. v. Ninety-Five Bales of Paper [Id. 10,274].

Case No. 15,038.

UNITED STATES v. EIGHTY-TWO PACKAGES OF GLASS.

[37 Hunt, Mer. Mag. 322.]

District Court, S. D. New York. July, 1857.

CUSTOMS DUTIES—FORFEITURE OF GOODS—UNDERVALUATION.

[1. A forfeiture is incurred if the goods are invoiced at a sum different from their actual cost at the place of exportation, with design to evade the duties; and it is immaterial whether the discovery of the fraud be made while the goods are passing inspection or afterwards.]

[2. The collector has authority to cause a re-examination and valuation of goods after an appraiser has passed the same, and such examination satisfies the legal prerequisites to a seizure of the goods for undervaluation.]

[3. It seems that, if a seizure is irregular, the government may nevertheless adopt the same, and proceed to condemnation, if the same was founded upon a good cause of forfeiture.]

[4. "Actual cost," as used in the statute, means the cost of the goods at the place of exportation, with the addition of all dutiable charges; and claimants cannot defend an undervaluation in the invoice by showing that the goods could be manufactured for the invoice price.]

This was a motion for a new trial. A libel of information was filed to forfeit the goods for undervaluation, under the 66th section of the act of March 2, 1799. The case was tried before a jury, who rendered a verdict condemning the goods. On the trial it appeared that the glass arrived at this port February, 1855, consigned to Schank & Downing, the claimants, by an association doing business near Nannur, in Belgium, called the "Floreffee Company." When it arrived, it was examined and appraised, and passed by the appraisers at the invoice valuation. But afterwards the appraisers sent to the claimants for a case of the glass, which was furnished and reappraised, informally, as the claimants alleged, and this action was commenced to forfeit it.

HELD BY THE COURT: That the forfeiture is incurred if the goods are not invoiced according to their actual cost at the place of exportation, with design to evade the duties; and it is immaterial whether the discovery of the fraud be made while the goods are passing inspection, or afterwards. That it is not made to appear that the importation was made, or entry offered, by manufacturers on their own account, and the collector must accordingly regard it as made by purchasers, and deal with it as such. That the collector had authority to cause a re-examination and valuation of the goods for dutiable purposes, and, when so made, the examination satisfies the legal prerequisites to an arrest of the goods; and it seems that the government have a right to adopt a seizure, if founded upon a good cause of forfeiture, and proceed for the condemnation of the goods, whether the seizure was regular or not. That the irregularity of appraisement, if any occurred, would not, under that doctrine, annul the action for the forfeiture. That the evidence of reappraisal was admissible to show authority for instituting the action. That "actual cost" is the cost of the goods at the place whence exported, with all dutiable charges added, and the claimants could not defend an undervaluation on the invoice by proving that the goods could be manufactured for the price. That the ruling of the court on the trial was correct.

Case No. 15,039.

UNITED STATES v. ELDER.

[4 Cranch, C. C. 507.] [1]

Circuit Court, District of Columbia. March Term, 1835.

DISORDERLY HOUSE—NUISANCE—EVIDENCE.

Facts from which the jury may find the defendant guilty of keeping a disorderly house.

[Cited in brief in Com. v. Kidder, 107 Mass. 191. Cited in Sawyer v. Davis, 136 Mass. 245.]

Indictment [against John Elder] for keeping a disorderly house. Verdict, guilty. Motion for a new trial, on the ground that the verdict was against evidence.

CRANCH, Chief Judge. There was evidence tending to prove the following facts: That the defendant kept a public drinking house in this city, where he sold spirituous liquors to all persons who would buy them, and suffered and encouraged persons to buy and drink them in his house; that his house was frequented by idle, disorderly, suspicious, and drunken persons, sometimes quarreling and fighting, and making a great noise late at night, and even till after midnight; that he kept a public ninepin alley, at which game people were often playing very late at night; that he suffered persons resident in this city to sit and continue drinking spirituous liquors in his house, until they were intoxicated, and this was suffered as much on Sundays as on other days;

[1] [Reported by Hon. William Cranch, Chief Judge.]

that his house was small, and not calculated for the entertainment of travelers, or even of lodgers, there being only two rooms on a floor, and the family occupying the upper stories. There was no evidence of his having had a tavern license at the time stated in the indictment, and respecting which the witnesses testified; nor has any such license been produced, although called for by the court upon this motion for a new trial. A transferred license has been produced, which expired on the first Monday of November, and the time stated in the indictment is the 1st of December, 1834. The indictment is in the common form, charging that he kept a disorderly house, and for lucre and gain caused and procured evil-disposed persons to frequent and come together in his house, and permitted them at unlawful times to be and remain there drinking, tippling, cursing, swearing, and quarreling to the common nuisance, and in manifest destruction and corruption of youth and other people in their manners, conversation, morals, and estate, etc.

The question, then, is whether a house kept in the manner, and for the purpose which, from the evidence, the jury had a right to infer that this house was kept, is not substantially a nuisance, within the meaning of the indictment and of the law. We think it is. Neither the act of assembly of Maryland respecting ordinary licenses, nor the charter of the city of Washington, nor the by-laws of that corporation, as far as we are informed, authorizes the keeping of such a house, in such a manner as it seems to the court by the evidence given upon the trial, the defendant's house was kept. If the defendant had had the most favorable license which the law allows, it could not have justified him in suffering idle, disorderly, suspicious, and drunken persons to meet together in and frequent his house, nor to suffer inhabitants of this city, not being lodgers or boarders in his house, to remain there drinking and tippling, for his lucre and gain, at any time; and especially on Sundays. But if this was done without any license at all, as seems to have been the case, there can be no doubt that it is a common nuisance.

Case No. 15,040.

UNITED STATES v. ELIASON.

[1 Hayw. & H. 21.] [1]

Circuit Court, District of Columbia. Jan. 23, 1841.

ARMY OFFICER — EXTRA SERVICES — DISBURSEMENTS.

An army officer, ordered to take charge of and superintend the works on certain fortifications, claimed credits for extra services under the army regulations for 1821, 2½ per centum of the amount disbursed by him. *Held*, on a suit by the government upon his account for alleged balances due, that the proviso of the 3d section of the act of congress of 1835, c. 30 (4 Stat. 771), did not apply to the case, and that he was entitled to such credits.

This was a suit brought by the plaintiffs for a balance due on an army officer's (the late Wm. A. Eliason) account.

The declaration contains the usual counts. The cause was tried on an agreed statement of facts.

The declaration is as follows: "District of Columbia, Washington County. To wit: William A. Eliason, late of Washington county, gentleman, was attached to answer unto the United States in a plea of trespass on the case, &c. And whereupon the said plaintiffs, by F. S. Key, their attorney, complain that whereas the said defendant, on the first day of January, in the year of our Lord one thousand eight hundred and thirty-nine, at the county aforesaid, was indebted unto the said plaintiffs in the sum of nine thousand eight hundred and thirty dollars and thirty-two cents, current money, for sundry matters and articles properly chargeable in account, as by a particular account thereof herewith into court exhibited appears; and so being indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and faithfully promised to the said plaintiffs to pay the said plaintiffs the aforesaid sum of money when he should be thereto afterwards required." Then followed a count for the like sum laid out and expended at the request of the said defendant, and a count for a like sum found in arrears, and due to the said plaintiffs. "Yet, the said defendant, not regarding his said several promises and undertakings, so by him made in this behalf as aforesaid, but contriving, and fraudulently intending, craftily and subtilely to deceive and defraud the said plaintiffs in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said plaintiffs (although so to do the defendant was requested by the said plaintiffs, to wit, on the same day and year aforesaid, and often afterwards, at the county aforesaid), but he to do this has hitherto refused, and still refuses. Whereupon the said plaintiffs say they are injured and have sustained damage to the value of twenty thousand dollars current money, and therefore the said United States bring suit, &c. John Doe, Richard Roe, Pledges. F. S. Key, Att'y for the United States for the District of Columbia."

The cause came on for trial at the March term, 1840, and the death of the defendant, William A. Eliason, was suggested, when Mary L. Eliason, administratrix, appeared.

The following agreed case was submitted for the opinion of the court: On the trial of the above cause the plaintiffs, to maintain

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

the issue on their part joined, offered in evidence the transcript from the treasury department which states a balance of $2,600.75 due from the defendant to the United States. And the defendant then offered evidence to show that said intestate was a captain in the United States corps of engineers, and, as such, was ordered to take charge of and superintend the works on Fortress Calhoun, and took charge of, on, and continued the said work from, the 7th of November, 1834, to the 10th of September, 1838. And further offered in evidence the general regulations of the war department, as follows: Article 67, § 14: "When there is no agent for fortifications the superintending officer shall perform the duties of agent, and while performing such duties, the rules and regulations for the government of the agents shall be applicable to him; and as compensation for the performance of that extra duty, he will be allowed, for moneys expended by him in the construction of fortifications, at the rate of two dollars per diem, during the continuance of such disbursements, provided the whole amount of emoluments shall not exceed two-and-a-half per cent. on the amount expended." Army Regulations 1821, p. 167. And further, that the said intestate while thus employed disbursed $214,392.61. That he was also directed to take charge of and superintend the removal of a light-house into Fortress Calhoun, in which service he disbursed $1,143.13. And further, that he was charged with the disbursement of, and did disburse, the sum of $1,891.43 for incidental expenses of fortifications, beginning in the year 1830. And that he purchased for the use of the engineer department a set of instruments and case, and the department allowed him for the instruments, but refused to allow him for the case, amounting to $10. And further, that the pay and emoluments of the said intestate have been stopped by the government of the United States from the 31st day of December, 1838, to the 15th day of June 1839, amounting to $1,014.95. And the defendant claimed credits to the amount of $3,764.05. And further offered evidence that all the claims above stated, except that for pay and emoluments, had been submitted to and rejected by the auditing officers of the treasury department. And further produced and offered in evidence the statement of the state of the appropriations under which the disbursements were made, in which it states the total amount to be accounted for by Capt. Eliason since April 1, 1835, $214,392.61.

The plaintiffs offered in evidence the regulations of the war department of March 14, 1835, construing the proviso in the act of congress of March 3, 1835. And upon the foregoing statement it is submitted to the court to say whether the defendant's intestate was entitled by law to the allowance claimed by him for disbursements as above stated. If the court is of opinion that he is so entitled, then the judgment to be for defendant, if otherwise, for the plaintiff for the amount appearing due by the transcript.[2]

F. S. Key, for the United States.

Joseph H. Bradley, for defendant.

The following is the opinion of THE COURT:

Upon the full consideration of the case stated as aforesaid, THE COURT is of opinion that the proviso in the act of March 3, 1835 (chapter 30, § 3),[3] is only applicable to the disbursing of public money appropriated by law during the session of congress in which that act was passed, and it appearing to the satisfaction of the court that no part of the money as aforesaid disbursed by the defendant was appropriated at the said session of congress; the court is also of opinion that the said intestate was entitled to the allowances claimed by him for the disbursements as above stated, and do therefore order the judgment to be entered for the said defendant.

Case No. 15,041.

UNITED STATES v. The ELIZA.

[Cited in Smith v. U. S., Case No. 13,122. Nowhere reported; opinion not now accessible.]

Case No. 15,041a.

UNITED STATES v. ELIZABETH.

[9 Reporter, 232;[1] 3 N. J. Law J. 49.]

Circuit Court, D. New Jersey. 1880.

MUNICIPAL CORPORATIONS — DEBT — TAXATION — MANDAMUS—DEMAND—REFUSAL—LEVY —AUTHORIZED TAX.

1. The authority in a municipal corporation to incur an obligation carries with it, by necessary implication, the duty of providing by taxation for its payment.

2. Where a judgment has been obtained against a municipal corporation for overdue interest on its bonds, it is not necessary to prove an express demand for payment, and an express refusal thereof, as a condition precedent to the issuance of a writ of mandamus to compel payment.

3. This court cannot, by mandamus or otherwise, direct a municipal corporation to levy a tax larger than is authorized by law.

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[2] The amount stated in the declaration was reduced to the amount stated in the transcript of the treasury department.

[3] Section 3, c. 30, of the act of March 3, 1835, repealed section 2, c. 92, of the act of 1834 [4 Stat. 698], making appropriations for the civil and diplomatic expenses of the government for the year 1834, and contained a proviso that no officer should receive under this act a greater annual salary or compensation than was paid to such officer for the year 1832, and that in no case shall the compensation of any other officers than collectors, appraisers and surveyors, whether by salaries, fees or otherwise, exceed the sum of $1,500 each, per annum. Nor shall the union of any two or more of these offices in one person entitle him to receive more than that sum, &c.

[1] [Reprinted from 9 Reporter, 232, by permission.]

The relators, who are the legal representatives of Peter and Robert Goelet, recovered in September, 1879, a judgment in this court against the city of Elizabeth for overdue interest on its municipal bonds, and execution thereon was returned nulla bona. [Case unreported.] A rule then issued from this court to defendant to show cause why writs of mandamus should not be granted, one directed to the city council, commanding a tax to be levied and collected for the amount due on the judgment, and the other to the board of assessment of taxes, commanding the assessment and collection of a tax for the same purpose. On the return of the rule.

E. T. Gerry and B. C. Chetwood, for relators.

B. Williamson, for respondent.

NIXON, District Judge, in delivering the opinion of the court, said:

There is a class of cases in which it has been held that courts have power to grant the writ, without absolute proof of a demand and express refusal. In other words, the refusal may be inferred from the acts or omissions of the parties. Thus, in Maddox v. Graham, 2 Metc. (Ky.) 56, it was adjudged that, where a city council is required by law to collect a tax sufficient in amount, annually, to pay the interest upon bonds issued by the city in payment of the subscription of stock to a railroad company, and there is no specific legal remedy provided for nonperformance, mandamus may be obtained to compel them to discharge that duty at the instance of the holders of the bonds; and where it appeared that the proper authorities of the city did not intend to do the act required, a refusal in terms was not necessary to put them in fault. Tapp. Mand. 285, in discussing the right to issue a mandamus under such circumstances, says: "The refusal may not be express, but there should be enough, from the whole facts, to show to the court that, for some proper reason, compliance is withheld." The parties are estopped by the existence of the judgment from denying that the bonds were legally issued (Mayor, etc., v. Lord, 9 Wall. [76 U. S.] 409), and the doctrine is now well established that the authority in a municipal corporation to incur an obligation carries with it, by necessary implication, the duty of providing, by taxation for its payment. Ex parte Parsons [Case No. 10,774]; U. S. v. New Orleans, [98 U. S.] 381; Citizens' Savings & Loan Ass'n v. Topeka, 20 Wall. [87 U. S.] 655. Every one who purchases a municipal bond is supposed to be familiar with the legislation existing in regard to the mode of its payment. He cannot complain if the authority to tax is confined to a rate per cent. which, on a fair valuation of the taxable property, will not realize a sufficient sum to meet the maturing obligations of the city, because he is chargeable with notice of the limitation when he made his investment. In such a case, he must wait for his just dues until a growth of the municipality, or a change in the law, will render the tax assessment more productive. There is certainly no power in this court, by mandamus or otherwise, to direct a corporation to levy a tax larger than the law authorizes. But, in the present case, the officers of the city do not have the excuse that no authority is conferred upon them by the charter to provide the means for the payment of the interest upon the bonds. The fourteenth section not only grants the power to the city council, but imposes upon them the duty to raise by tax, in each year, money for the payment of the interest upon the city debt. We are satisfied that an alternative mandamus should issue to the city council, commanding them to raise the requisite amount of money for the payment of the judgment in favor of the relators, in the manner prescribed by the city charter, or to show cause before the court, on the fourth Tuesday of March next, why they do not order the same to be levied and collected. Ordered accordingly.

UNITED STATES (ELIZABETHPORT & N. Y. FERRY CO. v.). See Case No. 4,362.

Case No. 15,042.

UNITED STATES v. ELLICK.

[2 Cranch, C. C. 412.] [1]

Circuit Court, District of Columbia. March Term, 1823.

SLAVES — ASSAULT AND BATTERY — JURISDICTION OVER OFFENCE.

This court has no jurisdiction in assault and battery by a slave on a white man; and will order him to be taken before a justice of the peace to be dealt with according to law.

This was an indictment of [negro Ellick] a slave, for an assault and battery upon Henry Shortle, a white man. The jury found him guilty, and assessed the fine at $23.

THE COURT arrested the judgment, being of opinion that neither the court nor jury could assess a fine or inflict corporal punishment upon a slave, and that an adequate corporal punishment could only be inflicted by a justice of the peace. They therefore ordered the marshal to take the prisoner before N. S. Wise, a justice of the peace, to be dealt with according to law, and that the verdict and this order be certified to the said justice.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,043.

UNITED STATES v. ELLIOT.

[25 Int. Rev. Rec. 319; 8 Reporter, 675; 14 Am. Law Rev. 247.]

Circuit Court, D. Massachusetts. Sept. 8, 1879.

STATUTORY PENALTIES—HOW RECOVERABLE—CIVIL AND CRIMINAL ACTIONS.

[1. The penalty imposed by Rev. St. § 4570, upon the owner or master of a vessel, for failure to provide the medical stores and other articles therein mentioned, may be recovered by the United States by a civil action, when the same is brought in the circuit court for the district of Massachusetts. This action may be in the form of an information in the nature of an action of debt, which is to be regarded as an action in tort.[1]

[2. A declaration to recover a statutory penalty must demand a precise sum, although the statute declares that the penalty shall be "not more than" a sum stated.]

An information in the nature of debt was filed by the attorney of the United States against the defendant [George F. Elliot] as owner and master of the American barquentine Annie E. Elliot, of Boston, to recover penalties for a breach of Rev. St. §§ 4569 and 4570, alleging, in the first count, that on the 3d day of May, 1874, said vessel was bound on a voyage from Boston "around the Cape of Good Hope," to wit, to Batavia, to Java, and that the defendant, as owner, neglected to provide the lime or lemon juice, as in said statute required, whereby an action had accrued to the United States to recover, by way of penalty, a sum of not more than five hundred dollars; and in the second count, that the defendant, as master, failed to serve out to the men lime or lemon juice on said voyage whereby the plaintiffs were entitled to recover a further sum of not more than one hundred dollars. The defendant demurred.

Frederick Dabney, for defendant.

The most appropriate remedy in this case is a criminal information or indictment. U. S. v. Abbot [Case No. 14,416]. An action or information of debt will not lie, because the penalty is not fixed, and cannot be ascertained by computation. College of Physicians v. Salmon, Ld. Raym. 680; U. S. v. Morin [Case No. 15,810]. This is the general rule in relation to that form of action. 1 Chit. Pl. 108–113; Peake, Ev. 272; Emery v. Fell, 2 Term R. 29; Bullard v. Bell [Case No. 2,121]; Gedney v. Inhabitants of Tewksbury, 3 Mass. 307; Bigelow v. Cambridge, etc., Corp. 7 Mass. 202; Stockwell v. U. S., 13 Wall. [80 U. S.] 452; Chaffee v. U. S., 18 Wall. [85 U. S.] 538.

Prentiss Cummings, Asst. U. S. Atty., for plaintiffs.

Rev. St. § 4610, appears to countenance either a civil or a criminal proceeding, some of the language being appropriate to the one mode, and some to the other. A civil action in the nature of debt is admissible. Theoretically, the sum must be fixed; but in practice any money demand may be recovered in debt. U. S. v. Colt [Case No. 14,839]; Hughes v. Insurance Co., 8 Wheat. [21 U. S.] 294; Dillingham v. Skein [Case No. 3,912a]; Ex parte Reed [Id. 11,634]. This was the law of Massachusetts until 1852, when the practice act substituted an action of tort for one of debt. Rev. St. c. 118, § 42; St. 1852, § 312; Stilson v. Tobey, 2 Mass. 521; Com. v. Stevens, 15 Mass. 195; Com. v. Connecticut River R. Co., 15 Gray, 447; Gen. St. c. 176, § 2; c. 155, §§ 20, 21. Perhaps the information should be called "tort," but the name is not important.

LOWELL, Circuit Judge. It is well settled that when pecuniary penalties are affixed by statute to an act or a neglect, and there is no imprisonment provided for, or other reason to suppose that a mere punishment is intended, and no special remedy is pointed out in the statute, a civil action (formerly always "debt") will lie for their recovery, although the penalties are for the sole use of the sovereign. Rolle, Abr. 598, pl. 18, 19; Jacob v. U. S. [Case No. 7,157]. When the practice of the courts of the United States first adopted that of the several states, penalties could be so recovered in Massachusetts. When the sovereign was interested in the penalty, it might be recovered, in England, by information in the nature of debt, which, in revenue cases, was brought in the exchequer, but in others in any of the king's courts. If an informer was interested, his rights were established by the decree. See Attorney General v. Hines, Parker, Exch. 182; U. S. v. Lyman [Case No. 15,647], per Story, J.; Rook's Case, Hardr. 20; Roe v. Roe, Id. 185; Rex v. Clark, 2 Cowp. 610; Butler v. Butler, 1 East, 338. In the vice admiralty court at Boston, in January, 1728, the advocate general exhibited an information in behalf of the king, the governor of the province, and John Jekyl, Esq., collector of the port of Boston, against Abishai Ffolgier, of Nantucket, master of the sloop Raven, for breach of the acts of trade, for that the said Ffolgier, on the 21st of December last, made report of his arrival from Nantucket with oil and whalebone, etc., but refused to give to said John Jekyl a manifest, and for certain other acts in connection with another vessel; and the decree was that the defendant pay one hundred pounds,—one third to his majesty, one-third to his excellency, the governor, and one-third to John Jekyl, the informer. Rex v. Ffolgier, 1 Vice-Adm. Records, Mass. 56. In 1831 a similar information was filed in the district court for this district against a master for not delivering his manifest, demanding a penalty of not exceeding $500. After hearing, Judge Davis awarded $5 and costs. Records, vol. 18, p. 27. There are other informations on file for pecuniary penalties. I assume, therefore, that where

debt will lie, the United States may have an information, unless the recent practice act has changed the rule,—a point to be considered hereafter.

In looking over the recent admirable collection of the province laws of Massachusetts, edited by Messrs. Ames and Goodell, I have found a great many acts imposing pecuniary penalties and forfeitures. In many of them no remedy is specifically given. In many others it is enacted that they may be recovered by "bill, plaint, or information." These words were probably used to meet the English law that a qui tam action could not be by "bill," but must be by "original" or by information. In others there is added after these words, "or by the presentment of a grand jury." In February, 1794, a statute provided that all pecuniary fines and forfeitures made, or that may be made, recoverable by bill, plaint, or information, or by any of these modes of prosecution, or where no mode of recovery is prescribed, shall and may be sued for and recovered by action of debt; saving, however, all remedies specifically given by any statute. This means, I suppose, that when the statute gave a right to file an information, or to obtain a presentment, these additional remedies should be preserved. St. 1793, c. 43, § 4. In 1801 a statute gave an alternative remedy by indictment whenever the penalty was wholly or in part for the use of the commonwealth. St. 1800, c. 57, § 4. It has remained the law of this state since 1801 that the commonwealth may have a civil action or an indictment at its election, though the form of the action is now tort. Rev. St. c. 133, § 14, and c. 118, § 42; Gen. St. c. 176, § 2.

It is in my opinion, the law of this country that debt will lie, though the amount of the penalty is uncertain. See the able judgment of Washington, J., in U. S. v. Colt [Case No. 14,839], the reasoning of which was adopted and enforced by the supreme court, though not in a case upon a statute. Hughes v. Union Ins. Co., 8 Wheat. [21 U. S.] 294; Rockwell v. State, 11 Ohio, 130; U. S. v. Allen [Case No. 14,431]. In Dane's Abr. c. 148, art. 9, § 5, it is said that for the many penalties and forfeitures enacted by congress, of not less than so much, or more than so much, debt is generally the proper remedy. In 1795 an action of debt was sustained in Massachusetts for an uncertain penalty, and the court assessed the amount. Eddy v. Oliver, 5 Dane, Abr. c. 148, art. 11, § 3. In the case of Com. v. Stevens, 15 Mass. 195, a similar action was sustained. The statute is not cited, but it must have been St. 1809, c. 108, § 34, art. 21, which imposes a penalty of not less than five nor more than twenty dollars for each offence.

Most of the foregoing cases were cited in argument, and it was urged by the defendant that they came under statutes which expressly mentioned an action of debt. This is true, and is the ground of decision in U. S. v. Allen [supra]; but the other cases do not rest upon that basis alone, but seem to me to establish, as Mr. Justice Washington asserts, a general rule that debt will lie for a penalty imposed by statute, as well as for one reserved in a bond, and that the declaration may be for the largest, or for any definite, sum, under which the penalty is to be chancered or assessed as the case may be. Our practice is now assimilated, as nearly as may be, to that of the several states at the time of suit brought (Rev. St. § 914); and an action of tort will lie in the district of Massachusetts to recover a penalty, where no other remedy is expressly or impliedly given by congress.

There is nothing in the section on which this information is brought which indicates that the exclusive remedy is a criminal proceeding. The language is, "liable to a penalty." The word "conviction" is used in the section, but this is often applied to civil prosecutions, and the context shows that the master who has been so convicted is to recover the amount of the penalty and the costs incurred by him from the owner; which seems to point to a civil action. In the many statutes and cases which I have examined I find words of a quasi criminal character constantly applied to civil actions for penalties. It is probable that informations for penalties were originally criminal. And it was always held in England that "not guilty" was a good plea to an action of debt for a penalty. See St. 21 Jac. I. c. 4, § 4; Wortley v. Herpingham, Cro. Eliz. 766; Attorney General v. Hines, Parker, Exch. 182; Atcheson v. Everitt, 1 Cowp. 382; Rex v. Clark, Id. 610. This plea was said by Parsons, C. J., to be of doubtful propriety in Stilson v. Tobey, 2 Mass. 521, 522; but the statute of James expressly authorizes it, and it was used in the cases above cited from Parker, Croke, and Cowper, Dane's Abridgement, and Com. v. Stevens, 15 Mass. 195. A striking example of the application of language imparting a criminal proceeding to a civil action for penalties is found in Adams v. Woods, 2 Cranch [6 U. S.] 336. It may be added that many parts of our Revised Statutes clearly show that a civil action is understood to be the usual form for recovering these penalties. Rev. St. §§ 732, 919, 942, 1041, 2124, 3087, 3213. Both parties agree that Rev. St. 4610, which purports to instruct us how the penalties and forfeitures of the title may be recovered, is so drawn that it is impossible to reconcile its language with either mode of proceeding exclusively. The rule that a civil action will lie is so general, and has been so long established, that I should hesitate to deny the remedy, unless upon a clear command against it; especially as it is in favor of the citizen. Mr. Justice Story has said that an indictment cannot

be brought in such a case. Ex parte Marquand [Case No. 9,100]. Mr. Justice Clifford has pointed out that there are many cases in which the government may proceed in that mode. U. S. v. Abbot [Id. 14,416]. The case last above cited, in which I sat with the presiding justice of this circuit, does not decide that a civil action will not lie for the penalty therein mentioned. The reasoning leads to the opposite conclusion. The act (now Rev. St. § 3213) provided that all fines, penalties, and forfeitures might be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, qui tam, or otherwise. The decision was that the last clause gave remedies in addition to an action, and, among others, an indictment; and, by a still stronger argument, the action which is mentioned must be sustainable. If those additional words had not been in the act, the civil remedy would have been exclusive. U. S. v. Tilden [Case No. 16,523].

We have seen that in Massachusetts the state has the election to proceed by action or by indictment. This election has been expressly given in several statutes of the United States, and may be fairly inferred from others. Judge Leavitt, expressing a clear opinion that an indictment might have been sustained for a pecuniary penalty under a certain statute in which no specific remedy was given, held that an action of debt would lie. U. S. v. Bougher [Case No. 14,627]. And at common law an indictment may be maintained for a misdemeanor, in addition to a specific penalty given by another part of the statute, and recoverable civilly. Rex v. Robinson, 2 Burrows, 799; Rex v. Harris, 4 Term R. 202; Shipman v. Henbest, Id. 109.

I therefore decide that, whether the penalties of Rev. St. § 4570, can be recovered by indictment or not, they may be sued for by the United States in a civil action. I do not think that the practice act (Rev. St. § 914) intends to deprive the United States of the right to file an information, instead of bringing an action, although informations for this precise cause of action are not now brought in Massachusetts. The provision of section 3213, that any proper form may be adopted, though by its context it is probably to be confined to penalties accruing under the internal revenue laws, expresses what I think is the intent of the legislature. The government must conform substantially to the practice of Massachusetts. That practice still admits civil information, though not for penalties, and if an informer sues qui tam, be should sue in tort; and I agree with the district attorney that the information, which is the king's action, should be treated as in the nature of an action of tort.

The declaration avers that an action has accrued for not more than certain sums. Mr. Justice Washington remarked in U. S. v. Colt [supra], that the declaration should demand a precise sum, and leave the court or jury to assess a lesser amount if they saw fit. This remark was more particularly applicable to an action of debt; but, even in tort, you demand a certain sum. Though you may fail to recover, in either action, all that you demand, still a demand of not more than $600 may be a demand of nothing, which is certainly not more than that sum. But this fault of pleading may be easily supplied by amendment. Demurrer overruled.

Case No. 15,044.

UNITED STATES v. ELLIOT.

[3 Mason, 156.][1]

Circuit Court, D. Maine. May Term, 1823.

INDICTMENT—CONCLUSION—FALSE SWEARING.

1. If a statute offence is alleged in the indictment according to the words of the act, it is not vitiated by a conclusion, which calls the offence by a wrong name.

2. As if the offence be false swearing under the pension act of 1820, c. 51 [3 Story's Laws, 1778; 3 Stat. 569, c. 53], the indictment is not vitiated by the jurors' conclusion, "And so the jurors say, &c. &c. that the party did commit wilful and corrupt perjury."

Indictment [against Jedediah Elliot] for taking a false oath under the pension act of 1st of May, 1820, c. 51 [3 Story's Laws, 1778; 3 Stat. 569; c. 53]. Plea, not guilty. At the trial a verdict was found against the defendant.

Mr. Fessenden, for defendant, made two points of law on a motion in arrest of judgment: (1) That the act did not make the offence perjury in its technical sense, though it affixed to it the same punishment. (2) That the indictment having concluded in the usual form of indictments for perjury, "And so the jurors &c. do say, that the defendant did falsely, &c. commit wilful and corrupt perjury," the indictment was bad in substance if the offence was not perjury, and it was not helped by the previous particular description of facts in the indictment. He cited Plowd. 125; 3 Bac. Abr. "Indictment," H, 3; 2 Hale, P. C. 168, 169, 192; 1 Esp. 280.

Mr. Shepley, U. S. Dist. Atty. contended e contra on both points, and cited 2 Chit. Cr. Law, 291, (312); 1 Chit. Cr. Law, 156 (232).

STORY, Circuit Justice. The pension act of 1820, c. 51, § 2 [3 Story's Laws, 1778; 3 Stat. 569, c. 53], declares, that "any person, who shall swear or affirm falsely in the premises, and be thereof convicted, shall suffer as for wilful and corrupt perjury." We incline to think, that the act does not make the offence a technical perjury, but only refers to it, for the purpose of affixing the

[1][Reported by William P. Mason, Esq.]

same punishment. The other objection is more important. But we think that the conclusion does not vitiate the indictment, if the offence is in other respects fully and exactly described; for it is but an inference of law from the premises; and if the jury mistook the nature of the offence, but have truly stated all the facts constituting it, it is sufficient, and the conclusion, "and so the jurors say &c." may be rejected as surplusage. In the previous part of this indictment, the offence is fully and exactly stated in the very words of the statute; and the party has been found guilty. If guilty of the offence, it is wholly immaterial whether it be perjury in the sense of the common law or not.

The motion in arrest of judgment must be overruled.

Case No. 15,045.

UNITED STATES v. ELLIOTT.

[1 Hayw. & H. 232;[1] 3 West Law J. 183.]

Criminal Court, District of Columbia. December 13, 1845.

CRIMINAL LAW — PRESENTMENT — INDICTMENT — DISCHARGE.

1. That the presentment of crime or the reverse is equivalent to the action and judgment of a grand jury upon a bill of indictment.

2. The court will order the discharge of a prisoner where the presentment of the grand jury is equivalent to the finding of "Not found" or "Not a true bill" on an indictment for murder or manslaughter.

[This was a presentment against William R. Elliott, charged with shooting W. Z. Kendall. Heard on motion to discharge.]

Before CRAWFORD, Judge.[2]

On motion of Mr. P. R. Fendall the prisoner was brought into court, and was assisted by Mr. Jones in asking for his discharge on the presentment made by the grand jury. The district attorney resisted the motion.

THE COURT delivered the following opinion:

The grand jury of this county, charged at the present term to inquire into all offences against the peace and government of the United States, on the 10th instant, returned the following presentment: "The jurors of the United States for the county aforesaid do upon their oaths present Wm. R. Elliott for causing the death of W. Z. Kendall, by shooting him with a pistol in self-defence, when he was attacked by and was retreating from the said Kendall, on or about the 23d day of August, 1845." The defendant has been confined in jail of the county since the commission of the homicide, viz., from the 23d day of August last, and now, this 13th day of December, 1845, a motion is made by his counsel, P. R. Fendall and Walter Jones, for his discharge, on the ground that this presentment is equivalent to the finding of "Not found," "Not a true bill," on an indictment for murder or manslaughter.

A presentment is, strictly speaking, the notice take by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the instance of the king, upon which the officer of the court must afterwards frame an indictment. 4 Bl. Comm. 301; 1 Chit. Cr. Law, 163. The act of Maryland, passed November 3, 1722, c. 4, provides that from and after the publication hereof no attorney general, or clerk of the peace, or of indictments, shall exhibit any bill or bills of indictment to any grand jury against any person whatsoever, without an express order from the governor and council, or from the court where the prosecution is to be, or some one of the justices of the court, or unless the offender be bound over to such court, or that the grand jury find or make a presentment of the offence of their own knowledge, upon penalty of paying the party grieved all the damages and charges that shall be occasioned by such prosecution, any law, statute, usage or custom to the contrary notwithstanding. Under this law, a practice has grown up to precede indictments by presentment. This I understand to be the uniform practice at this day, and it has been followed in this instance, the witnesses having been all summoned by the district attorney at the request of the defendant's counsel, so that the investigation might be made without delay by the grand jury, he having no further or otherwise interfered. The inquiry is, first, whether a presentment acquitting the accused is equivalent to a finding to the same effect on an indictment; and, second, if so, does this presentment amount to an acquittal at law, or have the grand jury on their responsibility, as a most important and the exclusive originators of judicial proceedings, presented such facts as show that in their judgment no offence, or an excusable one, has been committed by the accused.

1. The inquiry has been as full as it would have been on an indictment. This the court is bound to presume, or to suppose, which cannot be done by me, that the grand jury in assuming the high responsibility they have taken, have neglected their duty or misconducted themselves in its discharge. The practice here imposes this full investigation on them before they present; if they think a crime has been committed, they so present, and the indictment follows, and is found, I presume, without any examination of witnesses. I am therefore of the opinion that a presentment of crime, or the reverse, under the peculiar practice here, is and ought to be equivalent to the action and judgment of a grand jury upon a bill of indictment.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] On the 3d of November, 1845, Thomas Hartley Crawford, of Pennsylvania, late commissioner of Indian affairs, took his seat upon the criminal court bench in place of Judge Dunlop, appointed associate judge of the circuit court.

2. Do they present facts which in law amount to an acquittal? Homicide in law, excusable se defendendo, is: "If two men fight, and one of them dies, or if one attack another, and without fighting he flies, and retreating as far as he can until at length no means of escaping his assailant remain, and he then turn around and kill his assailant in order to avoid destruction, the homicide is excusable in self-defence." Fost. Crown Law, 277; Archb. Pl. & Ev. 391; 4 Bl. Comm. 183, 184; 1 Russ. Crimes, 543, 544. "No possible (or at least probable) means of escaping his assailant." The presentment is, "Wm. R. Elliott for causing the death of W. Z. Kendall by shooting him with a pistol in self defence when he was attacked by, and was retreating from the said Kendall," &c. That Wm. R. Elliott caused the death of W. Z. Kendall, by shooting him—the fact of the homicide is thus found; but they further say he shot him in self defence. This embodies the substance of the definition of a killing excusable. Self defence means to protect from an assault on his life, or to save himself from some great bodily harm, but the grand jury go on to say, "When he was attacked by, and was retreating from the said Kendall;" thereby, it seems to me, using almost the very terms of the law on the subject. If (and the grand jury so present) it was a case of self defence, after the accused was attacked, and while he was retreating from, or to avoid the deceased, it would be excusable homicide in the eye of the law. Suppose the grand jury had so found on a bill of indictment, no doubt is or can be entertained that the court would be bound on such judgment of the grand jury to discharge the defendant. The presentment is, under the practice, here equivalent. I know of no responsibility but that which I owe to God and my conscience for an upright discharge of duty. Here, however, there is none but what rests on the grand jury, who discharged their duty with conscientiousness and integrity I have neither doubt nor right to doubt. I am of opinion the accused is entitled, under the presentment made, to his discharge, and so accordingly order.

Case No. 15,046.

UNITED STATES v. ELLIS.

[1 Cranch, C. C. 125.] [1]

Circuit Court, District of Columbia. June Term, 1803.

PENALTY—STATUTE—INDICTMENT.

If a statute prescribes a particular mode of enforcing payment of a penalty, it must be pursued, and indictment will not lie.

Indictment for gaming. Verdict, guilty. Motion in arrest of judgment, that the act of assembly of Virginia, which gives the penalty, provides that it shall be recovered before a single magistrate in the same manner as small debts. It contains no prohibitory words, but says only, if any one shall play, he shall pay the penalty of twenty dollars—and does not say that the penalty may be recovered by indictment.

Mr. Mason, for the United States, cited the following authorities: Rev. Code, p. 112, §§ 24–26, which speaks of indictments for misdemeanors. Section 28. The court may order the clerk to issue summons, or other process. Section 37. Where the penalty does not exceed twenty dollars, it may be sued for by petition, as in the case of other small debts. Page 106, § 1. Grand jury in district court to present all misdemeanors. Section 2. The like in county courts. Page 107, § 5, the same as section 2. Section 6. Where the penalty in the district court does not exceed twenty dollars, the court may hear without indictment; so, in county courts where it does not exceed five dollars. By Rev. Code, pp. 183–185, § 13, the act is to be given in charge to the grand jury. Act 1797, c. 2, §§ 7, 8.

Mr. Swann, for defendant, cited the gaming act (Rev. Code, p. 185), which prescribes a specific mode of recovering the penalty, and contains no prohibitory clause. 2 Hale, P. C. 171; Stubbs, Crown Cir. Comp. 95; U. S. v. Simms (Sup. Ct. U. S., Feb. 1803) 1 Cranch [5 U. S.] 252; 2 Burrows, 803.

THE COURT arrested the judgment on the authority of Simm's Case, supra.

KILTY, Chief Judge, contra, thinking these cases differed from that.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,047.

UNITED STATES v. ELLIS. SAME v. PARROTT. SAME v. HENSLEY.

[4 Sawy. 590.] [1]

Circuit Court, N. D. California. June 11, 1866.

COLLECTOR OF CUSTOMS—BOND—SURETIES—NEW APPOINTMENT—PRIOR ACTS.

1. A bond given by a collector of customs for the faithful discharge of the duties of his office, under the act of congress of March 2, 1799 (1 Stat. 705), if given after he assumes office, binds the sureties for the acts of the collector prior to its date.

2. The act of congress of August 6, 1846 (9 Stat. 60), relating to the official bond of a collector of customs as a depository of the public moneys and fiscal agent of the United States, contemplates security against future responsibility and not for past transactions.

3. Where a statutory bond goes beyond the requirements of the statute, it is for the excess without obligatory force.

4. Where a collector of customs, appointed by the president during a recess of the senate, gave a bond for the faithful discharge of his duties as collector and also as a depositary of public moneys and fiscal agent of the United States, and afterward he was newly appointed to the same office by and with the advice and consent

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

of the senate, *held*, that the sureties on the bond were not liable for acts of their principal, done after he accepted his new appointment.

These three actions were brought by the United States against the sureties on the official bond of Beverly C. Sanders, executed by him as collector of customs in the port of San Francisco. Sanders was appointed such collector by the president, on the 13th of November, 1852. The appointment was made to fill a vacancy occurring during a recess of the senate. On the 16th of January, 1853, during the ensuing session of the senate, Sanders was appointed by the president, by and with the advice and consent of the senate, collector for four years from that date, and he accepted the appointment. On the 6th of December following his first appointment, he executed with Argenti and the defendants [Alfred J.] Ellis, [John] Parrott and [Samuel J.] Hensley, as sureties, the bond upon which these actions are brought—each of the sureties limiting his individual responsibility to the sum of $50,000. The pleadings were identical in each case. The questions for determination arose upon demurrer to the answers to the first and second counts of the amended complaint.

The first count averred that Sanders was collector from November 13, 1852, to January 16, 1853, inclusive, and assigned as breach of the bond the unlawful detention by him, and the conversion to his own use of public moneys received by him in his official capacity during this period. The second count differed from the first in averring that Sanders was collector of the customs from the 13th of November, 1852, to the 3d of March, 1853, inclusive; and in assigning as breaches of the bond the detention and conversion of public moneys received during that period. There were several special answers to both of these counts, upon which two questions were presented for determination: First, whether the bond in suit bound the sureties for the acts of the collector prior to its date; and second, whether it bound them for his acts after his acceptance of his new appointment, January 16, 1853.

J. P. Hoge, for the United States.

J. B. Crockett and Hall McAllister, for defendant.

FIELD, Circuit Justice. The bond upon which these actions are brought, appears to have been given by Sanders as his official bond for the faithful discharge of his duties as collector, pursuant to the act of March 2, 1799, and also as his bond for the performance of his duties as depositary of the public moneys and fiscal agent under the act of August 6, 1846, and it must be considered in this double aspect.

The act of March 2, 1799 (1 Stat. 705), provides that every collector shall give a bond to the United States within three months after he enters upon the execution of his office and furnishes the form of the bond. The condition in the form applies as well to the past as the future acts of the collector; its language is: "If he has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of the said office according to law, then the above obligation to be void and of no effect; otherwise it shall abide in full force and virtue."

The act of June 4, 1844 (5 Stat. 661), requires the bond to be given before the collector shall be qualified to enter upon the performance of his duties. Of course, if given before the office is assumed, the condition embracing past acts would be unmeaning and useless. But if for any cause such bond should not be executed or approved until after the assumption of the office, or the sureties accepted should be found, upon further information, to be insufficient, the form prescribed by the act of 1799 might very well be adopted. We do not perceive any such repugnancy between that act and the act of 1844, that the former is necessarily superseded by the latter. We are of opinion that in some cases the provisions of the former act may properly be followed. So far, therefore, as the bond is for the faithful discharge of the duties of the collector, under the act of 1799, our judgment is that it binds the sureties for his acts from the 13th of November, 1852.

But as a bond of a depositary of the public moneys and fiscal agent of the United States under the act of August, 1846, so far as that act imposes new and additional duties on the collector, not covered by his ordinary official bond, the case is different. That act contemplates security against future responsibility, not for past transactions. In the absence from it of provisions otherwise directing, the bond exacted must be held to apply only to subsequent acts. So far as it is made retrospective it is void. Where a statutory bond goes beyond the requirements of the statute, it is for the excess without obligatory force.

But in either view, whether as the bond of the collector or as the bond of a depositary and fiscal agent, it does not bind the sureties for the acts of their principal, done after the period when he accepted his new appointment. The first appointment, during the recess of the senate, by the president, and the subsequent appointment by the president by and with the advice and consent of the senate, are distinct from each other, as much so as if given to different persons. The former could under no circumstances extend beyond the close of the ensuing session of the senate; the latter was for the period of four years from its date. The first appointment would have extended until and including the 3d of March, 1853, had not in the meantime the new appointment been made and accepted. The acceptance of the new appointment was a surrender and superseding of the first. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720.

The bond was given with reference to the first appointment, and its obligation was limited to acts done during the continuance of that appointment. The office of depositary and fiscal agent was attached to the office of collector; it depended upon that office, and ceased when that ceased.

We may here observe that it is difficult to perceive how the new appointment could have been accepted on the day of the appointee's confirmation by the senate, unless he was present at the time in Washington. January, 1853, embraces a period when telegraphic lines across the continent did not exist, and instantaneous communication with the capital was impossible. We make allusion to this matter because it may appear on the trial that there was no legal acceptance of the new appointment until weeks after the action of the senate.

By the acceptance averred in the answers, a legal acceptance must be understood. Whether to constitute such acceptance the execution of new bonds or other equally expressive act on the part of the appointee was essential, is a matter which, hereafter, may demand consideration.

As the special answers do not deny the alleged breach of the conditions of the bond, between the 13th of November and the 6th of December, 1852, the demurrers must be sustained, and the defendants required to amend their answers, or file new answers to the complaint.

Case No. 15,048.

UNITED STATES v. ELM.

[2 Cin. Law Bul. 307; 23 Int. Rev. Rec. 419.]

District Court, N. D. New York. Dec. 24, 1877.

CITIZENSHIP OF INDIANS—DISINTEGRATED TRIBES—RIGHT TO VOTE.

[Indians born in the United States, of a tribe which has ceased to maintain its tribal int@grity, and who are subject to taxation under the laws of the state in which they reside, are "subject to the jurisdiction" of the United States, within the meaning of the fourteenth amendment to the constitution, and are therefore, under its terms, citizens of the United States, and of the state of their residence, and possess the right to vote in national elections.]

[Cited in Elk v. Wilkins, 112 U. S. 120, 5 Sup. Ct. 48, 55.]

[This was an indictment against Abraham Elm, an Oneida Indian, for illegal voting. Heard on motion for a new trial.]

WALLACE, District Judge. The defendant, an Oneida Indian, who was born and had always resided within the town of Lenox, Madison county, voted for representative in congress at the election of 1876, claiming to be a citizen of the United States. He was indicted for illegal voting, tried, and convicted in this court. Sentence was suspended by the court in order that the questions presented on the trial, and which were then formally ruled against the defendant, might be deliberately considered and decided upon a motion for a new trial. That motion has been made, and the question is now presented whether or not the Oneida Indians are citizens of the United States, and, as such, entitled to vote.

If the defendant was a citizen of the United States, he was entitled to exercise the right of suffrage. The right to vote is conferred by the state, not by the United States, and it has been conferred in New York upon "every male citizen of the age of twenty-one years who shall have been a citizen for ten days and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county, and for the last twenty days a resident of the election district in which he may offer his vote." By the fourteenth amendment to the constitution it is declared that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside," and by force of this language every citizen of the United States is a citizen of the state wherein he resides. It is not enough to confer citizenship on the defendant that he was born in the United States. It must also appear that he was "subject to the jurisdiction thereof," within the meaning of the fourteenth amendment.

In a general sense every person born in the United States is within the jurisdiction thereof while he remains in the country. Aliens, while residing here, owe a local allegiance, and are equally bound with citizens to obey all general laws for the maintenance of peace and order which do not relate specially to our own citizens, and they are amenable to the ordinary tribunals of the country. But there are classes of residents who, though they may be born here, are not subject to the exercise of those prerogatives of sovereignty which a government has the right to enforce over its own citizens, and over them alone, and it is to these that the language of the amendment applies. Within this sense. those persons who, though born here, are born within the allegiance of a foreign sovereign, or of another government, are not subject to the jurisdiction of the United States. The children of ambassadors, though in fact born here, are, in the theory of the law, born within the allegiance of the foreign power the parent represents.

Indians who maintain their tribal relations are the subjects of independent governments, and, as such, not in the jurisdiction of the United States, within the meaning of the amendment, because the Indian nations have always been regarded as distinct political communities, between which and our government certain international relations were to be maintained. These relations are established by treaties to the same extent as with foreign powers. They are treated as

sovereign communities, possessing and exercising the right of free deliberation and action, but, in consideration of protection, owing a qualified subjection to the United States.

If defendant's tribe continued to maintain its tribal integrity, and he continued to recognize his tribal relations, his status as a citizen would not be affected by the fourteenth amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter appear; and because of these facts, and because Indians in this state are subject to taxation, he is a citizen, within the meaning of the fourteenth amendment. This conclusion is sanctioned not only by the language of the fourteenth amendment, but is fortified by other legislation by congress concerning citizenship.

By Act Cong. 1866, c. 31 [14 Stat. 27], commonly known as the "Civil Rights Bill," all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. Native Indians in this state are taxed. By an act of the legislature passed in 1843, native Indians are authorized to purchase, take, hold, and convey real estate, and, when they become freeholders to the value of $100, "are subject to taxation and to the civil jurisdiction of courts of law and equity in the same manner and to the same extent as citizens." When by the civil rights bill Indians not taxed were excluded from the classes upon which citizenship was conferred, upon well-settled rules of construction those who were taxed were by implication included in the grant. In other words, those Indians who were taxed were not excepted from the class who were declared to be citizens.

Previous to the adoption of the fourteenth amendment, it had been held by high authority that congress might naturalize Indians by special act (7 Op. Attys. Gen. 746); and, of course, if this could be done by special act, it could by a general law, and the act in question would confer citizenship on the defendant. No doubt can be entertained of the power of congress to declare what persons shall be recognized as citizens of the United States, and when, by the fourteenth amendment, such citizens were declared to be citizens of the several states in which they should reside, the whole subject of citizenship was transferred to the jurisdiction of congress, and the rights of the defendant could safely rest upon the act in question. It is not necessary, however, to decide that the Indians in this state became citizens by force of the civil rights bill. I prefer to regard that act as a contemporaneous construction of the meaning of the fourteenth amendment. The civil rights bill was passed by the same congress which adopted the resolution to submit the fourteenth amendment to the legislatures of the several states. Both the amendment and the civil rights bill dealt with the question of citizenship, and in the declaration defining the class of persons to whom it was extended language almost identical was used in each. While, primarily, these measures, originated for the protection of natives of African descent, who, by the decision in the case of Scott v. Sandford, 19 How. [60 U. S.] 393, were held not to be citizens of the United States, within the meaning of the constitution, it is not to be doubted that they were intended to confer the rights of citizenship upon such others as, owing to the peculiar condition of our national development, were not citizens in legal contemplation, though by birth and by allegiance they were or might become entitled to recognition as such.

The phraseology employed is sufficiently broad to include Indians who have abandoned their tribes and become so far integrated with the general body of citizens that the states in which they reside have subjected them to the duties of citizens and enforced over them the prerogatives of sovereignty. Prior to the adoption of the fourteenth amendment, many of the Indian tribes had become disintegrated, and the members had abandoned their tribal relations, and were distributed among and assimilated with the general body of citizens of the state in which they lived, conforming to the same usages, and their rights of person and property regulated by the same laws, which controlled the rest of the inhabitants of the state. They were natives by birth, and were not aliens in allegiance. Their status had been defined, sometimes, as that of alien residents; sometimes, as that of domestic subjects. In the case of Scott v. Sandford, 19 How. [60 U. S.] 404, Chief Justice Taney said: "If an individual Indian should leave his tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." Accepting this as a correct statement of the law, it would follow that such an Indian was not, and in the absence of special legislation could not become, a citizen. He could not be naturalized, because the naturalization laws only apply to persons born out of the United States. The remarks of Chief Justice Taney were applicable to that class of Indians who had left their tribes, and thus abandoned their tribal relations; but instances were extant, in the history of the Indians tribes, where the tribal organization had become defunct, and where the individual Indians had so far been recognized as citizens of the state that they had been authorized to acquire and hold real estate, and subjected to taxation and to the civil jurisdiction of the courts. It had never been authoritatively decided whether or not such Indians were citizens.

In 1822 the supreme court of this state decided, in Jackson v. Goodell, 20 Johns. 187, that the Indians resident in this state were citizens, but that decision was reversed by the court of errors. Since that decision, however, great changes have taken place in the social and political relations between the Indians and the body of citizens at large, as is well illustrated by the history of the Oneidas. By treaties between the United States and the Six Nations, the Menomonies, and Winnebagoes in 1831 and 1838 the Six Nations acquired extensive cessions of lands in Wisconsin near Green Bay; and about that time the main body of the Oneidas removed to these lands. Since then, the tribal government has ceased as to those who remained in this state. It is true those remaining here have continued to designate one of their number as chief, but his sole authority consists in representing them in the receipt of an annuity which he distributes among the survivors. The 20 families which constitute the remnant of the Oneidas reside in the vicinity of their original reservation. They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population. In 1843, by an act of the legislature of this state, they were authorized to hold their lands in severalty, according to a partition which had theretofore been made. Reference has already been made to the general law of this state, passed in 1843, subjecting them to taxation and to the jurisdiction of the courts in the same manner and to the same extent as other citizens. In view of the changes which have intervened in the social and political relations of the Indians of this state since the decision of Jackson v. Goodell, there is certainly fair reasons to assume that, irrespective of the fourteenth amendment, they would now be held to be citizens of the state. However that might be, those who, like the defendant, have no tribe, and are taxed, are, within the language of the fourteenth amendment, subject to the jurisdiction of the United States, as that language should be interpreted in the light of the civil rights bill. They are natives, they owe no allegiance other than to the government of the United States, and they have been placed by the state upon an equality with its citizens respecting important rights denied to aliens. As the state and the United States can impose upon them all the duties and obligations of subjects, they are entitled to the corresponding rights which spring from relation. These are the rights which a government owes to its citizens.

For these reasons, my conclusion is the defendant was entitled to vote, and was improperly convicted. The motion for a new trial is granted.

Case No. 15,049.

UNITED STATES v. EL TELEGRAFO.

[Newb. 383.] [1]

District Court, E. D. Louisiana. Dec., 1846.

PRIZE—RESIDENCE IN ENEMY COUNTRY—ENEMY FLAG—NEUTRAL OWNERSHIP—FURTHER PROOF—EXAMINATION IN PREPARATORIO.

1. A person residing in the enemy country long enough to acquire a domicil there, is subjected to all the disabilities of an enemy, so far as it relates to his property.

2. A vessel sailing under the flag of the enemy, is considered as enemy property, and is liable to confiscation jure belli.

3. Upon the breaking out of war between the United States and the republic of Mexico, the province or department of Yucatan, belonging to Mexico, having assumed a flag of her own, and having manifested a determination to remain neutral, a special order was issued by the president of the United States, exempting her citizens from the operation of the laws of war. Under such circumstances no citizen or resident of Yucatan, could with impunity violate her neutrality by assuming, for the purposes of trade, the flag of the enemy.

4. It is a principle of the law of prize, as recognized by the supreme court of the United States (The Nereide, 9 Cranch [13 U. S.] 388), that the two maxims of "free ships, free goods," and "enemy ships, enemy goods," are not necessarily connected. The primitive law, independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property.

5. From the foregoing principle, it follows, that a distinction may be drawn between the vessel sailing under the flag of the enemy and her cargo belonging to a neutral; but if it appear that the neutral has by his residence in the enemy country, acquired a domicil there, his property will be considered as enemy property.

6. The court will refuse an application for further proof, where the claim and test affidavit of the claimant are utterly at variance with his answers to the standing interrogatories.

7. The greatest solemnity is attached to examinations in preparatorio. The standing interrogatories are of a searching character, and well calculated to elicit truth and detect fraud; and the reasons must be cogent indeed, that would induce the court to deviate from the established practice, and permit a claimant by further proof, to contradict his own declarations, made under the solemnity of an oath, touching a fact so important as domicil or national character.

In admiralty.

Mr. Durant, U. S. Dist. Atty.

Clarke & Stewart, for captors.

Mr. Soule, for claimant.

McCALEB, District Judge. The vessel containing the property which is now the subject of contest, was captured by the United States steamship Mississippi, under the command of Commodore Perry, on the 21st of October last, about thirty-five miles from the bar of the Tobasco river. She was taken as enemy property and as such con-

[1] [Reported by John S. Newberry, Esq.]

demned by a judgment of this court, as prize of war to the captors. A claim has been entered for the cargo by one Antonio Gual, who declares himself the owner of everything found on board, except a few articles of little value which were the property of the master. I will briefly advert to the evidence upon which the condemnation of the vessel was pronounced, and then proceed to inquire how far I am permitted to draw a distinction in favor of the cargo.

The deposition of the master in answer to the standing interrogatories, shows that the schooner "sailed under Mexican colors and had none other on board. He was appointed to the command of the vessel by John Graham, at Campeachy, on the 2d of October last; Graham was owner of the vessel when she was seized; the deponent knows this because Graham told him so; the said owner is an Englishman, and is a brother-in-law of Mr. McGregor, the American consul at Campeachy; he resides with his family in Campeachy, but deponent does not know how long he has resided there; nor does he know how long said owner has been in possession of the vessel, nor from whom he purchased her. He thinks the said owner came from England to Campeachy, and that he is an English subject." In answer to the thirty-second interrogatory, the deponent declares that "as to the property of the Telegrafo," she stands in the name of Alexandro Perez, who is a Mexican citizen, but really belongs to John Graham, who being an Englishman, cannot hold her in his own name. The deposition of Antonio Gual, the claimant of the cargo, shows that a commercial house in Campeachy, composed of John Graham and Jose Calome, is the owner of the Telegrafo, though she stands in the name of some other person whose name deponent cannot recollect. He knows that the persons here named were the owners, by documents which he has seen. The said owners were born, the former in England, and the latter in Campeachy. They now reside in Campeachy. Deponent never knew of them in any other place; they have been in possession of the vessel a long time; they purchased her from one Ramirez; the only sale he knows of, is that from Ramirez to Graham & Calome. He does not know what was the consideration of the sale, nor whether the same was paid, nor any security given. He thinks that said bill of sale transferred the vessel to an individual whose name is unknown to the deponent, but that Graham & Calome are, and were the true owners. He believes that the vessel, if restored, will belong to Graham & Calome, and none others. The certificate of John F. McGregor, styling himself United States consul at Campeachy, shows that "the Mexican schooner Telegrafo is owned by Don Alexandro Perez, a citizen of Campeachy." The papers of the schooner show her to be a vessel of the department of Yucatan, in the republic of Mexico.

I have not considered it necessary to determine whether the ownership of the vessel be in Graham & Calome, or in Perez, the Mexican citizen; for whether it be in the one or the other, the evidence shows enough to authorize a condemnation. If this question were important, I should undoubtedly feel myself bound by the register or bill of sale which fixes the ownership in Perez. But the residence of Graham & Calome, the latter being a citizen of Campeachy, places them in the situation of enemies. Whatever exemption from the laws of war might be pleaded in favor of Yucatan vessels, it is clear that the conduct of the owners has not been such as to authorize the court to draw any distinction between them and other citizens of Mexico residing in any other part of the republic. It has been proved before this court, that Yucatan had a flag of her own. Had this vessel been found sailing under it at the time of her capture, there would be some ground for supposing that the owners were adhering to that state of neutrality, which the executive department of the government was led to believe would be observed by Yucatan, and which was, on the breaking out of the war, declared in a circular of the secretary of the treasury, to be the ground of extending to the ports of that country, privileges which, by the laws of war, were necessarily forbidden to the other ports of the republic of Mexico. But the concurrent testimony of the master and crew shows that she sailed under Mexican colors, and had no other colors on board; thus openly claiming the protection of the flag of the enemy, and boldly setting at defiance the American squadron now blockading the ports of Mexico. The conduct of this vessel can be regarded in no other light, than as an open and flagrant violation of the very condition upon which our government extended the privileges to which I have alluded, to the ports of Yucatan; and may be regarded as among the many instances of bad faith on the part of citizens of that particular department, which prompted the executive department of our government to revoke the order contained in the circular of the secretary of the treasury, and to place her in the same attitude occupied by other portions of Mexico. The facts of the case thus presented, are not such as to authorize me to regard the vessel in any other light than as enemy property, and therefore liable to condemnation.

I will now consider the claim which has been asserted to the cargo. It is a well settled principle of the law of prize, as recognized by the supreme court of the United States, in the case of The Nereide, 9 Cranch [13 U. S.] 388, that the two maxims of free ships, free goods, and enemy ships, enemy goods, are not necessarily connected. "The primitive law," says Mr. Wheaton (Interna-

tional Law, 480), "independently of international compact, rests on the simple principle that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property." Let us then inquire how far the national character of the claimant in this case, as established by the evidence, will authorize the court to consider the cargo as neutral property. In answer to the standing interrogatories, the claimant himself declares, that "he was born in Spain. For the last seven years he has lived in Campeachy. He now lives in Campeachy, and has lived there twenty years. He belongs to the Yucatan government, originally belonged to Spain. He is not married. His brother and nephews live in Campeachy." It is unnecessary to look beyond his own declaration, for evidence to establish his national character, or such a domicil in the enemy's country, as will authorize the court to invest him with a national character, different from that which attached to the place of his birth. The claimant, by his own showing, though born a Spaniard, has, by his long residence in the enemy's country, acquired a domicil, which, by the laws of war, and for all the purposes of this libel, subject him to all the disabilities of an enemy. By his own showing, he was, at the time of the shipment of the cargo, fully cognizant of the fraudulent design on the part of those whom he considered the real owners of the vessel, to conceal their ownership by a simulated sale to an individual whose name he did not recollect, but which is proven by the master to be Perez, a Mexican citizen. And whether the property of the vessel was really in Perez, or in Graham and Calome, he knew or was bound to know, that the birth place of one of the partners, and the acquired domicil of the other, invested both of them with the character of enemies, and consequently was fully aware when he sailed with his cargo on the Telegrafo, he was sailing in an enemy's vessel. We have, then, here presented a case of an enemy shipper, embarking with his property on board of an enemy vessel. "In general, and unless under special circumstances," says Mr. Wheaton (International Law, 390), "the character of ships depends on the material character of the owner as ascertained by his domicil; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries, may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass, is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the government, from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the state. In time of war, a more strict principle may be necessary; but where the transaction takes place in peace, and without any expectation of war, the cargo is not to be involved in the condemnation of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears."

It is unnecessary to apply the principle sustained by this high authority, with the same strictness therein required, to justify a condemnation of this cargo. It is clearly shown to be the property of the enemy shipped in time of war on board of an enemy vessel, sailing under the enemy flag. I shall not stop to inquire whether there may not hereafter be a reason for the equitable interposition of the executive to be drawn from the fact, that at the date of the capture, the order contained in the circular from the treasury department, exempting the ports of Yucatan from the laws of war, remained unrevoked. For under the circumstances of this case, I consider it immaterial whether the order of the executive thus issued through the secretary of the treasury, was revoked or not, at the date of the capture; since, by the very terms of that order it is clear, that the strict neutrality on the part of Yucatan, which was the condition upon which it was granted, was disregarded alike by the owners of the vessel and the owner of the cargo. They have placed their property under the protection of the flag of the enemy, and sailed for an enemy port. The vessel and cargo are, in my judgment, so included in this transaction, that it is difficult to perceive upon what ground any distinction can be drawn. The order of the president cannot be construed into a sanction of the double dealing of which the parties in this case have been guilty. That order is recognized as the rule by which this court will be governed; but as its effect was to relax the stringent principles of the laws of war, it should be strictly construed and confined to the object it was intended to accomplish. In adopting so liberal and humane a policy towards Yucatan, it certainly was never the design of the president, that citizens and residents of that country, should be allowed to abandon the neutral and appropriate flag of their particular department, and assume that of the enemy; nor could it have

been his design to restrain the prize courts of this country, from inquiring how far the acts of those citizens and residents conformed to that state of neutrality and friendship towards the United States, in which the circular of the secretary of the treasury, expresses the hope they will remain. The questions which naturally and necessarily arise, are neutrality or no neutrality, hostility or no hostility: and the court cannot determine such questions without a free and unrestricted inquiry into the facts developed by the evidence. In the peculiar position occupied by Yucatan, it was the duty of her citizens, and those residing within her jurisdiction, to observe extraordinary caution in their commercial intercourse with other nations; and yet we see them, as in the case before us, openly assuming the garb of enemies, for the purpose of gaining access to the ports of the enemy. The conduct of the owners of this vessel and her cargo, presents to the view of the court a discordia rerum totally irreconcilable with a friendly or neutral attitude. They cannot be permitted at one and the same time, to plead before the prize tribunals of this country, an exemption from the general operation of the laws of war, under an order from the executive of our government, and before the tribunals of Mexico, an exemption from the operation of the same laws, by showing that they sailed under the Mexican flag. The very motive which prompted them to assume that flag, was doubtless to avoid the difficulty and inconvenience which might result from the maintenance of a separate and independent national character.

But the proctors for this claimant have strenuously contended that he is not a resident of the enemy's country, and has never acquired a domicil there; but that, on the contrary, he is a subject of the queen of Spain, and a resident of Havana. In support of this position they adduce his own test affidavit, and his affidavit subsequently made, alleging that he was misunderstood by the prize commissioner when he gave his answers to the standing interrogatories. It is difficult to believe that such a total misapprehension could have existed on the part of both the prize commissioner and the sworn interpreter of the court, when it appears by the certificate of the former, "that the witness having declared that he could not speak the English language, and that the Spanish was his vernacular, the oath was administered, questions propounded, and answers received, and afterwards read over to him in the latter language, through Edward Lanne, a sworn interpreter." To the plain and simple questions, "Where were you born? where have you resided for the last seven years? where do you now live and how long have you lived there?" he has answered, "that he was born in Spain, for the last seven years has lived in Campeachy, and has lived there twenty years; he belongs to the Yucatan government—originally belonged to Spain." In his test affidavit and claim he alleges that he is a subject of the queen of Spain, a native of Catalonia, in Spain, and a resident of the city of Havana, in the island of Cuba, one of the colonies of Spain. In his claim he further alleges, that for the last seven years he has been a resident of Havana, and that only occasionally, and in the fair and honest prosecution of his commercial dealings and transactions, has he visited the ports of Yucatan, of Mexico and of the United States; in neither of which ports he ever fixed his residence, but preserved his residence in Havana, as aforesaid, from which he started on his commercial undertakings. Upon being informed by his proctors of the conflict between his answers to the standing interrogatories and the facts relating to his residence, as stated in his test affidavit and claim, he presented another affidavit, declaring, not that he misunderstood the questions propounded to him in the Spanish language by the interpreter, but that the interpreter must have misunderstood his answers. With every disposition to extend indulgence to a party whenever there is a fair ground for supposing that any misunderstanding or mistake may have arisen, I cannot reconcile such an indulgence with a faithful discharge of my duty in the present instance. It is extremely improbable that any such misunderstanding on the part of the claimant existed. There is no similarity in the sound of the names of Campeachy and Havana which will justify the belief that the interpreter could have mistaken the latter for the former. This fact, alone, would be sufficient to induce the court to reject the subsequent affidavits, without looking to other parts of his answers to the standing interrogatories, which state facts so totally at variance with those which it is now alleged were intended to be stated. And yet the learned proctors have, notwithstanding these glaring inconsistencies in the oaths of their client, urged upon the court the propriety of granting an order for further proof, to enable him to establish a residence in Havana. Whatever may be the strength of the conviction of the honesty of this claimant, which has animated the efforts of his proctors (whose sincerity I cannot for a moment question), I do not feel myself at liberty to take the same benevolent and charitable views of the motives by which he is actuated In the language of Mr. Justice Johnson, in the case of The Rapid, 8 Cranch [12 U. S.] 164: "It is the unenvied province of the court to be directed by the head and not the heart. In deciding upon principles that must define the rights and duties of the citizen, and direct the future decisions of justice, no latitude is left for the exercise of feeling." Temptations to fraud in cases of this nature are many and strong, but it is the duty of a court of prize to exact the utmost fairness on the part of both captors and claimants, and to frown upon every attempt at deception.

The fact that the claim is in opposition to the examination in preparatorio, would alone

be a sufficient ground for the rejection of the claim. "The claim, too, of Mr. Tappan," says Mr. Justice Story, in the case of The Diana [Case No. 3,876], "was in total opposition to all the papers and preparatory examination. Now, I take the general rule to be, that no claim shall be admitted in opposition to the depositions and the ship's papers. It is not an inflexible rule, for it admits of exceptions; but, on examination, it will be found that those exceptions stand upon very particular grounds, in cases occurring in time of peace, or at the very commencement of war, and granted as a special indulgence. But in times of known war, to admit claims in opposition to all the preparatory evidence and papers, to enable parties to assume the enemy's garb for one purpose and throw it off for another, would be holding out an invitation to frauds, and subject the court to endless impositions. The rule can never be relaxed to such an extent without prostrating the whole law of prize." "On the whole, I am entirely satisfied that the claim of Mr. Tappan, standing, as it does, in direct opposition to all the papers and preparatory examinations, ought, even if he had been a neutral, to have been rejected in limine."

The greatest solemnity is generally attached to the examination in preparatorio. The standing interrogatories are searching in their character, and well calculated to elicit truth and detect fraud, and the reasons must be far more cogent than those here advanced, to induce me, in the present instance, to deviate from the beaten track and allow the claimant, by further proof, to contradict his own declarations made under the solemnity of an oath, touching a fact so important as domicil or national character. I shall, therefore, refuse the application for further proof, reject the claim of Antonio Gual, and condemn the cargo of the Telegrafo as prize of war to the captors. The register is hereby ordered to enter a formal decree of condemnation.

Case No. 15,050.

UNITED STATES v. EMERSON.

[4 Cranch, C. C. 188.] [1]

Circuit Court, District of Columbia. Dec. Term, 1831.

CONTEMPT—OBJECTIONABLE LANGUAGE—ASSAULT—IN PRESENCE OF COURT.

It is a contempt of court, punishable under the act of congress of the 2d of March, 1831 [4 Stat. 487], "declaratory of the law concerning contempts of court," to call another a liar openly in the presence of the court while in session, and in the hearing of the officers of the court; and an assault and battery committed in the hall of entrance into the court room, separated from it only by a door without panels, and covered with cloth, was either "in the presence of the court, or so near thereto as to obstruct the administration of justice."

[Cited in U. S. v. Anon., 21 Fed. 770.]

[Cited in Holman v. State, 5 N. E. 558.]

The defendant [Hiram S. Emerson] was brought before the court by the marshal for contempt. He had been standing near the stove, in the court room, in conversation with a man named Childs, concerning a suit which some negroes had brought for their freedom against Emerson, when the latter said to him, in the hearing of the crier and bailiffs, "You are a liar," to which Childs replied, "You are a damned liar." The crier commanded silence. Emerson shook his finger in Childs' face, and said, "This place is your protection"; to which Childs said, "This is not a place for altercation. I am willing to see you anywhere." They then went into the central hall of entrance, separated from the court room only by a door without panels, but covered with cloth, so as to afford but a slight obstruction to the sound. In the hall the conversation was repeated, and Emerson struck Childs several times with a whip. Some of the officers of the court being present brought the parties immediately before the court, who, upon hearing the testimony, ordered both parties to give security to appear in court the next day to answer interrogatories touching the supposed contempt. On this day the parties appeared, and answered the interrogatories which had been filed by the attorney of the United States; and, the facts appearing thereby to be substantially as before stated,

THE COURT (nem. con.) was of opinion that the language used by each to the other, in the presence of the court, was a contempt, and that the attack made by Emerson upon Childs, in the hall of entrance, while the court was sitting, was either "in the presence of the court, or so near thereto as to obstruct the administration of justice," within the meaning of the act of congress of the 2d of March, 1831 [4 Stat. 487], "declaratory of the law concerning contempts of court."

THE COURT therefore imposed a fine of five dollars upon each of the parties.

The grand jury having afterward found an indictment against Emerson for the assault and battery, and he having submitted to the court, was fined five dollars upon that indictment.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,051.

UNITED STATES v. EMERSON.

[6 McLean, 406.] [1]

Circuit Court, D. Indiana. May Term, 1855.

EMBEZZLEMENT FROM MAIL—EVIDENCE—WITNESSES—CHARACTER.

1. On a charge for stealing letters out of the mail by a post master or other person, it is important to have as witnesses the post masters through whose offices the letters passed or were distributed.

2. When such witnesses are not called, although there may be proof of the mailing of the letters, and that they were never received, it is not sufficient for the conviction of any post master on the route.

3. If a witness swear positively as to the commission of the offence under improbable circumstances, whose character is bad, it will have little weight with the jury.

4. And this is especially so where the accused shows a good character. Under doubtful circumstances of guilt, good character will lead to an acquittal of the defendant.

[This was an indictment against John M. Emerson.]

The District Attorney, for the United States.

Morrison & Walpole, for defendant.

OPINION OF THE COURT. This is an indictment which charges the defendant with embezzling various letters, which contained articles of value, while acting as post master at Hamilton, in Steuben county, Indiana. E. B. Mott, a witness, states, that on or about the 1st of January, 1853, he mailed a letter at the office of defendant, directed to James Akright, New London, Huron County, O., which contained two certificates of deposit, dated the 3d of December, 1852, given by the Tompkins County Bank, New York, in favor of James A. Gibbons, assigned to Akright. The package was directed to the distributing office at Toledo. S. W. Spratt stated that three letters or packets were mailed about the same time, one of which contained two certificates of deposit, each for fifty dollars; the other two packets contained a deed and other papers, all of which by their direction were to pass through the Toledo post office. The first letter was mailed the same evening, &c. Mr. Brown, the post office agent, in a short time after the loss of the letters was suspected, examined the distributing post office at Toledo, and found that no such letters as described had passed through that office, at or near the time that they should have been distributed at that office. Dugan, a witness, was called by the prosecution, who swore that on the 1st of January, 1853, he called at the post office in Hamilton, about ten o'clock at night, knocked at the door, and no one answering, he went across the street on some business. In a short time he returned, and seeing a light in the window of the post office, he crossed over the fence and approached the window, where he saw the post master sitting near the window engaged in opening letters; and he saw him take money and other articles out of the letters thus opened, which he put in his pockets, and one or two of the letters, after the contents had been taken out, he laid upon the window, so that the witness could see the directions on the letters, and he says the directions were to the same persons as sworn to have been mailed on the 1st of January. One he specially observed was directed to James Akright. He observed that one of the letters opened contained a deed, or what appeared to be a deed, or a patent for land. After the defendant had completed his work, he stepped into an adjoining room, opened the door of a stove and threw the letters into it. Dugan, by a large number of respectable witnesses, was proved to have a bad character, and every one stated that he was not worthy of credit under oath. The defendant's character, was proved to be good. He was a physician of respectable standing in society, and he was evidently a man of intelligence. It was also proved that Dugan was once arrested for perjury, at the instance of the defendant, on which account he was hostile to the defendant, although that difficulty had been settled between them.

The court charged the jury that the evidence, without the statements of Dugan, did not authorize a conviction. That the letters were mailed at the office of the defendant at the time stated, there could be no reasonable doubt. The witnesses were highly respectable, and nothing has been stated to their discredit. But from the office of the defendant to the distributing office at Toledo, a distance of more than fifty miles, there are several post offices where the mail was opened, but none of the post masters have been called as witnesses. The examination of the Toledo office where the mail is distributed, is satisfactory to show that no such mail as should have been forwarded from the Hamilton office was distributed at Toledo. But if the letters were abstracted at Toledo, where they passed through the hands of the post master or his clerks, and if they were carried in the mail to that point, the latter have not been called as witnesses. Nor is there any evidence to show that the letters deposited in the Hamilton office have not been received. These defects in the evidence are fatal to the success of the prosecution, unless the jury shall believe the evidence of Dugan. The credibility of witnesses must be considered and judged of by the jury.

In the first place, this witness is discredited by his neighbors. Many of them have been examined, and they agree in saying Dugan's character is bad, and that they would not believe him under oath. There is no better test of the character of a witness

[1] [Reported by Hon. John McLean, Circuit Justice.]

than the opinion of his neighbors. Every man has a character where he is best known, —where his daily walk and conversation are observed and spoken of. Local prejudices or excitements may sometimes do injustice to an individual. But this is generally temporary. So that upon the whole, there is no criterion so safe, in determining as to the truth of a witness, as the opinion of his neighbors. The relation of the witness in regard to the acts of the defendant, which he observed through a window at a late hour of the night, cannot be said to have been impossible; but they were very extraordinary. They were of a character to create strong doubts of their truth, unless they proceeded from a credible person. It appears that the witness and the defendant had been at enmity. This not unfrequently affords a motive for revenge, where injuries supposed or real had been inflicted on the witness. Of these matters, gentlemen, you are to judge and determine. The defendant has proved a good character. He is a professional man, and stood well with his neighbors. He has left the neighborhood, but he seems to have left few enemies behind him. Indeed, from the evidence, no witness speaks to his prejudice, except the witness, Dugan. Character, gentlemen, under all circumstances, is the best earthly inheritance. It is a shield to the innocent when unjustly accused. And in this case you will give weight to it, in connection with the other facts of the case.

Verdict "Not guilty."

Case No. 15,052.

UNITED STATES v. EMERY.

[4 Cranch, C. C. 270.] [1]

Circuit Court, District of Columbia. Nov. Term, 1832.

HIGHWAYS—RECORDING LOCATION.

The road from Georgetown, D. C., to the Little Falls bridge, is not a public highway, because the location thereof was not recorded among the records of the territory of Columbia.

This was an indictment for obstructing the highway between Georgetown, District of Columbia, and the Little Falls bridge, by blasting rocks, etc.

C. Cox, for defendant, contended that, as the location of the road had never been "recorded among the records of the territory of Columbia," as required by the Maryland act of 1795, c. 44, § 2, it was not a public highway, and therefore the indictment could not be sustained.

And so THE COURT instructed the jury (THRUSTON, Circuit Judge, absent).

See the case of U. S. v. Schwartz [Case No. 16,237].

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,053.

UNITED STATES v. ENRIGHT.

[Hoff. Land Cas. 239.] [1]

District Court, N. D. California. June Term, 1857.

MEXICAN LAND GRANT—INCHOATE TITLE—JUDICIAL POSSESSION.

An inchoate title, followed by juridical possession, presents an equity which the United States are bound to respect.

This claim was confirmed by the board, and appealed by the United States.

P. Della Torre, U. S. Atty.

J. B. Crockett, for appellee.

BY THE COURT. The documentary evidence of title exhibited by the claimant in this case is as follows: A petition to the governor dated December 20, 1844; a marginal decree or order for information by the governor, and a favorable report by the secretary, Manuel Jimeno. On receiving this report, the governor makes the following decree: "January 6, 1845. Granted as asked for and reported by the Most Reverend Father Minister. Micheltorena." The claimant has also produced a record of judicial possession, which seems to have been formally given him by the constitutional judge of first instance of the pueblo of San José Guadalupe on the 18th of February, 1846.

It is objected that these documents are insufficient to vest any title, either legal or equitable, in the claimant. It must be admitted that the concession in this case is not the final documento or title which, by the eighth article of the regulations, the governor was authorized to issue when the definitive concession was made.

In Arguello v. U. S., 18 How. [59 U. S.] 543, the supreme court, after alluding to the "informes" usually required, says: "By the fourth section, the governor being thus informed may 'accede or not' to the petition. This was done in two ways: sometimes he expressed his consent by merely writing the word 'concedo' at the bottom of the expediente; at other times it was expressed with more formality, as in the present case. * * * It is intended merely to show that the governor has 'acceded' to the request of the applicant, and as an order for a patent or definitive title in due form to be drawn out for execution. It is not itself such a document as is required by the eighth section, which directs that the definitive grant asked for being made, a document signed by the governor shall be given to serve as a title to the parties interested." But this concession, although not the final title which issued under the eighth article, is nevertheless a grant. The words of the grant are positive and plain; and though shorter and more informal than the usual decree of concession, commencing

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

with the words "vista la peticion," it is in all respects as effectual to constitute an inchoate or imperfect title.

It has always been held by this court, that according to the provisions of the regulations the formal or definitive title contemplated by the eighth article could not issue until after the concession of the governor had been approved by the departmental assembly; and that though the practice of issuing that document in advance of such approval, and in terms "subject to it," obtained to a considerable extent, yet such a document, where no approval had been obtained, constituted merely an inceptive or equitable title. Whether this latter view be correct or not, no doubt can be entertained that the first decree of concession, whether made in the more formal manner usually observed or, as in the present case, by the short declaration that the land was "granted as asked for," afforded the basis for the departmental assembly, whose approbation was necessary to perfect or give "definitive validity" to the title. When therefore it appears that this inceptive title has been delivered to the party shortly after its date, and has been regarded by the judicial officer as furnishing the requisite authority to enable him to put the grantee in possession, it should be treated as vesting in the grantee the inchoate or equitable title, which when followed by occupation and cultivation ought to be respected. There is no reason to suppose that when the governor, after having obtained the requisite information, had acceded to the petition, made a decree of concession, and ordered the patent to issue, he would have declined to sign the title in form. So far as his action was concerned he was functus officio, except the merely formal act of signing the final "documento;" and it may well be doubted whether, if this concession had been approved by the assembly, he would have been at liberty to withhold from the party the formal evidence of title which the eighth article directs him to issue in such cases. It is not explained why the governor did not in this case pursue the more usual practice of issuing the final title "subject to the approval of the assembly." He may, perhaps, in strict conformity with the regulations, have withheld it until the approval was obtained, or he may, according to the loose and informal practice of the country, have considered that for so small a piece of land the grant indorsed upon the petition was sufficient to secure the rights of the applicant. The concession was at all events delivered to the grantee; for we find it in his hands very soon after its date, and by virtue of it the possession was formally delivered to him.

The next inquiry is, did the grantee fulfill the conditions usually annexed to the formal title, and in consideration of which it issued? On this point there is some conflict of evidence. After referring to the testimony, the board in their opinion say: "From a careful examination of all the proofs in the case, we think the preponderance of proof is in favor of the claimant, and must be regarded as establishing the fact of the cultivation of the place by Garcia from a period anterior to the grant to the time of sale to Enright" (the present claimant). We see no reason to dissent from this conclusion.

The remaining question relates to the location and extent of the land. The petition describes it as "2,000" varas of farming land; a note in the margin of the petition by Pacheco states that the petition for the farming land is for 8,000 varas. Under this description juridical possession was given of a piece of land 2,000 varas square. There might, perhaps, be some room to doubt whether the land described in the petition was 2,000 varas square or 2,000 square varas; but the note of Pacheco, the construction given to the concession by the alcalde, as well as the natural interpretation of the words when properly used, satisfy us that the intention was to grant a piece of land 2,000 varas square, or bounded by a line 8,000 varas long, taking the four sides together, as stated by Pacheco.

On the whole, we are of opinion that the grantee acquired by the concession an inceptive or inchoate title, which when followed by cultivation and juridical possession constitute an equity the United States are bound to respect. The decree of the board must be affirmed.

[The United States objected to the official survey of this grant, but the survey was approved by the court in Case No. 15,054.]

UNITED STATES (The ENTERPRISE v.). See Case No. 4,499.

Case No. 15,054.

UNITED STATES v. ENWRIGHT.

[1 Cal. Law J. 254.]

District Court, N. D. California. Sept. 13, 1862.

MEXICAN LAND GRANTS — IDENTIFICATION OF BOUNDARIES—ERROR IN DECREE OF CONFIRMATION.

[1. In view of the well-known looseness and inaccuracy with which business was transacted in California under the Mexican government, the fact that a decree of concession made by a Mexican governor referred to a certain tree as a live oak, when in fact the only tree reasonably answering the other calls of the description was a white oak, is not sufficient ground for overthrowing a survey based upon such white oak; especially when there is other evidence identifying it as the one referred to in the act of possession.]

[2. In a decree of confirmation an apparent error, arising out of the obscurity of the act of possession, and which consists in assuming that the line taken as the base of the survey runs towards the property of a person mentioned, and may interfere therewith, should not be allowed to control a clear and definite call for that line, as of a given course and direction.]

[Objections by the United States to the official survey of a certain grant situated in Santa Clara county, and now claimed by

James Enwright. The decree of the board affirming the grant was affirmed in Case No. 15,053.]

OPINION OF THE COURT. The official survey in this case has been returned into court under the provisions of the act of 1860. The objections are filed on the part of the United States. By the final decree of confirmation, the land is described as follows: "The land, of which confirmation is made, is situated in the county of Santa Clara, and now occupied by said James Enwright; the said land being in a square of two thousand varas, on each side, and lying adjoining lands known as the 'Mission Lands of the Mission of Santa Clara,' and having, for the side of said premises next to said mission, a line drawn from the first live oak before the place known as 'San Pedro y San Pablo,' and running thence to the south-southeast 2,000 varas, unless the same shall sooner strike the limits of the land known, in 1846, as 'Mariano Castro's land,' and terminating the same at said Castro's limits, if the said line should strike said limits with less than 2,000 varas. The land hereby confirmed being the square having the line above mentioned for the side of the same on the part towards said mission." This description is founded on the record of judicial possession produced in the cause, and to which the decree of the board refers for greater certainty. That record, after stating that a cordel fifty Castillian varas in length was measured, proceeds as follows: "The measurement was commenced by drawing a line of twenty cordels from the first encino (live oak) in front of the place known as 'San Pedro y San Pablo' towards the south-southeast; which tree remained as a dividing boundary to form the square of the extension of the land; and afterwards there were measured 8,000 varas, drawing the first measured line as far as the limits of Mariano Castro's land." The official survey has been made by drawing a line in a direction nearly south-southeast from a tree, adopted as that referred to in the record of possession, to the distance of 2,000 varas, and, on this line, as a base, erecting the square confirmed to the claimant.

It is objected, on the part of the United States: (1) That on applying the description of the grant and the decree to the land and natural objects found upon it, it is so uncertain and incapable of definite application as to make it impracticable to survey any lands whatever. (2) That the tree adopted in the official survey as the point of beginning is not the one intended by the decree. (3) That the survey does not locate the land as described in the decree.

It is unnecessary to consider the first point separately. The examination of the other objections will necessarily involve the question whether or not the description in the act of possession, and in the decree of the lands granted and confirmed to Garcia, is so uncertain, and incapable of application to any ascertainable tract, as to compel us to deprive the claimant of any land whatever.

2. It appears that the tree adopted as the initial point of the survey is a "roble," and not an "encino," as mentioned in the act of possession. The difference between the "roble," or white oak, and the "encino," or live oak, is, undoubtedly, marked and unmistakable. But any one acquainted with the looseness and inaccuracy with which the former inhabitants of this country conducted almost all their business, even official, will have little difficulty in supposing that the act of possession might have mentioned one tree, when the other was, in fact, meant. The record was not drawn up on the ground, and possibly not until some days after the possession was given. The clerk or secretary might easily have forgotten whether the tree from which the measurement was made was a white oak or a live oak. Nor would, in those days, great accuracy on such a point be required, for the measurement was made in the presence of witnesses, and the tree marked as a visible monument. There are in the neighborhood several "encinos," which would satisfy the call of the record. But most of these appear to be in, and to form a part of, the grove known as "San Pedro and San Pablo," whereas the tree mentioned in the record is described as the first tree in front of ("antes") the place called "San Pedro y San Pablo." The encino of the survey is a lone tree of large size and considerable antiquity, standing out in the plain at the distance of about a mile from the grove referred to. But the question is entirely set at rest by the testimony of Salvio Pacheco, if his evidence can be relied on. He positively identifies the "roble" at which the survey begins as the tree mentioned in the record. It is testified by Mr. Beale, United States surveyor general, that Pacheco accompanied him, when viewing the land, to point out the boundaries. That, when at some distance, Pacheco pointed to the oak in question, stating his belief that it was the tree at which the measurement was begun, and that, if so, there was a small arroyo or sanjou at its foot, and that its trunk had marks upon it. On arriving at the tree, it was found to be on the banks of a small "sanjou," and marks, evidently made by an axe, and of considerable antiquity, were found upon it, as described by Pacheco. Mr. Beale adds that he has long known Pacheco, by reputation, as a very honest and worthy man, and that he believes no native Californian has a higher reputation for integrity. Pacheco himself testifies that the tree pointed out by him on this occasion was the identical tree adopted and marked by his brother, Dolores Pacheco, when giving possession. The latter and the other assisting witnesses are dead. Salvio Pacheco himself is seventy years of age. No witness identifies any other tree as that claimed by Garcia, or recognized as his boundary; nor is any other found bearing ancient marks, which might have been made at the time of the judicial possession. The ob-

jection rests entirely on the fact that the tree in question is a white, and not a live, oak. I think it clear that this slight discrepancy is not sufficient to counterbalance the other proofs which identify this tree of the survey with that referred to in the act of possession.

It may be added that the claimant submitted to the board several diagrams of the lands, including more or less of the adjacent country. In all of these the tract was laid down precisely as it has since been surveyed, and in all the oak tree of the survey is represented as the point of beginning. When, therefore, the board, in its description of the land confirmed, mentioned an oak tree as the starting point of the first line, none other than the tree represented on all the maps filed in the case could have been intended, for no other had, up to that time, been by any one referred to. So far, then, as the location adopted by the board can be considered as final and res adjudicata, it is evident that the tree in question must be taken to have been, by the final decree in the case, adopted as the initial point of the eastern boundary of the lands confirmed.

3. The next objection is that the lands are not located in accordance with the decree of confirmation. The record of judicial measurement states, as we have seen, that a line twenty cordels or 1,000 varas in length was run from the oak tree in a south-southeast direction, in order to form the square to be assigned to Garcia. It then states, in substance, that 8,000 varas of land were measured, drawing the first-measured line to the limits of Castro's land. But the land of Castro lies to the west of the point of beginning. A line drawn southeast from that point would never reach it. The board seems not to have been informed as to the situation of Castro's land, for the decree directs the first line to be run in a south-southeast direction 2,000 varas, unless the boundary of Castro be sooner reached. This discrepancy or obscurity in the language of the act of possession has not been explained. It would seem most probable that the line between the tract to be measured and the mission lands of Santa Clara was first established. In that case the record correctly describes it as running south-southeast. It is possible that, having established this line, which was measured, as the record states, to the distance of only 1,000 varas, the officer proceeded to measure a line at right angles to it, and running towards Castro's land; and, in his record of proceedings, he has called this latter his first measured line, regarding the 1,000 vara line as run merely for the purpose of establishing a base. But, whatever be the explanation, there is evidently a discrepancy in the description. Either the first line did not run south-southeast, or it did not run in the direction of Castro's land. As before observed, no question as to the location of the tract seems to have been raised before the board. All the maps—and there are three produced in evidence—represent a tract 2,000 long and 2,000 wide, located as it has since been surveyed. To this tract all the evidence of occupation and cultivation referred, and the board, being of opinion that the proofs established a sufficient cultivation and improvement, confirmed it to the claimant. There can be no doubt as to what land the board intended to confirm. The proof before them, the language of their opinion, and the terms of the decree are conclusive. The decree declares that the line drawn from the oak tree south-southeast is to be "the side of said premises next to the mission;" "the land hereby confirmed being the square having the line above mentioned for the side of the same on the part towards said mission." In their opinion, after stating that the act of possession established the starting point, and the direction of the line first run, with great distinctness, the board say: "This testimony establishes the location of the land as it was evidently intended to be on the southwest side of the line thus run, embracing the land occupied at the time of the judicial survey by the grantee, and located so as to adjoin the mission lands, and also the lands of Mariano Castro." We have thus unmistakably indicated the direction and length of a line which is to form the base of a square to be erected upon it, and this line is to be on the side of the tract next the mission, and the square is to be formed to the southwest of it.

The survey is in precise accordance with this description. The only call in the decree which it fails to satisfy is that which contemplates that the line drawn to the south-southeast shall run in the direction of the lands of Castro. But this, as we have seen, is impossible. The board were evidently under the impression that the line described in the decree would run towards Castro's land; and such would be the natural inference from the obscure language of the act of possession. But this error cannot control the clear and definite call for a line of a given course and distance, and the distinct location of the square on the southwest of this line as a base.

It is to be observed, in addition, that the decree does not direct the line to be run to the land of Castro. Its terms are, "running thence" (i. e. from the oak) "to the south-southeast 2,000 varas, unless the same shall sooner strike the limits of the land known, in 1846, as 'Mariano Castro's land,' and terminating the same at said Castro's limits, if the said line should strike said limits with less than 2,000 varas." The line of the survey is in literal accordance with this description. It runs from the point named, in the prescribed direction, to the distance mentioned, and it does not strike the limits of the land known, in 1846, as that of Mariano Castro. The fact that it could not do so, no matter how far produced, proves that the board was under an erroneous impression in that particular; but it cannot, on that account, be said that the calls of the decree have not been observed. There is, therefore, no foundation for the ob-

jection that "the survey does not locate the land as it is described in the decree of confirmation."

But, inasmuch as the decree was evidently founded on the act of possession, and refers to that document for further description, it might still be open to inquire whether the land described in the decree of confirmation is, in fact, that whereof possession was given. On recurring to the act of possession, we find, as before observed, that its language is obscure. A possible explanation of the seeming discrepancy has been suggested. It would seem that, however inaccurate may have been the notions of the alcalde and his assistants as to the courses by compass of the lines run by him, they could not have failed to know that the mission lands lay to the east, and Castro's land to the west, of the tract they were to measure. When, therefore, the record describes the first line as drawn to south-southeast, it is almost impossible that they should have intended it to run to Castro's land, which lay to the west and northwest. So gross a blunder can hardly be supposed. The testimony of Pacheco, the only surviving assisting witness, confirms. He identifies positively the line first run.

Some stress is laid in the brief filed on the part of the United States on the fact that Pacheco, in his deposition, says the first line was run "more or less south or southwest,—we called it southerly." The next line, he says, was run "northeast or northwest. We knew nothing about the points of the compass, except north, south, east, and west." The witness here exhibits the confusion of ideas as to courses by compass, so commonly found among his countrymen. But, though unable to describe them, no doubt can be entertained as to what lines he referred to. He has pointed them out to the surveyor on the ground as those actually run by the judicial officer; and in his deposition, though confused and erroneous as to points of compass, he states one fact about which he could not have been mistaken, and which shows that the line from the oak tree must have been run as described in the act of possession. He states that it was run "from the roble towards Santa Clara," i. e. about southeast. He also says that the lands of Mariano Castro lay to the northwest of the roble. They are, in fact, situated to the north and west of that tree. It is plain, therefore, that it could not have been intended by the alcalde that the first line should run towards the lands of Castro. The lines pointed out by Pacheco to the surveyor general are those of the official survey. They, in all respects, conform to those delineated on the maps presented by the claimant to the board, and they correspond with the description of the land confirmed contained in the decree.

The evidence of occupation and cultivation, on which the board confirmed the inchoate title, presented by the claimant, referred to the lands embraced within these lines. They are situated in the bajio, or low grounds, as mentioned in the act of possession; whereas, if located as suggested on the part of the United States, they would include but a small portion of the bajio, and would, to a considerable extent, be located in the grove called "San Pedro y San Pablo." The only circumstance which tends, in any degree, to throw doubts on the question of location is the description in the second deed from Garcia to the claimant. In this deed the lines are described as commencing at "San Pedro and San Pablo," and not at a tree in front of that place, and running "thence southwest 2,000 varas, thence northwest 2,000 varas, thence northeast 2,000 varas, thence to the point of beginning." Assuming that, by the words "San Pedro y San Pablo," the tree in front of that place was intended, it is evident that the tract described is to the northwest of the tract surveyed. I am unable to account for this description, except by supposing a clerical error in stating the course of one of the lines. The tract called for in the deed in no respect conforms to that described in the act of possession, except that the first line is run towards Mariano Castro's limits, and the square is formed by running lines perpendicular to it, towards the northwest. At least a third of the land included within these lines is embraced within the official survey of Mariano Castro's land, contrary to the express provision of the act of possession and of the decree, and contrary to the evident understanding of every witness who has spoken of the location and limits of the tract claimed by Garcia. Not only the terms of the act of possession, but the positive testimony of the only surviving witness to that proceeding, show that the tract was not located as described in the deed; and we are without the slightest evidence to justify us in assigning to the claimant, even if he desired it, the tract embraced within the arbitrary lines mentioned in his conveyance. All the right and title of Garcia to the land had previously been acquired by Enwright under a deed which described it, in general terms, as the piece of farming land, 2,000 varas square, granted on the 6th January, 1845, whereof judicial possession was given on the 18th February, 1846, etc. A subsequent conveyance, made one year after the first, contains the erroneous description which has been noticed.

It is plain that no claim for the land described in the second deed was presented to the board. The petition describes the land as it has since been surveyed, and the plat annexed to it, and the other maps produced in evidence delineate the same tract. It would seem, therefore, that the misdescription must be the result of a clerical error. But, whether it be so or not, the fact that Garcia has, either intentionally or by mistake, conveyed a tract different from that granted him, and whereof he received judicial possession, affords no reason why the court should change its location as established by the act of pos-

session; more especially when that location has been fixed by the decree of the board, which has become final by the consent of the United States.

For these reasons, I think that the official survey should be approved.

Case No. 15,055.

UNITED STATES v. ERIE R. CO.

[Cited in Case No. 15,056. Nowhere reported; opinion not now accessible.]

Case No. 15,056.

UNITED STATES v. ERIE RY. CO.

[9 Ben. 67;[1] 24 Int. Rev. Rec. 76.]

District Court, S. D. New York. March, 1877.[2]

INCOME TAX—INTEREST ON CORPORATION BONDS—ALIEN OWNERSHIP—PENALTY.

1. Interest on bonds of a corporation held by non-resident aliens is not taxable by the United States, under section 122 of the act of June 30, 1864 (13 Stat. 284), as amended by section 9 of the act of July 13, 1866 (14 Stat. 138).

2. Michigan Cent. R. Co. v. Slack [Case No. 9,527a], dissented from.

3. Only one penalty is recoverable for all failures to make returns for taxation, under said statute, prior to the commencement of a suit.

[Cited in Ex parte Snow, 120 U. S. 286, 7 Sup. Ct. 562.]

At law.

Roger M. Sherman, Asst. Dist. Atty.

William D. Shipman and Henry L. Burnett, for defendant.

BLATCHFORD, District Judge. This is a suit brought by the United States against the Erie Railway Company, to recover taxes alleged to be due to the plaintiffs on certain interest coupons paid by the defendant on bonds issued by the defendant, which payments were made in the years 1866, 1867, 1868 and 1869, and also to recover certain penalties alleged to be due to the plaintiffs for the failure of the defendant to make returns of the amount of said taxes. The suit is founded on section 122 of the act of June 30, 1864 (13 Stat. 284), as amended by section 9 of the act of July 13, 1866 (14 Stat. 138). Such section, as so amended, reads as follows, the parts of the section as amended which are not found in the original section being put in parentheses, and the parts of the original section which are not found in the amended section being put in italics: "Any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money, due or payable to its stockholders (including non-residents, whether citizens or aliens), as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a *duty* (tax) of five per centum on the amount of all such interest or coupons, dividends or profits, whenever (and wherever) the same shall be payable (and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens); and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the *duty* (tax) of five per centum; and the payment of the amount of said *duty* (tax) so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor, *in duplicate, and one of said lists or returns shall be transmitted and the duty paid to the commissioner of internal revenue within thirty days after the time when* (on or before the tenth day of the month following that in which) said interest, coupons or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of the *duty* (tax), and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of said *duty* (tax). And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the *duty* (tax) as aforesaid, the company making such default shall forfeit, as a penalty, the sum of one thousand dollars; and, in case of any default in making or rendering said list or return, or of the payment of the *duty* (tax) or any part thereof, as aforesaid, the assessment and collection of the *duty* (tax) and penalty shall be made according to the provisions of law in other cases of neglect or refusal: (Provided, that whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, in such cases the tax levied by this section shall not be paid to the

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed by circuit court. Judgment of circuit court reversed in supreme court. 106 U. S. 327, 1 Sup. Ct. 223.]

United States until said company resume the payment of interest on their indebtedness)."

Prior to September 1, 1866, the defendant had issued and sold, as hereinafter stated, sterling coupon bonds, dated September 1, 1865, the principal of which was payable ten years after date, and the principal and interest of which were, by the terms of said bonds and coupons, payable in London, England, at the office of J. S. Morgan & Co., bankers, of said London, to the amount of £800,000 sterling. After the 1st of March, 1868, and before the 1st of September, 1868, the defendant issued and sold of the same class of bonds, £200,000 sterling, the principal and interest of which were payable at the same place as the principal and interest of the £800,000 above stated. The rate of interest on all of said bonds was six per cent. per annum, payable semi-annually, on the first days of March and September of each year. Said bonds, with the coupons thereto attached, were all sold directly to foreign bankers, who had their banking houses and principal places of business in said London, and were resold by them to their customers in Europe. During all of the years 1866, 1867, 1868 and 1869, all of said bonds and coupons were held and owned by non-resident aliens and not by citizens of the United States, except bonds to the amount of £20,000, and the coupons thereto belonging, which latter bonds, and no more, were held and owned by a citizen or citizens of the United States residing in Europe. The amount of the interest, as the same fell due, on all of the said bonds, was provided for and sent forward by the defendant, in one sum, to said J. S. Morgan & Co., before the dates at which the same fell due, and it was paid at the respective dates at which it fell due, by said J. S. Morgan & Co., at their banking house in London, to the holders of the said bonds and coupons. The total amount of interest so paid, from and including September 1, 1866, to and including September 1, 1869, was £186,000 sterling, the amount of the tax on which, at the rate of five per cent., would be £9,300 sterling. Included therein is the amount of interest paid on the £20,000 sterling of bonds held and owned by a citizen or citizens of the United States, and the amount of tax thereon, such interest being £4,200 sterling, and such tax being £210 sterling. The defendant made no returns to the assessor, or to any other officer of the internal revenue of the United States, of the payment of the said interest, or of any part thereof, nor did the defendant pay any tax to the United States on said interest or any part thereof, nor did the defendant withhold said tax or any part thereof from the amount of said interest, but the defendant paid the full amount of said interest to the holders of said bonds. No assessment was ever made on the defendant for any portion of said tax, nor was any demand ever made on the defendant for the payment of the same to the United States, until December 31, 1872. The defendant has not paid to the plaintiffs any penalty for failure to make return of the payment of said interest.

The foregoing facts are agreed upon by the parties, in writing, and the case has been tried by the court, without a jury. The main question in the case is, whether the defendant is liable to pay to the United States the five per cent. tax, being £9,090 sterling, on the £181,800 sterling of interest which it paid to non-resident aliens.

Under the decisions of the supreme court in U. S. v. Railroad Co., 17 Wall. [84 U. S.] 322, and Stockdale v. Insurance Cos., 20 Wall. [87 U. S.] 323, it must be regarded as settled, in the construction of the statute in question, that, when interest is payable by a corporation to any bondholder who, for any special reason, is exempt from the tax on such interest, then the corporation is not liable to pay such tax. The tax is held to be a tax on the bondholder, in effect and in substance, the corporation being the agent of the government for collecting and paying over the tax. It is really a tax on the income of the bondholder, and is a part of the income tax provided for by sections 116 to 123 of the act of 1864 and the amendments thereto. In U. S. v. Railroad Co., above cited, it was held that the tax imposed by the statute in question could not be collected by the United States from a railroad corporation, in respect of interest payable by it on bonds issued by it and owned by the city of Baltimore, on the ground that that city, being a municipal corporation, and a portion of the sovereign power of the state of Maryland, was not subject to taxation by congress upon its municipal revenues. The tax was not regarded as a tax on the corporation, as such, or on its revenues, but was held to be a tax on the creditors of the corporation, and the corporation was held not to be liable to the tax unless the creditor was liable. The same case also determines, that, although the language of the statute in question may be broad enough to include, in terms, a tax on interest payable to a party or person not subject to taxation by congress, yet it will not be construed as applicable to such a party or person. This view is affirmed in Stockdale v. Insurance Cos., above cited.

Are the non-resident alien holders of the bonds in question in this case, subject to taxation in respect of the interest payable and paid on their bonds? In Railroad Co. v. Jackson, 7 Wall. [74 U. S.] 262, it was held, under the act of 1864, before the amendment of 1866, that congress did not intend to impose the five per cent. tax, as an income tax, on non-resident aliens; and that the scheme of the statute, in authorizing the company to deduct from the interest payable the amount of the tax thereon, was merely a mode of collecting that part of the income tax. But it is apparent that congress, in the amendment of 1866, intended to have the tax extend to

interest payable to non-resident aliens. In doing so, it has undertaken to lay a tax, and an income tax, on non-resident aliens, in respect of such interest. Can it lawfully do so?

In the case of State Tax on Foreign-Held Bonds, 15 Wall. [82 U. S.] 300, the state of Pennsylvania had passed an act requiring every company incorporated by Pennsylvania, doing business therein, which pays interest to its bondholders, to retain from said bondholders, before paying such interest, a tax of five per centum on every dollar of interest so paid, and to pay the same to the state treasurer for the use of the state. The state court sustained the validity of the tax. The supreme court held, that bonds of corporations, owned by non-residents of the state, were not property anywhere but in the hands of their owners; that they were thus beyond the jurisdiction of the taxing power of the state; and that the law which required the corporation to retain five per cent. of the interest due to the non-resident bondholders was not a legitimate exercise of the taxing power, because it was a tax on property beyond the jurisdiction of the state. The tax laid in that case was quite as much a tax on the corporation, or on moneys in the hands of the corporation, as is the tax now under consideration. But the supreme court looked through the form to the substance, and held that the tax was not a tax on the corporation, or on the property of the corporation, or on property within the jurisdiction of the state, or on the money in the hands of the corporation, but was a tax on the debt, which was not property of the debtor, but was property in the hands of the bondholders. The congress of the United States can have no greater power to tax persons or property not within the jurisdiction of the United States, than a state has to tax persons and property not within its jurisdiction. By the tax in question, it has taxed either the non-resident alien or his property out of the jurisdiction of the United States. Probably, the view which led to the amendment of 1866 was, that the tax was a tax on the corporation, or on the earnings, profits, income or gains of the corporation, or on money in the hands of the corporation, belonging to it. The form of the enactment is, that the company shall be subject to and pay the tax on the amount of the interest it has contracted to pay, when such interest shall be payable, and, of course, before such interest shall be paid. But, as the tax in this case is really a tax on the property and income of non-resident aliens, when such property is not within the jurisdiction of the United States, and is thus a tax on the non-resident aliens themselves, it is a tax which cannot be upheld.

In arriving at this conclusion, I dissent from the reasoning and decision of the circuit court for the district of Massachusetts, held by Judge Clark, in the case of Michigan Cent. R. Co. v. Slack [Case No. 9,527a]. In that case, the court, while holding that taxation cannot extend beyond the jurisdiction of the taxing power, and that the objects of taxation must be within the territorial limits of the taxing power, arrived at the conclusion, that, under the statute in question, the interest, when it became due and payable, was either the property of the corporation, and thus rightfully taxable, or the property of the bondholder, and thus taxable because in the shape of funds within the jurisdiction of the taxing power and under its control, the tax attaching to the interest, as funds of the bondholder in the hands of the corporation. These views seem to me to run counter to the decisions of the supreme court in U. S. v. Railroad Co., and Stockdale v. Insurance Cos., above cited. The latter case is not referred to by Judge Clark in his opinion.

The plaintiffs are, therefore, not entitled to recover the tax on the £181,800 sterling of interest which it paid to non-residents and aliens, or any penalty thereon. Their right to recover the £210 sterling tax on the £4,200 sterling of interest is admitted. The defendant contends that this amount is to be recovered at its value in legal tender currency at the date of the trial or judgment. But I am of opinion that, under sections 3 and 4 of the act of March 10, 1866 (14 Stat. 5), as amended by section 9 bis of the act of July 13, 1866 (Id. 147, now section 3178 of the Revised Statutes), the plaintiffs are entitled to recover the tax at its value in legal tender currency at the several dates when the interest was payable.

In accordance with the decision of this court in the case of U. S. v. New York Guaranty & Indemnity Co. [Case No. 15,872], Dec. 16, 1875, only one penalty is recoverable for all defaults prior to the commencement of the suit.

NOTE. The United States carried this case, by writ of error, to the circuit court, where it was heard before Chief Justice Waite. His decision was as follows: "I fully concur with the learned district judge in the view he has taken of this case. The tax for the recovery of which the suit was brought was a tax upon the owner of the bonds and not upon the defendant. It was not a tax, in the nature of a tax in rem, upon the bond itself, but upon the income of the owner of the bond, derived from that particular piece of property. The foreign owner of these bonds was not, in any respect, subject to the jurisdiction of the United States, neither was this portion of his income. His debtor was, and so was the money of his debtor, but the money of his debtor did not become a part of his income until it was paid to him, and, in this case, the payment was made outside of the United States, in accordance with the obligations of the contract which he held. The power of the United States is limited to persons, property and business within their jurisdiction, as much as that of a state is limited to the same subjects within its jurisdiction. State Tax on Foreign-Held Bonds, 15 Wall. [82 U. S.] 300. The default of the defendant in making its returns was a continuing

one. Only one penalty, therefore, is recoverable. The judgment of the district court is affirmed."

But see Railroad Co. v. Collector, 100 U. S. 595.

[The judgment of the circuit court was reversed in error by the supreme court. 106 U. S. 327, 1 Sup. Ct. 223. At a later day a petition for rehearing was denied. 107 U. S. 1, 2 Sup. Ct. 83.]

Case No. 15,057.

UNITED STATES v. ERSKINE.

[4 Cranch, C. C. 299.] [1]

Circuit Court, District of Columbia. March Term, 1833.

EVIDENCE—RECORDS—INDICTMENT FOR PERJURY—MOTION IN ARREST OF JUDGMENT—PRACTICE.

1. Upon an indictment for perjury in this court, it is not necessary to produce a copy of the record of this court in the cause in which the perjury was committed. The court is presumed to know its own record. The record exists, although not reduced to writing in full; and the record is what it ought to be when correctly extended from the minutes.

2. It is only necessary to prove so much of the testimony of the witness as relates to the particular fact on which the perjury is assigned. After conviction of perjury, if the defendant move in arrest of judgment, and then forfeit his recognizance, the court will not give its opinion until the defendant appears in person.

[Cited in Hutcherson v. State (Tex. Cr. App.) 24 S. W. 909.]

Indictment [against William Erskine] for perjury committed on the trial of John Ryan, at the last term of this court, by testifying that Evelina Ridgway, a witness in that cause, was a common drunkard.

Mr. Key, U. S. Dist. Atty., offered the record of this court to show that there was such a prosecution against Ryan; and, as evidence of the record, produced the docket entries and minutes of the court.

Mr. Marbury, for defendant, objected that the docket entries and minutes are not the record, and cited Archb. Cr. Law, 318; Reg. v. Carter, 6 Mod 168. The minutes of another court are not the record. Archb. Cr. Law, 81. The whole record must be given in evidence. 1 Har. Dig. 408; Rex v. Bellamy, 1 Ryan & M. 171; Harrison v. Rowan [Case No. 6,143]; 1 Murph. 156. The style of the court must be truly set forth in the indictment.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection, and said that, it being a record of this court, no copy of the record is necessary to be produced. The court itself needs not to be judicially informed of its record; it is presumed to know its own record, and the minutes and docket entries are mere memoranda to refresh the recollection of the court and the clerk, and by which he is to make up the roll. The record exists, although not reduced to writing in full; and the record is what it ought to be, when correctly extended from the minutes. See Burk's Ex'rs v. Tregg's Ex'rs, 2 Wash. (Va.) 215.

Mr. Marbury contended that it was incumbent on the United States to prove all that the witness testified on that trial, and cited Rex v. Jones, Peake, 38, and Rex v. Dowlin, Id. 171.

THE COURT, however, said (nem. con.) that the law was correctly laid down by Starkie on Evidence (part 4, p. 1142), who says: "It seems, therefore, that, at most, the rule amounts to this, that all the evidence given by the defendant in reference to the particular fact on which perjury is assigned, ought to be proved. And the rule, even to this effect, appears to be a doubtful one; for, when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems, in principle, to be incumbent on him to prove, if he can, that, in other parts of the testimony, he explained or qualified that to which he had so sworn."

Verdict, guilty.

Mr. Marbury, for defendant, moved in arrest of judgment, and the motion was argued by him and Mr. Key; but the defendant forfeited his recognizance, and the court refused to give any opinion upon the motion, unless the defendant should be present.

[1] [Reported by Hon. William Cranch, Chief Judge.]

UNITED STATES (ESLINE v.). See Case No. 4,528.

UNITED STATES (ESPINOSA v.). See Case No. 4,529.

Case No. 15,058.

UNITED STATES v. ESTUDILLO.

[Hoff. Land Cas. 204.] [1]

District Court, D. California. Dec. Term, 1856.

MEXICAN LAND GRANT—BOUNDARIES—"MORE OR LESS"—QUANTITY NAMED IN GRANT.

Where the description contained in a grant, and the circumstances of the case, justify the belief that the intention was to grant all the land included within the boundaries named, then the words "poco mas ó menos" (a little more or less) must be construed as operative to pass to the grantee such fractional part of a league as may be found in excess of the quantity named in the grant.

Claim [by the heirs of Jose Joaquin Estudillo] for one league of land in Alameda county [known as the "Rancho San Leandro"], confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.

Thornton & Williams, for appellees.

BY THE COURT. This claim was confirmed by the board. It has recently under-

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

gone so full an examination in the ejectment suit brought in the circuit court, that I conceive it unnecessary to consider at length the testimony by which its genuineness is established. On the whole, after an attentive consideration of the additional testimony taken in this court, I incline to the belief that the grant issued as alleged by the claimant, although the nonproduction of the original grant and the fact that the order of concession is unsigned, leaves some room for doubt on this point. It appears to me evident that the grantor intended to fix as the limits of the tract, the San Leandro, the sea and the diramaderos or overflowings of the springs. On the fourth side the boundary is designated as "a straight line from the diramaderos to the San Lorenzo, but so drawn as not to include the Indian cultivations." This line was, from the terms of the grant, to be a straight line, and should be drawn to the nearest point of the San Lorenzo to which it can be drawn without including the Indian cultivations; whether that line will thus take a southerly or a south-westerly direction will depend upon the extent of the Indian cultivations. Such has seemed to me, after much consideration, the true construction of the grant and diseño in this case, and such was the view taken of it by the circuit court and by the board of commissioners.

But the difficult question in the case is that presented by the words "poco mas ó menos." It is certainly not easy to say what precise effect they were intended to have. Some operation should clearly be given them, unless they are so hopelessly vague and uncertain as to admit of no definite construction. The grant conveys to the grantee "a part of the land known as 'San Leandro,'" and proceeds to define the boundaries with more than ordinary precision. The third condition states the land of which donation is made to be one square league, a little more or less (poco mas ó menos), directs it to be measured, and reserves the surplus. The quantity of land contained within the boundaries will probably exceed one league by a considerable fraction. Ought then the words "poco mas ó menos" to be rejected for uncertainty, and the grantee in this and all similar cases to be limited to the precise quantity of one league, no matter how small the gore or strip of land in excess may on measurement be found to be; or are we at liberty to construe the words referred to as embracing such fractional part of a league as may be found within the boundaries? The question is one of intention on the part of the grantor. In most instances the description in these grants was obviously intended to designate the tract out of which the granted quantity was to be taken, rather than to indicate the limits of the land granted. In some cases, on the other hand, the boundaries are indicated with much precision, and the mention of quantity is obviously rather a conjectural estimate of its extent than intended as a limitation of the grant to the quantity mentioned; and yet in these cases the sobrante clause is added, apparently from habit, or because no pains were taken to vary the form of the grant according to the circumstances of particular cases. The English equivalent for the words "un sitio, poco mas ó menos," would perhaps be given by the phrase "about one square league." Where under our system a grant specifies the boundaries of the land which it conveys in absolute terms, the subsequent mention of its extent as of "about one square league," with a reservation of the surplus, would probably be inoperative. It may plausibly be argued, that if any part of the grant is rejected for uncertainty, the whole phrase (un sitio, poco mas ó menos) should be rejected, and not merely the indefinite words which terminate it. Certainly, if the expression were in English "about one league," the court would hardly strike out the word "about" and construe the words "one league" as indicating that precise quantity—not to be exceeded by a single foot. It has on the whole seemed to me that where the grant describes in its granting clause a particular piece of land, with definite or ascertainable boundaries, and the condition mentions the extent of the land so granted as of so many leagues, "more or less," the latter expression should be so construed as to embrace such additional fractional part of a league as may on measurement be found within the boundaries. There is certainly some difficulty in determining what quantity shall by this clause be deemed to pass. To allow under a grant of one league, more or less, three or four or five leagues to pass, would evidently be unreasonable, unless the condition be rejected in toto. It would seem equally unreasonable to restrict the grantee to the precise quantity of one league as determined by an accurate survey, and to take from him a gore of land, perhaps a few yards in width, along one side of his rancho, and which is clearly embraced within the boundaries as mentioned in his grant. I think the words should be allowed a reasonable operation, and that where the description contained in the grant, the previous proceedings, and the circumstances of the case justify the belief that the grantor's general intention was to grant all the land within the boundaries, the words "poco mas ó menos" should be construed to embrace such fractional part of a league as might be found to be in excess of the specified quantity.

The circuit court and the board were of opinion that in the grant under consideration, the excess, such as it was shown to be, passed to the grantee, and in that opinion I concur.

A decree must be entered affirming the decision of the board.

[NOTE. The surveyor general of the United States for California caused a survey of the land confirmed to be made, which survey included 7,000 acres, and more, being over 2,500 acres in excess of one square league granted; that

such excess included land occupied and claimed by one Mulford and others, under the laws of the United States; that in October, 1859, the district court entered an order directing the surveyor general to return to the court his said survey, which was done, and exceptions filed thereto. The matter of said survey was pending in said court on the 14th day of June, 1860, and was made subject to the provision of the act of June 14, 1860. Mulford and others, claiming an interest in the survey, filed exceptions in the district court. Mulford, in order to ascertain his right to intervene in his own name, filed a petition to that end, and moved for leave to intervene, which motion was denied. In 1862 a decree was entered in the district court, approving the decree of the surveyor general, which decree was adverse to the interests of Mulford. An appeal taken to the supreme court was dismissed, on stipulation of the parties, and a motion afterwards made, on behalf of Mulford and others, that the stipulation be vacated. The motion was denied. 1 Wall. (68 U. S.) 710.]

Case No. 15,059.

UNITED STATES v. The ETHAN ALLEN.

[3 Am. Law Rev. 372.]

District Court, D. California. 1868.

SHIPPING—VIOLATION OF REGULATIONS RELATING TO PASSENGERS—FINES AND PENALTIES—LIENS.

[1. Under the act of March 3, 1855, known as the "Passenger Act," the fines imposed upon the master by sections 1 and 6, for acts which are therein declared to be misdemeanors, are not made a lien upon the vessel. The provision in the fifteenth section, that the "amount of the several penalties" imposed by the foregoing provisions shall constitute a lien, refers only to the penalties imposed by sections 2–5, 7, and 14, upon both the master and owners, and which are expressly made recoverable by suit.]

[Cited in The Strathairly, 124 U. S. 569, 8 Sup. Ct. 612.]

[2. Even if it be assumed that such fines are made a lien upon the vessel, an action against her to recover them cannot be maintained before the amount thereof, and the master's liability, has been fixed by his trial, conviction, and sentence.]

In this case a libel of information was filed by the district attorney of the United States against the barque Ethan Allen, charging that the master of the vessel took on board at Sydney, Australia, thirty-five more passengers than is "the proportion to the space occupied by them, and appropriated for their use on board said vessel, and unoccupied by stores or other goods, not being the personal baggage of such passengers," as provided in section 1 of the act of congress, approved March 3, 1855 [10 Stat. 715], entitled "An act to regulate the carriage of passengers in steamships and other vessels." Thereupon the vessel was taken into custody by the marshal. Exceptions were filed to the libel.

HOFFMAN, District Judge. The exceptions filed by the claimants to the libel of information present two questions: (1) Is the fine, which, under the first section of the act of March 3, 1855, the master of a vessel, on indictment and conviction, may be sentenced to pay, a lien on the vessel, and recoverable in a proceeding in rem? (2) Can such action against the vessel be maintained before the amount of the fine and the liability of the master have been fixed by his trial, conviction, and sentence?

The section referred to provides that, for certain violations of its provisions, the master "shall be deemed guilty of a misdemeanor," and on conviction thereof shall be fined fifty dollars for each passenger, &c., and may also be imprisoned not exceeding six months. The fifteenth section of the same act provides that the same "amount of the several penalties" imposed by the foregoing provisions shall be liens on the vessel, &c. If the fine imposed by the first section was the only fine or penalty mentioned in the act, it might be supposed to have been the intention of congress to secure its payment by making it a lien on the vessel. The act known as the passenger act contains various provisions for the safety, health, and comfort of passengers. For violation of these provisions two kinds of punishment are denounced. For certain offences mentioned in sections 1 and 6 the master is declared guilty of a misdemeanor, and, on conviction, is to be fined, and may also be imprisoned. For the violation of the provisions contained in the second, third, fourth, fifth, seventh, and fourteenth sections, the master and owners are to forfeit and pay specified amounts, to be recovered by suit in any United States court within the jurisdiction of which the vessel may arrive, &c. It is plain that the provision of the fifteenth section, by which the penalties imposed by the act are made liens on the vessel, applies only to these penalties, for which both the master and owners are liable; and the collection of which it was intended to secure by authorizing a proceeding directly against the vessel. In sections 1 and 6, the punishment of the master is spoken of as a "fine," while section 15 declares to be liens only the "penalties" imposed by the act. It would seem, therefore, that congress intended to distinguish between the "fines" which, on conviction of a misdemeanor, the master might be sentenced to pay, and the "penalties" which, in a civil action, are made recoverable from the owners, as well as the master. The offences for which the master is made criminally liable are wilful violations of the law, in which the owners may have no complicity. The infractions of the act, for which the owners are made responsible in a civil suit, relate to houses over passage ways, to ventilators, camboozes or cooking ranges, water closets, &c., and other arrangements for the comfort and health of the passengers, which it is the owner's duty to provide. For the omission to do so, the owners and the vessel are justly made responsible. I think it clear, therefore, that these, and these alone, are the penalties which, by the fifteenth section, are made liens on the vessel.

If this view be correct, it is unnecessary to consider the second point raised by the exceptions. It may be observed, however, that the only mode by which the liability of the master to a fine, and the amount of the fine, can be ascertained, is that prescribed in the act, namely, his indictment, conviction, and sentence. Until this liability has thus been judicially established, it cannot be said legally to exist; and certainly the court cannot, in a civil action against the vessel, determine how many passengers in excess of the legal number a jury might have found the captain to have taken on board, or what would be the amount of the fine the court by the verdict of the jury would have been called on to impose. Even if the master were first convicted and sentenced, it would be anomalous to hold the owners responsible, through their vessel, for the amount of a fine imposed in a proceeding to which they were not parties, and of which they may have had no notice. On the other hand, if the vessel is sued, and the fine collected from her proceeds before the master is tried, how can the latter, in a subsequent criminal proceeding against himself, set up the fact that the fine imposed on him has already been paid? Is the court to violate the positive requirements of the statute, and impose no fine on the master when found guilty, or is it, by sentencing him to pay the statutory fine, to exact a double payment of the single fine which the law imposes? I think it clear, to construe the fifteenth section as applying to fines which the master may be sentenced to pay, would involve such incongruities and absurdities as render the construction wholly inadmissible.

The exceptions are sustained.

Case No. 15,060.

UNITED STATES v. The ETTA.

[4 Am. Law Reg. (N. S.) 38.]

District Court. D. New Jersey. Sept. Term, 1864.

PRIZE—FORFEITURE—PURCHASE FROM BELLIGERENT.

The sale of a vessel of war by a belligerent to a neutral during hostilities is not valid as against the other belligerent.

[Cited in The Georgia, Case No. 5,349; The Georgia v. U. S., 7 Wall. (74 U. S.) 42.]

In admiralty.

A. Q. Keasbey, U. S. Dist. Atty.

1. The proof shows beyond doubt that this vessel was the rebel privateer Retribution, and was liable to seizure and forfeiture for some, or all of the causes set forth in the libel; and having been so liable, these claimants must show that they have acquired such a title as purges the forfeiture, and gives them the absolute ownership, and the burden of proof is upon them. The Emulous [Case No. 4,479]; Ten Hogsheads of Rum [Id. 13,830]; The Short Staple [Id. 12,813]; The Eliza [Id. 4,346]. Unless they show a valid title their claim must be dismissed, and they have no concern with the disposition of the vessel, or the form of proceeding.

2. They simply allege that they bought in good faith, of a British subject at Nassau, who bought at an auction, under a condemnation by surveyors for unseaworthiness, made at the request of the rebel captain. If we admit this to be true, the question remains, does such a title shield her from forfeiture, and require a return of the vessel?

3. This title is invalid: First. Because she was originally captured by the rebels from the United States; and if they are to be treated as pirates, she was stolen, and no title could pass from them. Second. If they are to be treated as belligerents, and gained title by capture, they used her to aid the rebellion, and she became liable to forfeiture, and any transfer was void under the 6th section of act of July 17, 1862 (12 Stat. 590); and the forfeiture took effect on the commission of the offence, and avoids subsequent sale to an innocent purchaser. Unless the statute is in the alternative, and forfeits the article or its value, the forfeiture relates back to the commission of the offence. U. S. v. Grundy, 3 Cranch [7 U. S.] 337; U. S. v. 1960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Mars, Id. 417; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246; Caldwell v. U. S., 8 How. [49 U. S.] 366; which cases overrule the decision of Judge Story in The Mars [Case No. 9,106]. Third. If the transfer to a neutral purchaser in good faith, was not void by the statute, yet she was prize of war, and no sentence of condemnation is shown; and until such sentence, no valid title can be made by the captors. The Flad Oyen, 1 C. Rob. Adm. 135; Jecker v. Montgomery, 13 How. [54 U. S.] 516, and 18 How. [59 U. S.] 110; The Falcon, 6 C. Rob. Adm. 198; The Kierlighett, 3 C. Rob. Adm. 97; The Dawn [Case No. 3,665]; The Estrella, 4 Wheat. [17 U. S.] 298; The Jos. Segunda, 5 Wheat. [18 U. S.] 338; The Astrea, 1 Wheat. [14 U. S.] 125.

4. The sale of this vessel by an enemy to a neutral was illegal. Such sales of merchant ships, though sometimes held valid in England and this country, are always regarded with extreme suspicion. The Bernon, 1 C. Rob. Adm. 102; The Argo, Id. 158; The Sechs Geschwistern, 4 C. Rob. Adm. 101; Append. to 2 Wheat. [15 U. S.] 30. But the sale of an enemy's vessel of war to a neutral, has been held by Lord Stowell to be absolutely illegal. The Minerva, 6 C. Rob. Adm. 396. And this doctrine is approved by Judge Story in Append. to 2 Wheat. [15 U. S.] 31, and should now be judicially adopted in this, the first case that has arisen in this country.

5. Treating her as the absolute property of the rebels the title of the claimants is invalid (1) because even if they were innocent purchasers without notice, and the rebel captain was the duly authorized master, he had no

power to sell the ship. A sale under condemnation for unseaworthiness can be valid only in cases of extreme necessity, where the vessel cannot be repaired, and it must be optima fide. The Tilton [Case No. 14,054]. And there must be a judicial condemnation, and even then, courts will look behind it into all the facts. 1 Pars. Mar. Law, 66; 2 Pars. Mar. Law, 643, and cases cited; The Flad Oyen; The Dawn, ubi supra. Here was no extreme necessity, no condemnation, but a sham survey, a mere cloak for the desired sale. But the captain was not authorized to sell her under any circumstances. Such a condemnation and sale of a national war vessel would be illegal anywhere. And their title is invalid (2) because the testimony clearly shows that they were not bona fide or innocent purchasers, without notice. They had full notice of her character and history, and were bound to know that they could not acquire a valid title. They could acquire no title if there was even enough to put them on inquiry. The Ploughboy [Case No. 11,230]; The Tilton [supra].

6. To establish this claim would be to form a precedent dangerous to us, and invaluable to the rebels. They would find pliant surveyors in every neutral port, and a ready market for all their prizes, and for all their war vessels when disabled or hard pressed by our cruisers.

In reply to a suggestion by Mr. Edwards that the Sumter and the Georgia had been dismantled and sold, with the sanction of the British authorities, Mr. Keasbey replied, that no judicial confirmation of such sales had taken place, and that if those vessels should be overhauled by our cruisers, they would certainly be seized, and then the very questions in this case would remain to be decided in our courts.

Charles Edwards, for claimants, after objecting to the testimony of the informer, and to certain hearsay evidence, made the following points:

1. The Etta had become British property unconditionally, and the only question should be whether a bonâ fide buyer of a vessel in a neutral port, getting a title through British law, has to look further than liens. She had become British property before they purchased her, and they bought her of a British subject in a neutral port, and complied with all the requirements of British law, to make her a British vessel.

2. She had been condemned as unseaworthy by a competent board of surveyors, and ordered to be sold. The unseaworthiness of the vessel, coupled with the survey, sale, and register to Stead, the purchaser, granted by the custom house at Nassau, vested the property in him (Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick 264); and the British title of the claimants is also perfectly clear. She was purchased bonâ fide and purely with a view to use her in peaceful neutral commerce. She does not appear to have had a warlike character at any time while she was at Nassau. Her seizure was that of a vessel of a country at peace with the United States. It was a tortious seizure, and restitution ought to be made. Talbot v. Jansen, 3 Dall. [3 U. S.] 133.

3. But even if she had borne the character of an enemy, honest change of ownership rubbed off enemy property. Enemy's ship may be bought by a neutral. The Sechs Geschwistern, 4 C. Rob. Adm. 100; The Johanna Emilie, Spinks, Prize Cas. 16, and same case in 29 Eng. Law & Eq. 562; 6 Op. Attys. Gen. p. 652; 7 Op. Attys. Gen. p. 538; The Ocean Bride, Spinks, Prize Cas. 79.

4. The charges against the vessel are of a criminal character, and must be proved by strict legal evidence, and the wrongful actors must be shown to be the owners; this must be done before the United States can have any standing, and yet even when it is done, we insist that she cannot be held.

5. Even if prior wrong committed is proved, yet she is not to be condemned unless she had a criminal character at the time of her seizure. U. S. v. 1960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Mars, Id. 417; The Saunders [Case No. 12,372]; U. S. v. The Manginate, 3 Cranch [7 U. S.] 356; U. S. v. Grundy, Id. 337; Santissima Trinidad, 7 Wheat. [20 U. S.] 283. She had no such hostile character, or warlike vitality about her when first put up for sale at Nassau, but was even for peaceful purposes, unseaworthy.

6. There can be no confiscation under the act of August 6, 1861, [12 Stat. 319], unless upon legal proof of ownership, and illegal acts done by the owners. There is no such proof; and if condemnation is sought under the act of July 17, 1862, the test of property must be of the time of the seizure. There is nothing in the act which forfeits unconditionally from the date of the statute.

7. If the vessel was seized by the rebels and used in piratical aggressions, she is clearly not condemnable; her old ownership would continue. The principle applied to The Chesapeake Case would apply here. Pirates have no ownership. 1 Kent, 184; 2 Dods. 369; 1 W. Rob. Adm. 433; Hagg. Adm. 143.

8. It is not proved that she attempted to run the blockade, but, if she had, she cannot be tried for it on the instance side of this court, nor even in a prize court, for she had ended any such voyage. Man. Law Nat. 328; Wheat. Int. Law, pt. 4, c. 3, § 13; The Santissima Trinidad, 7 Wheat. [20 U. S.] 348.

FIELD, District Judge. This is an information filed by the district attorney, in behalf of the United States, and of Daniel Howell, against the schooner, now called the Etta, but lately known as the Retribution, seized at Jersey City, on the 1st day of September, 1863, for an alleged forfeiture under the laws of the United States. The libel, after reciting the existence of an insurrection

against the government of the United States, and the proclamation of the president of the 15th of April, 1861, proceeds to allege five distinct grounds of forfeiture. (1) That Vernon C. Locke and Thomas Jones, and other persons unknown, have acquired, purchased, sold, and given the said vessel, with intent that the same should be used and employed in aiding and abetting such insurrection, in violation of the 1st section of the act of August 6, 1861 [12 Stat. 319], entitled "An act to confiscate property used for insurrectionary purposes." (2) That in violation of the same section, the said Vernon C. Locke and Thomas Jones and others, being the owners of said vessel, have used and employed her in aid of such insurrection. (3) That the said vessel was the property of Vernon C. Locke and other persons unknown, acting as officers of the navy of the rebels, in arms against the government of the United States, and therefore liable to seizure under the 5th section of the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." (4) That the said vessel was the property of Vernon C. Locke and others, holding certain offices and agencies under the government of the so-called "Confederate States of America," and therefore liable to seizure, under another clause of the same section of the act of July 17, 1862. (5) That the said vessel was purchased, fitted out in whole or in part, and held, for the purpose of being employed in the commission of piratical aggressions and depredations, and in the commission of other acts of piracy, as defined by the law of nations, in violation of the 1st section of the act of August 15, 1861, entitled "An act supplementary to an act entitled 'An act to protect the commerce of the United States, and punish the crime of piracy.'"

A claim is interposed by Gustave Renouard and Byron Bode, who allege that they are merchants, residents of Nassau, New Providence, British subjects, and bonâ fide owners of the said schooner Etta. That in the month of February, 1863, while the said schooner Etta, then called the Retribution, was in the port of Nassau, she was deemed unseaworthy, and a survey was duly had in Nassau upon her by competent shipbuilders and shipping merchants. That in consequence of such survey, and by order of the board of survey, she was in the said month of February, 1863, sold by public auction in Nassau to Thomas Stead of the same place, a British subject, who continued to hold and own her until about the 20th day of July thereafter, when he caused her to be sold by public auction at Nassau, at which sale these claimants bought her, in good faith and for a valuable consideration. That on the 2d day of July, 1863, and on the completion of such purchase, they received a bill of sale of her from the said Thomas Stead, took possession of her, and have been her sole owners ever since, no other persons having any share, interest, or ownership in her. They also allege, that since they have owned the said vessel she has not been engaged in any illegal or piratical voyage, and that they have not been privy to or interested in any prior illegal or piratical voyage, and that they have never used her at any time in contravention of any statute of the United States, or been privy to or interested in any such contravention. It is to the question of the validity of this claim that the arguments of counsel have been chiefly directed.

Now the first, and by far the most important question in this case, according to the view which I take of it, is this, What was the character of this vessel? Was she a merchant vessel, or was she an armed vessel of war in the service of the Confederate States? As the judgment I am to pronounce will depend in a great measure upon the solution of this question, I propose to examine somewhat in detail the evidence bearing upon it. We have in the first place the testimony of Daniel Howell. The first time he ever saw the vessel was at Nassau, in March, 1863. She was at Cochran's Anchorage. He saw her through a glass, while lying there. She appeared like an ordinary schooner with a gun amidships. When she came into the harbor, he went on board of her. She was not then armed, but there were indications that she had been. There was a track on the deck for a swivel gun. It looked as if it had been used for that purpose. She was a fore and aft schooner, and had the appearance of having been altered from a propeller. The filling in at the stern, where the propeller had been, indicated it. He saw the captain on board. He went under the name of Captain Parker, but his real name was Vernon C. Locke. The captain told the witness that the vessel was the privateer Retribution; that she was originally the propeller "Uncle Ben," and had been taken from the Yankees. He said, he had knocked some half dozen vessels of the Yankees to pieces. He showed witness some chronometers which he said he had taken from the Yankees. He had six himself, and his first lieutenant, whose name was Gray, had four or five. But these declarations of Parker, it is said, are nothing but hearsay evidence, and therefore inadmissible. This may be so, and even if they were not, we should feel disposed to receive with many grains of allowance, the boastful account given of his exploits by this rebel captain. But what the witness saw himself is certainly evidence. There were the indications that the vessel had been originally a propeller; that she had been altered to a schooner; that she had been armed. There were the chronometers. They told their own tale, of American merchantmen plundered and destroyed. They were the customary trophies of rebel privateers. The witness saw the vessel every day until the latter part of April, when she went out, as he says, to run the blockade. She had then another captain on board named Jones. She went out

to go to Wilmington, as the captain said. She cleared at the custom house for St. Johns, "as all the runners of the blockade do." I quote the language of the witness. She was loaded with salt; the witness might have added, as all the blockade runners are. The witness was on board, and saw the salt. About ten days after she came into port again. She was in the same condition in which she had gone out, minus her salt. The witness went on board of her. She had lost her cargo. The captain told him, that just as he got out, a steamer sighted him, and in running away from her he shipped so much sea, that he lost all his cargo. Now here again, what the captain told him may be hearsay, but what he himself saw is competent evidence. She cleared for St. Johns. She had a cargo of salt on board. She came back in ten days without it. Such an explanation of these facts, as the captain is represented as giving, is certainly not improbable, and might, perhaps, be fairly inferred even without any direct evidence. This witness also states that when the vessel first came to Nassau, the captain told him he was going to get her condemned and have her sold; that it was a very easy matter to get a vessel condemned. Now it turns out in point of fact, that the vessel was condemned; and the process by which it was effected shows that the operation was not a difficult one.

But, it is contended by the counsel for the claimants, that Howell is an informer, and has, therefore, a direct interest in procuring a sentence of condemnation; and on that account is an incompetent witness. But I do not understand this to be the rule of law. On the contrary, it is laid down by Greenleaf, in his Treatise upon Evidence, that the fact of a witness for the prosecution being entitled to a reward from the government upon conviction of the offender, or to a portion of the fine or penalty inflicted, is not admitted as a valid objection to his competency. "The public," he observes, "has an interest in the suppression of crime and the conviction of criminals. It is with a view to stir up greater vigilance in apprehending, that rewards are given, and it would defeat the object of the legislature, to narrow the means of conviction by means of those rewards, and to exclude testimony which otherwise would have been admissible:" 1 Greenl. Ev. § 412. The interest which this witness has in the event of the suit, may detract somewhat from the credit to which his testimony is entitled, and may cause it to be received with a certain degree of jealousy. But I see no reason to doubt the substantial truth of his statements. In all important particulars, they are abundantly confirmed by the testimony of other witnesses.

Eppes Sargeant lives at Nassau, and is clerk of the Dry Dock in that city. Thinks the vessel came in the last of February or first of March, 1863. She same in at Cochran's Landing and lay there some time. He saw her when she came into the harbor. He saw a circle on her, where it appeared a gun had traversed. It was where they carry pivot guns. He knew of no other purpose for which such a mark could exist. She was advertised for sale by Adderly & Co., as the "Confederate Schooner Retribution." Witness saw the advertisement. Adderly & Co. were agents for most of the rebel steamers. The Retribution was universally known and spoken of as a rebel privateer. From a conversation he had with Mr. Bode, one of the claimants, witness supposed he knew all about her. Witness remarked to him, on learning she was coming to New York, that he bought her on purpose to make trouble between the two governments, knowing that she had been a privateer, and that she probably would be seized as soon as she arrived. His answer was, "If they seized her, he would make them pay well for her." He did not deny that he knew she had been a privateer.

Thomas Samson is a detective in the treasury department at New York. He was in the Bahama Islands in the spring of 1863; was sent by board of underwriters and marshal to look after blockade runners. He first saw the schooner Retribution on the south side of Long Key. She was a rebel privateer, and armed. Remembers distinctly seeing one, and he thinks two, guns on board of her. Saw two of the officers of the vessel, the first and second lieutenants. Had a conversation about the difficulty between the North and the South. The captain of the Retribution said, "they had done nothing more than the North had." This was about the 15th of February, 1863. The witness next saw the Retribution, about a month afterwards, at Cochran's Anchorage, about five miles from the city of Nassau. She had no guns then. The Retribution was publicly and generally known at Nassau as a rebel privateer. It was as notorious as anything could be. Nobody doubted it. Such is an outline of the evidence adduced on the part of the libellants touching the character of this vessel. Is it contradicted by the witnesses who have been examined on the part of the claimants? So far from this, it is confirmed in almost every particular.

Byron Bode, one of the claimants, on his cross-examination says: "The Etta was known as the 'Retribution,' when she arrived at Nassau. I heard that she had been a propeller, and altered to her present state and shape as a schooner."

Charles I. Marshall says: "I heard that the Etta had been a privateer. I believe it was publicly known at Nassau."

George D. Harris says: "I believe the vessel to have been once employed in the service of the Confederate States as a privateer, under the name of the 'Retribution.' I think it probable it was known at Nassau, although I really don't know that it was. I knew Captain Parker in command of her when she was the Retribution. She was called the 'Retribution' when she arrived." In the copy of the

register granted to Thomas Stead, she is described as foreign built—her name "Etta"—and her foreign name "Retribution."

William Sawyer, who was the harbor master at Nassau, and one of the surveyors upon whose report she was condemned, says: "The vessel was called the 'Retribution' when I saw her first. It was said then that she was a Confederate vessel of war."

The testimony of Edward B. A. Taylor too upon this point is very significant, and must, I think, remove all doubt as to the true character of this vessel. He was the acting receiver general, and registrar of shipping at Nassau, and was examined as a witness upon the part of the claimants. "The Retribution," he says, "did not enter as a trader in this port of Nassau. She was treated as a Confederate vessel of war. Such vessels do not pass the receiver general's office at all."

From all the evidence then in this case, it is impossible to resist the conviction, that this vessel was an armed vessel of war in the service of the Confederate States. She was probably as well known at Nassau, as the Sumter at Gibraltar, or the Georgia at Liverpool. Could then the claimants, who are British subjects residing at Nassau, acquire a valid title to her, by a bill of sale, or in any other way? It is really the case of a purchase by a neutral, of a vessel of war belonging to a belligerent, while lying imprisoned in a neutral port, from which there was no escape without peril of capture. I use the terms "neutral," and "belligerent," as descriptive of the relation which subsists between the claimants and the Confederate States, because, by her proclamation of neutrality, of the 13th of May, 1861, the queen of England recognised "hostilities as existing between the government of the United States of America, and certain states styling themselves 'The Confederate States of America' "; and the supreme court of the United States have decided, that after such an official recognition by the sovereign, a citizen of a foreign state is estopped from denying the existence of a war with all its consequences as regards neutrals. Prize Cases, 2 Black [67 U. S.] 669.

This question, as to the right of a neutral to purchase an enemy's vessel of war, would at any time, and under any circumstances, be a question of importance; but it derives an especial interest from the nature and character of the war in which we are now engaged, and which would render the exercise of such a right, supposing it to exist, peculiarly liable to abuse. It is a matter of some surprise, that a question confessedly so important, and one too so likely to arise, should not have received a larger share of attention from writers on international law, and that it should not have been the subject of more frequent judicial determination. And yet, with the exception of the case of The Minerva [6 C. Rob. Adm. 396], decided by Lord Stowell in 1807, and which has been silently adopted as an authority by subsequent text writers, it has never, so far as I have been able to ascertain, been the subject either of legal discussion or of legal adjudication.

With regard to the purchase of merchant vessels belonging to a belligerent the case is otherwise. The question has frequently arisen, and there are repeated decisions in reference to it in the English courts of admiralty. The law, however, upon this subject varies in different countries. The 7th article of the French regulations of the 26th of July, 1778, which is still in force, provides, that enemy-built vessels cannot be reputed to belong to neutrals, unless there is documentary proof found on board, that the sale to a subject of an ally or neutral was made before the commencement of hostilities. This regulation is thus defended in a recent French treatise, in answer to the question, of what importance it is, whether enemy's vessels have been sold to neutrals before or after hostilities. "Belligerents, in desiring in maritime wars to appropriate to themselves ships of their enemies, do not wish that the latter should, to avoid capture and confiscation, realize the capital which their vessels represent. All enemy's vessels pursued by cruisers, and in danger of being captured, would take refuge in neutral ports, and in order that they might not be captured, their owners would sell them to neutral citizens." See Lawr. Wheat. Int. Law, 581, note. The Russian rule would seem to be the same as the French. In England, however, the validity of such purchases has been sustained, not however without much discussion, and some hesitation of opinion. They are allowed to be legal, but obnoxious to much suspicion, and courts will always feel it to be their duty to look into them with great jealousy. The Bernon, 1 C. Rob. Adm. 102; The Sechs Geschwistern, 4 C. Rob. Adm. 101. Such too would appear to be the law in the United States. 2 Wheat. [15 U. S.] Append. 450; 6 Op. Attys. Gen. p. 652; 7 Op. Attys. Gen. p. 538. Of course, in countries like France and Russia, where the transfer of an enemy's merchant ships is held to be illegal, the purchase of ships of war belonging to an enemy must be deemed illegal also. For every possible reason which could be assigned for the one, would apply with tenfold force to the other. But how is it in England and the United States, where the purchase by a neutral of an enemy's merchant vessel is not in general illegal? Is the right of purchase confined to merchant vessels, or does it extend also to vessels of war? There is, as I said before, but a single adjudged case, in which the question seems to have arisen. It is the case of The Minerva, decided by Lord Stowell, and reported in 6 C. Rob. Adm. 396. It was the case of a vessel under Kniphausen colors, and claimed by Count Bentinck, Lord of Kniphausen, as a ship purchased by him, in April, 1807, in the port of Bergen. She had

been a Dutch ship of war, belonging to the Dutch East India Company, and had been chased into North Bergen after an action with a British frigate, and had been lying in that port for nearly three years. Count Bentinck was allowed to appear in person before the court, and explain the circumstances of the transaction. He stated that the vessel had been long ago disposed of, at the breaking up of the Dutch East India Company, to individuals, on whose account she had since continued in the port of Bergen; and that it was from these persons, and not from the government of Holland, or from any public company, that the purchase was made. It was also stated that the vessel was purchased for the purpose of being employed in the West India trade to St. Thomas; and that she was on her way from Bergen to Kniphausen when she was captured. Here then was the case of a vessel, not belonging to the government of Holland but to the Dutch East India Company; a vessel that had been lying for nearly three years in a neutral port; that had been sold, a long time before, upon the breaking up of the company, to individuals, from whom she was purchased by a sovereign prince for the purpose of being employed in a legitimate trade. If, under these circumstances, the purchase was illegal, it would be difficult to imagine any possible case, in which the transfer of an enemy's war vessel to a neutral could be deemed lawful. And yet Lord Stowell rejected the claim, and held the transaction not to be legal. "The first question," he says in delivering his judgment, "is whether such a purchase can be legally made? I am not aware of any case in this court, or in the court of appeal, in which the legality of such a purchase has been recognised. There have been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which after much discussion and some hesitation of opinion, the validity of the purchase has been sustained. Such cases, I believe, did occur during the first war, in which I attended this court or the court of appeal. But whether the purchase of a vessel of this description built for war, and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerents, and driven into a neutral port for shelter, whether the purchase of such a ship, I say, can be allowed, which shall enable the enemy so far to rescue himself from the disadvantages into which he has fallen, as to have the value at least restored to him by a neutral purchaser, is a question on which I shall wait for the authority of the superior court before I admit the validity of such transfer. That a private merchant could lawfully do this, I shall not hold, till I am so instructed by the superior court. That a sovereign prince should embark in such a transaction, unless under such guards as would effectually remove all possibility of abuse, is what, but for the instance before us, could scarcely have been expected. Some communication, at least we might suppose, would be made to the belligerent government, accompanied with a disclosure of every circumstance of caution that should exclude the suspicion of what is always to be apprehended, the danger of such a vessel finding her way back again into the navy of her own country."

The judgment in this case was not appealed from; its correctness, so far as I know, has never been called in question; and the principle involved in it has since been adopted by English text-writers as a settled rule of international law 2 Wildm. Int. Law, 90; Hasack, Rights of Neutrals, 81; Hazlitt & R. Manual Int. Law, 209.

In this country the question seems never to have received a judicial determination; but in the appendix to the second volume of Wheaton's Reports, which is now known to have been written by Judge Story, after stating that the purchase by neutrals of enemies' ships during war is not in general illegal, the author adds: "But the right of purchase by neutrals, extends only to merchant ships of enemies; for the purchase of ships of war belonging to enemies is held to be invalid." And the case of The Minerva is referred to as an authority for this position. We have then the highest legal authority, both in England and this country, for the doctrine, that the purchase by a neutral of an enemy's ship of war is illegal. When Lord Stowell and Judge Story agree, upon a question touching belligerent rights and neutral responsibilities, he must be a bold man that would venture to differ. But the doctrine is sustained by reason as well as by authority. And perhaps no case could furnish a better illustration of the wisdom and propriety of the rule, than the one now under consideration. Here is an armed vessel, in the service of the Confederate States, which after preying upon our commerce with a boldness and success which almost commands admiration, takes refuge from the vigilance of our cruisers in the neutral port of Nassau. Deterred from venturing out for fear of capture, she is stripped of her armament, purchased by a citizen of Nassau, obtains a British register under a new name, clears for a neutral port, and then endeavors to run the blockade, and make her way back to a hostile port, where she may be repaired and refitted as a vessel of war, and again sally forth upon a new career of plunder and depredation. A vessel under such circumstances cannot be a legitimate subject of commercial speculation. A neutral who purchases her, whatever may be his motives, does it at his peril. He may design to devote her to peaceful commerce, but the warlike character once impressed still adheres to her. He may call her the "Etta," but she is still the "Retribution," and by that name will be known and remembered.

The counsel for the claimants, in the course of his very able argument, alluded to the

cases of the "Sumter," and the "Georgia," both of which had been Confederate vessels of war, and both of which had been transferred to neutrals. The inference that he would draw from these instances is, that such transfers could not have been illegal. But this is assuming the very point in controversy. When the legality of those transfers shall have been affirmed by our judicial tribunals, then, and not till then, can an argument in favor of the claimants be derived from them. On the contrary, these transactions only show the frequency and the facility with which such transfers are made, and ought therefore to admonish us of the danger of sanctioning such a practice. Let it be understood that such transactions are lawful, and we may look to see every rebel privateer, chased by our cruisers into a neutral port, emerging in a few days clothed with a British register—decked in new colors—and called by a new name.

But it is insisted that this vessel, after her arrival at Nassau, was, upon a survey, found to be unseaworthy, and thereupon sold at public auction, and that Stead, the purchaser, thereby acquired a valid title, which he afterwards transferred to the claimants. That there are circumstances under which the master of a merchant vessel may, in the absence of the owner, and upon a report by surveyors of her unseaworthiness, sell her, so as to vest the property in the purchaser, is undoubtedly true. But this is only in a case of supreme necessity, which sweeps all ordinary rules before it. It must be a necessity which leaves no alternative, which prescribes the law for itself, and puts the party in a positive state of compulsion to act. The master in such a case acts for the owner, because he has no opportunity to act for himself. If the property could be kept safely until he could be consulted, and have an opportunity in a reasonable time to exercise his own judgment as to the propriety of a sale, the necessity to act for him would cease. It is not enough that the master acts in good faith and for the interest of all concerned, if the requisite necessity for the sale be not clearly made out. Not even the sanction of a vice-admiralty court, much less the report of surveyors, will aid the sale when the requisite necessity is wanting. The master is employed only to navigate the ship, and the sale of it is manifestly beyond his commission, and becomes the unauthorized act of a servant, disposing of property which he was intrusted only to carry and convey. This is the doctrine of all the cases upon the subject, both in England and in this country, and is sanctioned by the very highest authority: Idle v. Royal Exchange Assur. Co., 8 Taunt. 755; Read v. Bonham, 3 Brod. & B. 147; Robertson v. Clarke, 1 Bing. 445; Hall v. Franklin Ins. Co., 9 Pick. 466; The Tilton [Case No. 14,054]; 3 Kent, Comm. (2d Ed.) 173.

Now it would not be difficult to show, from an examination of the evidence in this case, that no such necessity existed as would have justified the sale of this vessel, supposing it to have been an ordinary merchant ship. But no such examination is necessary, for the vessel in question was, as we have already seen, not a merchant vessel at all, but an armed vessel of war in the service of the Confederate States. That the officer in command of a war vessel of a belligerent can, under the pretence of her being unseaworthy, have her condemned and sold in a neutral port, and that a valid title can thus be acquired to her, is a proposition too monstrous to merit a moment's discussion. The relation in which such an officer stands towards those by whom he is commissioned and employed, is so entirely different from that which subsists between the master of a merchant vessel and the owner, that no rule drawn from the one can, under any possible circumstances, be applicable to the other. And even admitting that, as between the captain of this vessel and her owners, the sale of her under the circumstances was justifiable, still it was a transfer to a neutral of a war vessel of a belligerent, and, therefore, as I have endeavored to show, illegal. Surely, if the owners of this vessel could convey to Stead no valid title to her, it will hardly be pretended that the captain, acting as he always does in such cases as agent for the owners, could do so. If then the sale of this vessel to Stead conveyed no title to him, he of course could transmit no title to the claimants.

Whether the claimants, Renouard and Bode, acted in good faith in the purchase of this vessel, it is unnecessary to inquire. That they are respectable merchants of Nassau, that they paid a valuable consideration for her, and that they had no intention of employing her for any illegal purposes, are cheerfully admitted. This is more, however, than can be said with regard to Stead. There is too much reason to believe that his object in purchasing the vessel was to employ her in running the blockade. But whether this be so or not, it is a matter of no importance, in the view which I have taken of this case. He had no right to purchase her for any purpose. And as to Renouard and Bode, they must have known that this had been a war vessel in the service of the Confederate States, and they ought to have known that for this reason, she was not a legitimate object of commercial speculation. The claim is rejected.

Case No. 15,061.

UNITED STATES v. EVANS.

[19 Int. Rev. Rec. 118.]

District Court, E. D. Tennessee. April, 1874.

COUNTERFEITING—WITNESSES—DETECTIVES.

George Andrews, U. S. Dist. Atty.

E. C. Camp, for defendant.

EMMONS, District Judge, alluding to the claim of forbearance made for the defence because of their refusal to impeach the witness Dyer and show that he too had been engaged in passing counterfeit money, said in substance that the guilt of the defendant was proved quite irrespective of Dyer's credibility. No logical connection was seen between the assumed fact of his complicity and the punishment due to the prisoner. His honor saw in it only an additional reason for increased severity upon this whole class of offenders, so many of whom have been convicted and plead guilty during the present term. It is the temptations which they present to the young and inexperienced which bring to the bar so many novices in crime for whom a larger sympathy is felt and upon whom, consistent with justice, lighter punishment may be inflicted. The witness Dyer is a young man of prepossessing appearance. If we may assume the worst which is said of him it proves only that one more victim of these old dealers in counterfeit money has fallen a prey to their arts. His parents and kindred, or citizens who are interested in the safety of society, will fail to perceive in the fact that he had fallen any mitigation of the offence of the old and hardened criminal who had been one of the instruments of his fall.

The instrumentalities by which so large a number of offenders have now been brought to justice, the detective force of the government, have been but slightly referred to in the appeal made to the court; and certainly not in any manner demanding the dissent of the court on this occasion. As this case, however, owes its presence and result here to the skill and diligence of governmental employees, and as such agencies have been so frequently a subject of severe comment, he deemed it a duty briefly to call attention to the demonstration which the history of the present term afforded of the efficiency and beneficence of the system.

It had abundantly appeared that for many years in this district the passing of counterfeit money had become a methodized business. It had its manufacturers, its wholesale and retail dealers, many of whom were as well known and recognized in the community as the miller and the merchant. Magistrates, county clerks, members of the bar, and otherwise apparently respectable business men kept each other in countenance in the commission of this unpunished crime. Although arrests sometimes took place the most authoritative information warranted the declaration that convictions had not followed. The astounding and mortifying fact was presented that while public sentiment produced activity in the punishment of other high crimes this class of offenders perpetrated their wrongs with such impunity and frequency that the ordinary business of the country was seriously impeded. The numbers who were joining their ranks were rapidly increasing. Leading citizens appealed to the government for protection. Numerous suspected persons were pointed out, but proof of overt acts was found to be impossible. A detective force was sent to discover the necessary evidence for conviction. By a series of simple, yet skillful plans, large numbers of guilty parties were induced to offer their criminal wares for sale and display their possession in circumstances which removed all difficulty of proof. The gratifying result is that numerous old offenders, with still greater numbers of lesser criminals, whom they had deluded into their service, have been convicted and punished. That the agency has been efficient and successful is beyond all doubt. The only criticism which the court or a watchful public, jealous of the citizens' rights and careful to guard their reputation, can make of it is the danger that innocent parties may be seduced into crime by the agents of the government. His honor said he had examined the plans and methods of this action intended to prevent the possibility of such a consequence. Detail would be out of place here. All that would be appropriate would be to refer to actual results before us—to that which is proved by the records of the court. The extraordinary fact was true, that of the great number of indictments which stood for trial at the present term, pleas of guilty had been entered in nearly all, and in the few which have been brought formally before a jury, so clear and convincing was the proof that in not one of them had an address of any kind been made by counsel for the defence. The citizen might look upon this protective and necessary work without any fear that in the extent of its success and the rapidity of its execution a single citizen has been sacrificed by inadvertence or unscrupulousness.

If the detective force would continue this conscientious carefulness, adhere rigidly to those rules for their guidance so well calculated to insure the safety of their action, the time would soon come, if it had not already arrived, when counsel for the prisoner could no longer by a contemptuous emphasis of the word detective, and a sneering manner cast odium upon the calling. It will be as seldom attempted as the like unjust purpose now is in reference to the word judge. He believed there were few more useful arms of the public service than that which had so speedily brought to punishment so large a number of dangerous offenders.

Case No. 15,062.

UNITED STATES v. EVANS et al.

[Crabbe, 60.] [1]

District Court, E. D. Pennsylvania. Dec. 5, 1836.

UNITED STATES—PRIORITY OF CLAIM—PARTNERSHIP ASSETS.

It seems that where one of a partnership is indebted to the United States, and an assignment is executed of the joint and several property of the partners, the United States are not entitled to a preference over the joint creditors for the payment of such individual debt out of the assets of the partnership.

Jonah Thompson being indebted to the United States as surety on sundry bonds of Samuel Thompson, given in the years 1825 and 1826, became an insolvent on the 7th May, 1827, and was released by the secretary of the treasury on the 13th December, 1832. See United States v. Thompson [Case No. 16,487]. On the 25th May, 1827, Jonah and George Thompson, then, and for some time before, trading together, executed an assignment of their joint and several property. Certain joint assets came into the hands of the defendants [Joseph R. Evans, William Yardley, and James Nevins], as assignees, and this suit was commenced to test the right of the United States to a preference over the joint creditors for the payment of the individual debt of Jonah Thompson, on the bonds above stated, out of the joint assets of the partnership.

Mr. Gilpin, U. S. Dist. Atty.

This case presents less a question of fact than of law. The affairs of the estate have been properly managed by the defendants; and the question is whether the United States have a right to the assets now in the assignees' hands, in preference to other creditors, under the various laws on that subject. Act Aug. 4, 1790, § 45 (1 Story's Laws, 147 [1 Stat. 169]); Act March 3, 1797, § 5 (1 Story's Laws, 465 [1 Stat. 512]); Act March 2, 1799, § 65 (1 Story's Laws, 630 [1 Stat. 676]).

Samuel and Jonah Thompson became indebted to the United States, the one as principal and the other as surety, on various custom-house bonds, amounting in all to $10,585.43, on which the interest up to the present date amounts to $5,346.11. On the 7th May, 1827, Jonah Thompson became insolvent. On the 25th May, Jonah and George Thompson made a voluntary assignment, for the benefit of their creditors, to William Sansom and others. A partnership then existed between these assignors, and Jonah Thompson also carried on business in his own name. The assignment was of the joint and separate property, to pay the partnership and the personal debts. The assignees, however, refused to accept this assignment, and on the 16th November, 1827, they assigned over the property to the present defendants, on the same trusts. Under this assignment, a large sum of money passed into the defendants' hands. The gross amount received has been $81,678.25, and the claims thereupon which we admit are to be preferred to that of the United States are $70,920.08. This leaves the sum now in controversy at $10,758.17. To this last amount, under the laws which have been cited, we contend that the United States are entitled.

J. M. Read, for defendants.

If the United States are entitled to the money the defendants have received, we make no question as to where it came from, whether from the separate estate of Jonah Thompson, or the joint estate of both assignors. All the proceeds of the real estate of Jonah Thompson have been paid over to the United States, and there is no claim on that account. The personal estate of both assignors, received by the defendants, amounts to $140. And the whole of the sum now in question, with the trifling exception just mentioned, arose from the joint property. The question, then, is whether the United States, on bonds in which Jonah and George Thompson never appeared together, nor George Thompson at all, are to be paid out of the partnership funds of those parties, in preference to partnership creditors. Partnership property is never liable to pay a separate debt until all the joint debts are paid. United States v. Astley [Case No. 14,472]; Tom v. Goodrich, 2 Johns. 213; Rex v. Sanderson, 1 Wightw. 50, 6 Cond. Exch. 443; U. S. v. Hack, 8 Pet. [33 U. S.] 271.

Under an agreement of counsel that leave should be reserved to move to set the judgment aside, on the question of law, HOPKINSON, District Judge, charged the jury as follows:

The balance which is the subject of controversy, to wit, $10,758.17, arose from the sale of partnership property belonging to the firm of George and Jonah Thompson. This partnership is insolvent, and its assets insufficient to pay the joint debts. The question, then, is whether the fund arising from partnership property is to be applied to the debt of Jonah Thompson, one of the partners, in preference to the creditors of the partnership. I am of opinion that the United States are not entitled to this preference, and that your verdict should be for the defendants.

Upon this charge a verdict was given for the defendants, and judgment nisi entered thereon. The United States subsequently paid the costs, and made no motion to set aside the judgment.

[1] [Reported by William H. Crabbe, Esq.]

Case No. 15,063.

UNITED STATES v. EVANS.

[1 Cranch, C. C. 55.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

INFORMATION—AMENDMENT.

An information may be amended.

The information was amended by filling up the blank of the date of the commission of the offence. The same amendment was also permitted in the cases of U. S. v. Howard, U. S. v. Smith, and U. S. v. Zimmerman [unreported]. Leave was given to the defendants to plead de novo; and a continuance allowed at their request.

THE COURT, also, in this case, gave leave to amend the information, by describing the particular kind of liquor sold.

Case No. 15,064.

UNITED STATES v. EVANS.

[1 Cranch, C. C. 149.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

CONSTABLE—INDICTMENT—BOND.

Indictment lies for acting as constable without giving bond.

Indictment [against Evan Evans] for acting as constable without giving bond agreeably to the fourth section of the act of May 3, 1802 [2 Stat. 194].

Verdict, guilty of serving warrants, but not of serving any execution.

Mr. Peacock, for defendant, contended that the object of the law was only for the security of creditors as to receipt of money on execution.

But THE COURT (nem. con.) was of opinion that the omission to give the bond was a violation of duty; and fined the defendant one dollar.

Case No. 15,065.

UNITED STATES v. EVANS.

[4 Cranch, C. C. 105.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

INDICTMENT—KEEPING FARO TABLE—STATUTORY PENALTY—HOW RECOVERED.

The penalty for keeping a faro table in a place occupied as a tavern, contrary to the Maryland act of 1797, c. 110, may be recovered by indictment.

The defendant was convicted upon an indictment for keeping a faro table at a place occupied as a tavern, contrary to the Maryland act of 1797, c. 110.

Mr. Dandridge, for defendant, moved in arrest of judgment, and contended that the verdict does not authorize the court to give judgment for the penalty; but only creates a cause of action in favor of any one who will sue upon that verdict for the penalty. The second section of that act says: "On pain of forfeiting, for every offence, the sum of fifty pounds, upon conviction thereof by indictment or confession in the county court." The fifth section says, that "one moiety of the forfeiture accruing or becoming due under this act shall be applied to the use of the county, and the other moiety to the person or persons who shall sue for the same." By the act of congress of the 3d of March, 1801 (2 Stat. 115,) Burch's Dig. 233, it is enacted "that all fines, penalties, and forfeitures, accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered, with costs, by indictment, or information in the name of the United States, or by action of debt in the name of the United States and of the informer; one-half of which fines shall accrue to the United States, and the other half to the informer," etc.

Mr. Dandridge cited Com. v. Richards, 1 Va. Cas. 133, in which case it was decided, by the general court, that the forfeiture of $150, declared by Act 1797, c. 2, § 3, cannot be recovered for the use of the commonwealth by information; the forfeiture being given "to the person who will sue for the same." Rex v. Luckup, 2 Strange, 1048, that upon a conviction under St. 9 Anne, c. 14, for cheating at play, the court could not give judgment for five times the value of the thing won; the act having provided that the penalty should be recovered by action "by such person as will sue for the same." St. 30, Geo. I. c. 24.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the motion in arrest of judgment, because the forfeiture accrues upon the conviction, and the conviction is to be by indictment, according to the express words of the act of Maryland of 1797, c. 110, as well as by the act of congress of the 3d of March, 1801 (2 Stat. 115). No other mode of recovering the penalty is given by either of those statutes; and the practice has been, uniformly, both in Maryland and in this District, to render judgment for the penalty, upon conviction upon indictment under that statute.

The counsel for the defendant contended, that, as half of the penalty was, by the statute of Maryland, to be applied to the use of the county, and the other half to the person who should prosecute and sue for the same, the penalty could only be recovered by an action of debt by the informer and the United States. But the statutes upon which the cases which were cited by the defendant's counsel were decided prescribed the mode of recovery to be by any person who will sue for the same. Such is also the provision of the test act, 25 Car. II. c. 2, § 5, upon which the information was founded in the

[1] [Reported by Hon. William Cranch, Chief Judge.]

case of Story v. Pleasaunce, 1 Lutw. 54. Motion overruled. See, also, U. S. v. Simms, 1 Cranch [5 U. S.] 252.

Case No. 15,066.

UNITED STATES v. The EXPRESS.

SAME v. TWO HUNDRED AND FORTY BUNDLES OF CIGARS.

[21 Law Rep. 41.]

District Court, S. D. New York. 1858.

CUSTOMS DUTIES — DISCHARGE OF GOODS — MANIFEST—POST ENTRY.

Discharge of cargo into lighters not an unloading under the statute. After such discharge, by general order, consignee should be allowed to make a post entry of goods not on the manifest.

Proceedings to forfeit vessels and cigars on the ground that the cigars, exceeding $400 in value, were unloaded from the vessel without any permit from the collector, contrary to the fiftieth section of the collection act of March 2, 1799 [1 Stat. 665]. The facts were, that when the vessel arrived she was detained at quarantine, and her cargo was ordered to be discharged into lighters—some cigars under special permit, and the rest of the cargo under a general order. All the cargo of the vessel was thus discharged from the Express into lighters, under the inspection of custom house officers, and brought to this city; but before it was landed, the consignees, discovering that the cigars in question were not upon the manifest, applied to the collector to make a post entry of them.

Held, that upon the facts in evidence the act of removing the cargo into lighters was not an unloading and delivery of them from the barque, coming reasonably within the purview of the prohibition of the statute (1 Stat. 665, § 50), the separation from the vessel not taking them from her charge and control (U. S. v. Smith [Case No. 16,343]). That what was done in respect to these cigars, fairly falls within the scope of the authorization of the general order issued to the consignee. The informations dismissed, and vessel and cigars ordered to be discharged.

Case No. 15,067.

UNITED STATES v. FAIRCHILDS.

[1 Abb. U. S. 74; [1] 1 Am. Law T. Rep. U. S. Cts. 58; 7 Am. Law Reg. (N. S.) 306; 7 Int. Rec. 101; 15 Pittsb. Leg. J. 343.]

District Court, W. D. Michigan. Oct. Term, 1867.

CONSTITUTIONALITY OF BOUNTY AND PENSION LAWS—CLAIM AGENT'S COMMISSION.

1. Under the constitutional authority "to raise and support armies" (Const. art. 1, § 8), congress has power to bestow bounties and pensions upon those who may engage in the military service of the United States.

2. This power embraces and authorizes an enactment making it an offense punishable in the national courts, to detain from a military pensioner any portion of a sum collected in his behalf, as his pension.

[Cited in U. S. v. Hall, 98 U. S. 356.]

3. Sections 12 and 13 of the pension act of July 4, 1864 (13 Stat. 389), limiting the fees of agents and attorneys for making out and causing to be executed the papers necessary under the act, and providing that the receiving of any greater compensation than that prescribed shall be punishable as a misdemeanor, are, therefore, constitutional.

[Cited in U. S. v. Marks, Case No. 15,721.]

Demurrer to an indictment.

The defendant, James H. Fairchilds, was indicted for having wrongfully withheld from one Penrose, a pensioner of the United States, a portion of a sum which the defendant, acting as agent for Penrose, had collected from the pension office, as being a pension to which Penrose was entitled. The indictment was founded upon sections 12 and 13 of the pension act of July 4, 1864 [13 Stat. 389], the substance of which is as follows: That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for services under the act than that prescribed, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance under the act for a percentage on the amount of the claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due, shall be deemed guilty of a high misdemeanor, punishable by fine or imprisonment. The sum withheld was claimed and retained by defendant as his commission for services rendered by him to the pensioner.

[The indictment charges that Fairchilds wrongfully withheld $64.52 from Penrose, a pensioner, part of $174.52 collected and received by Fairchilds as pension money allowed and due Penrose from the United States. Penrose is a discharged soldier, and as such was entitled to a pension. He employed Fairchilds to obtain such pension, which Fairchilds did, and received from the pension office $174.52. Of this he paid Penrose $110, retaining and withholding the balance as compensation for services.] [2]

The defendant demurred to the indictment upon the ground that the facts alleged did not amount to any offense.

A. D. Griswold, Dist. Atty., and E. S. Eggleston, for the United States.

Lucius Patterson, for defendant.

WITHEY, District Judge. It is argued that congress has no power, under the constitution, to define as an offense that which is charged against Fairchilds. The question is, therefore, one of the constitutional power of congress. Sections 12 and 13 of the act of July 4, 1864, are claimed to be unconstitutional.

[1] [Reported by Benjamin Vaughn Abbott, Esq., and here reprinted by permission.]

[2] [From 7 Am. Law Reg. (N. S.) 306.]

It is argued by the learned counsel for Fairchilds that Fairchilds was the agent of Penrose and not of the government, and the district attorney does not deny the proposition. From this it is claimed that the transaction was purely between private citizens of a state, affected them only, and in nowise the United States government, nor any officer or agent of the United States; that these citizens were at liberty to make such bargain as they pleased in reference to the amount of compensation for services rendered by one for the other, whether that service related to pension money or otherwise; and that no law passed by congress can, in any regard, control or affect the parties or their rights or dealings under such contract. That when once the pension office paid the money over to Fairchilds, as the agent of Penrose, it was the property of Penrose, and he alone can call his agent to account for the same; and if any restriction can be placed upon the question of compensation of the agent, or any penalty be imposed on the agent for retaining or wrongfully withholding the whole or any portion of such moneys, only state laws can impose such restrictions and penalty. That there can be no offense by a citizen which both sovereignties can punish; if the one has the power, the other has not. That the state may exercise the power, and, therefore, the national government cannot.

It must be conceded that the line between the state and the national jurisdiction is not always clearly defined, and great care is demanded of the courts in passing upon a question like that involved in this case. The congress of the United States has, by the passage of the act in question, declared that the power exists under the constitution of the United States to protect the fund for the claimant, and limit the compensation which an agent or attorney shall receive for services rendered to one entitled to a pension in procuring the same. To warrant the courts in setting aside this law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist. Fletcher v. Peck, 6 Cranch [10 U. S.] 128. And especially is this so when the question is to be decided by a court of limited or inferior jurisdiction.

The constitutionality of the act of congress is, however, made a question, and there is no reason why this court should not consider and pass upon it. In construing the extent of the powers conferred by the constitution upon congress, we are to look at the language of the instrument which confers those powers in connection with the purposes for which they were conferred. What, then, are the constitutional provisions under which it is claimed congress could pass the act defining the offense charged in this case? The words of the constitution are: "Congress shall have power to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States." Article 1, § 8.

The supreme court of the United States, in McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316, hold that "although among the enumerated powers of government we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies;" and that "a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution;" that the constitution of the United States "does not profess to enumerate the means by which the powers it confers may be executed;" that "the government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

By the aid of the profound views thus expressed by Chief Justice Marshall, let us examine the question before us. Congress is expressly empowered to "raise and support armies," and we shall do well to remember that congress is to be allowed, according to the ruling I have read, to select the means by which armies are to be raised and supported. In selecting the means to accomplish these things, we find pay, bounties, and pensions are stipulated and promised to the soldier. Through these means, thousands who could not otherwise afford to leave all and enter the military service, come forward, enlist, and do battle to protect and defend the rights, interests, and honor of the nation. By the use of these means the government is enabled readily to raise an army and fill its ranks from time to time.

Pensions and bounties are not given for the support of the army, but promised by way of inducement and reward for the citizen becoming a soldier and faithfully serving his country. There is no express power given in the constitution to congress to give pensions or bounties to the soldier. The right is claimed, however, and has never been doubted as being within those incidental or implied powers flowing from the expressly granted or enumerated power, to "raise and support armies." They are among the means which it selects in the exercise of a granted power, and I apprehend congress is the sole judge as to what means are appropriate and to be selected in the exercise of any of its enumerated powers. Most of the penal laws of the government of the United States rest upon the incidental or implied powers of congress to punish violation of its laws. It was well argued by the district-attorney, that under the power to regulate commerce, congress has passed laws regulating vessels engaged in carrying passengers, in prescribing the

size of state-rooms and otherwise, as well as in requiring vessels to convey disabled American seamen found in a foreign port to this country. And, again, laws forbidding the sale of bounty certificates, as well as many other statutes of a like character, none of which have been held unconstitutional, or judicially questioned, so far as I know; and yet these statutes find no sanction in the constitution of the United States other than in the implied powers, and the general provision "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in the government.

If, then, congress may promise bounties and pensions to the nation's soldiers, may it not, by appropriate penalties, guard those rewards against him who would divert them in any manner away from the beneficiary? If the soldier may lawfully be promised bounties and pensions, and if, from his occupation of arms and want of the requisite knowledge, he must employ another to prepare the requisite evidence to the pension office to bring him within the law and secure the promised bounty and pension, may not the government say to such employee: This money we pay to you for one of our soldiers, and you must pay it over to him intact; failing in which you make yourself liable to fine and imprisonment? True, the employee is the agent of the soldier in all that he does for him, but he must deal with the government in the exercise of that agency; and in taking such employment to secure for the discharged soldier his bounty or pension, he knows the restrictions placed by congress upon the compensation he can receive, and the prohibition against his retaining any portion of the funds from the soldier. These provisions may be regarded as the terms and conditions upon which the government consents to recognize the agency of the person employed by the soldier, and pays the money over to such agent. Congress must alone be the sole judge of what is both necessary and expedient on any subject within the range of its powers to act.

"To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end." Congress has employed a means in raising and supporting armies, in addition to pay, clothing, &c.,—bounties and pensions; and has sought by appropriate penalties to guard these moneys through all channels from the nation's treasury into the hands of the pensioner.

Said the supreme court, in the case already referred to: "Let the end be legitimate; let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

I have endeavored to show not only that the end which the statute under consideration seeks is legitimate and within the scope of the constitution, but that the means employed by congress are appropriate and adapted to the end of raising and supporting armies, and therefore within the powers of congress under the constitution. Without entering upon a discussion whether the state may, in view of the legislation of congress, impose a penalty upon the citizen for withholding the money in question, and alone regulate and control contracts between citizens of the state in reference to compensation for such services as those by Fairchilds for Penrose, it will be recollected that a law of congress, if constitutional, prohibits and supersedes all state legislation on the same subject (1 Parker, Cr. R. 67); that while the state law might control in reference to these questions, in the absence of any exercise by congress of its constitutional powers on the subject, yet so far as congress does constitutionally act, the state laws are so far superseded, and the citizen cannot be punished by both sovereignties for the same offense. Sections 12 and 13 of the act of congress are held to be constitutional. The demurrer is overruled, with leave to the defendant to plead to the indictment.

Demurrer overruled.

Case No. 15,068.

UNITED STATES v. FAIRCLOUGH.

[4 Wash. C. C. 398.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

CUSTOMS DUTIES—MANIFEST—SURPLUS OF CARGO—MISTAKE OR ACCIDENT.

1. Under the fifty-seventh section of the collection law, a surplus of cargo, equally with a deficiency of cargo, is a disagreement with the manifest, within the true construction of that section. But this proviso is co-extensive with the enacting clause, excusing from the penalty in all cases where satisfactory proof is made, as required by this proviso.

2. In an action for the penalty given by the fifty-seventh section of the collection law for a disagreement between the cargo and the manifest, the defendant, to obtain the benefit of the proviso, must not only satisfy the court that no part of the cargo had been landed, or unladen after it was taken on board, as specified in the report, and pursuant to permits duly obtained; but also that the disagreement was by mistake or accident.

[Cited in U. S. v. Hutchinson, Case No. 15,431.]

[Error to the district court of the United States for the Eastern district of Pennsylvania.]

This was an action of debt brought in the district court against the defendant [Robert Fairclough], master of the Placidia, a for-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

eign vessel, to recover the penalty of $500, under the fifty-seventh section of the duty law (1 Story's Laws, 624 [1 Stat. 671]), for an alleged disagreement between the cargo on board and that reported in the manifest; there being found concealed on board twenty kegs of white lead more than were mentioned in the manifest.

The jury found a verdict stating that, upon the arrival of the vessel at this port, there were on board forty kegs of white lead, whereas only twenty kegs were reported in the manifest. That the twenty, so reported, were landed under permits, and the twenty not reported remained on board, and were discovered by the custom house officers, after the rest of the cargo was landed, were seized by them, and condemned as forfeited by the district court; and that no part of the cargo of said vessel was unshipped, landed, or unladen, after they were taken on board, except as was specified in the report, or manifest, and pursuant to permits regularly obtained. Upon this verdict the district court gave judgment for the defendant. [Case unreported.]

C. J. Ingersoll, U. S. Dist. Atty.

John Sergeant and Mr. Chauncey, for defendant.

WASHINGTON, Circuit Justice. This case turns upon the true construction of the fifty-seventh section of what is called the duty law, passed on the 2d March 1799, which enacts, "that if any package whatever, which shall have been reported as aforesaid, shall be wanting, and not found on board such ship or vessel, or if the goods, wares, and merchandize on board such ship or vessel shall otherwise not agree with the report or manifest delivered by the master, or other person having the charge or command of any such ship or vessel; in every such case, the master, or other person having such charge or command, shall perfect and pay the sum of $500." The proviso declares, that the penalty shall not be inflicted, if it shall be made to appear to the satisfaction of the collector, &c.; or, in case of trial for the penalty, to the satisfaction of the court, that no part whatever of the goods, &c. has been unshipped, landed, or unladen, since it was taken on board, except as shall have been specified in the said report or manifest, and pursuant to permits as aforesaid, or that the said disagreement is by accident or mistake.

It is contended by the defendant's counsel, that the case of goods found on board, which are not entered in the report, or manifest, is not one which is embraced by the enacting clause of the above section, the disagreement spoken of in that clause not applying to surplus cargo, but to a variance between the cargo and the manifest, in description merely. But I am clearly of a different opinion. There can be very little doubt but that the legislature considered this to be a case of disagreement, because they speak of a deficiency of cargo as such; for, after providing in respect to packages reported, and not found on board, the expressions are, "or if the goods, &c. on board such ship or vessel shall otherwise not agree with the report," &c. clearly showing that the case of deficiency in the cargo reported, was considered to be one of disagreement. Now, if this be so, it would require a very subtle casuist to maintain, that, if goods are found on board, which are not reported, there is no disagreement between the cargo on board, and that reported. But the latter part of the proviso removes all doubt upon this point, by requiring in all cases as aforesaid, a post entry to be made of goods omitted to be included and reported in the manifest, and forbidding the goods so omitted to be entered, to be unladen till such post entry is made; which part of the proviso is strictly applicable to that species of disagreement which is produced by the appearance on board of goods not mentioned in the manifest, although it also includes packages, &c. which disagree with the manifest in description merely.

But, although I consider every species of disagreement as being embraced by the enacting clause, I have no hesitation in deciding that the proviso is as broad as the enacting clause, and excuses from the penalty, in all the cases, where satisfactory proof is given, such as the proviso requires. But here the difficulty arises: What are the facts of which the master is required to satisfy the collector or the court? It is insisted for the United States that they are, not only, that no part of the goods has been unshipped, landed, or unladen, since they were taken on board, except as shall have been specified in the report, or manifest, and pursuant to permits, but also that the disagreement is by mistake or accident. On the other side it is contended, that, if satisfaction is given as to either of those matters, it is sufficient, the disjunctive "or" necessarily requiring this construction.

There are, I confess, strong reasons for believing that the former construction will best fulfil the intention of the legislature, to be discovered by what is expressed in another section of this act, as well as from the reason and policy of the provision itself. For it may fairly be asked, how does the proof that no part of the goods had been unladen, except as specified in the manifest, and according to permits, account for the circumstance of there being found on board goods not entered in the manifest? This might afford some satisfaction, if the disagreement arose from goods being reported which are not found on board; as a suspicion, in that case, might naturally be entertained that the goods, not found, had been illicitly unladen. In the other case, the reasonable way of accounting for the

disagreement, would be by showing, that it was occasioned by accident or mistake. Nor is it unreasonable, in the case of a deficiency of cargo, to require of the party to account for it, not only by showing that the missing packages, &c. have not been unladen, but that it has arisen from mistake or accident, such as the decay of perishable articles, robbery, theft, destruction by rats, or in some other way.

But what presses still more strongly on my mind is the twenty-fourth section of this act, which is in pari materia with the fifty-seventh, and embraces expressly, though not exclusively, the case of goods found on board which are not entered in the manifest. That section extends also to disagreement between the cargo and the manifest, and consequently extends (if the former part of this opinion in relation to the fifty-seventh section be correct), to a deficiency in the cargo, as well as to a disagreement in description. The penalty imposed upon the master by this section, is the forfeiture of a sum equal to the value of the goods not included in the manifest, provided, that if he make it appear to the satisfaction of the collector, &c. or of the court, that no part of the goods has been unshipped after it was taken on board, except such as shall have been particularly specified, and accounted for in the report of the master, and that the manifests had been lost, or mislaid, without fraud, or collusion, or that the same were defaced by accident, or incorrect by mistake, the forfeiture shall not incur.

But this section is confined to the commanders of vessels belonging to citizens, or inhabitants of the United States. If the fifty-seventh section, which is general in its terms, also includes this description of persons, the incongruity between the two, if the latter be interpreted literally, would be striking. For not only would the master be subjected to a double forfeiture, but, in order to relieve himself against the first, he must satisfy the collector of both facts, which would be, in effect, to convert, as to him, the disjunctive in the fifty-seventh section, into the copulative, used in the twenty-fourth. I am inclined, however, to the opinion, that the former of these sections applies exclusively to the masters of foreign vessels. Still it must seem extraordinary that the guard against fraud, provided by the twenty-fourth section, in requiring the master to account satisfactorily for the disagreement between the goods manifested, and those found on board, should have been intentionally relinquished in the case of masters of foreign vessels.

It was contended by the defendant's counsel, that the case of surplus goods was not a disagreement which was intended to be included in the enacting clause of the fifty-seventh section, because, as those goods are liable to be seized and forfeited under the sixty-eighth section it was deemed unnecessary to subject the master to this pecuniary penalty. But it would seem that congress thought otherwise, when, in a case precisely the same, except as to the national character of the vessel, the penalty, as against the master, is distinctly provided for; and yet the goods are equally liable to forfeiture under the sixty-eighth section, as they are in this case.

The only remaining inquiry is, whether, as this section, the fifty-seventh, is penal, the court can give it a construction against its letter? I understand it to be an exemption from the rule that the penal statutes are to be construed strictly, that a departure from the natural signification of the words used, is proper, wherever an adherence to it would involve an inconsistency or contradiction, by reason of some other clause in the same, or another statute, indicating that the intent of the legislature was not that which the literal import of the words would lead to, and this is applicable as well to penal, as to other acts. In the case of U. S. v. Fisher, 2 Cranch [6 U. S.] 318, it was laid down that, if, from a view of the whole law, or of other laws in pari materia, the evident intention of the legislature is different from the literal import of the words employed to express it in; that intention shall prevail, because that, in fact, is the will of the legislature. This I take to be a general and well established rule of construction, applicable as well to penal as to other laws.

I am, upon the whole, of opinion, that the defendant cannot claim the benefit of the proviso, as he has failed to satisfy the court that the disagreement between the goods on board, and the report or manifest, was by mistake or accident. The judgment must be reversed.

Case No. 15,069.

UNITED STATES v. FANJUL.

[1 Lowell, 117.] [1]

Circuit Court, D. Massachusetts. 1866.

INFORMER — MONEY PAID UPON RECOGNIZANCE.

1. The penalty of a recognizance for the appearance in court of a defendant charged with a crime under the customs act of 1799 [1 Stat. 627], is not a penalty recovered by virtue of that act.

2. It seems, that a fine imposed under that act goes, in part, to the informer.

3. But money paid into court by the sureties on a recognizance is not such a fine, and is not instead of a fine, though the alleged crime was one that might have required the imposition of a fine if the defendant had been convicted; and no part of it belongs to the informer.

The defendant was arrested on an indictment charging him with a criminal offence

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

under the customs act of 1799, and gave bail for his appearance, but afterwards made default, and his sureties paid the amount of the bond into court. The petitioner alleged himself to be the person who first informed the collector of the crime committed by the defendant, and prayed that a moiety of the money in the registry might be paid out to him.

W. A. Field, Asst. U. S. Dist. Atty., submitted the case without argument, excepting a citation of Ex parte Marquand [Case No. 9,100], and a statement of the practice which has followed that decision.

LOWELL, District Judge. In Ex parte Marquand [supra], it was decided that fines imposed on a defendant in a criminal case, under the statute of 1799, were to be distributed under section 91 of that act (1 Stat. 697), like penalties and forfeitures; and it is understood to have been the practice in all the districts, since that case, to admit informers to a share of such fines. But in this case the penalty, so called, which has been paid into court, is not a fine, penalty, or forfeiture recovered by virtue of that act, but the penalty of a recognizance taken by the court to insure the appearance of the defendant to answer the charge. The amount in which the bond was taken was estimated with a view to all the circumstances of the charge, including the possible fine; but it was in no sense a substitute for the fine. If the defendant, after his default, had appeared, or had been brought in by his bail, the court might have remitted to the sureties the whole or some part of the penalty of the recognizance, by virtue of the act of 1839 [5 Stat. 321]. Supposing the time for such action to be passed, and that the sureties have relinquished all claim to a remission, still if the defendant is found he can be tried, and if convicted may pay a fine, in which the petitioner may be interested; but as I said before, no such fine or penalty has yet been imposed or paid. It was once the law of England, in certain cases, that upon default of the principal, his sureties should take the punishment which he ought to have borne; and this is what the petitioner says we arrive at in a roundabout way by charging the bail. It may turn out to be true, in fact, that the government will be content with this payment, and make no effort to find the defendant; but any bargain to that end would be as illegal as it would be impolitic; and even if it were made, the result would not be that a fine had been paid for a breach of the statute of 1799. It is very doubtful whether an informer has any strict legal right to money paid by way of compromise for a breach of the act, even when the remedy is only of a civil nature. Here there is no evidence of any compromise, or of any payment on account of the breach of a revenue law.

Petition dismissed.

Case No. 15,070.

UNITED STATES v. FARMERS' LOAN & TRUST CO.

[3 Int. Rev. Rec. 62.]

Circuit Court, S. D. New York. Feb., 1866.

INTERNAL REVENUE — BANKS — LOAN AND TRUST COMPANIES.

[1. A loan and trust company which issues certificates of deposit and makes loans on stocks, bonds, and other securities, is subject to the payment of the license fee imposed by Act 1864, § 79, cl. 1.]

[2. Such company is "engaged in the business of banking," so as to be liable for the payment of a duty of one twenty-fourth of one per centum each month upon the average amount of its deposits, as provided by section 110 of said act.]

This case involved the important question to the government in the way of revenue, whether loan and trust companies were subject to the tax imposed by the act of congress of June, 1864 [13 Stat. 223], and as amended by the subsequent act of March, 1865 [Id. 469], which provides that banks shall pay a license, &c.; that every person, firm, or company, and every incorporated or other bank having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, &c., shall be regarded a banker under this act.

SHIPMAN, District Judge. The defendants in this case are a corporation created by the legislature of the state of New York, and have an office or place of business in this city. Certain questions having arisen touching their liability to take out a license as bankers, and pay a monthly tax on their deposits and capital, an agreed statement of facts has been submitted to this court and its judgment invoked on the points in dispute. The charter of the company is made part of the agreed statement. The charter was granted in perpetuity, and created the corporation originally under the name of the "Farmers' Fire Insurance & Loan Company," with the power to loan money and insure property, as well as for some other purposes set forth in their charter. This charter (originally granted in 1822) was subsequently and at different times modified and amended by the legislature. It is not deemed necessary to refer specifically to its provisions here, inasmuch as the nature of the business of the company, and the manner in which it is transacted, must determine the questions affecting its liability under the internal revenue law. The agreed statement of facts sufficiently set forth, in terms, both the nature of the business and the manner in which it is conducted, and the act of congress has prescribed the rule by which the court must determine the extent to which the company

is liable under our new system of taxation.

The first question to be settled is whether or not the defendants are bankers within the meaning of the internal revenue act. It is immaterial to the present inquiry whether or not they are bankers in the general popular or commercial sense. Congress in this act have seen fit to use the term banker in a specific sense, and have set forth in express language the rule by which we are to determine what that sense is. The clause of the act which relates to this point is the first part of the seventy-ninth section, which requires the payment of a license fee by those engaged in particular kinds of business. After providing that bankers shall pay such fee in proportion to their capital, as specified, the act proceeds to declare who should be deemed a banker within the meaning of the law, as follows: "Every person, firm, or company, and every incorporated bank having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be regarded a banker under this act." This language is explicit, and for the purpose of ascertaining whether a given person or corporation is to be deemed a banker or not under this act it is only necessary to determine whether the business transacted by such person or company comes under any of the different branches of business described in the clause cited. In the present case the agreed statement of facts sets forth that the defendants are a corporation with a capital of $1,000,000, that this capital and a part of their deposits are invested permanently on bond and mortgage, government securities, and other stock securities. That their principal business is as trustee and receiver under their charter, and in those capacities they receive and keep the books of registry and transfer of various railroads and other corporations, and act as trustees in railroad mortgages and other fiduciary capacities. That they pay the interest and dividends in the matters in which they act as trustees to the parties entitled to the same by their checks on banks in which they keep their deposits. As a part of their general business the defendants receive money in trust under special contract for specified times and upon an agreed rate of interest to be allowed therefor, and in all cases give to the depositor a contract or certificate as follows: "New York,——, 18—. No. ——. This certifies that the Farmers' Loan and Trust Company have received of —— the sum of —— in trust; that said company will retain the same and allow interest thereon, at the annual rate of — per cent. for the term of —— from the date of this certificate, and at the expiration of that period will repay the same, with the interest accrued thereon, to the said——, or assigns, on the presentation of this certificate. ——, President."

It is also agreed that "the daily average amount of its deposits on hand for which contracts are outstanding varies from $200,000 to $500,000" and that "some part of these sums is loaned out by the defendants, as occasion offers, on stocks, bonds, and other securities." The agreed statement further declares, "that the defendants do not open credits by the deposit or collection of money, subject to be paid or remitted upon draft, check, or order, and do not discount or loan money upon bills of exchange or promissory notes." This last clause of the agreed statement merely goes to show that the defendants are not bankers in the ordinary commercial sense of that term; and had the act of congress used the term banker, and left its definition to the law merchant, the defendants would not have been included within the act. Both the agreed statement and the argument of the defendants would have been conclusive on that point. But the clause of the act cited declares that "every person, firm, or company * * * having a place of business, * * * where money is advanced or loaned on * * * stocks (or) bonds, * * * shall be regarded as a banker under this act." There is no room for official construction here. The language is so explicit, that I am bound to assume that congress intended its effect should be direct and precise. Its operation may be harsh upon these defendants, but this is a difficulty from which they can be relieved only by the power which enacted the law. Now, the agreed statement, while it shows that they are not bankers under the ordinary commercial understanding of the term, explicitly states that they have a place of business, where they, among other pecuniary transactions, loan money, as occasion offers, "on stocks, bonds, and other securities." Thus they are brought directly within the descriptive term of the law, and belong to that class of companies which congress declares shall be regarded as bankers under the act in question. They are bound, therefore, to take out a license as bankers, and pay such fees therefor as the act prescribes.

The other question is, whether the defendants are required to pay a tax on their deposits and capital under the 110th section of the same act. The first part of the section covers this point, and is as follows: "There shall be levied, collected, and paid a duty of one twenty-fourth of one per centum each month upon the average amount of the deposits of money subject to payment by check or draft or represented by certificate of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation engaged in the business of banking; and a duty of one twenty-fourth of one per centum each month as aforesaid, upon the average amount of capital of any bank, associa-

tion, company, or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds." Here the argument of the defendants is met by the same insuperable difficulty. Congress having given an arbitrary meaning to the word banker as used in this act, it follows in strict logical sequence that they have extended the same meaning to the terms "business of banking." The act would be no more explicit if it had said that any person or company having a place of business where money is advanced or loaned on stocks or bonds, shall be deemed and regarded under this act to be engaged in the banking business. The agreed statement of facts brings the defendants directly within the plain letter of the law, while the law itself restricts and applies the letter, by descriptive terms, which excludes all doubts as to the sense in which it is used, and leaves no room whatever for the court to resort to the ordinary rules of definition or construction. The defendants have large deposits, which are represented by approved certificates, payable at some future day. They have a large capital, some portion or all of which is employed in what congress says shall be regarded as the business of banking under this act. And I see no way in which, so long as this act stands, they can be relieved from the prescribed duty on both. Judgment must, therefore, be rendered for the plaintiffs, subject to adjustment under a referee, as contemplated by the parties in their agreed statement of facts, submitted to this court, reserving all their rights touching an appeal or suit of error for the purpose of revising this decision.

Case No. 15,071.

UNITED STATES v. FARNHAM.

[2 Blatchf. 528; 11 N. Y. Leg. Obs. 161; 10 West. Law J. 289.] [1]

Circuit Court, S. D. New York. Jan. 21, 1853.

SHIPPING — PUBLIC REGULATIONS — SAFTY VALVE OF STEAMBOAT—NEGLECT TO RAISE—INDICTMENT FOR MANSLAUGHTER.

1. On an indictment for manslaughter, under the twelfth section of the act of July 7, 1838 (5 Stat. 306), against the captain of a steamboat, it is not necessary for the prosecution to show wilful misconduct, negligence or inattention in the captain

2. The captain of a steamboat is responsible for the proper performance by the engineer the pilot and all the other officers, of their duties on board, unless their authority is expressly made independent of him.

3. The duties and responsibilities of the captain of a steamboat are the same as those of the captain of any other vessel; and, as to the relative duties and responsibilities of the different officers of steam vessels, there is no distinction between those which navigate inland waters exclusively and sea-going vessels.

4. The seventh section of the act above named makes it the duty of the master to see that the safety-valve of the boiler is raised when the steamboat stops.

5. Under that section, it is not sufficient to raise the safety-valve only when the pressure of steam is higher after than before the stoppage of the boat.

6. Nor is the safety-valve to be raised only when the pressure of steam becomes, during the stoppage, higher than that named in the certificate of the inspectors as the pressure the boiler will bear.

7. Nor can other methods of lowering the pressure of steam—such as opening the furnace-doors—be substituted for the raising of the safety-valve.

8. It is a culpable omission in the captain to leave it to the discretion of the engineer whether to raise the safety-valve during a stoppage or not.

9. The omission of the captain to give orders for the raising of the safety-valve when the boat stops, is legal evidence to support an indictment against him under the twelfth section of the act, provided the omission to raise the safety-valve was the proximate cause of the destruction of life.

This was an indictment against the defendant [Charles W. Farnham], under the twelfth section of the act of July 7, 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam" (5 Stat. 304), for manslaughter, in causing the death of several persons, who lost their lives by the explosion of the boiler of the steamboat Reindeer, while she was landing passengers at Bristol dock, on the Hudson river. The defendant was the captain of the steamboat. The substance of the indictment, and the facts put in evidence to sustain it, on the trial, which took place before BETTS, District Judge, sufficiently appear from the charge of the court.

J. Prescott Hall, U. S. Dist. Atty.

William Curtis Noyes and Dennis McMahon, for defendant.

[2] [BETTS, District Judge. In this case, gentlemen of the jury, you have heard with great attention the testimony offered for the prosecution and the defence, and the arguments of the public prosecutor and the defendant's counsel; and no doubt you are possessed of every fact essential to the merits of the case, both on the part of the United States and the accused. The indictment was originally framed against two persons, the master and engineer of the steamboat Reindeer; but, at the instance of the parties accused, the charges have been severed, and the proceedings are now carried on against the master alone. Although the character of the event which gives rise to this prosecution, is calculated to excite deep interest in the community, with which you, as citizens, must necessarily sympathize, we may, nevertheless, congratulate ourselves that the case is now presented under such circumstances that the court and yourselves can

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. 10 West. Law J. 289, contains a condensed report.]

[2] [From 11 N. Y. Leg. Obs. 161.]

give to it a calm, dispassionate, and impartial consideration. It is not disputed but that Capt. Farnham was fully competent to the station in which he was employed. He was an experienced navigator. He had been, more or less, for a long period familiar with the use of steam machinery, and he was skilful and prudent in the discharge of his duties. There is no imputation against him of any improper command or omission, directly relating to this disaster, nor a suggestion that he was guilty of any act intentionally wrong. There was no designed culpability on his part, either of commission or neglect. Furthermore, although the occurrence was startling and deplorable in the extreme, causing the loss of numerous lives, and filling the whole community with alarm, yet happening more than one hundred miles from this city, and five or six months having elapsed since the shock was experienced, there is no reason to apprehend that you entertain unfavorable prepossessions against the defendant, or any other feelings upon the subject than such as are common to the public at large, and are compatible with an unprejudiced judgment upon this case. Nor is there any reason to suppose that you had friends or relatives involved in the calamity, whose sufferings or exposure may appeal to your sympathies to the disadvantage of the accused. The court, therefore, congratulate you that, on coming to the consideration of this case, you can examine the facts, and pass upon the whole transaction, in a calm and dispassionate frame of mind.

[In the first instance, a question of law was raised, in behalf of the defendants, whether this court, acting under the authority of the federal government, could take cognizance of the case. That question was properly addressed to the court, as entirely one of law. The court decided that the laws of the United States govern the subject, and have vested cognizance of it in this tribunal. You will, therefore, not regard that point as before you for consideration, and will proceed upon the issue before you, and dispose of it according to law and evidence, acquitting the accused, if you do not find the charge in the indictment satisfactorily fastened upon him, or condemning him by your verdict if your judgments are convinced that he has committed the offence created and defined by the law. It has been remarked, by counsel, that this court has no jurisdiction in the case other than what is conferred by the act of congress referred to. Such is the law. Unless congress had legislated on the subject, the offence, however heinous, could not be proceeded against here, but would have come under the authority of the state tribunals. Those judicatories might have cognizance of the offence, by force of the common law, without any act of the legislature. But the courts of the United States cannot look to any authority other than the written law, the act of congress, in relation to this subject, which creates the offence under prosecution, and appoints the mode and extent of its punishment. It may aid us, in passing upon the facts of the case, to take a slight survey of the objects which congress had in view in making these enactments. To this end we may profitably notice the state of navigation by steam in this country when congress passed the act of 1838. You are aware that, as an historical fact, steam had been employed for more than thirty years coastways, and in all the interior waters of the country, and that the use of it was accompanied by many startling disasters, particularly on the Western waters; and the destruction to property and the loss of life so agitated public feeling that congress undertook to enforce regulations in the equipment and navigation of vessels propelled by steam, which might tend to the preservation of life and property exposed to that mode of transportation. The purpose of congress manifestly was to reach the source from which these evils sprung, and establish rules for their prevention. In order to effect this, provisions were enacted requiring vessels propelled, in whole or in part, by steam, to be sufficiently strong to sustain the weight of the machinery used, directing precautions to be supplied against the hazard of fire in generating steam, and to enforce watchful precautions in the management of the machinery, both to avert explosions and disabling the vessel, as also to secure all practicable skill and prudence in navigating it.

[You will observe, from this general summary, the leading design of the act of 1838. To give efficacy to these provisions, the act requires every vessel belonging to citizens of the United States to be enrolled or registered, and that no vessel propelled in whole or in part by steam shall be registered without first complying with the conditions designated; and, to compel an enrolment, declares that no such vessel shall navigate the waters of the United States without it; and imposes a penalty of $500 every time a steam vessel is run without such enrolment. The act points out the particular qualifications necessary to obtain an enrolment, and, in order to ascertain the sufficiency of the vessel and her machinery, it created a board of inspectors for every revenue district of the United States, designating their duties with great minuteness. They are to examine the vessel, and determine whether she possesses sufficient strength and capacity, and also carefully examine the steam boilers, and see that they are sufficiently strong for the purpose they are to be employed in; and, if satisfied that the vessel and boilers are of sufficient strength, in their judgment, they give a certificate of such facts, without which the collector cannot grant an enrolment. In this way congress intended to provide for a rigid examination of vessels and machinery by officers appointed for that purpose, and thus secure a higher degree of confidence and safety in this most important mode of conveyance. The law was not, however, limited to measures looking to the strength and sufficiency of steamboats and their ma-

chinery alone, but it gave to those requirements the most stringent sanctions, pecuniary and personal, against owners and officers, in order to guaranty the safety of persons and property transported in such vessels. The regulations to insure the safety of property or remunerate for its loss, need not be specified at large, but will be hereafter adverted to, as explanatory of the penal enactments. They are contained in sections 7 and 12, which have been read to you.] [2]

The indictment in this case is founded on the twelfth section of the act of July 7, 1838, which is in these words: "And be it further enacted, that every captain, engineer, pilot or other person employed on board of any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any circuit court in the United States, shall be sentenced to confinement at hard labor, for a period of not more than ten years." The seventh section of the act is to be taken in connection with the twelfth, as indicating the particular act of negligence on which the indictment is based. That section is as follows: "And be it further enacted, that whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the motion or headway of said boat or vessel, or when said boat or vessel shall be stopped for the purpose of discharging or taking in cargo, fuel or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of two hundred dollars for each and every offence."

The indictment charges on the master of the Reindeer the crime of manslaughter, because, by his misconduct, negligence or inattention at the time and place alleged, the lives of many persons on board were destroyed. The question at issue on the indictment is, whether the government has, by legal and sufficient proof, convicted the defendant of the crime of manslaughter.

The law does not require the public prosecutor to prove wilful mismanagement or malconduct by the accused. The inqury is not, whether he was guilty of intentional negligence or inattention, but only whether he did what is forbidden by the law, and whether the explosion and destruction of life charged in the indictment arose from either of those causes. To resolve that question, you must have a clear and accurate understanding of the meaning of the terms used by congress in the law.

By misconduct, negligence or inattention in the management of steamboats, mentioned in the statute, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it be slight or gross, if the proof satisfies you that the explosion of the boiler was the necessary or most probable result of it.

In order to possess a satisfactory apprehension of the language of the act, it is important to understand what are the duties of the captain of a steamboat—what responsibility he incurs personally—when his duty is merged in the duties of the other officers—and when the responsibilities of the other officers are independent of his. Was it the duty of the master to see to the state of the boiler, or that proper precautions were taken to relieve it from the pressure of steam when the boat was running or had stopped, or did that duty belong exclusively to the engineer? The practice and opinions of experienced officers and engineers on the subject have been testified to. It appears that a practice has grown up and become very common, to allot to the different officers separate and independent trusts and commands; and it is a general notion that it belongs to the pilot to navigate the vessel, independently of the captain, and that the engineer is, in his special department, not subordinate to the captain in the performance of his duties. If that were the true construction of the law, the captain would stand discharged of responsibility for all acts of the engineer appertaining to his particular department. There is no foundation in law for such distinction and restriction in the duties of officers of steamboats. They are the same in law as those of the officers of other vessels. The master is commander-in-chief. The law entrusts him with the control of the vessel and of every department of service on board; and the engineer has no more right to refuse obedience to his orders than has the mate. The captain is charged with responsibility for the right performance of all duties which appertain to the command and management of the propelling power of the vessel. If there be misconduct or neglect in the engineer's department, the captain is, by the maritime law, responsible civilly, and, by this statute, criminally for the consequences. But, if he procures competent persons, and gives them injunctions to perform the duties, the law will not impute guilt to him, if they, without his knowledge, neglect the duties assigned to them.

Although the captain may not select or engage the engineer, and the owners, as they have a right to do, employ him and fix the amount of his compensation, yet that circumstance in no way withdraws from the captain the rightful control over him, in every particular of his service on board, unless his authority is expressly made inde-

[2] [From 11 N. Y. Leg. Obs. 161.]

pendent of the captain. This must manifestly be so, or there could be no unity of command or action in working the vessel. The notion expressed by some of the witnesses, that an engineer holds his place independently of the authority of the master, and that the latter has no power to restrain him, even if he is crowding the machinery with a head of steam beyond what the master deems to be safe or prudent, has no foundation in law. The master has supreme command in all respects, in directing the navigation of the boat, including control over the head of steam to be used. He is responsible for every misuse or neglect of that authority, and is, by the law in question, made a wrongdoer, answerable criminally on indictment, if he omits to interpose and suppress the danger. He is bound to see that all persons under his command do their duty properly; and this statute especially compels him, at his personal peril, to be actively awake to the safety of his passengers. It makes no difference in his favor, if the engineer be the more skilled and competent man in respect to the management of steam. The supremacy of authority is with the master, on general principles; and, in respect to specific duties imposed on him by law, he is responsible that proper measures be taken for their performance.

There is no distinction, in law or maritime usage, between the relative duties and responsibilities of different officers who serve on vessels propelled by steam, whether such vessels navigate inland waters exclusively or are sea-going vessels. The pilot cannot, at his discretion, take a course different from that directed by the master. Nor can the engineer raise the steam to or keep it at a gauge beyond what is prescribed by the master, whatever may be the desire or judgment of the pilot or engineer in those respects. It belonging to the master, of right, to dictate to his subordinate officers, it will be presumed that what is done by them, under his observation, is so done by his direction or assent, unless he proves his ignorance or that his directions have been disregarded.

The great question in this case is, whether the omission to raise the safety-valve when the vessel stopped at the dock at Bristol, was an act of misconduct, inattention or negligence in the captain, within the meaning of the twelfth section of the statute? This question arises on the seventh section of the same statute, which I have already read to you. The statute does not charge the engineer with the duty of raising the safety-valve, but it is imperative in respect to the master, and imposes the duty on him to see that the safety-valve is raised when the boat stops. The omission to do so thus becomes, in respect to him, a direct violation of the law, and has an important bearing upon the meaning and application of the twelfth section.

It is not a correct interpretation of the law, to understand it as requiring the safety-valve to be raised only in the contingency that the boiler has acquired, while stopped, a higher pressure of steam than was upon it when the boat was under headway; for that would permit the captain, without regard to danger, to keep the head of steam, during stoppage, the same as it was before coming to the dock. This would be, manifestly, in violation of the whole policy of the enactments, because a boat might thus be running under any head of steam, no matter how extreme and perilous, and yet the steam might be maintained at the same height while at the dock. The law was framed to promote the safety of the vessel and of the property and passengers on board. The whole purpose aimed at would be frustrated, if the boat could be allowed to retain, when stopped, any pressure of steam she could generate whilst in motion. The object of the law was to secure a low state of steam, at all events, when the boat stopped; and, to effect this, the safety-valve is required to be opened, so as to keep the steam down, at all events, to what it was when the vessel was under headway. This presupposes that she is running with no more steam than is safe and prudent in the condition of her boiler. It would be, in itself, an act of misconduct to keep, at any time, a gauge of steam on the boiler beyond its fair capacity to bear; and, in addition to that plain obligation implied in the provisions of the twelfth section, congress superadded, in the seventh section, the express duty of raising the safety-valve on stopping the boat.

The course of the defence would seem to imply that the accused was justified in carrying any amount of steam within the range of fifty pounds to the square inch, which the certificate of the inspectors suggests the boiler would bear. But, the inspectors have no authority, under the act, to dictate what amount of steam, whether forty or fifty pounds, more or less, may be used, or to compel steamboat owners or masters to follow their advice in that respect. It was wise and prudent in them to counsel parties on that subject. But this was only advisory and cautionary. They had no power to compel obedience. Nor was their opinion backed by facts which could give to it any special importance with the engineer or master. They had no authority to test the sufficiency of the boiler by steam or hydraulic pressure, to ascertain whether it could bear fifty pounds or ten pounds pressure to the inch. Moreover, these inspections are only periodical, and are required to be made at six months' intervals. In this instance, the period for re-inspection had nearly come around, and that should have been a further caution to the officers of the Reindeer to be vigilant and prudent, and not to rely upon the opinions of inspectors, given months previously, as to the present safety and sufficiency of the boiler.

The testimony also affords reason to believe that, during the time since the last inspection, the boat had been running in active

competition with others, which would have tended to overstrain and weaken the boiler, and to render less and less liable and trustworthy the opinion of the inspectors upon its former condition and strength. This condition of things is necessarily incident, in a greater or less degree, to all boats in use; and, therefore, it is not to be implied that congress intended to take the height of steam put upon a boiler whilst a boat is running, as the measure of what may be retained when she is stopped. It would be to abrogate the beneficial object of this feature of the law, so to construe it. The whole scope of the enactment shows that congress intended that steam vessels should be, at all times, restrained to the use of no more steam than is compatible with entire safety; and the particular provision in question aims to fulfil that general intention, by guarding against an accumulation of steam when the vessel is at rest. Masters and engineers would be responsible, under the common and local law, for putting on an unsafe amount of steam in running boats. And congress, without giving further sanction to that law, by inflicting a fine or punishment, under the United States authority, for its violation, has applied its positive enactments, in this particular, by an absolute injunction that the safety-valve shall be raised whenever the vessel is stopped. It is hoped that the provisions of the new law, which goes into effect in a few days,—Act Aug. 30, 1852 (10 Stat. 61),—will prove more efficacious, both in ascertaining the actual strength of boilers, and in compelling a prudent use of them when the boat is in motion, than has been secured under the existing law; but its regulations have no application to this case.

The special question for the jury to consider and determine is, whether the vessel was under a prudent and safe head of steam at the time she was stopped at the landing, and whether the boiler had a sufficient supply of water; and next, whether the omission to open the safety-valve at that time was the cause of the explosion.

A ground of defence taken on this branch of the case is, that the safety-valve is required to be raised only as a means for lowering the steam in the boiler, and that the method pointed out in the act need not be adopted, if other and better means are employed for effecting the same end. In this view, it is contended that the accused has clearly proved, from universal practice and the judgment of skilful and experienced men, that, when coal is used for fuel, the steam in the boiler is more speedily and certainly reduced and made safe, by opening the furnace and flue-doors, than by raising the safety-valve. I do not, however, interpret the statute as leaving it optional with the master to adopt the course prescribed by the statute, or to substitute another. I think the statute is peremptory, and that the master has no right to deviate from its particular requirement. The plain language of the act must govern, and the master is bound to obey it. Congress has the like power to dictate in this particular as in that of the enrolment or inspection of steam vessels before they are allowed to run, and, in either case, to subject owners and masters to penalties for disobeying the prohibition.

The propriety of this enactment, or its fitness to secure the end proposed, or its inutility or inferiority to other methods, could not be determined with certainty by the opinions or theories of experts, if it were left an open question. This has been clearly evinced by the evidence on this trial. The statute is designed to obviate all obscurity or speculations on this point, and to supply a plain and determinate rule of action for the avoidance of a special hazard and peril, and, what is equally important, to ensure implicit obedience to its regulations. Engineers, like other professional men, naturally incline to give slight heed to legislative directions which stand in conflict with their own opinions and practices. But it cannot be necessary to say more on this head, than that theories and speculations can have no place here. Congress has the power to give the rule, and we must accept the national will, as expressed in the law, as fixing the method which must be observed and adhered to, without regard to its abstract reasonableness or usefulness. Besides, it is far from being made clear, upon the evidence, that the usage of opening the doors of the furnaces relieves the boiler sufficiently, or that the idea is an erroneous one which induced congress to require the safety-valve to be always opened for the discharge of steam when the boat is stopped. After an experience of twelve or thirteen years, congress appears to adhere to the same opinion; and, in a few days, a law will go into operation compelling steamboats to have, not only one but three safety-valves ready for use, one of which must be self-acting and out of the control of the captain or engineer, so that it shall open at a particular point of steam, no matter what other means are in use to keep the steam below that point. Nor do I think that the engineers express themselves decidedly of opinion that opening the doors of the furnaces and flues can always be relied upon as sufficient, nor but that, under many circumstances, it will be necessary to open the safety-valve also, especially if there be a deficiency of water in the boiler.

It seems to the court plain, that the object congress had in view, in the provision, was to compel the master to have the safety-valve opened when the boat stops, without regard to other measures which may be employed to prevent an exp'osion. If experience has demonstrated the law to be useless or improvident, and that additional danger is incurred by raising the safety-valve, the legislature should have been appealed to for a repeal or modification of the law, so that masters need not be compelled to use means calculated to increase danger instead of warding it off.

The legislative will must govern; and that declared by this law must be obeyed until a different one is substituted by congress. But, if we may judge by the late enactment on the subject, there has been no change of legislative opinion. It is no matter what may be the inconvenience or expense to the owners, or what delay it may cause in the progress of the boat. It is your duty, equally with that of the court, to hold captains of steamboats to a strict obedience to the direction of the legislature, and to regard an intentional deviation from it as a fault. Whether such neglect or misconduct be of a criminal character, will be more particularly considered hereafter.

The excuse set up for the master, in this instance, that he was occupied with other duties of his command, cannot avail as a defence, because it was in no way necessary that he should be personally at the engine and raise the valve with his own hand. He would stand acquitted of blame if he had laid express commands on the engineer and his assistants to see that it was done at every stoppage. He is not permitted to leave this duty to the judgment and discretion of the engineer, even if satisfied the latter has more skill and experience than himself.

The crime created by the statute does not rest upon any wrong intention of the officer who is subjected to indictment. As regards the defendant in this case, he is not accused of any wilful misconduct, or of any design to injure the vessel or any person on board or to put either in danger. The indictment is not placed upon that ground. You will examine the evidence, and see whether you can fairly imply from it that the captain had given proper orders for the safety-valve to be raised when the boat was stopped; and, if not, you must regard his omission to take that precaution as legal evidence of misconduct, negligence and inattention, tending to support the indictment. In order to convict him, the district attorney must prove some act of negligence or omission. It must be shown that the accused omitted to do something which it was incumbent upon him to do in fulfilment of his duty, or that he did something in violation of his duty. The mere circumstance of the valve's not having been raised, is not to be taken by itself as full proof of the crime charged against the captain. The essential question is, not whether the evidence shows that the captain was negligent of his duty, but whether the explosion was caused by the particular negligence proved; that is, whether the proof satisfies your judgment that the omission to raise the valve was the proximate cause of the explosion and of the death of the persons destroyed. And, in examining this point, it is important to ascertain what was the actual state of the boiler. If it was insufficient, from some inherent defect, at the time it was inspected, or had afterwards become so from ordinary use, and there was nothing discernible, by reasonable attention and diligence, to indicate any defect, and if, furthermore, it appears that such occult defect was the cause of the explosion, then the defendant cannot be made responsible criminally for consequences arising out of that condition of things. It is necessary that this branch of the case be carefully considered, and, if it appears upon the evidence that this boiler must, most probably, have exploded under a cautious use of steam, and that it was intrinsically unsafe under such circumstances, the omission to raise the valve on stopping the boat should not be regarded as adequate evidence that such omission caused the explosion, and the accused ought to be acquitted of the crime charged upon him by the indictment.

It is incumbent upon the jury to weigh considerately the proofs bearing upon this point, and to be satisfied there was no more than a reasonable head of steam upon the boiler at the time of the explosion; because, latent defects in that will afford the master no protection, if he allowed an improvident and unsafe pressure of steam to be then generated. The accused is called on to answer for his negligence or misconduct in allowing the boiler to be under a dangerous gauge and pressure of steam, but not for an explosion arising from other causes. The only direct proof of any act of misconduct, negligence or inattention by the defendant, is his omission to have the safety-valve raised at the time it was, by statute, made his duty to raise it; but, you must connect with that and consider all other circumstances in evidence attendant upon the catastrophe or directly preceding it, and judge from the whole evidence whether that omission was the productive cause of the explosion and homicide charged upon him. If, on consideration of all the facts and circumstances laid before you by the testimony, you are unable to determine, to the clear satisfaction of your judgment, what was the immediate cause of this disaster, and of the appalling destruction of life which attended it, or if, on such review, it remains doubtful in your minds whether the explosion was occasioned by any culpable inattention, or negligence or misconduct of the defendant, then he is entitled to your acquittal.

[In submitting this case to your judgment, the court, gentlemen of the jury, reposes the most entire confidence in your intelligence, discretion, and sagacity, and is persuaded that the issue, so deeply affecting the defendant and the public, will be determined by you according to the law and the facts.][2]

The jury, after retiring, came into court, and requested a further explanation of the seventh and twelfth sections of the act.

Judge BETTS read the two sections to the jury, and remarked that, the command of the seventh section being positive, that the mas-

[2] [From 11 N. Y. Leg. Obs. 161.]

ter shall open the safety-valve on the stoppage of the boat, it is a culpable omission in him to leave it to the option of the engineer to open the valve or not, at his discretion. It is the duty of the master to give explicit orders that the statutory direction in this respect be strictly obeyed. The true construction of the law does not authorize the master to keep the safety-valve down while the boat is stopped, although the steam is no higher during the stoppage than when the boat was under headway, provided the pressure before she stopped was an unsafe one. The law does not authorize the master to keep on a head of steam when the boat is stopped, which was dangerous when she was under headway

The twelfth section does not declare that the particular act of misconduct or neglect, in keeping down the safety-valve when the boat is stopped, is a criminal offence; but it becomes so, under that section, if the omission to open the valve at that time causes the explosion of the boiler. If the jury are satisfied, upon all the evidence, that an improper and unsafe pressure of steam was kept on the boiler, and that it exploded from that cause, and of the further fact, that, if the safety-valve had been opened when the boat was stopped, the danger would have been avoided, then, as before remarked, the master's disobedience of the seventh section in that respect would be legal evidence against him under the twelfth section. That disobedience is not declared to be of itself a crime; but yet, if it causes the death of a person on the boat, it is competent evidence in proof of the misconduct or negligence which is made criminal by the twelfth section. [Whether it had that effect or not, is wholly matter of fact for the jury to decide.][2]

[The jury then returned to their room and, after an absence of one hour, returned into court, stating their inability to agree on a verdict. By consent of counsel, on both sides, the jury were discharged without rendering a verdict.][2]

Case No. 15,072.

UNITED STATES v. FARNSWORTH.

[1 Mason, 1.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1815.

CUSTOMS DUTIES—CONCEALMENT OF GOODS—RESISTING SEIZURE.

1. What constitutes a concealment of goods within the 69th section of the collection act of March 2, 1799, c. 128 [1 Story's Laws, 632; 1 Stat. 678, c. 22.]?

2. If an officer of the customs seizes goods, a party, who resists the seizure, is not guilty of concealment within the statute, merely by such act of resistance; although the goods are taken away, and wholly removed from the custody of the officer in consequence thereof.

This was a writ of error upon a judgment of the district court, in an action of debt brought by the United States against the defendant, to recover the penalty prescribed by the 69th section of the collection act of March 2, 1799, c. 128 [1 Story's Laws, 632; 1 Stat. 678, c. 22], for concealing goods, knowing them to have been unlawfully imported. At the trial in the district court, evidence was offered to show, that certain packages of goods were concealed in a stable of Mrs. Trask in Boston, and were there seized by certain custom-house officers; that at the time of the seizure, the defendant, with other persons, did attempt to rescue the goods so seized. threw a great part of them out of the window of the stable, and finally, by their resistance of the officers, and throwing the goods out of the window, succeeded in depriving the officers of the possession and custody of a great portion of the goods, so that they were never afterwards found.

The district attorney, upon this evidence, prayed the court to instruct the jury, "that, whether the defendant were or were not concerned in, or privy to, the original concealment of the packages of merchandise referred to, in the stable of Mrs. Trask, still if they should be satisfied, that the defendant was in fact knowingly concerned in impeding the seizing officer or his assistants in the execution of their duty, and in casting the packages from the window of the stable in the manner represented by the witnesses, whereby the seizing officer was deprived of his possession of them, and thus the goods were removed and put away, so that the said officer could not afterwards find or get possession of them, that this would amount, in point of law, to a concealment of the said packages and goods, within the true intent and meaning of the provisions of the 69th section of the act of March 2, 1799, c. 128 [1 Story's Laws. 632; 1 Stat. 678, c. 22]. But the court did, then and there, refuse so to direct or instruct the jury; and, on the contrary, did instruct the jury, that if they were not satisfied by the evidence adduced, that the defendant was concerned in the original concealment of the packages and goods in the stable of Mrs. Trask, or in a subsequent concealment; and if his only offence was in resisting the searching officer and his assistants, and in throwing the packages out of the stable window, in the manner stated by the witnesses for the United States, then he could not be lawfully convicted upon this suit under the 69th section of the act, though the officer was deprived of the possession of the goods by such proceedings on the part of the defendant, and could not afterwards recover the possession of said goods." [Case unreported.]

It was contended, on the part of the United States, that there was error both in the refusal, and in the direction of the district court.

G. Blake, for the United States.

W. Sullivan, for defendant.

[2] [From 11 N. Y. Leg. Obs. 161.]

[1] [Reported by William P. Mason, Esq.]

STORY, Circuit Justice. The question resolves itself into this, whether the mere acts of resisting the officers of the customs, and casting the packages of goods out of the window of the stable, whereby they were entirely removed from the possession and custody of the officers, constituted per se in point of law a concealment of the goods. I cannot yield to the argument, that endeavours to maintain the affirmative. Neither the act of resisting the officers, nor of throwing the goods out of the window, is of itself a concealment, although it may have led to a concealment within the statute. The defendant may have concurred in either or both of these acts, and yet may not have been party to the subsequent removal and concealment of the goods. On the other hand, a person may have concealed the goods, who did not concur in the previous resistance of the officers, or the removal of the goods from the stable. If this be true, then the conduct of the court, both in the refusal and in the instruction to the jury, was perfectly correct. It is quite another question, whether the evidence would not have warranted the jury to infer, that the defendant was a party to the concealment, as well before as after the seizure. This, however, was a fact exclusively for their consideration, and in respect to which the charge of the court did not at all interfere. On the whole, the judgment of the court below must be affirmed.

Case No. 15,073.

UNITED STATES v. FARRELL et al.

[8 Biss. 259;[1] 24 Int. Rev. Rec. 231.]

Circuit Court, N. D. Illinois. July 8, 1878.[2]

INTERNAL REVENUE—DESTRUCTION OF SPIRITS BY FIRE — TAXES THEREON — WHEN TAX ON DISTILLED SPIRITS ATTACHES.

1. The fact that distilled spirits placed in a distillery warehouse were destroyed by fire, because of the absence of the government storekeeper from the warehouse, does not release the bondsmen from liability for the amount of the taxes which were due on the spirits. The government cannot be made a loser by a neglect of duty by an officer.

2. The liability of a distiller for the tax on distilled spirits attaches so soon as the spirits are produced, and if he places them in a warehouse, giving bond for the payment of the tax on their removal and within one year from the date of the bond, and the warehouse and spirits are destroyed without any negligence on his part, this does not release him from liability for payment of the tax.

3. A destruction by fire is a "removal" within the meaning of the statute and the bond.

[This was a suit against De Witt C. Farrell and others, brought on a distiller's bond.]

Mark Bangs, U. S. Dist. Atty.

McCagg, Culver & Butler and S. D. Puterbaugh, for defendants.

BLODGETT, District Judge. This is a suit upon a distiller's warehousing bond, dated June 13, 1870, given by the defendant Farrell, as principal, and signed by the other defendants, as sureties, in the penal sum of $33,000, conditioned for the payment by Mr. Farrell, as principal, to the collector of internal revenue of the Fifth collection district of this state, of the tax on 449 barrels of distilled spirits, containing 32,184$^{89}/_{100}$ gallons of proof spirits, which were entered for deposit in the distillery warehouse attached to Mr. Farrell's distillery in Peoria in said district, before said spirits could be removed from said warehouse, and within one year from the date of said bond. It is admitted that on the 27th day of July, next after the spirits were deposited in the warehouse and the bond given, a fire broke out in a building not connected with the Farrell distillery or warehouse, by which Farrell's distillery and warehouse took fire, and the same were wholly destroyed with the contents, including the spirits described in the bond, without any negligence or carelessness on the part of Farrell or those in charge of the distillery. It is also shown by the proof, and not disputed, that the warehouse in question was in charge of the government storekeeper, who had the keys thereof, and that he was not present at the time the fire broke out, and for some time thereafter. And the proof tends to show that if he had been so present at the time it became evident that the distillery premises must burn, a portion, if not all, the spirits in the warehouse might have been saved, there being at the time in the warehouse about 2,000 barrels of spirits, and the spirits in controversy only amounting to 449 barrels. The defendants deny their liability for the tax upon the facts shown.

The first point insisted upon is, that the loss occurred by reason of the absence of the storekeeper from the warehouse at the time that the fire broke out, and until it was too late to remove the spirits therefrom. The fire occurred about noon, and the proof shows that the storekeeper had gone to his dinner, and the distillery was not then in operation, and his constant presence was not needed to superintend the operation of the distillery. I do not understand that any law or regulation requires the constant presence of the storekeeper at the warehouse and distillery when the distillery is not in operation; but even if it did, the rule is well settled that the government cannot be made a loser by the neglect of duty by an officer.

The defendants in this case claim, however, that the United States supreme court has, in the case of Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, held that the failure of an officer to perform his duty releases the distiller. An examination of that case shows, however, that that was a case where the United States itself, or rather the de-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Affirmed in 99 U. S. 221.]

partment itself, was at fault, and not the officer of the department, in which I think there is a clear distinction. The operations of the distillery were suspended in that case for a number of days by reason of the failure of the treasury department to appoint a storekeeper; and the suit was brought against the distillery for the recovery of the amount of tax which the distillery should have paid according to its capacity, or, in other words, for its capacity tax. And the supreme court simply held that during the time the operations of the distillery were suspended for the want of a storekeeper the capacity tax should not be charged against the distillery. The case is clearly placed upon the neglect of the government, and not upon the neglect of a subordinate officer of the government to perform his duty; that the distillery was not legally in condition to legally run during the time that there was no storekeeper, therefore there was no earning of the capacity tax.

But the main point insisted upon in the argument is, that the distiller is not liable on his bond until he asks and obtains a permit to remove the spirits from the warehouse; that the act of paying the tax and removal must be simultaneous.

It is sufficient to say, that I do not concur in this view of the law. Section 3,248, Rev. St., provides that the tax shall attach to distilled spirits as soon as the same is in existence as such; that is, the distiller becomes liable for the tax as soon as the spirits are produced; but by the warehousing system the distiller is allowed one year in which to pay the tax, or such time as he chooses within one year, by depositing the spirits in a warehouse, and giving a bond. He is a debtor to the government to the amount of the tax as soon as the wines are produced, but upon certain conditions, is allowed time for making payments. Sections 3,287, 3,293, and 3,294, when taken together, clearly show that the warehousing bond is taken solely for the purpose of securing the payment of the tax at the convenience of the distiller within one year. This view is further sustained by the provisions of law which fix the tax to be paid by the amount of spirits which are gauged into the warehouse, and not by the amount which are gauged out. If the tax was not fixed until the removal, that would be the time at which to gauge the spirits, and determine the amount of the tax; but instead of that, it is the amount gauged into the warehouse, and the amount which is at that time marked upon the barrels, which determines the amount of tax to be paid. The letter of the bond, too, provides for the payment of the tax on a fixed and certain quantity of spirits before such spirits shall be removed from such warehouse, and within one year from the date of the bond. By the terms of the bond the distiller must pay the tax on the removal of the spirits, it matters not whether the removal is caused by their evaporation or combustion from fire, or by the deliberate act of the distiller; in either case they are removed, and the condition of the bond is broken. This may seem a harsh rule but it is the only guide the court has to go by. The court cannot make the contract, but must construe and enforce that which is made by the parties.

This rule is clearly laid down in U. S. v. Keehler, 9 Wall. [76 U. S.] 83; U. S. v. Prescott, 3 How. [44 U. S.] 578; and U. S. v. Dashiell, 4 Wall. [71 U. S.] 182. The view I take is much strengthened by the provisions of section 3,221 of the Revised Statutes, which reads as follows: "Sec. 3,221. The secretary of the treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remain in the custody of any officer of internal revenue in any distillery warehouse, or bonded warehouse of the United States, and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits, the said secretary shall refund the same to the owners thereof out of any moneys in the treasury not otherwise appropriated." Now the question naturally occurs here: Why clothe the secretary of the treasury with the power to abate the tax if none was due? Why give the secretary of the treasury the power to remit a claim against a person, if the government has no claim against him? The whole theory upon which that statute is based is to my mind clear that the tax was due upon the production of the spirits, and that, as an equitable consideration, the secretary of the treasury may, in his discretion, abate the tax, if he sees fit.

The questions involved in this case I admit are not entirely free from doubt, and I have not the light of much direct authority upon the question. No case, I think, has ever been decided by the supreme court of the United States directly involving the question here raised. There is the case of Insurance Co. v. Thompson, 95 U. S. 547, where it seems to me that the plain intimation of the court is in favor of the view of the law which I am now taking. In that case certain wines were placed in a bonded warehouse connected with the distillery; the parties interested in those wines insured them, and they not only insured the value of the wines themselves but the government tax thereon; they were destroyed, as the wines in question were, by an accidental fire, and suit was brought upon the warehousing bond and the amount of tax recovered on the warehousing bond. After the

recovery of the amount of the tax and the payment of the judgment, as I infer from the record in the report, the parties who had obtained insurance, the owners of the wine and the parties interested, brought suit against the insurance company; and it was contended in that case that the amount of the government tax was not an insurable interest; the court below held that it was and rendered judgment, and the case was taken to the supreme court and affirmed. So that the argument from that case is that the party placing wines in a government warehouse or in a bonded warehouse, has an insurable interest, to the amount of the cost or value of the wines and the government tax, and can, therefore, insure for that amount. I know the fallacy that courts frequently are led into by following a case where the direct question is not decided, that is before the court, yet it seems to me that in the absence of authority, some force, at least, ought to be given to that case; and, though the case is not entirely free from doubt, yet my conclusion is, that the defendant was liable for the tax on these spirits from the time they were purchased, and they, like the importation of goods subject to customs dues, where the importer obtains a certain amount of indulgence of time for the payment of his customs duties, by placing the goods in a bonded warehouse, yet at the same time the duties are due the moment the goods are imported and arrive, and the destruction of the goods afterwards would not release him.

[There will be a finding for the plaintiff of the penal sum of the bond, and as damages, of the amount of the tax. You may make that computation, Mr. Bangs.

[I hardly think any special finding will be needed in the case, because the stipulation as to the facts is broad enough, and it will go up in the record, if the parties wish to take the case up. If a special finding is necessary, why counsel may have it. A certain finding will be necessary in regard to whether the storekeeper was there or not.] [3]

There will be a finding for the plaintiff.

This opinion was affirmed by the United States supreme court in 99 U. S. 221.

Case No. 15,074.

UNITED STATES v. FARRELL.

[5 Cranch, C. C. 311.] [1]

Circuit Court, District of Columbia. May 13, 1837.

WITNESS—SLAVES—DISTRICT OF COLUMBIA—CUMULATIVE SENTENCE.

1. Slaves are competent witnesses in criminal prosecutions, in Alexandria county, against negroes or mulattoes.

2. The act of Virginia passed on the 21st of January, 1801, is in force in that county, although it was to commence in force from the 1st of June, 1801, and although the jurisdiction of Virginia ceased on the 27th of February, 1801.

3. If a man be convicted of a second offence, while in the penitentiary under sentence for the first, the sentence for the second may be made to commence from the expiration or other termination of the period for which he was first sentenced.

Indictment [against Joseph Farrell] for forging a certificate of freedom for Mr. T. F. Mason's slave Sandy. The slave Sandy was offered as a witness for the United States.

W. L. Brent, for defendant, objected that the Virginia act of the 21st of January, 1801, by the 4th section of which it is enacted, that "any negro or mulatto, bond or free, shall be a good witness in pleas of the commonwealth, for or against negroes or mulattoes, bond or free; or in civil pleas where free negroes or mulattoes shall alone be parties," never was in force in the county of Alexandria, because it was not in force on the 27th of February, 1801 [2 Stat. 103], when congress adopted the laws of Virginia, as they then existed, and declared that they should "remain" in force in the county of Alexandria.

Mr. Key, Dist. Atty., contra, contended that congress intended that the district should have the benefit of all the state legislation up to the 27th of February, 1801. But it is not material whether the act of Virginia of the 21st of January, 1801, is or is not in force here, as the 5th section of the Virginia act of the 17th of December, 1792, admits negroes and mulattoes as witnesses in pleas of the commonwealth against negroes or mulattoes, and in civil pleas where negroes or mulattoes alone are parties; at least, such has been the construction which this court has always given to it. The words of that section are, "No negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes, or in civil pleas, where negroes or mulattoes alone shall be parties." These words have always been construed to include slaves.

THE COURT (THRUSTON, Circuit Judge, absent), being of that opinion, permitted the slave Sandy to be sworn and examined as a witness.

Verdict, guilty. Sentenced to the penitentiary for four years, on the 13th of May, 1837.

NOTE. The prisoner was again convicted of a like offence, by forging a pass for negro Sam, another slave of Mr. Mason, at October term, 1837, and the entry of the sentence was: "And it appearing to the court that the traverser is in the custody of the keeper of the penitentiary of the District of Columbia, under the sentence of this court passed at the last term for a like offence, the sentence of the court, for the offence of which he is now convicted, is, that he suffer imprisonment and labor in the penitentiary of the District of Columbia, for the period of three years next after the expiration or other termination of the period for which he already stands committed to the said penitentiary."

[3] [From 24 Int. Rev. Rec. 231.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,075.

UNITED STATES v. FARRING.

[4 Cranch, C. C. 465.] [1]

Circuit Court, District of Columbia. May Term, 1834.

CRIMINAL LAW—EFFECT OF NOLLE PROSEQUI.

A nolle prosequi, without the consent of the defendant, after the jury has been sworn, is equivalent to an acquittal, and may be so pleaded.

[Cited in brief in State v. Champeau, 52 Vt. 315; State v. Primm, 61 Mo. 168.]

Indictment for larceny [against John Farring].

The defendant had been indicted at this term for stealing two silver dollars, and an order drawn by Hoffman and Stephenson on ——— for $15. Upon the trial, the order, produced in evidence, was drawn by Hoffmans and Stephenson.

Mr. Key, for the United States, thereupon directed the clerk to enter a nolle prosequi, and the jury was discharged without the consent of the defendant, and a new indictment was found by the grand jury, reciting the order truly. A verdict of guilty was found upon this second indictment, subject to the effect of the nolle prosequi and discharge of the jury, as if specially pleaded. Motion in arrest of judgment for that cause.

Mr. Taylor, for defendant. It is only in cases of inevitable necessity that a jury can be discharged without the consent of the defendant. Wedderburn's Case, Fost. Crown Law, 22g; 1 Chit. Cr. Law, 630.

Mr. Key, contra. It is now brought to a reasonable rule. Wherever it is for the benefit of, or is indifferent to, the prisoner, the jury may be discharged without his consent, as in the case of the sudden illness of a juror or witness, or where a witness is kept out of the way by the prisoner, or other accident. A mistake of a single letter in an indictment is an accident, like the illness of a witness or juror. 1 Chit. 631, note; 2 Johns. Cas. 275, 301; 2 Caines, 100, 304; Cogan's Case, Leach, 167. But this is not an indictment for the same offence. The order could not have been given in evidence upon the former indictment.

THE COURT (THRUSTON, Circuit Judge, contra) arrested the judgment, being of opinion that the discharge of the jury without the defendant's consent was equivalent to an acquittal as to the dollars, and that the defendant might have pleaded it with an averment that the stealing of the dollars and of the order was one act of taking, if such an averment be necessary; which is doubtful, as the indictment charges it to be one act of theft, and upon a general verdict of guilty he would have been sentenced to the penitentiary.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,076.

UNITED STATES v. FAULBREE.

[See Case No. 3,393.]

Case No. 15,077.

UNITED STATES v. FAW.

[1 Cranch, C. C. 456.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

CORONER—INDICTMENT FOR MAKING FALSE STATEMENT OF EVIDENCE—DUTY IN STATING EVIDENCE.

Neither at common law, nor by the statute of Virginia, is the coroner bound to put in writing the effect of the evidence given upon an inquisition, unless the offence be found to be murder or manslaughter.

The indictment charged, that the defendant [Abraham Faw], being coroner of the county of Alexandria, and having, upon view of the dead body of one Curran, taken an inquest, stating that, while opposing the lawful orders of a justice of the peace, the said Curran was killed by a brickbat thrown by some unknown person, but not finding the killing to be murder nor manslaughter, he, the defendant, "wilfully, injuriously, and unlawfully made a false statement of the evidence in writing, and suppressed material parts of the same; and annexed to the inquisition a false, colorable, and unfair statement, in writing, of the said evidence, under the false and colorable pretence of putting in writing and annexing to the said inquisition fairly and truly the effect of the said evidence, being material, in contempt of the laws of the United States, in violation of the duties and dignity of his office, and against the peace and government of the United States."

E. J. Lee, and F. L. Lee, for defendant, moved the court to quash the indictment. The coroner is not bound at common law to put down the effect of the evidence, in writing, in any case; and by the law of Virginia (page 125, § 11; Nov. 29, 1792), he is required to do it only in case the inquisition shall charge some person with murder or manslaughter, which this inquisition does not. 1 Bl. Comm. 346; 2 Inst. 31; 4 Inst. 271. This is an indictment at common law, and if he was not bound at common law to state the evidence in writing, it is no offence to state it imperfectly or incorrectly. And if it states no offence at common law, it may and ought to be quashed on motion. Rex v. Page, 1 Lev. 304; Rex v. Sellars, 3 Mod. 167; Rex v. Griffith, Id. 201; Rex v. Whitehead, 1 Salk. 371; Rex v. Hotch, 1 Strange, 552; Rex v. Lister, 2 Strange, 788.

Mr. Jones, for United States, contra. The coroner, at common law, has a right to

[1] [Reported by Hon. William Cranch, Chief Judge.]

take evidence in writing, and if he undertakes to do it, and does it unfaithfully, wilfully, and falsely, it is an offence at common law. The depositions may be used for various purposes, as in a question of bail, or to justify an arrest of some person, or to discredit a witness upon the trial.

THE COURT, at July term, 1808, quashed the indictment, being of opinion that it did not set forth an offence at common law, or under the statute; inasmuch as by the common law, the coroner was not bound to put down in writing the evidence, or the effect of it, and the statute required it to be done only when, by the inquisition, some person is indicted for murder or manslaughter.

[See Case No. 15,079.]

Case No. 15,078.

UNITED STATES v. FAW.

[1 Cranch, C. C. 486.] [1]

Circuit Court, District of Columbia. July Term, 1808.

JUSTICE OF PEACE—INDICTMENT FOR ILLEGALLY TAKING BAIL—GROSS IGNORANCE—INTENT.

A justice of the peace cannot discharge a prisoner who has been committed for trial on a charge of felony; nor can he take money in lieu of bail. But he is not liable for so discharging the prisoner, unless he did it contemptuously and wilfully, and with evil intent.

[Cited in Reinhard v. Columbus, 49 Ohio, 267, 31 N. E. 35.]

Indictment for misdemeanor in office of justice of the peace in taking the personal recognizance of Harry Allen, in the sum of one hundred dollars, charged with theft of goods to the amount of sixty dollars, and receiving one hundred dollars in cash in lieu of bail of security.

E. J. Lee and C. Lee, for defendant, contended that the justice acted judicially, and that it was an error in judgment for which he is not liable to answer criminally, and that he has a right to take the money; and cited Cro. Car. 446.

Mr. Jones, U. S. Atty., contended that it is not necessary to show a corrupt motive, but that the defendant is liable for gross ignorance. He acted ministerially, and if it be a palpably illegal act, he is punishable.

E. J. Lee, for defendant. A justice of the peace is not liable unless he acts from corrupt motives. Rex v. Jackson, 1 Term R. 653. He has a right to bail after commitment, and to discharge without habeas corpus.

C. Lee prayed the court to instruct the jury that if they should be satisfied by the evidence, that the defendant acted uprightly and without corrupt motives, he ought to be acquitted, and so unless they should be satisfied by the evidence that he did it contemptuously.

Mr. Jones, contra. The defendant had no right to discharge at all after commitment; and no authority to take money as a deposit in lieu of bail for a person charged with felony.

THE COURT (DUCKETT, Circuit Judge, absent) said they had no doubt on those points. The justice of peace cannot discharge after commitment for trial, nor can he take money in lieu of bail.

THE COURT (DUCKETT, Circuit Judge, absent) instructed the jury that unless they should be satisfied that the acts were done contemptuously, wilfully, and with an evil intent, they ought not to find the defendant guilty. (The words "wilfully" and "contemptuously" were used in the indictment.) The jury found a special verdict, that Faw acted illegally, in taking the money in lieu of bail, and in discharging the traverser from imprisonment; but he thus acted through ignorance and mistake of the law, and without any sinister or corrupt motive.

Judgment for the traverser on the verdict. DUCKETT, Circuit Judge, absent.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,079.

UNITED STATES v. FAW.

[1 Cranch, C. C. 487.] [1]

Circuit Court, District of Columbia. July Term, 1808.

CONSTABLE—RIGHT TO BREAK DOORS.

A constable, having a warrant to arrest a man for assault and battery, has a right to break open the door of the offender's dwelling-house to arrest him.

Indictment for not doing all in his power to prevent a riot, whereby a man was killed. [For prior proceedings in this suit, see Case No. 15,078.]

Mr. Jones, for the United States, prayed the court to instruct the jury, that neither the constable nor the magistrate had a right to break open the door of the house inhabited by a man, to arrest him upon a warrant for an assault and battery,

Which THE COURT refused (DUCKETT, Circuit Judge, absent).

The jury found the defendant not guilty.

[1] [Reported by Hon. William Cranch, Chief Judge.]

UNITED STATES v. FAXON. See Case No. 16,324.

Case No. 15,080.

UNITED STATES v. FEARS.

[3 Woods, 510.] [2]

Circuit Court, N. D. Georgia. March Term, 1878.

RESISTANCE TO REVENUE OFFICER—AUTHORITY OF OFFICER—ENTRY WITHOUT WARRANT—INDICTMENT.

1. A person may be guilty, under section 3177, Rev. St., of the offense of obstructing and hindering an officer of internal revenue in the ex-

[2] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

ercise of his authority, to enter any building or place where articles subject to tax are produced, for the purpose of examining such articles, although such person does not own the building or the articles subject to tax, and did not make, produce or keep them.

2. It is no offense to resist or obstruct an officer who is acting without authority, or who is exceeding his authority.

3. The right of resistance to illegal official action is essential, not merely to all free government, but to any government whatever.

4. Under section 3177, Rev. St., a collector, deputy collector or inspector of internal revenue, may, without process, enter any building where distilled spirits, subject to tax, are produced or kept, so far as may be necessary for examining the same, and under section 3453, Rev. St., may, without process, seize illicit distilled spirits.

5. An indictment, under section 3177, for hindering an internal revenue officer, without warrant, from entering a building where illicit distilled spirits, subject to tax, were kept, and from seizing said spirits, must aver that the attempt of the officer to enter, which was hindered, was made in the day time, or that it was made in the night season when the premises were open, and that such entry was necessary for the purpose of examining such distilled spirits, and that they were in the custody of some person who had the purpose of selling or removing the same, in fraud of the internal revenue laws, or the design to avoid the payment of the taxes thereon.

Heard on demurrer to the indictment.

The indictment in this case was based on the last clause of section 3177, Rev. St. U. S. The entire section reads as follows: "Any collector, deputy collector or inspector may enter in the day time any building or place where any articles or objects subject to tax are made, produced or kept within his district, so far as it may be necessary for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers may enter them while so open in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector or deputy collector, or inspector in the execution of any powers vested in him by law, or shall forcibly rescue, or cause to be rescued, any property, articles or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court." The indictment charged that the defendant did "forcibly obstruct and hinder one William W. Brown in the execution of a power and authority vested in him, the said William W. Brown, by law, to seach for and seize two packages of corn whisky, containing, in the aggregate, sixty gallons, said two packages of corn whisky then being distilled spirits, subject to tax, on which the tax had not been paid, said distilled spirits having been removed from the place of distillation to a place other than the distillery warehouse provided by law, said two packages of distilled spirits being then and there supposed to be kept concealed in the smoke-house of him, the said E. P. Fears, then and there being; he, the said William W. Brown, being then and there a deputy collector of internal revenue for the Second collection district of Georgia, in the execution of a power and authority vested in him by law, to search for and seize said two packages of distilled spirits, wherever found, and to enter said smoke-house, so far as it was then and there necessary, for the purpose of making such search and seizure."

The demurrer to this indictment was based on two grounds: (1) Because it was not averred that the defendant, E. P. Fears, concealed the said distilled spirits. (2) Because the authority under which the officer acted was not sufficiently set out.

H. P. Farrow, U. S. Atty.

S. A. Darnell, for defendant.

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge. The first ground of demurrer is clearly untenable. The offense charged is not the removal, nor concealment, nor keeping of distilled spirits contrary to law, but the obstructing of an internal revenue officer in the discharge of his duty. The distilled spirits may be kept by one person in his own building, and yet another person may obstruct or hinder the officer when he attempts to enter such building for the purpose of examining the spirits. The latter would clearly be amenable to the law, though he owned neither the building nor the spirits, and did not make, produce or keep them. To keep or conceal illicit spirits is one offense, to obstruct or hinder an officer from entering a building where illicit spirits are kept, is a distinct and different one. It is the latter which the pleader has attempted to charge in this indictment.

The second ground of demurrer is, we think, well taken. An indictment for obstructing or hindering an officer should show the authority under which the officer is acting. It is no offense to resist or obstruct an officer who is acting without authority or who is exceeding his authority. The pleader seems to have known the rule, and has made an attempt to conform to it. In this, we think, he has failed. There is no pretense that the officer was acting by virtue of any search-warrant or any other legal process. The theory of the prosecution seems to be that, under section 3177 of the Revised Statutes, the internal revenue

officer may enter without process any building where distilled spirits subject to tax are made, produced or kept, so far as it may be necessary for examining the same; and that under section 3453, he may also, without process, seize illicit distilled spirits. This is true, but the authority exists only where the circumstances prescribed by these sections exist. The officer has the authority in the case pointed out by the statute, and in no other. To show his authority, it must appear that such a state of facts existed as are contemplated by the statute. By section 3177 the internal revenue officers are authorized in the day time or in the night, when the premises are open, to enter any building where any articles subject to tax are made, produced or kept, so far as it may be necessary for the purpose of examining said articles.

There is no averment in the indictment that the attempt to enter the smoke-house of the defendant and examine said distilled spirits was made in the day time, or made at night when the premises were open, nor that said distilled spirits were made, produced or kept on said premises, or that such entry was necessary for the purpose of examining said spirits. It does not appear, therefore, from the indictment, that the officer had authority to make a search or to enter the premises of defendant; and it does not appear that it was unlawful for the defendant to resist the officer in making such entry and search. If, for instance, the officer had attempted to enter the premises in the night season, when the door was shut, the defendant would have had the right to resist him, and would violate no law in so doing. Section 3453, Rev. St., authorizes the seizure of taxable articles by the internal revenue officers "which shall be found in the possession or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with the design to avoid the payment of the taxes thereon." There is no averment in the indictment that the distilled spirits therein mentioned were in the custody of any one for any of the purposes mentioned in the section just quoted. The authority of the revenue officers to seize is, therefore, not averred, and it does not appear from the indictment that the defendant was guilty of any offense in obstructing or hindering such seizure.

As to both the attempted examination and seizure, from all that appears in the indictment the officer seems to have been a trespasser who might be lawfully obstructed and resisted. The right of resistance to illegal official action is essential not merely to all free government, but to any government whatsoever. All citizens of the United States are guarantied by the constitution security in their persons, houses, papers and effects, against unreasonable searches and seizures. The right to resist an unauthorized search or seizure is a direct consequence of this guaranty. In order, therefore, to show that defendant was guilty of an offense in resisting the search and seizure of the revenue officer, the authority of the latter should have been set out. This the indictment entirely fails to do. It is, therefore, defective and bad, and the demurrer must be sustained.

Case No. 15,081.

UNITED STATES v. FEARSON.

[5 Cranch, C. C. 95.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

JUDGMENT—CORRECTION OF—MISTAKE.

The court will, at a subsequent term, correct a judgment entered by mistake for too large a sum.

Debt on an administration bond [by the United States for the use of Keirle]. Judgment for the whole amount of the plaintiff's claim, when the estate was insolvent.

Mr. Redin moved to quash the execution and correct the judgment, which was confessed at the last term, it having been entered for about $50 too much, as the defendant contends by mistake.

Mr. C. Coxe, contra. A judgment on an administration bond cannot be for assets, as in an action against an executor or administrator. The judgment must be absolute.

THE COURT, being satisfied that Mr. W. L. Brent had confessed the judgment by mistake, ordered it to be corrected.

UNITED STATES (FEARSON v.). See Case No. 4,712.

Case No. 15,082.

UNITED STATES v. FEELY et al.

[1 Brock. 255.] [2]

Circuit Court, D. Virginia. May Term, 1813.

CRIMINAL LAW—RECOGNIZANCE—FAILURE TO APPEAR—FORFEITURE—POWER OF COURT TO SUSPEND.

Where an individual is charged with the commission of a criminal offence, and enters into a recognizance, conditioned to appear at a given day, and undergo his trial, which recognizance is forfeited by the failure of the party to appear and submit himself to the law; but the accused appears at the succeeding term of the court, the court in which the recognizance is filed has full power to suspend (or discharge?) it, for good cause shown by the accused, why he did not comply with the condition of the recognizance; the object of such a recognizance being, not to enrich the treasury, but to combine

[1] [Reported by Hon William Cranch, Chief Judge.]

[2] [Reported by John W. Brockenbrough, Esq.]

the administration of criminal justice with the convenience of a person accused of a criminal offence, but not proved to be guilty.

[Cited in U. S. v. Duncan, Case No. 15,004.]

[Cited in Caldwell v. Com., 14 Grat. 705; State v. Hoeffner, 124 Mo. 488, 28 S. W. 7.]

At law.

Before MARSHALL, Circuit Justice, and TUCKER, District Judge.

MARSHALL, Circuit Justice. This is a motion made to stay proceedings on a scire facias, which has been sued out of this court, by the attorney of the United States, against Feely and his security, requiring them to show cause, why execution should not be had against them, on a recognizance entered into by them, conditioned for the appearance of the said Feely, on the first day of the last term, to answer an indictment filed against him in this court. Feely did not appear, and his default was recorded. He appeared on the first day of this term, and is now in custody, on the motion of the attorney for the United States.

It is contended, on the part of the United States, that the court possesses no power over this recognizance; that being forfeited, it has become a debt due to the United States, which is no more subject to the control of this court, than a debt upon contract.

It is admitted, on the part of the United States, that in England, the court of exchequer exercises this power. But the statutes of 33 Hen. VIII. (chapter 39), and of 1 Geo. II., expressly delegate it, and it is contended, that from these statutes alone, the authority of the court of exchequer is derived. Mr. Bacon, in his Abridgment (volume 2, p. 150), says, that it is by virtue of 33 Hen. VIII., that courts of exchequer discharge recognizances, and his opinion is certainly entitled to respect.

It is contended by the counsel for the prisoner, that these statutes are made in affirmance of the common law. For this there is no dictum in the books. But if they do not simply give a statutory form to a rule of the common law, there is reason to believe that they permit a principle to be exercised, directly and effectively, which was before not absolutely unknown to the court. They authorise a discharge, or a compounding of recognizances, and, perhaps, without them, recognizances could not be absolutely discharged or compounded. But it does not follow necessarily, that the same effect might not be indirectly produced by a perpetual suspension. It is apparent, that the power given by statute is conferred on the court of exchequer only; consequently, the power exercised by the courts of common law, is derived, not from the statute, but the common law.

It is admitted by the prosecutor, that the power which the courts of common law exercised over recognizances in England, may, in the United States, be exercised by this court. Let us, then, inquire what that power is? The attorney relies upon the case of Reg. v. Lord Drummond, 11 Mod. 200. In that case, a motion made on the day of appearance to discharge the recognizance, because the cognizor was sick and unable to appear, was overruled by the court, notwithstanding the consent of the attorney for the crown, because the court could not grant the motion; but the time for appearance was enlarged. The officers of the crown are generally sufficiently attentive to its interests, and it is somewhat extraordinary, that one of them should consent to release a debt, which debt was absolutely beyond the power of the court. The expression employed by the judge, may be used in reference to the propriety of the order. But, admitting it to import a positive legal inability to grant the motion, it will be recollected, that the motion was for an absolute discharge of the recognizance. A declaration, that the court could not discharge it, was not equivalent to a declaration, that the court could exercise no power over it. In fact, the court did proceed to relieve the party from his default, by extending the time for his appearance. If the court possessed no power over the subject; if, upon failure to appear, the debt, according to the terms of the recognizance, became absolute, and was placed beyond the power of the court, it would be difficult to support the order which was actually made. The case of Reg. v. Ridpath, 10 Mod. 152, does not bring into view the power of the court. It did not, in any degree, turn on that point. The case of Rex v. Tomb, 10 Mod. 278, is vaguely reported, and its circumstances are omitted. In that case, however, the principle is expressly laid down, that "judges of oyer and terminer are the proper judges whether recognizances ought to be estreated or spared;" that is, that the court in which the recognizance is filed, decides after default made, whether the attorney for the crown shall estreat the recognizance, in order to put it in suit. It will be recollected, that in England, the recognizances of this description are filed in a court of criminal jurisdiction, and sued, not in that court, but in the court of exchequer. "No instance," says the book (Rex v. Tomb), "can be produced, of a certiorari to remove a recognizance for appearance from a court of oyer and terminer. It would be to take away a jurisdiction that properly belongs to them." "It is for the advantage of public justice, that it should be in the power of justices of oyer and terminer to spare the recognizance, if, upon the circumstances of the case, they see fit." This, then, is an express decision, that the court in which the recognizance is filed, may, if, upon the circumstances of the case, they see fit, after default has been made, and the recognizance is forfeited, refuse to permit it to be estreated, in order to be put in suit. It is a question exclusively for their decision, and no other court will control or inquire into the propriety of that decision. This power remains so long as the recognizance remains in court. When once estreated, the recognizance

and all power over it are transferred to another tribunal.

In the United States, there is no separate court of exchequer; and recognizances are put in suit in that court in which they are originally filed. They are never estreated. The power which the courts of law in England exercise on the question, whether a recognizance shall be estreated or not, is exercised after default, and continues as long as the recognizance remains in court. It is dependent on the discretion of the court, and, according to Hawkins, is applied in relief of the cognizor, if the person who has forfeited it, shall appear at the next succeeding term and take his trial. The same power existing in this court may, it would seem, as in England, be exercised so long as the recognizance continues in court. If, when the default was recorded, it had been shown to the court that the accused was in custody of the law, then, according to the case in 11 Mod., the court might have extended the recognizance. Why may not the excuse be made as effectually at a subsequent day? The case of Rex v. Eyres, 4 Burrows, 2118, is also reported in a very unsatisfactory manner. It is not improbable that the case had been compromised in the court of exchequer. There is too much uncertainty in the report to rely much upon it.

The authority on which the court most relies is Mr. Blackstone. In his 4th volume (page 254) he says: "A recognizance may be discharged, either by the demise of the king, to whom the recognizance is made, or by the death of the principal party bound thereby, if not before forfeited, or by the order of the court, to which such recognizance is certified by the justices, (as the quarter sessions, assizes, or king's bench,) if they see sufficient cause." Upon authority, then it appears, that entirely independent of the statute, the courts of England exercise the power which this court is now required to exercise. It is not an unreasonable power. The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as is in his power, by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done. If the accused prove innocent, it would be unreasonable and unjust in government to exact from an innocent man a penalty, intended only to secure a trial, because the trial was suspended, in consequence of events which are deemed a reasonable excuse for not appearing on the day mentioned in the recognizance. If he be found guilty, he must suffer the punishment intended by the law for his offence, and it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial. The reasonableness, then, of the excuse, for not appearing on the day mentioned in the recognizance, ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offence, and of the default. Should the legislature think otherwise, the case may be provided for by statute. At present, the law is understood to be that this court possesses full power over the subject. All proceedings, therefore, on this recognizance may properly be stayed, until it shall appear whether the accused shall continue to submit himself to the law, or shall attempt to evade the justice of the nation. This recognizance will await the final trial of the cause. In the mean time, the court is of opinion, that an additional recognizance may be required, but not in such a sum as to amount to refusal of bail, or to be really oppressive. It is the direction of the court, that the prisoner stand committed until he shall enter into a recognizance himself, in the sum of $500, and one or more sureties in the same sum, conditioned as the law requires.

Case No. 15,083.

UNITED STATES v. FEHRENBACK et al.

[2 Woods, 175.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

CRIMINAL LAW — LIMITATIONS — REVENUE LAWS.

1. Section 5440 of the Revised Statutes of the United States, which makes it a misdemeanor to "conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose," etc., forms a part of the revenue laws of the United States.

[Cited in U. S. v. Dennee, Case No. 14,948. Distinguished in U. S. v. Sanche, 7 Fed. 718.]

2. The limitation for prosecutions under said section is declared by section 1046, Rev. St., and is five years.

The indictment in this case was predicated on section 5440 of the Revised Statutes of the United States, which declares: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of said parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." The indictment charges that the defendants [Edward Fehrenback and others], on the eighth of April, 1874, did unlawfully and fraudulently conspire among themselves to defraud the United States of the internal revenue tax of seventy cents per gallon on one hundred thousand gallons of distilled spirits, there-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

after to be produced at said Edward Fehrenback's distillery, and that to effect the object of the conspiracy, Fehrenback did on the same day, with intent to defraud the United States, remove from his distillery to a place other than the distillery warehouse, twenty thousand gallons of distilled spirits, on which the internal revenue tax had not been paid. The second count was similar to the first, and laid the offense as having been committed on the first day of April, 1874. The indictment was returned into court by the grand jury on April 8, 1876. Counsel for defendants claimed that the prosecution was barred. On this point the court charged the jury as follows:

J. R. Beckwith, U. S. Atty., and John H. New, Associate U. S. Atty.

W. H. Hunt, T. J. Semmes, L. A. Sheldon, W. R. Whitaker, and J. D. Rouse, for defendants.

WOODS, Circuit Judge. It is claimed for defendants that this prosecution is barred by the statute of limitations. Counsel for defense say that the conspiracy is alleged in the indictment to have been formed on the 8th of April, 1874; that the proof shows that if there was any conspiracy at all, the date laid in the indictment must be the correct one, and that under the statutes of the United States the prosecution is barred if not commenced within two years, and as the indictment was not returned into court until April 8, 1876, more than two years had elapsed between the offense and the finding of the indictment, and the prosecution therefore comes too late. The provisions of the Revised Statutes bearing upon this question are as follows: Section 1044 declares: "No person shall be prosecuted, tried or punished for any offense not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within two years after the offense is committed." Section 1046 provides: "No person shall be prosecuted, tried or punished for any crimes arising under the revenue laws or the slave trade laws of the United States, unless the indictment is found or the information instituted within five years after the committing of such crime." The ground taken by the defense is that section 5440, on which this prosecution is based, is found in the Revised Statutes under the general title, "Crimes;" that the offense made punishable by it is conspiracy, and not the actual defrauding of the revenue; that consequently this is not a prosecution under the revenue laws of the United States, and therefore falls under section 1044, and is barred in two years.

Is this position tenable? This depends upon the answer to the question whether section 5440 forms a part of the revenue laws of the United States. This section is taken, as appears by the marginal note, from section 30 of the act of March 2, 1867, and is a reproduction of that section in letter and spirit. 14 Stat. 484. This act is entitled "An act to amend existing laws relating to internal revenue, and for other purposes," and is devoted to the subject of internal revenue. It contains amendments of existing internal revenue laws, some new provisions, which all refer to the internal revenue, and in addition it contains section 30, and nothing more. Now when we find that section 30 of this act punishes a conspiracy to defraud the United States, and is found embedded in a law devoted exclusively to the subject of internal revenue, the conclusion is inevitable that it was at the time of its enactment a part of the revenue laws of the United States. Has it ceased to be a part of the revenue laws by its collocation in the Revised Statutes? This question is answered in the negative by section 5600 of the Revised Statutes, which declares: "The arrangement and classification of the several sections of the Revision have been made for the purpose of more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." In my judgment, therefore, section 5440, on which this prosecution is based, is a part of the revenue laws, and prosecutions under it are not barred until the expiration of five years, as provided by section 1046. As the distillery of Fehrenback was not out in operation until January 12, 1874, and if there was any conspiracy, as charged in the indictment, it must have been entered into at or about that time, you need not trouble yourselves about the statute of limitations. Upon the conceded facts of the case, and upon the law as I have given it you, the defense that the prosecution is barred cannot be successfully made in this case.

Case No. 15,084.

UNITED STATES v. FEIGELSTOCK.

[14 Blatchf. 321.] [1]

Circuit Court, S. D. New York. Sept. 15, 1877.

INTERNAL REVENUE—WHOLESALE LIQUOR DEALER—SINGLE SALE—FORFEITURE.

1. Under section 3242 of the Revised Statutes, a person does not carry on the business of a wholesale liquor dealer without having paid the special tax as required by law, who, without having paid such special tax, sells, in quantities of not less than five wine gallons at one time, a single lot of spirits which he has taken for a debt.

2. Under that clause of section 3281 of the Revised Statutes which provides for the forfeiture of distilled spirits, the forfeiture does not operate when the statute is violated, but only at the time of the seizure of the spirits or wines.

[Error to the district court of the United States for the Southern district of New York.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[This was an action for forfeiture of fifty barrels of distilled spirits, Alois Feigelstock claimant. The judgment of the district court was in favor of the claimant. Case unreported. The case is now heard upon writ of error sued out by the United States.]

Roger M. Sherman, Asst. Dist. Atty.
Waldemar J. Tuska, for defendant in error.

JOHNSON, Circuit Judge. This case comes here upon a writ of error to the district court, to review its judgment, in an information of forfeiture, given upon the verdict of a jury against the plaintiffs, by direction of the judge, at the trial. A bill of exceptions, taken by the United States, presents the questions on which a reversal is asked. The first arises upon the facts, that one Kingston was a creditor of the Binghams, who were distillers in Patoka, Indiana, for goods sold, and for services rendered, and for money lent by him to them; that the spirits seized were, on the 10th day of May, 1875, sold and transferred by the Binghams to Kingston, on account of that indebtedness; that Kingston assumed control of the spirits, and procured them to be shipped from Patoka to the city of New York, and authorized Feigelstock, a wholesale liquor dealer, and the claimant, to sell the same on account of Kingston, in quantities of not less than five wine gallons at one time; and that Kingston did not pay the special tax payable, by the laws of the United States, by a wholesale liquor dealer. Upon these facts, it is claimed by the United States that the spirits seized were forfeited, under section 3242 of the Revised Statutes. But, the forfeitures created under that section are denounced against every person who carries on the business of a wholesale liquor dealer without having paid the special tax as required by law. This provision is found in chapter 3, of title 35, entitled "Special Taxes." Section 3232, which begins the chapter, enacts, that no person shall be engaged in, or carry on, any trade or business thereinafter mentioned, until he has paid a special tax therefor, in the manner thereinafter provided. Section 3244 provides, that "special taxes are imposed as follows: Fourth. Wholesale liquor dealers shall pay one hundred dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, or wines, in quantities of not less than five gallons at the same time, shall be regarded as a wholesale liquor dealer." Taking the language of these sections together, it is plain, that those persons only are included who engage in, or carry on, a trade or business of liquor dealing, and that it does not apply to the case of an isolated sale. Even the definition of a wholesale liquor dealer, taken by itself, implies more than a single transaction—a trade or business of selling, as expressed in the other sections referred to. The case states a single transaction, in respect to a lot of spirits taken for debt, and that affords no ground to infer that this was in prosecution of any trade or business requiring the payment of a license under the statute.

No other question is presented which seems to me to need consideration, except that which arises upon section 3281. The Binghams carried on business, as distillers, with intent to defraud the United States of the tax on the spirits distilled by them, or of some part thereof, and, at that time, were owners of the spirits seized, as to which no fraud or illegality appears. Before the seizure the spirits had been sold to Kingston for an existing debt, and Feigelstock had made an advance upon them, in good faith, and they had been removed, under Kingston's direction, from Indiana to New York, to be sold by Feigelstock on Kingston's account. The forfeiture denounced by the section in question is, that "all distilled spirits or wines, * * * owned by such person, wherever found," shall be forfeited to the United States. The question is, whether the forfeiture operates at the time when the statute is violated, as the plaintiffs contend, or at time of the seizure, as the claimant insists.

This question has been decided adversely to the United States by the district court for the Southern district of New York, in the case now under review. A similar decision was made by the district court of Maryland, in April, 1876, in U. S. v. 100 Barrels of High Wines [Case No. 15,947], and, upon writ of error to the circuit court of the United States for that district, the judgment was affirmed, the circuit judge presiding. Under these circumstances, I think it suitable to follow those decisions without question; and I do so the more readily, because it leaves the case in a condition in which it may, if such is the pleasure of the United States, be reviewed with the least delay.

Let the judgment be affirmed.

UNITED STATES (FELIZ v.). Ssee Case No. 4,720.

Case No. 15,085.

UNITED STATES v. FENELON et al.

[14 Int. Rev. Rec. 182.]

District Court, D. Massachusetts. 1871.

INTERNAL REVENUE—PENALTIES, HOW RECOVERABLE—INDICTMENT—EXPOSING UNSTAMPED ARTICLES FOR SALE.

[1. The penalty of $100 imposed by the act of June 30, 1864 (13 Stat. 296), §§ 167, 169, as amended by the acts of March 3, 1865 (13 Stat. 482), and July 13, 1866 (14 Stat. 144), upon any person exposing for sale articles mentioned in Schedule C, without having affixed thereto the proper stamp denoting that the duties thereon have been paid, is recoverable by indictment, and a civil action is not necessary.]

[2. Persons selling these articles are bound to see that the taxes are paid before the article goes out of their shop; and whether, in the case of a partnership, the sale of an unstamped article is made by one or the other of the partners, or by their clerk, is immaterial, provided it was made

by a person having authority to make the sale. In such case both partners will be liable.]

[3. It seems that, if an article is actually sold from the shop of a dealer without any stamp upon it, the same must be deemed to have been exposed for sale, within the meaning of the statute, even if in fact it had been taken from a package, and placed upon or near the counter, without any intent of then offering it for sale, and was afterwards sold to one offering to buy it, without any intent to violate the statute.]

This was an indictment under sections 167 and 169 of the act of June 30, 1864, c. 173 (13 Stat. 296, 297), as amended by act of March 3, 1865, c. 78, § 1 (13 Stat. 482), and by act of July 13, 1866, c. 184, § 9 (14 Stat. 144). The third count of the indictment alleged that on, etc., at, etc., the defendants [John J. Fenelon and others] "a certain article and commodity named in Schedule C of an act of the congress of the United States of America, entitled 'An act,'" etc., "approved," etc., "to wit, a certain bottle containing a certain extract, to wit, an extract to be used and applied as a perfume, to wit, 'Lubin's Extract, Jockey Club,' so called, did offer and expose for sale; and they, the said (defendants), on," etc., "at," etc., "said article and commodity, to wit, said bottle containing said extract, which said bottle, with its said contents, then and there exceeded the retail price and value of one dollar, and did not then and there exceed the retail price and value of one dollar and fifty cents, to wit, was then and there of the retail price and value of one dollar and twenty-five cents, to Frank H. Freeman did sell, before the duty thereon had been fully paid by affixing thereon the proper stamps, to wit, United States internal revenue stamps of the denomination and value of six cents, as provided by law, against the peace," etc. The government offered evidence that on the day named in the indictment Freeman bought of one of the defendants in their shop the article named in the indictment unstamped, which article at that time was exposed on the outside of a show case, and that the defendants were copartners. The defendants offered evidence that all such articles, when they arrived at their store, were placed on a table, and outside the show-case, prior to being stamped, and, after being stamped, were placed inside the show-case, and then only were intended for sale; and that one of the defendants was not present at the time of sale, and seldom visited the shop, but had charge of another place of business on another street. To rebut the defendants' evidence, the government offered evidence that, a few days after said sale, revenue officers visited the defendants' shop, and found many articles unstamped inside, as well as outside, the show-cases; and, upon asking one of the defendants how many revenue stamps he had on hand, he replied, after making search, "Not any."

D. H. Mason and F. W. Hurd, for the United States.

H. D. Hyde and M. F. Dickinson, Jr., for defendants.

LOWELL, District Judge (charging the jury). The only count of this indictment which is now relied on is the third out of the four which originally were found by the grand jury, the other three having been made to meet the construction of the law, which has not prevailed after argument, although it had a very fair coloring of right, undoubtedly, in its favor at the start. The court has decided—I have decided, as well as I might—(U. S. v. Houghton [Case No. 15,396]) that the acts charged in the first, second, and fourth counts are not punishable under the statutes; and therefore remains the third. The third is founded on the law, which has already been read to you. "that any person who shall offer for sale any of the articles named in Schedule C, whether of foreign or domestic manufacture, etc., shall be deemed the manufacturer, and shall be liable to the duties and penalties and the liabilities imposed by law in regard to the sale of domestic articles without the use of the proper stamp or stamps denoting the duty to be paid thereon." That refers back to another section, which is that "every manufacturer (showing what these people are to be liable to) who shall sell any of the articles mentioned in Schedule C, before the duty thereon shall have been fully paid by affixing a proper stamp, shall be liable to a penalty of one hundred dollars." Now, it has been held that that penalty, if incurred, may be recovered by an indictment. U. S. v. Abbott [Case No. 14,416]. That, again, was a question of some considerable doubt whether it should not be an action of debt or civil action.

Taking the whole statute together, and looking at the numerous penalties therein prescribed for various offences, and the mode of enforcing them, it was considered, on the whole, that it was the intent of congress that these penalties—most of them, this one amongst others—should be recovered by indictment. It is scarcely more than a question of the form of action, because it is very plain, on this statute, and it is admitted by both sides here, and urged by both sides here, that it is a penalty affixed for mere neglect, without any regard to any willfulness, any purpose, any intent to defraud the government; that for the mere neglect, if it be one, of selling one of these articles before the duty has been fully paid by stamp by the manufacturer, or by the seller, if the manufacturer has not done so,—before the duty shall have once been fully paid by affixing the proper stamp, —the penalty is incurred, whether there was any intention not to pay, or even any knowledge on the part of the seller that he or somebody else had not paid. Therefore, it is not really a criminal offence, and it was by a construction of the statute, from which the intent of congress was discovered, to enforce the penalty in this mode, rather than from any idea that the offence itself was criminal in the ordinary acceptation of the word, that this decision was arrived at. There are some

indictments known to the common law for matters which are not really criminal, such as an indictment, as you may have heard, against a town for not keeping its bridges in repair, or something of that sort. Still they are rather rare. This is one of those indictments which lies to recover a penalty, which perhaps might more appropriately be recovered by a civil action. Still, this being so, the parties on the one side and the other, undoubtedly are put in the position, so far as the trial of the case is concerned, so far as the evidence is concerned, of a criminal action. The government are bound to make out their case beyond any reasonable doubt. And the charge here is that these defendants did sell a bottle of an extract, called "Lubin's Extract of Jockey Club," to Mr. Freeman, on the 22d of May, before the duty had been fully paid by affixing the stamp of six cents, or whatever it was; and that is the question to be considered. The law means, as I understand it, that the persons who deal in these articles, whether manufacturers or not, shall see to it that these taxes, which are undoubtedly very small, trifling in each particular instance, are paid, and that, if that is not done, the failure is punished by penalty —very large, undoubtedly, in this instance— in proportion to the loss which the government has suffered by the particular sale; but with that we have not much to do, at this time. The penalty is exactly no more and no less than $100. Persons selling are bound to see to it that these taxes are paid before the article goes out of their shop, and, whether the mistake is committed by themselves, or by one of them, or by their clerk, so it was committed by a person who had authority to make the sale, then it was committed by them, and the penalty has accrued. From that point of view, it is of no sort of consequence whether one or the other of the persons charged, if they are jointly interested in the business, made the sale, if the sale was made, or whether it was made by either of them if it was made by their authority. Now, it is not denied that this sale was made without the duty having ever been paid, either by the manufacturer or by any intermediate person, or by the defendants; not likely to have been paid by anybody else, because these articles are of foreign manufacture, and the foreign manufacturer does not care anything about our law, and never puts stamps on. And, if bought from the importer, the importer is not bound to put the stamps on, unless he breaks the original packages. It is not denied that the article was sold for the benefit and in the interest of these two defendants.

The only question, so far as I can see, though you are bound, of course, to pass upon all the facts, is whether, in respect to this article, they were under any obligation to stamp it. The charge in the indictment is that these defendants did offer this article for sale, and so are manufacturers, and bound to stamp it; and the defendants say they "did not. They never offered it for sale. Therefore they are not manufacturers. They are not quasi-manufacturers, put in the position of manufacturers, and bound therefore to stamp this article." That is to say, the argument, as far as I can understand it, is a question of fact in that aspect. The argument is that, without having ever offered the article for sale, without intending or meaning to sell it, Mr. Freeman came in there, and, taking up an article which was not offered, which nobody meant to sell, and nobody intended to sell, he did induce one of the defendants to let him have it for a price, and that it accidentally got out without being stamped for that reason; that their goods, when really offered or intended to be offered for sale, were always stamped, or at any rate were always intended to be stamped, and were used only after they were stamped; that very fact was denied by the government, and they say, as a matter of fact, that the articles that were intended for sale, were as much left unstamped as any other article. They take issue on the fact. But the government also say that, when a person does sell an article, he thereby offers it for sale. If he consents to sell it, he offers it to sell; and that, in my judgment, is the meaning of the law. Congress, when it says that persons who offer these articles for sale shall be in the position of manufacturers, and liable to the same duties, simply means to say that sellers of these articles should be in the same position as manufacturers, that is all. Well, then, if a person came to your house, and saw a bottle of cologne on your table, and induced you to let him have it for a price, it would not make you a manufacturer, nor a quasi manufacturer of that article. The intention is to define those people who are liable to see to it that these things are stamped. A person who merely by accident, not following the business, makes one sale, not being a dealer, if that is really the fact, has no duty to perform about it one way or the other, because that duty has already been performed, or left unperformed, before the goods ever came into his possession. It is no duty of a purchaser, who wants these articles for use, to stamp them; and, although he might be induced by a neighbor afterwards to sell, selling, I mean, strictly speaking, by accident, and without any previous intent, not being a dealer at all, he would have no duty to perform. But when it comes to a dealer, I suppose that the meaning is that you know him to be a dealer because he offers such articles for sale. Instead of saying "a dealer" in those articles, which congress thought might be a little ambiguous, they say "any person who sells" them.

The indictment, however, happens to confine the offering and exposing to this particular bottle, and then the question is whether the dealer was bound to stamp that bottle,

whether he ever offered it for sale; because that is the allegation, that he did offer this for sale. Well, my impression is that, as applied to the dealer, that must mean pretty nearly the same thing as selling it, when he did sell it; that he could not have sold it without offering or exposing for sale as well. If a man carried it off first, and paid for it afterwards, and had taken it in such a way that the dealer could not know whether it was stamped or not, had not his attention been called to it, that might be a different matter; but, when a man goes in and buys a thing from a dealer in what appears to be the ordinary course of trade, I think it would be very difficult to draw the line, and say that, although sold, that article was never offered for sale. However, it has been argued to you as a question of fact, and, as such, I leave it with you, whether this article was ever offered for sale by these defendants,—that is to say, in the interest of their business, for that is all it means (it does not mean any personal act of theirs necessarily, but by any one authorized to sell their goods); and, if so, whether it was sold to the person named in this indictment, Mr. Freeman, on or about the 22d day of May last, without the duty having first been paid by affixing the proper stamp.

The jury returned a verdict of guilty against both defendants.

Case No. 15,086.

UNITED STATES v. FENWICK et al.

[4 Cranch, C. C. 675.] [1]

Circuit Court, District of Columbia. April 7, 1836.

RIOT—UNLAWFUL ASSEMBLY—RIOTOUS ACTS—ACT OF VIOLENCE—PUBLIC EXCITEMENT—INDICTMENT—TRIAL—INSTRUCTIONS.

1. In an indictment for a riot, it is sufficient to state that the defendants assembled to disturb the peace, and being so assembled, did such and such unlawful acts.

2. It is an indictable offence, at common law, to incite others to insurrection, tumult, and riot; and the indictment need not aver that insurrection, tumult, and riot were thereby excited.

3. The defendants were permitted to give evidence, that Walker, a colored man, whose sign was pulled down by the mob, had recently said that the sign was cut down, at his request, to prevent further excitement.

4. If there is no evidence against one of the defendants, he may be examined as a witness for the other defendants.

5. If a large number of persons assemble, for the purpose of seizing a man on account of insulting language which he was reported to have used, and agree to accomplish that object, and attempt to execute it by tumultuously surrounding his house, and entering it with intent to seize him without legal authority therefor, this is a riot; and the jury may infer the intent from the acts done: and ought so to infer, in the absence of all contradictory evidence.

6. It is not necessary, in order to convict the defendants of a riot, that the intended act of violence should have been perpetrated, or that they should all have been present, doing the act.

7. It is not necessary that an act of violence should have been perpetrated.

8. Upon the count for inciting others to insurrection and riot, it is not necessary to prove an act of violence done in consequence of the incitement.

9. When either party, in a criminal prosecution, has asked an instruction to the jury, upon a question of law, and the other party has proceeded to argue the point before the court, and the court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury.

10. If either party does not join in the argument to the court, but insists upon arguing it to the jury, the court will require him to proceed with his argument and will, after the argument is closed, give or refuse the instruction prayed, or give such other instruction as the court shall think proper.

[Cited in State v. Burpee, 25 Atl. 972, 65 Vt. 28.]

11. If three or more persons assemble, with intent, forcibly and violently to disturb the public peace in a tumultuous manner, and with intent mutually to assist each other against any who should oppose them in the execution of such purpose; and if, with force and violence, and in a tumultuous manner, they proceed to disturb the peace, either by a show of armor, threatening speeches, or turbulent gestures, to the terror of the people, this constitutes a riot, whether or not they committed the particular act of violence charged in the indictment.

12. The marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters; and the citizens have a right to arm themselves.

13. The public excitement is no justification of the intended force and violence.

14. An intent to seize a man by force, for uttering slanderous or offensive words, and to carry him by force, anywhere, even before a justice of the peace, without a legal warrant, is an unlawful intent.

15. All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them, in furtherance of the common object of the assembly; and all who join them after the original meeting, and who were present at any subsequent act, and either active in doing, countenancing, or supporting, or ready, if necessary, to support the unlawful act, thereby become parties to the riot, and are equally guilty of all their subsequent acts.

Indictment for a riot. The first count charged that the defendants on, &c., at the county of Washington, did unlawfully, riotously, routously, and tumultuously assemble and gather together, to disturb the peace of the United States in the said county; and, being so then and there assembled and met together, did then and there make great noises, riot, tumult, and disturbance; and then and there unlawfully, riotously, routously, and tumultuously surrounded and entered the house of Snow & Walker, and destroyed their goods, &c., and remained and continued together making such noises, riots, tumults, and disturbances, for a long space of time, to wit, for the space of five hours and more, then next following, to the great terror and disturbance, not only of the good citizens of

[1] [Reported by Hon. William Cranch, Chief Judge.]

the United States in the said county, but of all other good citizens of the United States in the said county, there passing and repassing, in and along the public streets and common highways there, in contempt of the laws and against the peace and government of the United States. The second count was for inciting others to insurrection and riot. The defendants pleaded the general issue.

Upon the trial, Mr. W. L. Brent, for defendants, objected to evidence of any other act of violence than such as occurred at the house of Snow & Walker. The first count does not state for what unlawful purpose the defendants assembled, except to disturb the peace. It does not state any particular unlawful act that they assembled to do. 1 Russ. 267, and Reg. v. Gulston, 2 Ld. Raym. 1210, where it is said that aliquid illicitum, is too general.

Mr. Key, contra, cited 2 Chit. 485, 488, 490, and note.

THE COURT (THRUSTON, Circuit Judge, absent) said that they had in some previous case, decided that it was sufficient that the defendants assembled to disturb the peace, and being so assembled, did so and so; and referred to the forms of indictment in the Crown Cir. Companion, 384–390.

Mr. Hoban, for some of the defendants, moved the court to instruct the jury, that the second count does not state an indictable offence. It charges the defendants with inciting others to insurrection, tumult, and riot. There is no such offence as "insurrection" in this country. "Tumult," is too vague, and so is "riot." Starkie, Cr. Pleading, 78; Rex v. Holland, 5 Term R. 625. It ought also to have averred that insurrection, tumult, and riot were thereby excited. Reg. v. Daniell, 6 Mod. 99, 101, 182; Reg. v. Collingwood, Id. 288.

Mr. Key, contrà, cited 2 Chit. 507, where there is a similar form of indictment.

THE COURT (nem. con.) refused to give the instruction.

Mr. Brent, for defendants, then offered to prove that Walker, a colored man, and partner of Snow, had, this morning, said that the sign was cut down at his (Walker's) request, to prevent further excitement.

Mr. Key, contrà, objected that Walker's declarations, now made, are not competent evidence to prove his request.

THE COURT, however (CRANCH, Chief Judge, contrà), overruled the objection, and permitted the evidence to be given.

The United States having closed their evidence, and there being nothing proved against Mr. Moore, one of the defendants, he was examined as a witness for the other defendants.

Mr. Hoban, for Beedle and Wetherall, two of the defendants, prayed the court to instruct the jury: (1) That if they do not believe, from the evidence, that they were present at the destruction of the property of Snow & Walker, on 6th street, or if present, not aiding and assisting thereat, the jury should acquit them. (2) That if the jurors believe, from the evidence, that the defendant Beedle was in company with a crowd, armed with clubs, and no act of violence or outrage proved, he should not be found guilty of a riot. (3) That to find the defendant guilty under the second count in the indictment, they must believe, from the evidence, that he actually persuaded, and tried to induce three or more persons tumultuously to assemble to break the peace, and do some act of violence.

Mr. Hoban contended: (1) That the act of violence, intended, must have been perpetrated; and that those only who were present, and did the act, can be found guilty. (2) That if no act of violence was perpetrated, it was no riot. (3) That, in order to convict the defendant, under the second count, there must have been an act of violence done in consequence of the incitement.

Mr. Key, contrà, cited U. S. v. Gooding, 12 Wheat. [25 U. S.] 469, and contended that if the defendants assembled to do one unlawful act, and they do another unlawful act, they are guilty; and thereupon prayed the court to instruct the jury,—That if they believe, from the evidence, that the defendants, or any of them, assembled together with others, to the number of nearly one hundred, for the purpose of seizing one Beverly Snow, on account of insulting expressions which they had heard he had used, then such assembly of such persons, agreeing together to accomplish such object, and their attempting to execute such purpose by tumultuously surrounding his house, and entering it with intent to seize him, without legal authority therefor, if believed by the jury from the evidence, constituted a riot; and the jury may infer the intent from the acts done; and ought so to infer, in the absence of all contradictory evidence.

THE COURT (nem. con.) refused to give the instruction prayed by Mr. Hoban, and gave that prayed by Mr. Key.

After the court had decided the point of law which had been argued by Mr. Key and Mr. Hoban, Mr. Brent, for the defendants, other than those for whom Mr. Hoban appeared, offered to argue the same point of law to the jury, in opposition to the instruction which the court had given.

THE COURT said, that after a point of law had been argued by the counsel of the parties, and the court had, at the request of either party, instructed the jury upon the point so argued, they could not permit the question of law to be reargued to the jury, in opposition to the instruction given by the court.

Mr. Brent contended, that, as the jury had a right, in criminal cases, to decide the law as well as the fact, he, as counsel for some of the defendants, had a right to argue the law to the jury; and cited 1 Chase, Tr. pp. 5, 34; 2 Chase, Tr. pp. 59, 60; Croswell's Case, 3 Johns. Cas. 352, 376; Erskine, Speeches, 152; Van Horne v. Dorrance, 2 Dall. [2 U. S.]

307; State of Georgia v. Brailsford, 3 Dall. [3 U. S.] 4.

Mr. Key, contrà, contended that if there can be appeal from the court to the jury upon a question of law, it can be only in capital cases. Blunt v. Com., 4 Leigh, 689; Davenport's Case, 1 Leigh, 588.

Mr. Hoban observed that he appeared for two of the defendants only, Beedle and Wetherall; and that his argument in their defence ought not to prejudice that of the other defendants.

Mr. Bradley, who appeared, with Mr. Brent, as counsel for the other defendants, contended that the rule suggested by the court, applied only to cases where the defendants have asked an instruction to the jury, or have joined in the argument to the court, upon an instruction asked by the attorney of the United States, and thereby waived their right to argue the law to the jury; and stated that they had objected to the court's giving an instruction to the jury before they had argued the law to them.

THE COURT said that they had not heard any such objection, and had considered the counsel for all the defendants as joining in the argument upon the motions of Mr. Hoban and Mr. Key to the court for instructions to the jury. But as they had made such objection, although not so understood by the court, they were allowed to argue the whole law of the case to the jury; MORSELL, Circuit Judge, observing that the court never denied the power of the jury to decide the law as well as the fact, in criminal cases by finding a general verdict; but when either party has asked an instruction, and the other party has proceeded to argue the question before the court, and the court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury. If the party does not join in the argument to the court, but insists upon arguing it to the jury, the court will require him to proceed with his argument, and will, after the argument, give, or refuse, such instruction, or give such other instruction as the court shall think proper.

Mr. Key replied to the argument to the jury, and concluded by requesting the court to instruct them upon the whole law of the case; whereupon

THE COURT instructed the jury as follows: As the counsel for some of the defendants have argued before you upon the law as well as upon the facts of the case, and the attorney of the United States has requested the court to state to you the law upon the whole case, we will endeavor to do so. In criminal cases, the jury has a right to give a general verdict, and, in doing so, must, of necessity, decide upon the law as well as upon the facts of the case. As we have not taken notes of the evidence, not having had an expectation of being called upon to give an opinion upon the whole case, we leave the question of fact entirely to your consideration. But, as to the law, we say, that, if from the evidence you should be satisfied that the defendants, or any of them, assembled, to the number of three or more, with intent forcibly and violently to disturb the public peace in a tumultuous manner, and with intent mutually to assist one another against any who should oppose them in the execution of the purpose aforesaid, and they did thus assemble with force and violence, and in a tumultuous manner to disturb the peace, either by show of armor, threatening speeches, or turbulent gestures, to the terror of the people, then such assemblage, with such intent as aforesaid, so executed, constituted a riot, whether they broke into Snow's house, or not. That the marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters, and that the citizens had a right to arm themselves. That the excitement, whatever might be the cause, was no justification of the intended force and violence. That the intent to seize Snow, by force, for uttering slanderous or offensive words, and to carry him, by force, anywhere, even before a justice of the peace, without legal warrant, if such case should be proved to the satisfaction of the jury, was an unlawful intent. That the intent may be presumed from the act; for every man is presumed to have intended to do what he has done, until the contrary is proved. That all concerned in the unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common objects of the assembly; and all who joined them after the original meeting, and who were present at any subsequent act, and either active in doing, countenancing, or supporting, or ready, if necessary, to support, the unlawful act, thereby became parties to the riot, and are equally guilty of all their subsequent acts.

The jury found six of the defendants guilty, and recommended them to the mercy of the court.

When they were brought up for judgment, CRANCH, Chief Judge, said: "Before passing sentence upon the defendants who have been convicted in the cases of riot, the court has deemed it proper to make a few observations upon the nature and tendency of the offence. Civil society cannot exist without laws to protect the weak against the strong. These laws are of no avail unless supported by the strength of the whole society, or, at least, of a majority. They must be executed according to prescribed forms, by known, responsible, public functionaries, selected for the purpose. Our judicial tribunals, and their forms of proceeding, have received the sanction of many ages, and by them the laws have been administered, to the general satisfaction of the people under all the various forms of government through which we and our ancestors have passed. In a regular government no laws can be made, or executed, but according to the forms prescribed by the constitution and fundamental laws of the state

or society. No voluntary association of individuals, unknown to the constitution, have a right to make or execute the laws, or to judge, condemn, or punish those whom they may deem to be offenders, and to punish whom they may suppose the law to be inadquate to, however pure or holy may be their motive; and if, in their fanaticism or their frenzy, they should take the life of their victim, they would be guilty of murder. Such, also, would be the judgment of the law if any unauthorized individual, or combination of individuals, should snatch from the officers of justice even a condemned murderer, and proceed themselves to execute the sentence. But the example of such an usurpation of judicial or executive functions, if unpunished, would be far more pernicious to society than the mere act of murder which would have been committed. The reign of terror would have commenced and no one could foresee the extent of its ravages. It is easier to create an excitement than to allay it; for every degree of excitement tends to pervert the judgment, to obscure the light of reason, and to sear the conscience. When a mob is once raised, no one can tell where it will end, and all who assisted in raising it are guilty of all the consequences. The more respectable the persons engaged in it, and the more desirable the end to be obtained, the more dangerous is the example; for if good men may use unlawful means to accomplish a good end, how can wicked men be restrained from using like means for an unlawful end? All good ends must be pursued by lawful means. The supremacy of the law is the only security for life, liberty, and property."

The defendants, who were convicted, were then sentenced to six months' imprisonment, and to pay a fine of fifty dollars and costs.

Case No. 15,087.

UNITED STATES v. FENWICK.

[5 Cranch, C. C. 562.] [1]

Circuit Court, District of Columbia. May Term, 1839.

CRIMINAL PROCEDURE—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

It is error in a judge to instruct the jury that the evidence is sufficient to convict the defendant. The sufficiency is to be decided by the jury.

[Cited in Stettinius v. U. S., Case No. 13,387; U. S. v. Taylor, 11 Fed. 473.]

[Cited in Territory v. Kee (N. M.) 25 Pac. 926.]

Error to the criminal court for Alexandria county, in a prosecution for perjury.

The judge had instructed the jury that the evidence was sufficient to convict the defendant [Francis Fenwick], who objected to the instruction, and took his bill of exceptions.

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the judge should not have instructed the jury that the evidence was sufficient; that question is for the jury.

Judgment reversed, and venire de novo to be awarded.

Case No. 15,088.

UNITED STATES v. The FIDELITER.

[14 Int. Rev. Rec. 142.]

District Court, D. California. Sept. 21, 1871.

SHIPPING—REGISTER—FRAUDULENT SALE—OWNERSHIP—ALASKA PURCHASE.

1. A, an American citizen, purchased a British ship, but procured the bill of sale to be executed to B, a British subject, by whom a British register was obtained. A, afterwards, under a power of attorney from B, made a bill of sale to C, a Russian subject, but no consideration was paid by C, and the vessel, from the time of the first purchase by A, remained in his exclusive possession, and under his control.

2. After the ratification of the treaty with Russia, A, as attorney for C, applied for an American register, took the oath prescribed by the act of 1792, and produced as further proof that the vessel was the property of a Russian, a Russian passport. The pretended sale to C was made for the purpose of giving to the vessel the appearance of Russian property, and thus enabling her to obtain an American register. *Held*, that the oath taken under the act of 1792 was not a false oath, as the ownership therein referred to is the legal ownership.

3. The vessel was not the property of a Russian inhabitant of Alaska, within the meaning of the treaty; she was not entitled to be registered as American, and the register was fraudulently obtained for a vessel not entitled to the benefit thereof

In admiralty.

Mr. Latimer, U. S. Dist. Atty.

Delos Lake and Milton Andros, for claimant.

HOFFMAN, District Judge. The libel of information in this case was originally filed in the district court of the United States for the district of Oregon. [Case No. 4,756.] Voluminous depositions were taken, and a decree of forfeiture rendered, the reasons of which were given by the learned judge of that court in an elaborate opinion. On appeal to the circuit court, it was for the first time suggested that no seizure of the vessel had been made at the time the libel of information was filed. The circuit court therefore held that the district court had no jurisdiction of the case. [Id. 4,755.] The vessel was thereupon reseized in this district, and a libel of information filed in this court. At the hearing of the cause it was agreed between the advocates for the respective parties that all the testimony as contained in the printed copy of the transcripts sent from the district court for Oregon should be considered in evidence in the case before this court, and also that all recitals and statements of the testimony contained in the opinion of the learned judge for the district court of Oregon should be received as

if such testimony had been regularly copied into the transcripts.

The position assumed by the advocates for the claimants at the hearing before this court differs essentially from that taken by them before the district court for Oregon. At the former trial an attempt was made to cover up the true nature of the transaction by which the forfeiture is claimed to have accrued, and the acuteness of the learned judge was exercised and his ability displayed in stripping it of its various disguises and exposing its real character. At the hearing before this court, the facts, as found by the court at the former trial, were substantially admitted, but it was contended that they constituted no violation of the law. To present the point thus raised, only a brief statement of facts will be necessary, omitting all details which do not vary the essential character of the transaction. In June, 1866, the British ship Fideliter was purchased by one William Kohl, an American citizen, but the bill of sale was made by his direction to one John Dutnell, a British subject, who subsequently, by like direction of Kohl, caused her to be registered as a British vessel. On the sixth of June, 1867, Kohl, under an irrevocable power of attorney given him by Dutnell, executed a bill of sale to one Joseph Lugebil, a Russian subject, who received the title without the payment of any consideration therefor, and held the same in trust for Kohl, to whom he, on the same day, gave an irrevocable power of attorney, authorizing him to sell the vessel. On the ratification of the treaty with Russia, by the terms of which Lugebil became an American citizen, Kohl applied, as agent for Lugebil, for a register, and obtained the same from the collector at Sitka on making oath that Lugebil was the true and only owner of the vessel, and that no foreigner was directly or indirectly interested therein, etc., as required by the act of 1783.

It is not pretended that Lugebil had any interest in the vessel otherwise than as holding the legal title, nor can it be denied that the object of the parties in making the transfer to him was to convert the vessel into an American bottom, by availing themselves of the construction given to the treaty by the American government, under which any vessel owned by a Russian subject, resident in Alaska, might be admitted to American registry, irrespective of her previous nationality. The Russian owner of a British built vessel thus became entitled to privileges not enjoyed by the American owner of a similar vessel, and to obtain this advantage was unquestionably the design of the parties.

The questions presented, therefore, are—(1) Did Kohl, in swearing that Lugebil was the true and only owner of the vessel, swear to what was not true, inasmuch as Lugebil was merely the legal owner, but not beneficially interested in her? Act Dec. 31, 1792, § 4 [1 Stat. 289]. (2) Was the register "knowingly and fraudulently obtained for a vessel not entitled to the benefit thereof"? Act July 18, 1866, § 24 [14 Stat. 184].

At the former trial the counsel for the claimants seem to have omitted to call the attention of the court to the fact that the ownership referred to in section 4 of the act of 1792 has been decided to be the legal, and not the beneficial ownership. The existence of any direct or indirect interest in a foreigner, by way of trust, confidence, or otherwise, is provided against by the succeeding clause, which thus, not only carries out the policy of the law by excluding from registry any vessel in which a foreigner has any interest, legal, or equitable, but seems to imply that such equitable interests, if held by an American, need not be disclosed or denied, and that the oath may be taken by him who by bill of sale or otherwise has become the holder of the legal title. Weston v. Penniman [Case No. 17,455]; Hall v. Hudson [Id. 5,935]. If then this had been the ordinary case of an application for the re-registry of an American vessel, the statement contained in the oath that Lugebil was the true and only owner, and that no foreigner was directly or indirectly interested in the vessel, would have been literally true according to the legal effect and meaning of the oath. That the vessel was not the property of a Russian resident of Alaska, within the meaning of the treaty is, I think, clear. She was, therefore, not entitled to an American registry, and had the facts been known, it would probably have been withheld. Some further assurance that she was in reality Russian property than that afforded by taking the oath prescribed by the act of 1792, might reasonably have been exacted. But none was required, and the oath actually taken, though it failed, when its meaning and effect are understood, to furnish any guarantee that the vessel was the property of a Russian within the meaning of the treaty, was nevertheless true, inasmuch as the formal or legal title was in the person who was sworn to be the owner.

The libel of information, so far as it claims a forfeiture on the ground that the oath taken by Kohl was false, cannot be sustained. But a forfeiture is also insisted on the ground that the certificate of registry was knowingly and fraudulently obtained by Kohl for a vessel not entitled thereto. It has already been observed that the vessel could not be considered Russian property within the meaning of the treaty. Under its provisions, the Russian inhabitants of Alaska were secured "in the free enjoyment of their liberty, property and religion." On the ratification of the treaty, the revenue officers at Alaska were instructed that, "every vessel belonging to a recognized inhabitant will be allowed to exchange her Russian for American papers, or on production to you of satisfactory evidence of such ownership, she will be entitled to American marine papers according with her tonnage. And, in order to be invested with all the rights and privileges of an American vessel, she will

be required to take such papers, and, so far as practicable, to conform to existing laws and regulations until congress shall otherwise provide." General Instructions, Treasury Department, August 15, 1867. It is evident that the expression "property of a Russian inhabitant of Alaska," contained in the treaty and the words, "vessel belonging to a recognized inhabitant," contained in the instructions refer to an actual and bona fide ownership by a Russian, and not to a pretended and fictitious appearance of ownership, created by a sham sale without consideration, or change of possession, where the pretended vendor retains exclusive control of the ship. The collector was instructed to require satisfactory evidence of such ownership. This, had he been aware of its legal effect and meaning, he would not have considered as afforded by the applicant's taking the oath prescribed by the act of 1792, for that oath, as we have seen, only refers to the legal or nominal ownership. It did not furnish any evidence that the vessel was really "the property" of a Russian, or "belonged" to him within the meaning of the treaty or of the instructions.

The whole transaction which terminated in the obtaining of an American register by a vessel not entitled thereto was a fraud; facilitated, it is true, by the want of circumspection of the collector, who neglected to require the production of the "satisfactory evidence of ownership" as directed by his instructions, and who accepted as such evidence an oath which in fact afforded no proof whatever that the vessel belonged to a Russian in any sense which would entitle her to an American register. From the time of his original purchase from Brown, Kohl was the real owner of the vessel. The procurement of a British register to Dutnell as owner was therefore a fraud upon the British navigation laws. The pretended sale to Lugebil and the obtaining by him of a passport, reciting that she was "owned by the Russian subject, J. Lugebil," was a fraud upon the laws of Russia, if, as is presumed, vessels owned by foreigners, and in which Russian subjects have no interest save a nominal one, created by a fictitious sale, are not entitled to be registered as Russian vessels. The execution of the bill of sale to Lugebil was also a fraud upon the laws of the United States, for it was designed to give to the vessel the false and colorable semblance of Russian property, and thus obtain privileges to which that species of property was entitled under the treaty, when, in truth, she was not Russian property in any sense that would entitle her to an American register, and was owned, possessed, and controlled by an American citizen. The oath taken by Kohl was not strictly a false oath; but the execution of the bill of sale to Lugebil with intent to create a false appearance of Russian ownership of the vessel within the provisions of the treaty; the omission to disclose to the collector the real circumstances; the production to him of a passport which asserted her to be owned by a Russian subject, and therefore a Russian national vessel, which passport could only have been obtained in fraud of the Russian laws, and all this with the intent to impose the vessel upon the collector as Russian property within the meaning of the treaty, constitute, in my opinion, a clear case where a certificate of American registry has been fraudulently and knowingly obtained for a vessel not entitled thereto.

It has been held by the supreme court of the United States that a conveyance though made for the avowed purpose of transferring an interest so as to give the United States courts jurisdiction as of a suit between citizens of different states will accomplish that purpose if the interest be really transferred. But a conveyance without consideration, with a distinct understanding that the grantors are to retain all their real interest, and that the deed is to have no other effect than to give jurisdiction to the court, is to be treated as a fraud upon the court. Smith v. Kemeschen, 7 How. [48 U. S.] 216; Barney v. Baltimore City, 6 Wall. [73 U. S.] 288, and cases cited. If, then, the transfer to a merely "nominal and colorable" grantee, for the purpose of enabling him to sue in the United States courts is considered a fraud upon the court, although the object of the parties is not reprehensible, and the desired result would have been attained if the interest had really been transferred, how much more must the transfer in this case be held to be a fraud upon the laws of the United States, since it was not only made without consideration to a merely nominal and colorable vendee, but the object of the sale was to give to a vessel the false appearance of Russian property, and thereby induce the United States authorities to admit her to privileges to which she was not entitled.

A decree of forfeiture must be entered.

Case No. 15,089.

UNITED STATES v. FIELDS.

[4 Blatchf. 326.] [1]

Circuit Court, S. D. New York. May 26, 1859.

PRACTICE IN EQUITY—BILL OF REVIVOR.

Where a defendant in a suit in equity has neither been served with process nor appeared in the suit, a bill of revivor against his administrator, after his death, is not proper, and the court will not make an order reviving the suit against such administrator.

This was a bill in equity, filed by the United States against George A. Gardiner in his lifetime, and the New York Life Insurance and Trust Company. A subpœna and an injunction were served upon the trust company, as the depository of certain moneys sought to be recovered by the plaintiffs in this suit, the ground of the suit being that

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

those moneys had been fraudulently obtained by Gardiner, under the Mexican claims commission. The plaintiffs having filed a bill of revivor against the administrator of Gardiner [Thomas C. Fields], now applied for an order reviving the suit against him as such administrator.

Charles H. Hunt, Asst. Dist. Atty., for plaintiffs.

Abraham B. Tappen, for defendant.

HALL, District Judge. As it appears that Gardiner, the defendant in the original suit, never appeared therein, and was never even served with process, I am of the opinion that a bill of revivor is not proper, and that the application for the order sought by the attorney for the United States must be denied. The following authorities are, I think, decisive of the case, and they will sufficiently indicate the course proper to be pursued: 3 Daniell, Ch. Prac. 1673, 1698, 1707, 1708; 2 Barb. Ch. Prac. 36, 37; Crowfoot v. Mander, 9 Sim. 396; Stewart v. Nicholls, Tam. 307; Hardy v. Hull, 14 Sim. 21; Foster v. Foster, 16 Sim. 637.

The motion is denied, but without prejudice to any future application for leave to file a supplemental bill, or a bill in the nature of a supplemental bill, or to any motion which the United States or the defendant may think proper to make.

Case No. 15,090.

UNITED STATES v. FIFTEEN HOGSHEADS OF BRANDY.

[5 Blatchf. 106.] [1]

Circuit Court, N. D. New York. Nov., 1862.

APPEAL—FORFEITURE CASE—TRIAL WITHOUT JURY.

1. A seizure case, triable by a jury in the district court, cannot be reviewed in this court on an appeal, but can be reviewed only on a writ of error.

2. Where such a case is, by agreement of parties, tried by the district court without a jury, the record should be made up in form, as in the case of a writ of error, with the proper exceptions to the admission or rejection of testimony, or to the instructions of the court to the jury.

[Cited in Town of Lyons v. Lyons Nat. Bank, 8 Fed. 373; Boyd v. Clark, 13 Fed. 909; Doty v. Jewett, 19 Fed. 338; Rogers v. U. S., 12 Sup. Ct. 94.]

[Appeal from the district court of the United States for the Northern district of New York.]

In this case a libel of information was filed in the district court, for the forfeiture of fifteen hogsheads of brandy, for undervaluation. The case was tried in the district court, by the court without a jury [case unreported], under an agreement between the parties that the court should determine the law and render a verdict and judgment. This was done, and the court gave judgment for the libellants, and the claimants took an appeal to this court. The libellants now moved to dismiss the appeal.

NELSON, Circuit Justice. A seizure case, such as the present one is, in which the parties are entitled to a trial by jury, can only be reviewed on a writ of error. And, if a writ of error had been taken in this case, this court could not have entertained it, because there is no bill of exceptions; and there could have been none, as the court below was made the judge of both the law and the fact. The record should have been made up in form, as in the case of a writ of error, with the proper exceptions to the admission or rejection of testimony, or to the instructions of the court to the jury.

The appeal is dismissed for want of jurisdiction, but without costs.

UNITED STATES v. FIFTY BARRELS OF DISTILLED SPIRITS. See Case No. 15,946.

Case No. 15,091.

UNITED STATES v. FIFTY BARRELS OF WHISKEY.

[11 Int. Rev. Rec. 94; 3 Am. Law T. Rep. (U. S. Cts.) 59.]

District Court, D. Kentucky. 1870.

INTERNAL REVENUE—REMOVAL OF SPIRITS—ENTRY IN BOOKS—HOW AND BY WHOM TO BE MADE.

1. The requisition of the 26th section of the internal revenue act of 1866 [14 Stat. 154], that there shall be entered daily the number of proof gallons purchased or received, of whom purchased or received, and the number of proof gallons sold or delivered, is complied with as to entries made before the act of 1868 [15 Stat. 125], if the entries, although made in a continuous manner without anything to designate to what the figures refer, are a true statement of such transactions.

2. The provision of the statute that requires the wholesale dealer and rectifier to make these entries daily does not demand that they should make them with their own hand. The duty may be delegated to a clerk, but the dealers and rectifiers are responsible if the proper entries are not made.

At law.

BALLARD, District Judge (charging jury). The information contains four counts; but the third count, being substantially the same as the fourth, has been abandoned by the attorney for the United States. I shall, therefore, direct your attention to the first, second, and fourth counts. The first and second counts are founded upon the 45th section of the act of July 13, 1866. This section provides: "That any person who shall remove any distilled spirits from the place where the same are distilled otherwise than into a bonded warehouse as provided by law shall be liable to a fine," etc. "All dis-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

tilled spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States," etc. The first count charges in substance that the 50 barrels of whiskey in contest were found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid. The second count charges that the said distilled spirits were removed from the place where the same were distilled otherwise than into a bonded warehouse as provided by law. The fourth count I shall notice hereafter.

In order that you may understand the first and second counts, it is proper for me to say that the statute provides that all distilled spirits, when they are withdrawn from the cistern which the law requires to be connected with every distillery, shall be immediately inspected, branded, and removed to a bonded warehouse, either class A or class B. They cannot be taken to any other place. There is no way in which the tax can be paid on them until they are in a bonded warehouse. You see, then, why it is made an offence to remove spirits from a distillery to any other place than to a bonded warehouse. When the spirits are once in a bonded warehouse, they may be removed therefrom, after being inspected and gauged, on bond for export, on bond for transportation from one warehouse to another, or on bond for redistillation or rectification, or for changing into other packages, or on the payment of the tax. In case they are removed for redistillation, rectification, or change into other packages, the bond requires them to be returned into the same warehouse. When they are removed from or to a warehouse, they are required to be inspected, gauged, and branded by a revenue inspector. Of course they may be again taken from the warehouse on payment of the tax thereon. And now you see why spirits, found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, are forfeited.

It appears from the evidence, that on the 31st December, 1867, there were 40 barrels of highwines removed from the distillery of Eastman & Wood, in Peoria, Illinois, to the bonded warehouse, class B, of one Zell, after the same had been inspected, gauged, proved, and marked as required by law. It also appears that these same 40 barrels were, on the same day, regularly removed from the warehouse on the payment of the tax. These facts are established beyond controversy, for they are proven by the government officers who knew the facts and by the production of the proper vouchers. Now the claimants insist that the 50 barrels in controversy are rectified spirits and are the product of the 40 barrels above mentioned. If they have established this to your satisfaction, of course your verdict must be for them on the first and second counts. If, on the other hand, you should come to the conclusion that the 50 barrels are not rectified spirits, or are not the product of the 40—nay, if it is not established to your satisfaction that they are, you must find for the United States. The burden of proof is on the claimants to show that the requirements of law have been complied with. This is the provision of the statute, and it is founded on the principle that it is always in the power of the owner of spirits to trace them and to show that the requirements of law respecting them have been complied with. The burden being on the claimants, the case must not be left in equipoise. The property being found outside of a bonded warehouse, if the claimants had offered no evidence, your verdict must have been for the United States, and therefore your verdict must be in the same way unless you believe from the evidence adduced by the claimants, or rather from the whole evidence in the case, that produced by the claimants and by the United States also, that these spirits are the product of the 40 barrels removed from the distillery of Eastman & Wood on December 31, 1867, to the bonded warehouse of Zell, and removed from the warehouse on the same day on the payment of tax. You must consider the whole evidence in the case bearing on these points, and, after considering it, if you are satisfied that the spirits are the product of the 40 barrels, your verdict will be for the claimants on these counts, or for the United States if you are not so satisfied.

On the issue tendered on these counts, the claimants have produced one witness, Mr. Dunn, who has been examined before you and read two depositions. One of these depositions was given by the claimant Warner, and the other by Mr. Funke, United States inspector. All that Mr. Funke testifies to is the identity of the barrels seized with the like number he inspected for the claimants at their rectifying and alcohol establishment in Peoria, Illinois, on the 8th of January, 1868. He does not know or pretend to know anything in respect to the spirits in these barrels being the product of the 40 barrels, on which the tax was paid. The testimony on this point comes solely from the two witnesses, Warner and Dunn. These witnesses do swear positively that they saw the 40 barrels dumped into the receiving cisterns or rectifying tubs of Eastman & Warner, and that they saw the product withdrawn therefrom and put into the barrels now in controversy. But the district attorney insists that these witnesses are mistaken or are not to be credited. He relies upon many facts and circumstances, of the weight and force of which you must

judge. First. That, notwithstanding the haste with which the 40 barrels were removed from the bonded warehouse (you will remember they were removed on the same day they were put into the warehouse), they were retained in the rectifying establishment, according to the testimony produced by the claimants, at least 8 days. Second. That it is not reasonable that the taxes would have been paid on the spirits if they were intended for rectification. It is a fact that the spirits, when withdrawn from the warehouse, amounted to 2,435 gallons, that the claimants might have removed the same in bond, and upon the return of the same they might have been credited by 3 per cent. as lost in the process of rectification. Now, 3 per cent. of 2,435 gallons is 73 gallons. On this amount the claimants might have lawfully escaped the tax by removing the spirits in bond, instead of paying the tax in the first instance. But there was nothing unlawful in rectifying the spirits after the tax was paid on them. The owner had the right to do with them as he pleased, and I believe it has been not an uncommon practice to pay the taxes on spirits in the first instance, that is, before rectification. Third. That the circumstances attending the alleged sale of the spirits are peculiar and suspicious. Fourth. That it is incredible that the spirits were sold as claimants insist at $2.28 per gallon, when spirits of the same kind rectified by the same parties, had been sold to the same party only a short time before at $1.90 per gallon. Fifth. That the manner of shipment is suspicious. You will remember the shipment was to W. L. Weller on account of T. W. Weller, and that there is no such person as T. W. Weller. Sixth. That the spirits were never rectified at all, and two experts have been introduced, who, you will recollect, expressed their opinion on this subject. Seventh. That there are discrepancies between Warner and Dunn and between Dunn's deposition and his testimony here, which render the testimony of these parties unreliable. Eighth. That Warner is interested in the result of the suit, that Dunn was his clerk, and that these circumstances affect their credibility.

Your own memory will doubtless supply other circumstances. You must consider all these circumstances and all others which the evidence has developed, and the explanations which claimants have offered respecting them. You must judge of the credibility of the witnesses. You should not arbitrarily reject the testimony of any witness. If he had opportunity of knowing what he testifies, and he testifies to nothing which is irrational, improbable, or which taxes your credulity, if he has delivered his testimony in a credible manner, if his character is unimpeached and his testimony not contradicted, both common sense and the law suggest that he should be credited. But, if he is contradicted, if his story is improbable, if his manner of testifying is not straightforward, if he has contradicted himself, you are authorized to disbelieve him, and if he is interested in the cause it affects his credibility. I am not attempting to tell you what is the character of the testimony before you. This is not my province. I have been simply endeavoring to give you some of the rules which the law has prescribed for determining the credibility of witnesses. Again, when two witnesses make apparently contradictory statements, it is not to be assumed that either witness has sworn falsely, but rather that one is mistaken. If the witnesses are equally credible and one may be mistaken, without imputing to him an intention to state a falsehood, and the statement of the other cannot be untrue without imputing to him wilful perjury, the rule is that the statement of the latter is rather to be taken; so a statement of a witness based upon knowledge derived from sight is ordinarily more reliable than a statement which is a mere expression of an opinion. But it may happen that the jury would be authorized to receive the latter statement, as in case the first comes from an unreliable witness or one who is contradicted by other testimony. In fact, gentlemen, the rules upon this subject are the dictates of common sense, and your judgment will teach you better what testimony to believe and what to disbelieve than any rule which can be laid down by the court.

I will now proceed to the fourth count. This count is founded upon the 26th section of the act of 1866. This section provides "that every rectifier or wholesale dealer in distilled spirits shall enter daily, in a book or books kept for the purpose, under such rules and regulations as the commissioner of internal revenue may prescribe, the number of proof gallons of spirits purchased or received, of whom purchased and received, and the number of proof gallons sold or delivered; and every rectifier or wholesale dealer who shall neglect or refuse to keep such record shall forfeit all spirits in his possession," etc. This count charges in substance that heretofore, to wit: on the 31st December, 1867, the spirits seized were in the possession of Eastman & Warner, who were then and there rectifiers of distilled spirits, and did purchase and receive and sell and deliver large quantities of distilled spirits; and that while said fifty barrels of spirits were in their possession they did neglect to enter daily, in a book kept for the purpose, the number of proof gallons of spirits purchased and received, of whom purchased and received, and the number of proof gallons sold and delivered, etc. The claimants have produced the book which Eastman & Warner professed to have kept. It does not appear from this book by whom it was kept or to whom it belongs. At the top of the left-hand page are written the words "Spirits purchased free and in bond," and at the top of the right-hand page are written

the words "Spirits sold and bonded." Then on the left page are written, in a continuous account—First, a date; second, the name of some person; third, figures constituting a small number; and fourth, figures constituting a large number, which latter number is from fifty to sixty times the amount of the preceding number. There is nothing at the top of the page or at the head of the columns to indicate what these figures mean; but the witness introduced by claimants proves that one of the numbers indicates the number of packages, and the other the proof gallons. To this evidence the district attorney has objected. He insists that the book should show on its face whose it is, and that the entries themselves should show distinctly what they mean, and that parol proof cannot be used to explain them. There is much force in this objection; but as the commissioner had, at the date of these entries, adopted no rules or regulations for making them, except that they should be made in a continuous account, I am inclined to the opinion that the requisition that there shall be entered daily the number of proof gallons purchased or received, is complied with when it is shown that the entry made truly expresses the number of proof gallons purchased or received, and that it was made on the day of purchase or receipt, although there is nothing connected with the entry in the book to show that it refers to proof gallons any more than it does to wine gallons, or in fact that it refers to "gallons" at all. If the entries as made are respectively the true numbers of proof gallons purchased or received on the given days, if they contain respectively the true name of the person from whom purchased or received, and if they are respectively the true number of proof gallons sold or delivered, it seems to me the statute is literally complied with. There is nothing in the act of 1866, or in the regulations prescribed by the commissioner under it, which requires these entries to be made in the columns with appropriate headings, as seems to be contemplated by the act of 1868 and the regulations under it. I therefore instruct you, that if this is the book which Eastman & Warner kept for the purpose contemplated by the 26th section of the act of 1866, as before explained, and they did enter daily thereon the number of proof gallons purchased or received, of whom purchased and received, and the number of proof gallons sold or delivered, although they have to resort to parol testimony to explain the entries to the extent above indicated, they have substantially complied with the statute.

Again, it appears from the testimony that these entries were not made by Eastman & Warner personally, but by their clerk, and it is insisted by the district attorney that this is not a compliance with the statute. He insists that the statute requires that the entries shall be made by the rectifier himself, and that the making of them by a clerk is not a satisfaction of the law. To sustain his position he has called my attention to the difference between the language of the twenty-sixth section of the act of 1866 and the language of the forty-ninth section of the same act, as well as of the sixty-eighth section of the act of 1864 [13 Stat. 248], and the twenty-fifth section of the act of 1867 [14 Stat. 483], and the forty-fifth section of the act of 1868, and he has also shown me the opinion of Judge Blatchford on this point. Judge Blatchford does seem to say that the act of 1868 requires the rectifier and wholesale dealer to make these entries personally, and that they cannot delegate the making of them to another, and I do not see any substantial difference affecting this question between the act of 1868 and the act of 1866. But I am not certain that Judge Blatchford means more than that the rectifier or wholesale dealer cannot excuse himself from responsibility for the proper entries not being made, by showing that he employed some one specially to make them, and directed the person employed to make them. If this is what he means, I entirely concur with him. The entries must, undoubtedly, be made, or the rectifier or the wholesale dealer will incur the penalty; but it seems to me wholly immaterial by whom they are made. This is not the proper occasion for the discussion of this question; but I must say, however, that it would require something much more explicit than the difference between the language of the several sections of the several statutes before mentioned to induce me to hold that the provision of the statute which requires the wholesale dealer and rectifier to make certain entries daily means that they shall make them with their own hand. The consequences of such a construction are too serious. It would preclude every person who cannot write from being either a rectifier of or a wholesale dealer in distilled spirits. Every rectifier or wholesale dealer would be obliged to suspend business when sick or absent from his place of business. No, I cannot adopt this construction of the statute. The general rule of law is, that what a man does by another he does himself, and there must be something peculiar in the nature of the duty or specific in the requisition to demand more than the general rule exacts. In this case there is nothing, in my opinion, either in the nature of the duty exacted or in the language prescribing it, which requires anything more. I perceive no essential difference between the words that the "rectifier shall enter daily" and the "rectifier shall enter or cause to be entered daily." They are simply different forms of expressing the same thing, and every purpose of the statute is as well accomplished by the rectifier causing the entries to be made as by his making them himself. I therefore instruct you that it is wholly immaterial whether the entries were made by Eastman or Warner or their clerk. If the proper entries were in fact made, the law is satisfied. But it appears from the claimants' own witness that the book does not contain a correct entry of

the number of proof gallons sold and delivered by them. The book shows as many gallons sold and delivered as were purchased, and it is conceded that there was a loss of at least three per cent. by the processes of rectification and redistillation. Mr. Dunn, who made the entries, tells you that he did not attempt to enter in this account the correct number of proof gallons of alcohol sold or returned to the bonded warehouse, that he entered as sold or returned the same number as was purchased or received, making no deduction for loss by evaporation in the process of redistillation, which he says was at least three per cent. It is conceded that the entry made January 2, 1868, is incorrect in this respect, and that it was made while the fifty barrels now in controversy were in possession of the parties whose duty it was to make the entries. I agree with the district attorney that for this cause the spirits are forfeited, and, as there is no controversy respecting the facts, your verdict must be for the United States on the fourth count. I have considered the proposition contended for by claimants' counsel, that the statute does not require spirits received by a rectifier in bond and returned in bond to be entered at all. They insist that all the statute requires to be entered are the spirits purchased and sold. But such has not been its construction, nor is it, I think, its true meaning. I think the statute requires the rectifier and wholesale dealer to make the entries respecting all spirits which come into their respective establishments from all sources whatever.

It may seem to you, gentlemen, hard that these spirits should be forfeited because the claimants entered in their books more proof gallons of spirits as returned to the bonded warehouse than were actually so returned. But the law, in requiring the entries to be made, it seems to me, demands that they be accurate. The statute does not make the forfeiture depend upon the entry being fraudulent or wilfully false, but upon the neglect or refusal to make the entry—that is, the correct entry, as I understand it. We cannot fritter away the statute because it seems harsh. The remedy for harsh legislation belongs to the legislative department. The judiciary have nothing to do but to interpret and enforce the statutes as they find them. But, if these were the only grounds of forfeiture, it might be my duty to certify the facts to the secretary of the treasury and his duty to remit the forfeiture. It is therefore desired by all parties that you shall, in your verdict, respond to the issue on each count of the information. As before stated, the third count has been abandoned, and your verdict must be for the United States on the fourth count, but it will be for the claimants or for the United States on the first and second counts accordingly as you shall find, upon the principles before announced, that the spirits in controversy are or are not rectified spirits, and are or are not the product of the forty barrels removed from the distillery of Eastman & Wood, December 31, 1868, to the bonded warehouse of Zell, and removed therefrom upon the same day. The whole controversy, I repeat, on these counts is reduced to a very simple inquiry. The burden of proof being on the claimants, they have staked the whole case on the proposition that the spirits in controversy are rectified spirits, and are the product of the forty barrels before mentioned. If they have proven this fact to your satisfaction, you must find for the claimants on these counts; if they have not, or if you are not satisfied after scanning the whole evidence, your verdict must be for the United States.

Case No. 15,092.

UNITED STATES v. FIFTY-EIGHT THOUSAND EIGHT HUNDRED AND FIFTY CIGARS.

[21 Law Rep. 267.]

Circuit Court, D. Massachusetts. May Term, 1857.

CUSTOMS DUTIES—CONCEALMENT OF GOODS—TIME FOR ENTRY.

1. Under section 68 of the collection act of 1799 (1 Stat. 677), the concealment of goods which works a forfeiture need not be with the concurrence, knowledge, or consent of the owner or consignee.

2. Such forfeiture may be enforced before the time has passed for the owner to enter the goods. A subsequent offer within such time to enter them, cannot affect the forfeiture, though made as soon as the owner was aware of their arrival.

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a libel of information founded on the sixty-eighth section of the collection act of 1799 (1 Stat. 677). The district court decreed a forfeiture [case unreported], and the claimants appealed.

In this court certain facts were agreed as follows: The bark Medora, Capt. Robey, of Portland, Maine, arrived in the harbor of Boston, from Havana, on the 11th of December, 1854, and her manifest was on that day produced to the boarding-officer, and endorsed by him. The vessel was reported at the custom house by the master, on the 12th of December, 1854, and the usual oath taken by the master. The vessel was loaded with molasses, consigned to R. C. Hooper, of Boston, and had also on board the cigars in controversy, to wit, 58,850 cigars, which were not on the manifest. There was also another lot of cigars, to wit, 7,000, entered on the manifest, shipped by Cabarga, consigned to the master, Robey; and an ullage thousand entered as ship's stores. On the said 12th day of December, William W. Parker, assistant deputy surveyor, Thomas P. Wilson, an aid to the revenue, with a boarding-officer and a boatman, went on board the vessel,—still lying in the

stream, about a mile and a half from the wharf,—and made search, suspecting that cigars were concealed on board. The cigars mentioned in the information, were found separate from the residue of the cargo, in the following manner: The officers in search took up the floor of the lower cabin, in doing which they were obliged first to remove a wash-sink, which was fastened to the floor, and some other heavy articles. After taking up two or three of the boards composing the floor of the cabin, they discovered a double flooring, about a foot apart, between which and the upper flooring, they found four boxes of cigars, containing five hundred cigars in each box. The upper flooring was not nailed down; it rested on timbers. No trap-door or scuttle led to the place where these cigars were found, and the only way to get to them was to take up the floor of the lower cabin, as was done. The officers continued the search. On each side of the cabin, between the last berth and the bulkhead that divided the cabin and hold, was a door leading into a closet, the floor of the closet being even with the cabin floor. The door of the closet was not fastened. In one of these closets, piled up on the floor, were the boxes which contained the seven thousand cigars that were entered on the manifest, and the ullage thousand entered as ship's stores. These boxes were in open sight, and there was no appearance of any thing being concealed or deposited behind them. The partition of each closet was made of boards, painted, and matched together, and to all appearance were permanent partitions. On removing the floor in these closets, which was a rough flooring, and taking down the partitions, the officers discovered and took out, in boxes, fifty-eight thousand eight hundred and fifty cigars, about equally divided in number in each of the places last mentioned. There was no access to these places behind the partitions, either by door, window, slide, or otherwise; but on removing the floor and partitions, a space was discovered, extending under the deck of the vessel, and in these spaces on each side of the vessel, said cigars were found, in boxes of different sizes, with Spanish brands. The two closets were large enough to have held all the cigars which were found on board, without putting any behind the partitions. The officers seized the cigars found as above, and they are the same described in the information, and no duties have been paid on them. The manifest was dated December 2, 1854. The cigars were shipped on board of the Medora, November, 1854, at Havana, for Boston, by Antonio Cabarga, a merchant at Havana, and were sent by him to Albert W. Porter, for his account, and that of T. G. Mitchell. They were all shipped to A. W. Porter as the consignee, by orders from A. W. Porter and T. G. Mitchell, in Portland, to Cabarga, who was paid for the cigars partly by R. Morrison & Co., at Havana, for said Porter, and partly by proceeds of sales of goods that A. W. Thayer had sent out to Havana in the Medora. They were paid for before the Medora sailed. Edwin Parker, of Boston, a commission merchant, had been requested by S. W. Porter, of Portland, who was the principal owner of the bark, before her arrival, to take care of her when she arrived, on account of the captain being intemperate. Upon learning the fact of her arrival, he made immediate efforts to find the captain, but did not find him until the 14th of December. He then found him enfeebled in body and mind, intoxicated, and incompetent for business. Said Parker took charge of the vessel, went to the custom house on the said fourteenth day of December, and found that the cigars of the claimants were not on the manifest; and as their agent, and the agent of the captain, offered to amend the manifest, and to make a post or amended entry, and to pay the duties thereon—which offer was refused by the collector. Said Parker had not then received any invoice or bill of lading of the cigars. Afterwards he did receive the papers hereunto appended, marked "A." On the 18th of December, the molasses was entered by the consignee thereof, after which the unlading of the cargo was begun. The cigars seized were appraised at $1,690.95.

A.

Memorandum of Cigars put on board the bark Medora, for account of A. W. Porter, Esq.

20 M Esmeraldas, London size, @ $18	$ 360 00
10 M Crisols, " " @ $16	160 00
10 M Corona, seconds, @ $25.....	250 00
10 M Corona, thirds, @ $20.....	200 00
Export duties and boat hire.....	38 50
	$1,008 50
10 M Rio Hondo, thirds, @ $14.....	$ 140 00
6 M La Marina, @ $20.....	120 00
6 M Infancia, @ $17.....	102 00
Export duties and boat hire.....	17 00
	$ 379 00

B. F. Hallett, for the United States.
J. A. Andrew, contra.

CURTIS, Circuit Justice. The objection made at the bar to the decree of the district court is that when these goods were seized the time had not arrived for the claimants to enter them; that it did not appear they were in any way connected with the concealment of the goods, or intended to defraud the revenue; and that in point of fact, their agent offered to enter and pay the duties on the goods, as soon as he was aware of their arrival. And it is urged that it was not the purpose of congress, nor required by the true construction of the section in question, to inflict a forfeiture upon an owner who was innocent of any fraud, and had not been guilty even of any laches. The sixty-eighth section of the collection act, on which the libel is founded, provides that "Every collector, &c., shall have full power and authority to enter any ship or vessel in which they shall have

reason to suspect any goods, wares, or merchandise, subject to any duty, are concealed; and therein to search for, seize, and secure any such goods, wares, and merchandise; and all such goods, wares, and merchandise, on which the duty shall not have been paid, or secured to be paid, shall be forfeited."

It has been decided that the concealment here spoken of is a withdrawal of the goods from public view, on account of their being subject to duties, or from some fraudulent motive. U. S. v. 1,250 Chests of Tea, 12 Wheat. [25 U. S.] 498. The question is, whether such withdrawal must be by the owner or consignee, or by his procurement, or with his concurrence. So to hold would be to require what the language of the act does not require. That makes the forfeiture depend solely on the concealment of goods on which the duties have not been paid or secured, without regard to the person by whom the concealment was practised. Nor are the subject-matter of the law, and the mischief it was designed to prevent, such as to call for a construction which would render the act or concurrence of the owner or consignee necessary. That subject-matter is a concealment of dutiable goods, with intent to avoid payment of the legal duties thereon, or some other fraudulent intent. Whether this be done by the master alone, or by him in combination with the consignee, the revenue is endangered. Congress might have provided that the forfeiture should not be inflicted unless the time had passed for the consignee to make entry of them. But this would have put it in the power of the consignee to avail of the concealment, and smuggle the goods, if opportunity should offer, after arrival, and before the expiration of the fifteen days allowed for their entry; and to enter them, and escape all punishment, if he should find he could not profit by the concealment. In other words, it would not have punished the mere concealment, which it was the manifest purpose of this section to prevent. So far from providing that there must not only be a concealment, but the time must have arrived for the consignee to act, this section sets up a different standard. It requires, to escape a forfeiture on account of concealment, that the duties should have been actually paid, or secured to be paid. Nothing short of this is sufficient; and this is inconsistent with the construction contended for by the claimants, when they insist that it is enough that the time had not arrived to enter the goods.

The argument derived from the alleged injustice of punishing the owner of the property for an act which he neither practised nor consented to, has been often addressed to the courts of the United States in similar cases, but has never induced them to insert in a law a substantive requirement which it did not contain.

It was pressed on Chief Justice Marshall in U. S. v. The Little Charles [Case No. 15,612], which was a libel for a forfeiture under the embargo laws. The answer he made was: "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner." So in the case of The Malek Adhel, 2 How. [43 U. S.] 233, which was a libel to enforce a forfeiture on account of piratical aggression, the question was made whether the innocence of the owners could withdraw the ship from the penalty of confiscation under the act of congress; and, upon the ground that the act made no exception whether the aggression be with or without the co-operation of the owner; and that it was not uncommon, in cases under the revenue and other laws, to treat the acts of the master and crew as binding the interest of the owner, it was held that no co-operation by him need be shown. And though in that case the cargo was held exempt, it was because the act did not, by its terms, exact its forfeiture. (See also the other cases therein referred to.) Revenue laws should be so construed as effectually to prevent the mischief which they were designed to prohibit. Taylor v. U. S., 3 How. [44 U. S.] 197. To require the co-operation of the owner in concealing the property to be shown, would leave a wide opening for fraud. No doubt cases of hardship may possibly occur; but they are provided for by the power to remit the forfeiture, lodged with the secretary of the treasury.

I think I ought to say further that in this particular case, though the consignees may be entirely innocent, yet in the actual state of the proofs before me, the burthen of proof is upon them, and they have failed to support that burthen. Under the seventy-first section of the collection act, where probable cause for the prosecution is shown to the court, the burthen is on the claimant. Here the goods were not only found concealed under such circumstances as tended very strongly to show an intention to evade payment of duties, but they were imported without any invoice, bill of lading, or consular certificate, the absence of which directly implicates the owners of the goods, and affords a strong prima facie case of an intent to smuggle them, and this is not met by evidence on their part.

The decree of the district court is affirmed, with costs.

Case No. 15,093.

UNITED STATES v. FIFTY-FOUR BARRELS OF DISTILLED SPIRITS.

[9 Int. Rev. Rec. 121.]

District Court, E. D. New York. April, 1869.

INTERNAL REVENUE—REMOVAL OF SPIRITS—FALSE BONDS—MIXTURE—FORFEITURE.

In the case of the United States against Fifty-Four Barrels of Distilled Spirits, tried

before BENEDICT, District Judge, in the E. D. New York, the spirits were seized on a charge of having been removed on false bonds in June, 1867, from the bonded warehouse No. 72 Walker street to the rectifying establishment of William Krone, whence they were taken to New York and sold instead of being returned to the warehouse, as the bond required. This action was brought to condemn the property as forfeited for the use of the government. It was shown by the evidence that Krone had received for redistillation 200 barrels on fraudulent bonds and thirty-four barrels on which the tax had been paid; that the two lots were mixed, and that from this mixture the spirits in court were drawn off. Held, that the payment of the tax on all the spirits not having been proven, there being a mixture of fraudulent spirits with spirits that had paid the tax, the whole lot was legally forfeited to the use of the government, and directed a verdict accordingly.

J. J. Allen, Asst. Dist. Atty., for the government.

T. B. Clarkson, for claimants.

Case No. 15,094.

UNITED STATES v. FIFTY-ONE DOZEN PIECES OF MERCHANDISE.

[2 Spr. 100.] [1]

District Court, D. Massachusetts. Jan., 1864.

CUSTOMS DUTIES — FORFEITURE — HOW FEES PAID OUT OF PROCEEDS.

At law.

SPRAGUE, District Judge, ruled that in cases of sales of property declared forfeit for breach of the revenue laws of the United States, under Act 1799, c. 22, § 90 (1 Stat. 696), the marshal is to pay into the registry of the court the gross proceeds of the sale, less the expenses attending the sale, and that the marshal's commissions for the sale of property and collecting and paying over the proceeds form part of the expenses so to be deducted, and that all other fees, charges, and expenses, whether of the marshal or any other officer or person, for services not relating to the sale, are to be paid by an order of the court from the proceeds after they are paid into the registry. The practice in prize causes is different, by virtue of the acts of 1862 and 1864. Act 1862, c. 50, § 4 (12 Stat. 375); Act 1864, c. 174, § 8 (13 Stat. 308). In prize sales, the marshal deposits the gross proceeds with the assistant treasurer, subject to the order of the court; and all costs and charges, whether of the sale or otherwise, are paid by order of the court on the assistant treasurer.

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

Case No. 15,095.

UNITED STATES v. FIFTY-SIX BARRELS OF WHISKEY.

[1 Abb. U. S. 93; [1] 6 Am. Law Reg. (N. S.) 32; 4 Int. Rev. Rec. 106.]

District Court, D. Kentucky. July Term, 1866.

INTERNAL REVENUE — FORFEITURES — INNOCENT PURCHASER—ADMIXTURE.

1. A bona fide purchaser of personal property, which has been forfeited to the government by previous acts of the former owner, is not protected against the title of the government. The right of the government founded on the forfeiture must prevail over any title acquired by purchase subsequent to the forfeiture.

[Cited in U. S. v. Seventy-Six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. 150.]

2. The general rule in respect to the time when a forfeiture takes effect, is, that when a statute denounces a forfeiture of property as the punishment of a violation of law, if the denunciation is expressed in direct terms and not in the alternative, the forfeiture takes place at the time when the offense is committed, and operates at that time as a statutory transfer of the right of property to the government.

[Cited in U. S. v. Sixty-Four Barrels Distilled Spirits, Case No. 16,306; U. S. v. One Copper Still, Id. 15,928; Heidritter v. Elizabeth Oil-Cloth Co., 6 Fed. 141.]

3. No distinction exists, in this respect, between the operation of a statute which declares that, for a specified offense, the property designated shall be forfeited, and one which declares that the offender shall forfeit the property.

4. Where one who has purchased property,—such as spirits,—which had been previously forfeited to the government, has mixed it (although in good faith) with other property free from forfeiture, so that it can no longer be identified, the courts, in enforcing the forfeiture, can not make any division of the aggregate between the claimant and the government. All the forfeited property must be delivered to the government; and if this, by reason of the admixture, necessitates the delivery of the other, the claimant must bear the loss.

Trial of an information.

This was an information filed against fifty-six barrels of whiskey, and certain stills and other vessels, for a violation of section 68 of the internal revenue act of 1864 [13 Stat. 248]. The information contained two counts. The first count alleged, in substance, that one William E. Reed was the owner of the stills and other vessels in question, and used the same in the distillation of spirits continuously from September, 1865, until the seizure, and that he had used said stills and vessels in the distillation of the fifty-six barrels of whiskey seized; but he did not, from day to day, make, or cause to be made, in a book kept for that purpose, a true and exact entry of the number of gallons so distilled, or of the number sold or removed for consumption or sale. The second count alleged that Reed did not render to the assessor, or to the assistant assessor, on the 1st, 11th, and 21st days of each and every month, or within five days thereafter, or on

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the first day of each month, an account in duplicate, taken from his books, of the number of gallons of spirits distilled, or the number sold or removed for consumption or sale. Twenty-two of the barrels seized were claimed by William H. Walker & Co., three were claimed by Gheens & Co., and the remaining thirty-one, together with the stills and other vessels, not having been claimed by any one, were condemned by default. The claimants filed separate answers, but the defense of each was substantially the same. Both denied every substantial allegation contained in the information, and both alleged that they purchased the whiskey claimed by them respectively before the seizure, bona fide, and that they paid for the same a full and fair consideration, without any knowledge or suspicion of the alleged forfeiture, or cause of forfeiture. They also both alleged, substantially, that the whiskey was, at the time of the purchase, regularly and legally branded by plaintiffs' inspector. The case was, by agreement of parties, submitted to the court upon the law and facts, a jury being waived.

B. H. Bristow, Dist. Atty., for the Government.

John W. Barr and Martin Bijur, for claimants.

BALLARD, District Judge. I shall neither state nor discuss the facts proven. My conclusion in respect to these is, that every substantial allegation of the information is true, and that no part of the matter set up in the answers, in support of the claims, is sustained by the evidence, except: (1) That the barrels of whiskey purchased by the claimants had been regularly branded by the United States inspector prior to the purchase. (2) That the claimants are bona fide purchasers, without any notice of, or cause to suspect, the alleged forfeiture.

These facts present the following questions for my decision, to wit: First. Does the information set forth a good cause of forfeiture? Second. Have the claimants supported their claims?—that is, do the facts alleged and proven by them constitute any reason why the forfeiture should not be enforced?

Sections 57 and 68 of the internal revenue act furnish a complete answer to the first question. Section 57 makes it the duty of "every person who shall be the owner of any still, boiler, or other vessel used * * * for the purpose of distilling spirituous liquors * * * and of every person who shall use any still, boiler, or other vessel as aforesaid, either as owner, agent, or otherwise, from day to day, to make a true and exact entry, or cause to be entered in a book kept for that purpose, the number of gallons of spirits distilled * * * and also the number sold or removed for consumption or sale."

The first count, we have seen, alleges a neglect of the duty here enjoined. This section also provides, that every such person, if he distill one hundred and fifty barrels of spirits per year, or more, shall render the assessor, or assistant assessor, on the 1st, 11th, and 21st days of each and every month in each year, or within five days thereafter, an account in duplicate, taken from his books, of the number of gallons of spirits distilled, and also the number of gallons sold or removed for consumption or sale, and that he shall pay the taxes on such spirits at the time of rendering the duplicate account thereof. If he distill less than one hundred and fifty barrels per year, he may make his returns and pay duties on the first day of every month.

The second count of the information avers a neglect of this duty. Section 68 provides "That the owner, agent, or superintendent of any * * * still, boiler, or other vessels used in the distillation of spirits, on which a duty is payable, who shall neglect or refuse to make true and exact entry of the same, or to do, or cause to be done, any of the things by law required to be done as aforesaid, shall forfeit, for every such neglect or refusal, all the * * * spirits made by or for him * * * and the stills, boilers, and other vessels used in distillation, together with the sum of five hundred dollars * * * which said spirits, with the vessels containing the same, with all the vessels used in making the same, may be seized by any collector or deputy collector of internal duties, and held by him until a decision shall be had thereon, according to law. * * * And the proceeding to enforce said forfeiture of said property shall be in the nature of a proceeding in rem." It is manifest that the information does, in apt form and in apt language, set forth neglects of duty for which a forfeiture is denounced by the express terms of this section. This is conceded by the learned counsel of the claimants. They admit that the property seized must be condemned as forfeited if the facts established by the claimants are not sufficient to show that, as to the property claimed by them, there never was any forfeiture.

In respect to the first fact established by the claimants, that is, that the barrels were regularly branded by the United States inspector before they purchased, it is clear that it furnishes no answer to any thing alleged in the information. Besides the duties which are enjoined by section 57, the neglect of which is alleged in the information, section 59 requires, "That all spirits distilled as aforesaid by any person licensed as aforesaid shall, before the same are used or removed for any purpose, be inspected, gauged, and proved by some inspector appointed for the performance of such duties." If the information had alleged a removal of the spirits distilled before inspection, the fact that the barrels were branded before removal would have been material. It, however, not only furnishes no answer to the charges set out in the information, that

no entry was made from day to day, in a book kept for that purpose, of the number of gallons of spirits distilled, or the number removed for consumption or sale, and that no return was made to the assessor, such as is required by law, but it has not the slightest relation to either of them. This is conceded by the claimants. They do not rely on this fact as precluding a condemnation. They treat it simply as one of the facts which show that the claimants acted in good faith and are bona fide purchasers; and, as I have already announced that I am satisfied, upon the whole case, that the claimants are such purchasers, it is wholly immaterial for me to state what influence I have given to this single fact in arriving at the more general conclusion of the good faith of the claimants. If the barrels had not been branded by an inspector this would have been a most material fact, if an effort had been made to show bad faith; but no such effort has been made. That the claimants were innocent purchasers is established, and is not, in fact, contested by the United States, and, therefore, the fact of the barrels being branded is entitled to no consideration whatever.

This brings me to the consideration of the main question in the case: Does the fact that the claimants purchased the whiskey claimed by them bona fide, and without any knowledge or suspicion of the alleged cause of forfeiture, preclude a judgment of condemnation? This is a very important question, whether it be considered in reference to the citizen or to the government. It has been argued before me with great ability, and I have bestowed upon it much reflection. The general law of property is, that the true owner may recover it of any one who has it in possession, no matter whether the possessor be a bona fide purchaser or not. The law which protects bona fide holders of bills of exchange and other negotiable paper has no relation to property generally. Every purchaser of merchandise or other property risks, in a certain sense, the title of his vendor, and, if it turns out that his vendor has no title and the property be recovered of him, he has no remedy except on the warranty of the vendor. It follows that, if when Walker & Co. and Gheens & Co. purchased the whiskey claimed by them their vendor had no title—that is, if it had already been forfeited to the United States, the fact that they are bona fide purchasers cannot avail them. Their good faith cannot oust the claim of the true owner. They are exactly in the condition of every bona fide purchaser of property whose title fails and who is therefore obliged to surrender it to the owner. They must look to the warranty of their vendor.

Indeed, I have difficulty in perceiving that the bona fides of the purchase is at all material, or that it has any relation to the grounds of forfeiture alleged in the information. If the forfeiture took place prior to their purchase, it is undisputed and indisputable that the right of property was immediately transferred to the United States, and that the right of the latter must prevail over that of the purchaser, notwithstanding the purchase was made in good faith. The right of the United States in such case depends not at all on the conduct of the purchaser, but upon their own superior title, resulting from a forfeiture which took place prior to any inception of right in the purchaser. If there was no forfeiture prior to the acquisition of right by the claimants, whether the right was acquired by purchase for a valuable consideration or by gift, I am at a loss to conceive how there was any forfeiture at all. I cannot see how property, whether acquired by gift or purchase, can be condemned as forfeited for the offense of its former owner, which was not already forfeited at the time of the gift or purchase. If the acquisition be by pretended gift or pretended purchase, in such sense that the title is not changed, but really remains in the first owner, then, of course, his offense committed after the pretended gift or sale may work a forfeiture. But neither the internal revenue act nor any other act of congress forfeits property for the crime of a person which does not belong to him, or is not managed by him at the time of the forfeiture. Property is sometimes forfeited in consequence of the act of some person who manages or controls it other than the owner; but the forfeiture does not extend to property previously managed or controlled, and which, before being contaminated with the offense, is sold or otherwise parted with in good faith.

The question then comes to this: When does the forfeiture denounced by section 68 take place? Does it take place at the time the offense is committed, or at some subsequent time? The decisions are uniform, both in England and the United States, that when a statute denounces a forfeiture of property as the penalty for the commission of crime, if the denunciation is in direct terms, and not in the alternative, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government. Robert v. Witherhead, 12 Mod. 92; 1 Salk. 223; Wilkins v. Despard, 5 Term R. 112; U. S. v. Nineteen Hundred and Sixty Bags of Coffee, 8 Cranch, [12 U. S.] 398; The Mars, Id. 417; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311; Wood v. U. S., 16 Pet. [41 U. S.] 362; Caldwell v. U. S., 8 How. [49 U. S.] 381.

The case of United States v. Nineteen Hundred and Sixty Bags of Coffee arose under section 5 of the nonintercourse act of March, 1809 (2 Stat. 529), which provides: "That whenever any article * * * the importation of which is prohibited by this act, shall after May 20, be imported into the United States * * * or be put on board of any ship or vessel, boat, raft, or carriage, with intention of importing the same into the United States * * * all such articles, as well

as all other articles on board of the same ship or vessel, boat, raft, or carriage belonging to the owner of such prohibited article, shall be forfeited, and the owner shall, moreover, forfeit and pay treble the value of such articles." The claimants made precisely the same plea which Walker & Co. and Gheens & Co. make in this case; that is, they alleged that they were bona fide purchasers for a valuable consideration. The case was most ably and elaborately argued; but the supreme court overruled the plea, and held that by the terms of the statute the forfeiture took place upon the commission of the offense, and the purchaser was not protected. It will be perceived that this statute does not fix the time at which the forfeiture is to take place in more explicit terms than does the statute under which the present case arises. The one declares that whenever any article shall be imported it shall be forfeited, and that the owner shall forfeit other property; and the other declares that the owner, agent, or superintendent, &c. * * * who shall neglect to make true and exact entry and report, or to do any of the things required by law, shall forfeit, &c. If the forfeiture under the act of 1809 takes place at the time of the commission of the offense, so as to override the title of all subsequent purchasers, and this, we have seen, the supreme court have expressly decided, I can conceive of no argument which would not refer the forfeiture under the act of 1864 to the same time, or which would not invest the forfeiture with the same consequences.

The case of Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311, involved a construction of the neutrality act of 1794 (1 Stat. 383), the third section of which declares a forfeiture of vessels fitted out and armed to be employed in the service of a foreign state in committing hostilities against the citizens, subjects, or property of another foreign state with whom the United States are at peace. The court say "the forfeiture must be deemed to attach at the moment of the commission of the offense, and consequently from that moment the title of the plaintiff would be completely divested, so that he could maintain no action for the subsequent seizure. This is the doctrine of the English courts, and it has been recognized and enforced in this court upon very solemn argument."

The case of Caldwell v. U. S. involved, in part, the construction of sections 66 and 68 of the collection act of 1799 (1 Stat. 677), the latter of which declares a forfeiture in the alternative, that is, of the goods or their value, and the former declares it without any alternative. The inferior court had instructed the jury, "that if the goods were fraudulently entered, it is no matter in whose possession they were when seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title of the goods to the purchaser." The supreme court say: "This instruction is partly right and partly wrong—right in respect to section 68, as the penalty is a forfeiture of the goods without an alternative of their value; wrong, as the instruction applies to section 66, the forfeiture under it being 'either the goods or their value.' In the first, the forfeiture is the statutory transfer of right to the goods at the time the offense is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the right to them relates backwards to the time the offense was committed, so as to avoid all intermediate sales of them between the commission of the offense and the condemnation. So this court said in the case of U. S. v. Nineteen Hundred and Sixty Bags of Coffee, 8 Cranch [12 U. S.] 398. It was said again in the case of U. S. v. The Mars, Id. 417; declared again, four years afterwards, in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311, in these words: 'The forfeiture must be deemed to attach at the moment the offense is committed, so as to avoid all sales afterwards.' "

There is, we have seen, no alternative in section 68 of the internal revenue act of 1864. The forfeiture of the spirits, stills, boilers, and other vessels used in distillation, is by it directly declared. Its construction is, therefore, fixed by the decisions to which I have referred, almost as certainly and conclusively as if its provisions had been the direct subject of adjudication. The conclusion to my mind, then, is irresistible, that the forfeiture denounced by this section, to use the language of the supreme court, "takes place at the time of the commission of the offense, so as to avoid all sales afterwards."

It is just to the learned counsel of the claimants to say, that they concede this would be the correct construction of the section if it had, in so many words, declared that the spirits, &c., should be forfeited. They say that the statute does not declare that the spirits, &c., shall be forfeited, but that the owner, agent, or superintendent shall forfeit them, and that this difference of language requires a difference of construction. Their argument is extremely refined, and is difficult to state. If I understood them, they contend that there is a difference between the construction of a statute which denounces a forfeiture of specific property as the penalty of an offense, and one which declares that the offender shall forfeit it. In the first case they concede that the forfeiture takes place at the time of the commission of the offense, whilst in the latter they insist it does not take place until seizure, conviction, or judgment. No adjudged case or other authority has been cited in support of this distinction, and I am unable to conceive any good reason

for upholding it. What ground is there for referring the forfeiture to the time of seizure? There must have been a previous forfeiture to authorize a seizure. The seizure is the consequence of the forfeiture, not the cause. Nor do I see any reason for referring the forfeiture to the time of conviction or judgment. The conviction and the judgment are simply the consummation of the proceeding that the law requires to be instituted to ascertain the fact or forfeiture of which the seizure is the beginning.

If the statute made the forfeiture the consequence of the personal conviction of the offender, in which case there is no seizure, or if it even required a personal trial and conviction to precede judgment of forfeiture, there might be some force in the argument of the learned counsel founded on forfeitures at common law in cases of treason and felony. I admit that, at common law, there was no forfeiture of the goods and chattels of a felon until he was convicted; but under that law, no penalty whatever could be inflicted for the crime of felony except in cases of suicide, flight, and perhaps a few other analogous cases, until after the personal conviction of the offender, and in the excepted cases the forfeiture related to the time of the offense. When the felon was convicted, death was the penalty, and judgment of death followed. A forfeiture of goods and chattels was a consequence of the conviction, and a forfeiture of real estate a consequence of the judgment; but forfeiture was no part of the judgment. Here, however, we are not trying the offender at all, or if at all, only incidentally. He is not personally before the court, and cannot in this proceeding be convicted. The statutes under which we are proceeding do not make the forfeiture the consequence of his conviction, but of his offense, which offense it authorizes to be inquired into by a seizure of, and a proceeding against, the property itself. Having ascertained that offenses were committed, I cannot in this proceeding render any judgment against the offender; I can only render a judgment of condemnation of property, which judgment is merely the judicial ascertainment of the fact that the property was previously forfeited.

When a statute declares that an offender shall forfeit property as the penalty of his offense, and authorizes a proceeding in rem to ascertain the forfeiture, I am satisfied that the forfeiture takes place at the time of the commission of the offense just as certainly as it does when the statute directs, not that the offender shall forfeit, but that the property itself shall be forfeited. There is a difference between common law and statutory forfeitures. Common law forfeitures, except in cases of deodand, suicide, flight, and perhaps a few others, were the consequence of conviction, or of judgment against the felon, and followed his personal trial; but statutory forfeitures are usually enforced by proceeding against the thing, and relate to the time of the commission of the offense. This distinction is recognized by the supreme court in the case of U. S. v. Grundy, 3 Cranch [7 U. S.] 337, and other cases. They say: "When the forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the legislature." When there is no alternative in the statute, when it directly declares a forfeiture, and no time subsequent to the committing of the crime is named at which the forfeiture is to take effect, the settled rule, we have seen, is, that it relates to the time of the commission of the offense.

Whether the statute declares a forfeiture of property as the consequence of crime, or that the person who committed the crime shall forfeit it, the effect is the same. In either case the immediate loss falls on the owner. Whether the forfeiture is in consequence of his own unlawful act, or of the unlawful act of some other person, respecting the thing forfeited, the loss is still his, and his only. It is he who in fact forfeits or loses, no matter in what language the forfeiture is declared. By the terms of the statute we are now considering, the agent or superintendent who uses stills, boilers, or other vessels in the distillation of spirits, and who neglects to do the things enjoined by law, forfeits as well as the owner. But the agent is not owner, and literally he cannot forfeit what he does not own. He may cause its forfeiture by his unlawful act, but he cannot lose what is not his. Therefore, when the statute declares that the agent or superintendent shall forfeit the stills, boilers, and other vessels, it must be understood to mean that these articles shall be forfeited in consequence of his neglect of duty. And if this be its meaning, even the learned counsel of the claimants would concede, that the consequence and effect of the forfeiture are that the title to the thing forfeited passes instantly upon the commission of the offense.

I observe that the learned judge of the Eastern district of Missouri treats section 68 as if it read, that the owner of the spirits shall forfeit them. And on this reasoning he seems to have founded his conclusion that the owner does not forfeit what he sells before seizure. He says: "That as 'the owner,' &c., shall forfeit, and not the purchaser, the owner can forfeit only what belongs to him." It may be conceded that the owner can forfeit only what belongs to him, but I do not see that this helps the argument; for if the forfeiture takes place, as I have shown it does, at the time the offense is committed, it is not necessary to claim that he forfeits more than what then belongs to him. If he forfeits that, the title of the United States immediately takes effect and prevails over that of all purchasers. U. S. v Three Hundred and Ninety-Six Barrels [Case No. 16,503]. An attentive examination of the section, however,

will show that, by its terms, it is not the owner of the spirits, but the owner, agent, or superintendent of the stills, boilers, or other vessels in the distillation of spirits, who forfeits. It is the neglect to perform a prescribed duty by any one who uses stills, boilers, or other vessels in the distillation of spirits, whether as owner, or simply as agent or superintendent, which produces the forfeiture; and what are forfeited are the stills, boilers, and other vessels and spirits made by or for him. If the agent forfeits only what "belongs to him," he forfeits nothing, for the stills, boilers, and other vessels and spirits do not belong to him. They belong to the principal. But the statute says the agent who neglects, &c., shall forfeit these things, and there are no means of escaping a provision so express. The statute, then, must mean that these things shall be forfeited for the agent's neglect, or as to him it is inoperative, and has no meaning at all. And if they are forfeited for his neglect, surely the forfeiture takes effect the moment of neglect. There is no other period to which it can possibly be referred.

I have great respect for the opinions of the learned judge who decided the case of U. S. v. Three Hundred and Ninety-Six Barrels, above referred to. I have not ventured to differ from him until after the fullest consideration and the clearest conviction. I cannot but think his decision is based on a misreading of the statute, as well as on a misconception of adjudged cases. The conclusion to which I have arrived is, I think, sustained by an opinion of the learned judge of the Southern district of Ohio, in the case of U. S. v. Sixteen Hogsheads of Tobacco [Case No. 16,302], and by the uniform decisions of the supreme court of the United States; and I have not a doubt of its correctness.

I need not say that I have arrived at my conclusion reluctantly. I have examined every provision of the statute; I have attentively considered section 180, and every section which declares a forfeiture, and I think that the provisions of each and all of them confirm the construction of section 68 which is here adopted. It would be a much more pleasing task for me to order a restoration of the property seized to the innocent claimants than to adjudge its condemnation, if I could do so consistently with my sense of duty. I have been literally forced to a decision in spite of my personal inclination by a current of authorities which is irresistible. Judgment of condemnation must be entered.

The counsel of Walker & Co., however, ask that the judgment be limited to nineteen of the barrels claimed by them, and that the other three seized in their possession be restored. This motion is based on the following state of facts: The twenty-two barrels of spirits claimed by Walker & Co. are part of a lot of thirty-seven barrels purchased at the same time. Only thirty-two of the barrels were distilled by William E. Reed, mentioned in the information. Five were distilled by some one else; and as to them, there is neither proof nor allegation that there was any violation of law. If these five barrels remained and could be identified as among those seized, they would be restored, of course. But Walker & Co. mixed the whole thirty-seven barrels together in the process of rectifying, and, after rebarreling and selling a portion of the compound, the twenty-two barrels seized remain, so that it is now impossible to identify any of the spirits which were not distilled by William E. Reed. It is possible, and perhaps probable, that five thirty-seventh parts of the twenty-two barrels, or about three barrels in quantity, were not distilled by him. But it cannot be alleged, with absolute certainty, that any part of the five barrels remain. All that can be said is, that it is probable. And if any part of them remain, it is, of course, impossible to separate that part from the rest. If, then, I restore to Walker & Co. three barrels, those barrels will contain some whiskey which has been forfeited, and therefore belongs to the United States. I have no right thus to dispose of the property of the United States. I have no right to make an equitable division between them and the claimants. I am obliged to give to the United States all the spirits which are shown to be theirs. If the claimants, by mixing their own whiskey with that of the United States, have rendered it impossible to identify theirs, they must suffer the consequences of their own act. They made the mixture, it is true, in perfectly good faith, in the regular exercise of their trade and business, and believing that the whole of the whiskey belonged to them; still, by their act they have put it out of their power to give to the United States only what belongs to them. They are obliged, by force of a well known rule of law, to surrender to the plaintiffs all that belongs to them; although in so doing they may be obliged to give up some that belongs to themselves. If one intermixes his goods with those of another, without his knowledge or consent, so that they cannot be identified, the law does not allow him any remedy; but gives the entire property, without any account, to him whose original dominion or property is invaded. 2 Bl. Comm. 405. The order of condemnation must, therefore, include the whole of the thirty-two barrels. Nor does this decision work in this case any real hardship. The United States are actually entitled to thirty-two barrels of the whiskey purchased by Walker & Co. They claim in this suit only twenty-one, leaving with Walker & Co. ten, or the proceeds of ten, which are not claimed, and may never be claimed.

In concluding this opinion, I adopt what

the supreme court of the United States said in announcing their decision in a similar case: "It is true that cases of hardship and even absurdity may be supposed to grow out of this decision; but, on the other hand, if, by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it. When hardships shall arise, provision is made by law for affording relief under authority much more competent to decide on such cases than this court ever can be. In the eternal struggle that exists between the avarice, enterprise, and combination of individuals on the one hand, and the power charged with the administration of the law on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature."

Decree accordingly.

Case No. 15,096.

UNITED STATES v. FIFTY THOUSAND CIGARS.

[See Case No. 4,782.]

Case No. 15,097.

UNITED STATES v. FIFTY-THREE BALES OF RAGS.

[19 Alb. Law J. 60.]

District Court, D. Massachusetts. Jan. 7, 1879.

CUSTOMS DUTIES—FORFEITURE—CLAIM OF RAILROAD FOR FREIGHTAGE.

The case of the United States against Fifty-Three Bales of Rags, decided by the United States district court for Massachusetts, was an information under Rev. St. § 3082, against certain bales of rags as having been clandestinely imported and brought from Montreal into some part of the state of New York without having been entered at the custom house and without payment of duties. The jury found most of the goods to be liable to forfeiture, and they were condemned and sold. The Boston & Lowell Railroad Company, from whose custody the goods were taken by the marshal, petitioned for the payment of $47.36 from the proceeds of the sale. This was claimed to be freight due for the transportation of the goods to Boston by the petitioners and connecting roads, all of whom were entirely innocent of the fraud on the government.

THE COURT held that smuggled goods were absolutely forfeited, and no intervening rights even of a bona fide purchaser could prevail against the title of the government which relates back to the illegal act. The goods were, at the time of their transportation, the property of the United States, and by the common law a carrier has no lien as against the true owner for the carriage of goods intrusted to him by one who had no authority to contract for the service.

Case No. 15,098.

UNITED STATES v. FIFTY-THREE BOXES OF HAVANA SUGAR.

UNITED STATES v. TWENTY-NINE AND ONE-HALF BOXES OF SUGAR.

[2 Bond, 346.] [1]

District Court, S. D. Ohio. Feb. Term, 1870.

CUSTOMS DUTIES — UNDERVALUATION — SUGARS — FALSE GRADE—FALSE ENTRY—SMUGGLING —INNOCENT PURCHASER.

1. The consignee of goods, wares, or merchandise subject to duty, imported into the United States at an alleged fraudulent undervaluation, who has no knowledge of such fraud, and who, in good faith, makes advances to the consignor, and incurs expenses in the storage and management of the property, occupies the position of a bona fide purchaser, and his title will be protected.

2. A bona fide purchaser of such property, before the United States has elected whether to proceed for a forfeiture or sue for the value of the property, will hold the same as against the government claiming a forfeiture for fraud in the importation.

3. The fraudulent entry of goods at less than their actual value subjects them to forfeiture under section 1 of the act of congress of March 3, 1863 [12 Stat. 737], but that section, to constitute such a fraudulent entry as will subject the goods to forfeiture, requires that the entry should have been knowingly made on a false invoice.

4. Where the United States claim the forfeiture of sugars, on the ground that they were entered as of a grade which subjected them to a duty of three cents per pound, when they were of a grade subjecting them to five cents per pound, it must appear, by the evidence, that the importer had knowledge of the false grade, and that a fraud was intended; and, if this guilty knowledge and intent are negatived by the evidence, there is no ground for a judgment of forfeiture.

5. The entry of property at a custom-house, at a false valuation, does not subject it to forfeiture under section 4 of the act of July, 1866 [14 Stat. 179], "to prevent smuggling, and other purposes;" the scope and intent of said section being to prevent the clandestine introduction of property into the United States, to evade the payment of duties, known as smuggling, in the accepted sense of that term; and does not apply to a false entry at a custom-house.

At law.

Warner M. Bateman, Dist. Atty., and Lewis H. Bond, for the United States.

King, Thompson & Avery and Collins & Herron, for claimants.

LEAVITT, District Judge. As these cases present substantially the same questions, they have been submitted together, and do not require a separate consideration. In the first named of these cases, one hundred and twenty-three boxes of sugar were seized, by order of the collector, at Cincin-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

nati, as having been imported in violation of law. An information was filed in this court, claiming the condemnation of this sugar. James H. Laws & Co., of this city, intervened in the case, and filed a claim to seventy of the one hundred and twenty-three boxes of sugar as bona fide purchasers; and, upon the hearing of the case, it appearing that they had purchased the sugar in open market, without any knowledge or intimation of any fraud in the importation, and before any seizure or other proceeding by the United States for the condemnation of the sugar or the recovery of its value, it was decided by this court, without any reference to the question of fraud, that the claim of Laws & Co., as innocent purchasers, was sustained, and the seventy boxes were accordingly awarded to them. On an appeal to the circuit court, the judgment of this court was affirmed. [Case unreported.] The claim of the United States is now against fifty-three of the one hundred and twenty-three boxes, in one case; and in the other, against twenty-nine and one-half boxes, being a part of another consignment also seized by order of the collector. These lots are separately proceeded against by the government as forfeited. And the question in both cases is, whether the alleged grounds of forfeiture are sustained. The ground of forfeiture relied upon by the United States, in both cases, is, in substance, that the sugar was imported from Havana, in the Island of Cuba, and entered at the custom-house at New Orleans, upon a false and fraudulent invoice and entry, in which the grade or quality of the sugar, being subject to a specific duty, was described as not above No. 12, Dutch standard; whereas its true grade or quality, by such standard, was 20 or upward. As the result of this false classification of the sugar, it is alleged the government was defrauded of two cents duty on every pound of the sugar. The information, in both cases, alleges that the sugar in question is forfeited to the United States—First, as being invoiced and entered in violation of section 1 of the act of congress of March 3, 1863; and, second, as subject to forfeiture under section 4 of the act of July 8, 1866. Adolphus Wood & Co., Cincinnati, have intervened in the first case named, and assert a lien on the fifty-three boxes, on the ground that the sugar was consigned to them, as commission merchants at Cincinnati, for sale, by the house of F. W. Perkins & Co., of New Orleans, and that in good faith, without any knowledge of any fraud in its importation, or any reason to suspect fraud, they received the sugar, made large advances to the consignors upon it, and have also a claim for commission, storage, and other charges.

Before passing to the consideration of the question of fraud, it may be proper to remark here that there can be no question that the lien asserted by Wood & Co. is equitable and valid, and must be sustained unless it shall be held that the sugar is subject to forfeiture, as claimed under section 4 of the act of July 8, 1866. In that case the forfeiture, by operation of law, must be held to have occurred at the time the fraud was committed, and the asserted lien of Wood & Co. would not be available. On the other hand, if the court find there was fraud in the importation, and a ground of forfeiture under section 1 of the act of 1863, their claim must be sustained. They must be viewed as before the court in the light of innocent purchasers, and entitled to indemnity for their advances, commissions, etc., on the same principles that innocent purchasers would be entitled to protection. Their rights will therefore be dependent on the decision of a question hereafter to be considered. Perkins & Co. have filed answers in both the cases submitted, claiming the ownership of the sugar in question, asserting their claim as such, denying the fraud charged, or any knowledge of or participation in any fraud in the importation and entry of the sugar at the custom-house. The first question for consideration is, whether the allegation of fraud is proved, and whether, as a legal result, the sugar is subject to forfeiture. The questions arising in the cases have been ably argued, and are not, perhaps, wholly free from doubt.

If the sole question were whether this sugar paid the full duty imposed by law, I should not entertain any doubt. The evidence, I think, proves it was of a grade subjecting it by law to a duty of five cents per pound, whereas but three cents per pound was paid. It is true the evidence shows that a part of the two hundred and fifty-five boxes, of which the sugar in controversy was a part, was of a very low grade (No. 12), but what proportion was of this low grade does not appear. It was also proved that the sugar was graded by the custom-house officers, at New Orleans, according to a system of average then practiced there, and reported to the collector and the duty imposed as if it were of the minimum grade of No. 12, Dutch standard. While there are strong reasons for the conclusion that this average was erroneous, it is a proper inquiry whether the evidence so far implicates Perkins & Co. or Cavenna in any fraud in the entry of this sugar as will subject it to forfeiture under the law upon which the information is based.

This is the controlling question presented in this case. And, before adverting to the evidence, it will be proper to notice section 1 of the act of March 3, 1863, upon which the first charge in the information in both cases is framed. This section is of great length, very comprehensive, and very minute on the subject of the importation and entry of property from foreign countries. For the present purpose it will not be necessary to quote the entire section. It is clear, however, that the prevention of false and fraudulent invoices and entries of property, by undervaluation or false and fraudulent representations of quantities, quality, etc., is the

prominent object of the section. After a minute specification of the legal requirements in the entry of property, it is provided "that if any owner, consignee, or agent of goods, wares, and merchandise, shall knowingly make or attempt to make an entry thereof, by means of any false invoice, * * * or any invoice which shall not contain a true statement of all the particulars hereinbefore required, * * * or any other false or fraudulent practice or appliance whatever, the property, or its value shall be forfeited." There is not, in my judgment, room for a doubt that the allegations of fraud in the invoice and entry of the sugar at a grade below the true grade, as charged in the information, brings the case within the scope of this provision. And as Perkins & Co., and Cavenna, are the only persons implicated in the alleged false invoice and entry, the question for the decision of the court is, whether the evidence sustains the charge as against them. The clause of the first section just referred to provides for a forfeiture as the penalty where the owner, consignee, or agent shall knowingly make an entry upon a false invoice. As Perkins & Co., and John L. Cavenna, were the only persons interested in the sugar, and the only persons connected with the invoice and entry, the inquiry is, whether they jointly or by collusion, or either of them, knowingly participated in the alleged fraud; in other words, whether they had a guilty knowledge that a fraud was perpetrated or intended. It is clearly incumbent on the government, in order to establish its right to a forfeiture, to bring the knowledge home to the parties charged with the fraud, as the basis of a judgment of forfeiture. It is clearly not enough for the government to prove that the sugar was entered upon an erroneous grade, and the duty paid less than that imposed by law. The fraudulent intent must also appear; and such intent must be fairly inferable from the facts proved, and can not rest upon mere suspicion.

The facts relied upon by the government to sustain the charge of fraud are the entry of the sugar at an erroneous grade, the supposed fraudulent collusion between Cavenna and Perkins & Co., and some circumstances connected with the disposition and sale of the sugar by that firm, as indicating their knowledge of the alleged fraud. Now it was undoubtedly competent for Perkins & Co., as the owners of the sugar, to adduce proof in rebuttal and explanation of the facts proved by the government, and thus to repel the charge of fraud. This they have done with a view to relieve themselves from any presumption of any fraudulent intent, or any knowledge of any fraud in the transaction.

I shall advert only to some of the material facts proved, bearing on this question. These facts are before the court, chiefly from the depositions of J. L. Cavenna and F. W. Perkins. From these it appears that in the latter part of March, 1869, Perkins & Co., at the request of Cavenna, addressed a letter to the house of Lawton Brothers, merchants at Havana, in which they say that Cavenna wishes, through them, to order two hundred and fifty boxes of grocery sugar; such as, on an average for the lot, would be about No. 12. They direct the Havana house to charge the sugar to their account, and to send the invoice to Cavenna. Lawton Brothers shipped the sugar pursuant to this order. Before its arrival at New Orleans, Cavenna, for reasons stated in his deposition, proposed to Perkins & Co. to become the purchasers of the sugar, to which they assented. The entry at the custom-house was, however, made by Cavenna in his name, Perkins & Co. advancing the funds to pay the duties. The sugar was entered as of a grade not exceeding No. 12, though Cavenna, in his deposition, says he had not examined the sugar, or seen any samples of the grades, but supposed it was of the grade and quality ordered. The usual forms at the custom-house were observed. The sugar was appraised and inspected, and a report made to the collector, who issued the necessary papers, and the sugar was withdrawn from the warehouse, and delivered to Perkins & Co., and by them shipped to Cincinnati, for sale. Both Cavenna and Perkins deny that there was any fraudulent collusion between them in the purchase of the sugar, or in the entry at the custom-house. They say, that supposing in good faith the sugar purchased was of the quality ordered, the entry was made as of a grade not exceeding No. 12. It appears, also, from the depositions of the custom-house officials, that the sugar was graded as not above that number, and that duty paid accordingly.

The question of the right of the government to the forfeiture claimed under section 1 of the act of 1863, seems to turn upon the credit to be given to Cavenna and F. B. Perkins as witnesses. And I am aware of no principle on which the court can arbitrarily pronounce them unworthy of credit, and wholly ignore their testimony. Cavenna has no interest in the event of these suits, and there is no proof of any fraudulent collusion between these parties in reference to this transaction. Perkins, though interested, is a competent witness, and unless proved to be unworthy of credit, his testimony can not be rejected. No attempt has been made by the government to impeach either Cavenna or Perkins, by evidence of bad reputation for veracity when under oath; and receiving their statements as credible, they disprove the allegation in the information that they, or either of them, knowingly, or as charged, with a fraudulent intent, caused the sugar to be invoiced and entered at the custom-house at a grade below the true grade. There are, undoubtedly, some reasons developed in the case, justifying the suspicion that there was a design to get the sugar

through the custom-house upon a false invoice and entry. But it seems to the court that the transaction is explained by the evidence of Cavenna and Perkins, so as to relieve them from the charge of knowingly causing the entry to be made, as charged in the information. There was, obviously, a want of the care, vigilance, and exactness which may properly be looked for in such a transaction, but nothing that under the statute fixes the taint of fraud upon this sugar.

In this view of the case, the charge in the information, based on the act of 1863, is not sustained. The remaining question is, whether the case is within the operation of section 4 of the act of July, 1866. As noticed in a previous part of this opinion, the second charge in the information is framed under this section. It charges, in substance, that, by means of a fraudulent invoice and entry of the sugar, the full amount of the specific duty, imposed by law, was not paid, and that the said section 4 of the act of 1863 was violated, and the sugar subject to forfeiture under its operation. The question raised as to this charge in the information is, whether property imported, subject to duty, and entered at a custom-house, and which has passed under the scrutiny of the officers of the government, and has been delivered to the owner or consignee, without the payment of the full amount of duty chargeable, is an unlawful importation, within the meaning of said section 4, subjecting the property to forfeiture. Without quoting the section at length, it will be sufficient to notice that it provides that if any person shall fraudulently or knowingly import or bring into the United States any goods, wares, or merchandise, contrary to law, a forfeiture shall be incurred; and, in addition, the offending party be subject to fine and imprisonment.

It is claimed by the district attorney that the entry of the sugar in question was fraudulent, and in violation of law, for the reason that the full amount of duty was not paid. I do not propose to discuss this question at length. The views of the court, as stated, seem to dispense with the necessity of this. It is clear that if, in the importation and entry of the property, there was no guilty knowledge of any fraud perpetrated or intended, the section referred to does not apply. And as, according to the views already stated, such guilty knowledge in these cases is not made out by the evidence, it is not within the terms of the section.

There is another objection to this second charge, namely, that the section was intended only to embrace the case of property brought into the country clandestinely, with the fraudulent purpose of evading the import duty, and does not apply where it is entered at a custom-house and the forms of law observed, but in respect to which a fraud is subsequently ascertained. In other words, that the section embraces only acts of smuggling, in the usual and accepted meaning of the word. The title of the act is, "An act to prevent smuggling," and this is significant of the intent of the statute, notwithstanding the addition of the words, "and other purposes," to the title. Terms and phrases occur in many sections of the statute, indicating clearly that congress had it specially in view to prevent the illicit introduction of dutiable goods, wares, and merchandise; and it may be suggested that one of the main objects leading to the enactment of this statute was to put a stop to smuggling along the extended lines dividing the United States from foreign coterminous countries on the north and southwest. Many of the phrases and terms indicate that overland smuggling was prominently in the minds of the legislators who passed the statute. The inference does not seem reasonable that congress intended to supersede or interfere with the prior provisions of law, for the prevention of frauds in the entry of taxable property at a custom-house at a false valuation, if subject to an ad valorem duty, or a false grade or classification when subject to a specific duty. This object had occupied the attention of congress from an early period of the government. Section 66 of the act of 1799 [1 Stat. 677], was full and stringent on this subject. The act of March, 1863, is more explicit and comprehensive in its requirements than the old statute, and seems to embrace every possible case of fraud in the entry of goods, wares, and merchandise at a custom-house. Without going more fully into the consideration of this subject, I can see no reason for the conclusion that it was intended by section 4 of the act of July, 1866, to change all the previous legislation on this subject, and to provide that any unlawful act committed in the entry of property, imported openly, and entered at a custom-house, and suffered to go into the market after the scrutiny and inspection of the proper officers as duty paid, is subject to forfeiture under the section referred to, upon the discovery that the entry was erroneous or fraudulent. Former legislation had fully provided for such a case, and there was clearly no necessity for anything additional on the subject. There are many other considerations that might be urged to sustain this construction of the section referred to, but I do not think it necessary to expand this opinion, already too long, by adverting to them.

The result of the views I have presented is: (1) That the lien asserted by Adolphus Wood & Co. on the fifty-three boxes is valid, and must be satisfied out of the proceeds of the sale of the sugar, now in the hands of the marshal. (2) That the grounds of forfeiture set forth by the government in the informations are sustained, and the sugar in both the cases submitted is not subject to forfeiture. The marshal will, within thirty days from this day, pay to Perkins & Co., or their attorney, the balance of the pro-

ceeds of the sale of the sugar, after deducting the amount due to Wood & Co., which amount, if not agreed upon by the counsel, shall be ascertained by a reference to a master.

In announcing the conclusion of the court, it is proper, perhaps, to suggest that, in my judgment, Perkins & Co. are justly indebted to the United States to the amount of two cents on the pound of the sugar in controversy, that being the deficiency in the duty paid, and that an action could be sustained against them for the recovery of this sum. But the court, in this proceeding has no authority to render judgment for that sum, or make an order directing the marshal to retain it out of the money in his hands. It will be for the district attorney to adopt such course in relation to it as he may think proper.

[See Case No. 16,418].

Case No. 15,099.

UNITED STATES v. FINLAY.

[1 Abb. U. S. 364;[1] 3 Pittsb. Rep. 126; 9 Int. Rev. Rec. 99; 16 Pittsb. Leg. J. 254; 26 Leg. Int. 92.]

District Court, W. D. Pennsylvania. Feb. 20, 1869.

INTERNAL REVENUE—REPEAL OF STATUTE.

1. The provisions of section 2 of the act of March 31, 1868 [15 Stat. 59], which repeal sections 94 and 95 of the internal revenue law of June 30, 1864 [13 Stat. 264, 272], and acts amendatory thereof, do not operate to preserve prosecutions commenced but not carried to judgment before the repeal took effect.

2. Where the statute declaring an offense and its punishment is repealed, without a provision saving pending prosecutions, an indictment previously found, but not yet tried, should be quashed on motion. There is no longer an offense; and no one can be punished for what is not an offense at the time of punishment.

[Cited in U. S. v. Libby, Case No. 15,596; U. S. v. Barr, Id. 14,527.]

Motion to quash an indictment.

This was an indictment against John B. Finlay, for rendering false returns of manufactures of woolen goods. The facts of the case are sufficiently stated in the opinion.

Mr. Golden, Mr. Marshall, and Mr. Kerr, for the motion.

Mr. Baily, Mr. Carnahan, Dist. Atty., and Mr. Boggs, opposed.

McCANDLESS, District Judge. As both the government and the defendant are ready to proceed to trial, the brief space which has intervened since the argument has not afforded me time to elaborate an opinion upon the points submitted by the learned counsel for the defendant. It will be sufficient to state a few of the reasons for the conclusions at which I have arrived.

The defendant is indicted for making false returns of woolen manufactures, with intent to evade and defeat the assessment of taxes imposed by the internal revenue law. The taxes on woolen goods were assessed by virtue of section 94 of the act of March 2, 1867 [14 Stat. 474], which was amendatory of the act of June 30, 1864. By section 82 of this act of 1864, as amended, these returns were required to be made to the assessor of the district, and were required to be upon oath. By section 15, any person who shall deliver to the assessor any false or fraudulent return, shall, upon conviction, be subject to fine or imprisonment, or both, at the discretion of the court; and by section 42, any person swearing falsely in any matter, where an oath is required under this act, shall be deemed guilty of perjury, and be subject to the pains and penalties provided by the laws of the United States for such crime.

It is charged that from the month of June, 1867, to the month of March, 1868, inclusive, the defendant delivered, as true, false and fraudulent statements of the woolen goods sold and removed for consumption and use, which were manufactured by him, and upon which taxes were imposed by law. It is now moved to quash this bill, upon the ground that the act of congress upon which the defendant is indicted has been repealed by the act of March 31, 1868, exempting certain manufactures from internal revenue tax, and for other purposes. In considering this question, we are not driven to the necessity of inquiring whether this is a repeal by implication, or whether there is such a repugnance between the two acts that the former must give way to the latter. The repeal is in express terms, and without a saving clause as to offenses committed in violation of the repealed statute. Section 2 simply reserves the right to collect, under the old system, any tax which might accrue between the date of the passage of the act and April 1, 1868. Revenue bills are reported and discussed many months before their enactment into laws, and as by section 4 the first quarterly assessment under the new system was to be made in the month of July following, for the three months preceding, congress anticipated that there might be a hiatus or interval between the passage of the bill and April 1, to which neither law would apply, and therefore provided for it in this section. But there was no hiatus, for the act passed the day before, on March 31. This is the only provision in the act of 1868 that savors of a saving clause, and it is limited to taxes which may thus accrue. It can have no application here, for all those taxes had accrued before the passage of the bill.

What, then, are the provisions of the act

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

of 1868? It declares that sections 94 and 95 of the acts of June 30, 1864, and all acts and parts of acts amendatory of said sections, be, and the same are hereby repealed. Section 4, in lieu of the tax of two and a half per cent. ad valorem, imposes a tax of two dollars per thousand on sales in excess of five thousand dollars, which shall be assessed and paid quarter-yearly, as other taxes are assessed and paid. This act is then a repeal and abolition of the tax and system of taxation upon woolen manufactures, which existed at the period when it is alleged this offense was committed. It is a repeal of the law under which the defendant is indicted. The crime and its penalty are abrogated. Where, then, is our jurisdiction? How can we try the defendant, and, if found guilty, punish him under a law that has no existence? The offense is gone, and no one can be punished for what is not a crime at the time of punishment. Nothing is more certain that that if a statute creating an offense be repealed, all proceedings under it fall. [U. S. v. Passmore] 4 Dall. [4 U. S.] 373. The government alone is interested in the prosecution of criminal cases; it can terminate them at any stage by a nolle prosequi; it can obliterate the offense from the Penal Code; and provided it leaves the citizen his civil remedy for the injury that is peculiar to himself, it violates no right of property, and it offends no principle of justice. The law unquestionably is, that after the repealing act is passed there shall be no such offense as that for which this defendant is indicted. It is no longer an offense; it cannot be indicted, it cannot be punished, it is taken from the Penal Code absolutely. This was substantially the argument for the defense in Duane's Case, in 1 Bin. 601, sustained by the chief justice, afterwards by the supreme court of Pennsylvania, in [Ammidon v. Smith] 1 Wheat. [14 U. S.] 460, and by Mr. Justice Washington, who, in Anonymous [Case No. 475], says: "It is a clear rule, that if a statute create an offense, and is then repealed, no prosecution can be instituted for any offense committed against the statute previous to its repeal."

Such being the law, the present prosecution must fail. And suppose, as is certainly the case, that these internal revenue laws are not without obscurity, in the language of Chief Justice Tilghman, I feel myself on the safest and strongest ground, in adopting a construction which takes away the punishment.

Indictment quashed.

Case No. 15,100.

UNITED STATES v. FISHER.

[Cited in U. S. v. Hall, Case No. 15,281, and U. S. v. Pomeroy, Id. 16,065. Nowhere reported; opinion not now accessible.]

Case No. 15,101.

UNITED STATES v. FISHER.

[1 Cranch, C. C. 244.] [1]

Circuit Court, District of Columbia. July Term, 1805.

WITNESS—FREE NEGRO—SLAVERY—PRESUMPTION.

1. A free negro is a competent witness against a free white man Quære.

[Cited in U. S. v. Mullany, Case No. 15,832.]

2. General reputation of freedom is sufficient to rebut the presumption of slavery arising from color.

[This was an indictment against Henry Fisher, a free white man.]

Indictment for beating prisoner's wife. The assault having been proved by Mr. Threlkield, Lucy Butler, a black woman, was offered as a witness on the part of United States. Mr. Threlkield having sworn that she had always passed for a free woman for many years, the court permitted her to be sworn to the jury.

Quære. See the act of assembly of Maryland (1717, c. 13, § 2).

Case No. 15,102.

UNITED STATES v. FISHER.

[5 McLean, 23.] [2]

Circuit Court, D. Ohio. Oct. Term, 1849.

EMBEZZLEMENT FROM MAIL—INDICTMENT—ARTICLE OF VALUE.

1. Where an indictment charges the carrier of the mail with stealing a letter out of it, it is sufficient.

2. If the letter contain an article of value, it must be so averred in the indictment, to subject the defendant to the incurred penalty.

3. But as it is an offence to steal a letter which contains no article of value, it is not necessary to aver that it contained no such article.

The District Attorney, for the Government.
Mr. Lawrence, for defendant.

OPINION OF THE COURT. This is an indictment against the defendant [John Fisher], charging him as carrier of the mail, with stealing letters, &c. A motion is made to quash certain counts in the indictment which charge the defendant with stealing a letter, without alleging that it contained no article of value. This is not necessary. A carrier of the mail is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value. And when this offense is committed, the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty. But where the offense consists in stealing a letter, it may

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon John McLean, Circuit Justice.]

be so laid in the indictment, and the proof cannot go beyond the indictment. The motion is overruled.

The evidence being heard by the jury, he was convicted, and sentenced by the court.

Case No. 15,103.

UNITED STATES v. FISHER et al.

[1 Wash. C. C. 4.] [1]

Circuit Court, D. Pennsylvania. April Term, 1803.[2]

BANKRUPTCY—PRIORITY OF UNITED STATES.

Claim, by the United States, of priority of payment out of the effects of an insolvent and bankrupt debtor.

The action was brought to recover from the assignees of [Peter] Blight, a bankrupt, the amount of a protested bill of exchange endorsed by Blight, with damages, &c. as settled at the treasury. The bill was purchased by the cashier of the Bank of the United States, for the secretary of the treasury, and paid for by a warrant on the bank. It was protested, and notice given on the 11th of April, 1800. Blight having committed an act of bankruptcy, a commission issued against him on the 10th of April, 1801. On the 25th, a provisional, and on the 30th of May, an absolute assignment of his effects were made. Previous to these transactions, viz. in January, 1801, Blight had deposited a part of the cargo of the ship China with the collector of some port in Rhode Island, to secure the duties on that cargo; of which the commissioners having notice; they some time in April sent their messenger with a warrant to seize these goods as the property of Blight; and they gave notice of the claim of the commissioners to the collector and marshal of the district. On the 16th of June, 1801, an attachment was taken out in the name of the United States, and levied on the goods in the hands of the collector, for the debt due on account of the bill before mentioned; but they were afterwards delivered to the defendants, under an agreement that they should pay the debt due to the United States, if it should be decided that the United States were entitled to have the same first satisfied. An agreement has also been entered into on the part of the government and the defendants, that an action for money had and received should be brought, and the general issue to be pleaded, defendants to admit sufficient funds in their hands, of Blight's property, to pay the claim of the United States, but not enough to pay all his debts. The question to be, whether the debt due to the United States from Blight is first to be satisfied out of his money and effects, or any part thereof, in the defendants' hands, by virtue of the attachment in their agreement mentioned, or of any acts of congress. If judgment in the affirmative, to be entered in favour of plaintiff for $——; if in the negative, to be entered generally for defendants.

Dallas contended that the 5th section of the act of the 3d March, 1797 (3 Laws [Folwell's Ed.], 423 [1 Stat. 515]), gives a priority to the United States in cases of insolvencies, in all cases whatsoever of debts due to the United States; and that the 62d section of the bankrupt law clearly protects and secures this right of priority, so as not to be affected or impaired by that law. That the United States not being within the operation of the bankrupt law, the attachment gave a priority to the claim of the United States. He principally relied upon the case of U. S. v. King [Case No. 15,536], decided in the late circuit court for this state.

Ingersoll and Tilghman opposed this construction, upon the ground that the act of 3d March, 1797, gave no preference to the United States, except against public agents; and therefore they are not in other cases to have a priority.

After a very long argument by these gentlemen, WASHINGTON, Circuit Justice, stopped Lewis, who was about to argue also for the defendants, and desired Dallas to conclude.

WASHINGTON, Circuit Justice (charging jury, after stating the case). The single question is, has the United States a right to be paid the whole of the debt due from the bankrupt out of his estate, in preference to the other creditors? This will turn entirely upon the construction of the act of the 3d March, 1797, and the bankrupt law; for I at once lay the attachment out of the case; because, unless the priority of the United States be established by those laws, the attachment, being laid after the assignment, could give no lien and no right of preference to the United States; for at that time the property belonged not to Blight, but to the assignees. This right of preference, upon prerogative principles, has been wisely disclaimed by the district attorney, who founds it upon a legislative grant solely. The 62d section of the bankrupt law [of 1800; 2 Stat. 36], declares, that "nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to or security in money due to the United States, or to any of them." Mr. Ingersoll seemed to suppose, that as the king is not within the operation of the bankrupt laws in England, this section was only intended to express, in regard to the United States, the same legal principle. Mr. Tilghman appeared to think that the United States had an election to come in under the commission and receive a dividend,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [Reversed in 2 Cranch (6 U. S.) 358.]

or to refuse to do so, in which latter case the bankrupt's certificate would be no bar of her claim.

It is unnecessary to give any opinion, whether the United States may elect to come in under the commission or not, because this is not a question wherein they have put in any claim, or in which the bankrupt is endeavouring to protect himself by his certificate. The United States contend for a right to be paid the whole of their demand, and found this right on the section recited, and on the 5th section of the act of the 3d March, 1797 [1 Stat. 515]. The 62d section of the bankrupt law does not give a preference to the United States, but merely saves the right of the United States in cases where such a preference had by law been previously granted. This then brings me to the act of the 3d March, 1797, which, it is contended on behalf of the United States, gives them a preference in all cases of debts due to them, no matter by whom or on what account. The title of this law is "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money." The objects of the 1st section are revenue officers and persons accountable for public money, and directs who shall institute suits against such of them as are delinquents, and declaring what interest shall be recovered. The 2d section defines the kind of evidence to be received in such suits, for establishing the demand. The 3d section directs the trial of the cause to take place at the return time. The 4th section provides for the defendant, and points out the mode in which he is to establish his credits, if he claims any. The 5th gives to the United States a preference in case of insolvency; and the 6th is upon the subject of execution after judgment obtained. The 5th section declares, that "where any revenue officer or other person thereafter becoming indebted to the United States by bond or otherwise, shall become insolvent," the debt due to the United States shall be first satisfied. The words "or other person," are certainly broad enough to comprehend every possible case of debts due to the United States, and the court is now called upon to give to this section its proper construction. On one side it is said, that the words must have a literal interpretation, so as to extend to all persons indebted to the United States; and on the other, a limited interpretation is contended for, so as to confine the meaning of those words to persons accountable for public money.

Where a law is plain and unambiguous, using either general or limited expressions, the legislature should be intended to mean what they have plainly expressed, and no room is left for construction. But, if from a view of the whole law taken together, or from other laws in pari materia, the evident intention is different from the import of the literal expressions used in some part of the law, that intention ought to prevail, for that in truth is the will of the law-makers. So, if the literal expressions would lead to absurd or unjust consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, it can fairly be made. These rules are founded in law, and in plain honest good sense; and I think will give us light enough to pursue the present inquiry with success. Now what would be the consequence of a literal construction in this case? Not only a preference and inequality in favour of the United States, but such as no prudent citizen could guard himself against. As to public officers and agents, they are or may be known, and any person dealing with them does it at the peril of having his debt postponed to that of the United States—he acts with his eyes open. But if this preference be extended to all persons dealing with the government, there is no mode by which other citizens can be put on their guard against them, and consequently all confidence between man and man will be destroyed. If however the law is so, it must be submitted to. But we must see if such consequences may not be avoided, by a fair and reasonable construction.

The object of the law, as declared by the title of it, is to provide for the effectual settlement of debts due from accountable agents to the United States. To effect this, suits are directed, the species of evidence to support the claim pointed out, a speedy trial provided, and a preference given to the United States in case of a deficiency of estate to satisfy the judgments. Here then is one entire connected system; the different provisions constituting the links of the same chain—the members of the same body. The title, though it cannot control the positive expressions of the law, may assist other parts of the law in limiting the extent of their meaning. It is admitted that the three first sections of the law apply to those only who are declared by the title to be the objects of the law: the 4th section is the first which uses general expressions, without a reference to those who had before been spoken of; but when we come to the 5th section, the reference is again taken up, with the addition of the words "or any other person;" and we are to say, to what extent these general expressions are to go. In the first place, what necessity was there for departing from the mode of expression used in the 4th section, which for the first time is general, without particular reference to any of the persons before described? Would it not have been as well in the 5th as in the 4th section, to say, that "where any individual hereafter becoming indebted to the United States, shall become insolvent," &c.? What reason can be given for the specification of one of the persons mentioned expressly in the first section, and intended by words of reference in the 2d and 3d, unless to show, that if the primary object of the law had

been interrupted by the 4th section, it was intended to be resumed in the 5th? Secondly: What necessity was there for the specification of revenue officers, if all persons whatsoever are comprehended, who are debtors of the United States? for those words would certainly have comprehended revenue officers. Unless they are construed to limit and restrain the generality of the other words, they are without any use whatever. If the preceding sections of the law had applied only to revenue officers, then, from necessity, we must have construed the words "any other person," as broad as their natural import would warrant; because we could derive no rule whatever, from the law itself, to limit the generality of the expression. But the law professing by its title to relate to all accountable agents, and the first section specifying amongst those accountable agents revenue officers, we have a rule by which to limit the generality of the expressions in the 5th section, viz. "or any other person accountable for public money," or, "or other person indebted as aforesaid." This construction renders the law uniform, and consistent with what it professes. And thirdly: The special wording of the 62d section of the bankrupt law, furnishes another strong argument in favour of this limitation of the 5th section of the law, more immediately under consideration. If the United States were entitled to a preference in every possible case of debts due to them, what necessity for speaking of "the right of preference to prior satisfaction of debts due to the United States, as secured and provided by any law heretofore passed"? This mode of expression was calculated to induce an opinion, that the legislature supposed there were some cases where the priority had not been provided for by law; for if otherwise, it would have been enough to declare, that the bankrupt law should not extend to or affect any debts due to the United States. Upon the whole, I am of opinion that the law is with the defendants.

The jury found a verdict for the defendants.

Upon an appeal, this judgment was reversed. U. S. v. Fisher, 2 Cranch [6 U. S.] 358, 396.

NOTE. In this case, the supreme court decided: (1) The acts of congress, securing to the United States a priority of payment out of the effects of their debtor, in all cases of insolvency or bankruptcy are constitutional. (2) The government is to pay the debts of the Union, and is authorized to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which render the transaction safe. (3) It is no objection to the claim of priority on the part of the United States, that it interferes with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies, on the part of their own revenue officers. This result, so far as it may happen, is the necessary consequence of the supremacy of the laws of the United States, on all subjects to which the legislative power of congress extends. If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect. Whart. Dig. 81, 82.

Case No. 15,104.

UNITED STATES v. FISK et al.

[2 Int. Rev. Rec. 10; 13 Pittsb. Leg. J. 110.]

Circuit Court, S. D. New York. 1865.[1]

INTERNAL REVENUE—BANKERS AND BROKERS—TAX ON SALES.

[The provision in Act March 3, 1865, extending the definition of "brokers" given in Act June 30, 1864, § 79, subd. 9, which requires a license fee to be paid by brokers, so as to make it apply to persons negotiating sales of stocks or securities, whether "for themselves or others," does not apply to section 99 of the act of 1864, imposing certain duties upon sales by brokers.]

BY THE COURT. This is an action to recover an amount of duties upon the sales of government stocks by the defendants [Harvey Fisk and Alfred S. Hatch], under the act of congress of June 30, 1864 [13 Stat. 223], amended by the act of 3d March, 1865 [13 Stat. 469]. The defendants are bankers in the city of New York, licensed under section 79 of the former act. In the course of their business they buy and sell government securities on their own account, and for themselves, and not for others, or on commission. It is admitted that in the month of April last they sold, as such bankers, government stocks held and owned by them in their own right, the duties upon which, if they are subject to the payment, amounted to the sum of $1,000, under the seventy-ninth section of the act of 1864. The question involved in the case is, whether or not the defendants are liable to this tax?

The first subdivision of section 79 of the act of 1864 required bankers, employing a capital not exceeding $50,000, to pay a license fee of $100, and, for every additional $1,000, $2. It also defines the term "bankers" within the meaning of the act, as follows: "Every person, firm, &c., having a place of business — (1) where credits are opened by a deposit or collection of money, &c., subject to be paid or remitted upon draft, &c.; (2) where money is advanced, or loaned on stocks, &c.; or (3) where stocks, &c., are received for discount or sale." By subdivision 9, brokers are required to pay a license fee of $50. A broker is defined as follows: "Every person, firm, &c., except such as hold a license as a banker, whose business it is as a broker to negotiate purchases or sales of stocks, exchange, &c., or other securities." By subdivision 13, produce brokers pay a license fee of $10, and by subdivision 14, commercial brokers pay a fee of $20. Wholesale dealers in merchandise, &c., pay a license fee of $50 (subd. 2), and retail dealers a fee of $10 (subd. 3). The

[1] [Affirmed in 3 Wall. (70 U. S.) 445.]

ninety-ninth section of the act of 1864 enacts that brokers, and bankers doing business as brokers, shall pay the following rates of duty: "Upon all sales of merchandise, produce, or other goods, one-eighth of one per centum; upon all sales and contracts for sales of stocks and lands, one-twentieth of one per centum on the par value thereof," &c, provided that any person, firm, &c., not being licensed as a broker, or banker, or wholesale or retail dealer, who shall sell, &c., any merchandise, produce, &c., "stocks, bonds, or other securities, not bona fide at the time their own property, and actually on hand, shall be liable to pay, &c., fifty per centum in addition to the foregoing duties." The law thus stood under the act of June 30, 1864, and, it is admitted, on behalf of the government, that, under the provisions of this act, neither the broker, or banker doing business as a broker, was subject to the duty of one-twentieth of one per centum, when doing business on their own account, or for themselves; but only upon sales made for others, or on commission; in other words, when acting in the character and capacity of brokers. This section 99, in terms, limits the tax to sales made by brokers, and bankers doing business as brokers. The word is familiar, and well understood, as used in statutes or in its legal acceptation. A broker is an agent employed to make bargains and contracts between other persons in matters of trade or business, usually for compensation, called brokerage. The difficulty in this case arose out of the amendments made by the act of 3d March, 1865. The first amendment bearing on the question is of the ninth subdivision of section 79, by adding to the words "other securities," "for themselves or others." This enlarges the definition of a broker, and makes the term embrace a person or firm negotiating purchases or sales of stocks &c., for themselves as well as for others. Since this amendment, it is insisted that the enlarged meaning shall be applied to the term as used in section 99; and hence the broker is liable, upon sales of stocks made in his own right and for himself, to the duty of one-tenth of one per centum.

There are several difficulties in the way of this construction. In the first place, this section was amended at the same time and by the same act, without at all effecting or even alluding to any change or intended change, in the meaning of the word "brokers" as originally used in it. In the second place, the words "brokers, and bankers doing business as brokers," in section 99, embrace produce and commercial brokers, who are subject to a tax of one-eighth of one per centum upon their sales. Now, it cannot be pretended that as to this class of brokers, they are subject to this enlarged meaning, that is, that they are liable for the duty or tax on sales made in their own right and for themselves. A special license is provided in case of such sales, as is seen in subdivisions 13 and 14 of the seventy-ninth section of the act of 1864, and which have not been altered or amended. The words, therefore, in section 99, as it respects this class, must be taken in their ordinary and legal acceptation, and not otherwise; and, in order to give the argument any force in favor of the transfer of the enlarged meaning of the terms to this section, we shall be obliged to hold that the same word possesses different and opposite meanings when used in the same section and in the same connection. And finally, in the third place, the proviso to section 99 forbids the construction claimed. That prohibits persons or firms from selling, among other articles, stocks or bonds, without a license as a broker or banker, unless, at the time, their own property bona fide, and actually on hand; clearly indicating, we think, that the sales contemplated in the enacting clause are limited to those made as brokers for others, and not in their own right and for themselves.

As we have seen, the amendment wrests from the word "broker" its true meaning, as known in law or commerce; and if this new meaning is to be extended beyond the immediate connection in which the word is found, especially in a statute regulating and establishing a system of taxation and revenue, it will lead to consequences never intended by the lawmakers, and involve contradictions and absurdities that it would be unjust to impute to them. The word, whenever used in the act of 1864, was used in its ordinary acceptation, and the object of the change of meaning in the ninth subdivision of section 79 by the amendment, is not apparent. It may have had reference to the license fee, or, in addition to this, it may have been made with a view to guard against an evasion by persons doing business as brokers. It is understood that in the negotiation of sales of stocks, in the several boards of brokers, the contract of sales is made in the name of the broker, and apparently on his own account, and for his own benefit, although, as between him and his customer, it is made for the benefit of the latter. The amendment prevents any advantage to be gained by setting up the apparent contract as the real one intended. The proviso to the ninety-ninth section would seem to have had in view the possibility of this practice on the part of the broker, and hence limits the sales exempt from tax by persons on their own account, and for their own benefit, to sales of their own property bona fide at the time, and which was then on hand.

We are quite aware of the difficulties and perplexities attending the construction of acts of the legislature as obscure and contradictory as the present one; but, after the best consideration, and for the reasons above stated, we have come to the conclu-

sion that neither brokers, nor bankers doing business as a broker, are liable, under the ninety-ninth section of the act of 1864, to the duty claimed upon sales made in their own right, and for themselves, and not for others or on commission.

According to stipulation of the attorneys and counsel, judgment must be rendered for the defendants.

[The case was taken on a writ of error to the supreme court, where the judgment of this court was affirmed. 3 Wall. (70 U. S.) 445.]

NOTE. U. S. v. Robert L. Cutting et al. July 5, 1865. Nelson, Circuit Justice. For the reasons given in the case of U. S. v. Fisk and Hatch judgment must be entered for the defendants.

Case No. 15,105.

UNITED STATES v. FISLER.

[4 Biss. 59.] [1]

District Court, D. Indiana. Nov. Term, 1865.

COUNTERFEITING—POSSESSION OF FORGED TREASURY NOTES—INDICTMENT—COPIES.

1. An indictment for possessing forged treasury notes and postal currency with intent to pass them, must profess to give, and must actually give, exact copies of them, or allege a reasonable excuse for not doing so. Quære, whether in such a case it is sufficient to paste the forged instruments themselves on the indictment as a part of it?

2. To charge in the indictment in such a case, that the prisoner had in possession "divers" such forged instruments, it too indefinite. The number ought to be stated.

McDONALD, District Judge. This is an indictment for the felonious possession of forged United States treasury notes and forged United States postal currency, with intent to pass them. The prisoner [James Fisler] was tried by a jury at the present term, and a verdict of guilty was returned against him. He now moves in arrest of judgment, on the ground that the indictment is materially defective. There are two counts in the indictment. The first count charges the felonious possession of forged postal currency; the second avers the felonious possession of forged treasury notes. In other respects, the counts are alike.

In the first count it is charged that, on the 15th of November, 1864, in this district, the prisoner "unlawfully and feloniously did have and keep in his possession, and conceal, with intent to pass, utter, and publish as true, divers false, forged, and counterfeit fractional notes commonly called postal currency, in imitation of the postal currency, which, before the day and year aforesaid, had, by the secretary of the treasury of the United States, been furnished to the assistant treasurers and other depositories of the United States by him selected, called and known as fifty-cent stamps of the postal currency of the United States—which said false, forged, and counterfeited fractional notes, commonly called postal currency, each of them are in substance described as follows." Here is pasted on the indictment one of the supposed forged fractional notes.

The second count, in the same language as the first, charges the felonious possession of "divers false, forged, and counterfeit treasury notes, and each of them are in substance described as follows, that is to say:" Here is pasted on the indictment one of the supposed forged treasury notes.

It is objected that both these counts are bad, because they profess to give the substance of the notes only. And it is insisted that, in charging forgery, the indictment must not only set out, but must profess on its face to set out, an exact copy of the thing forged, or must state some valid reason for not doing so.

This objection is fatal to the indictment. There is nothing better settled than that the rule in such cases requires exact copies of forged instruments to be given, and to purport on the face of the indictment to be given. The indictment in such cases generally employs such language as this: "to the tenor and effect following;" or, "in the words and figures following;" and it will never do to say "in substance as follows." State v. Atkins, 5 Blackf. 458; Whart. Cr. Law, §§ 306, 308, 1468.

It is also urged as a ground for arresting the judgment, that both the counts are defective for not stating the number of the forged notes mentioned. Indictments ought to be characterized by a reasonable certainty of allegation. They should at least be as certain as a declaration at common law should be. It is a rule in civil pleading at common law, that when the action concerns different things, they must be described by quality, quantity, and number. Steph. Pl. 296. Unquestionably a declaration in trespass for taking or destroying divers chattels—for example, divers horses or cows—would be bad as not stating the number of them. Surely the reason is equally strong for requiring that the number of these forged instruments be stated. Yet the indictment does not attempt to give the number. It only says "divers false, forged, and counterfeit fractional notes"—"divers false, forged, and counterfeit treasury notes." It is not pretended that in either civil or criminal pleading, the evidence must strictly conform to the allegation of number. In most cases, we may aver one number and prove another without a fatal variance. But some number must, in such cases, be stated. To say the least, it is doubtful whether to paste the original forged instrument on the indictment as a substitute for a copy, as was done in this case, does not render the indictment defective. It is a slovenly, unlawyerlike practice, not to be encouraged by courts. It is held good in England only by virtue of the act of 7 Geo. IV., not in force here. Rex v. Harris, 7 Car. & P. 429. But at any rate, the attaching of the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

forged instrument does not aid the statement that it is "in substance as follows."

The judgment must be arrested The prisoner must be held in custody or on bail to answer to a better indictment.

As to the particularity required in an indictment, consult U. S. v. One Distillery [Case No. 15,929], and cases there cited.

Case No. 15,106.

UNITED STATES v. FITTON.

[4 Cranch, C. C. 658.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

WITNESS—ASSAULT AND BATTERY UPON WIFE.

Upon an indictment against the husband for assault and battery of his wife, she may be examined as a witness against him.

[Followed in U. S. v. Smallwood, Case No. 16,316.]

This was an indictment [against Thomas Fitton] for an alleged cruel assault and battery of the defendant's wife.

Mr. Key, for the United States, offered the wife as a witness against her husband.

Mr. Mason, for defendant, objected; but

THE COURT (nem. con.) permitted her to be sworn and examined. See McNal. Ev. c. 16, pp. 160–176; 3 Chit. Cr. Law, 819; 1 Starkie, Ev. 84, 85, 705, 706; Davis v. Dinwoody, 4 Term R. 678; 2 Russ. 604, and the cases there cited. The wife's testimony was slightly corroborated, but strongly discredited by evidence of her habits and conduct.

Verdict for the defendant.

Case No. 15,107.

UNITED STATES v. FITZGERALD.

[4 Cranch, C. C. 203.] [1]

Circuit Court, District of Columbia. May Term, 1832.

PURSER IN NAVY—DUTIES—DISBURSEMENTS — EXTRA COMPENSATION.

1. The duties of a purser in the navy, stationed at a navy-yard, are not defined by law, and are to be ascertained by the jury.

2. It is competent for the court to admit evidence of equitable claims by the defendant against the United States, which have been rejected by the accounting officers of the treasury.

3. A purser who disburses money for the United States, which it is not his duty, as purser, to disburse, is, in equity, entitled to a reasonable compensation therefor.

4. The pursers are bound by the regulations made by the commissioners of the navy in 1817, with the consent of the secretary of the navy, and approved by the president of the United States, and are thereby bound to make the disbursements required, without other compensation than their regular pay as purser, unless when the disbursements were made, there was an agreement or understanding between them and the secretary of the navy, or other officer competent to make such an agreement, that they should receive compensation therefor, other than their regular and fixed pay as purser.

This was a suit, docketed by consent, to recover from the defendant [Edward Fitzgerald] a balance of $5,035.68, stated by the accounting officers of the treasury department to be due from him, as a purser in the navy, to the United States.

That balance accrued by the rejection of the following items of debit claimed by him, viz.:

Clerk hire for the year 1828.....	$ 600 00
" for 1st quarter 1829.....	150 00
Travelling expenses to Washington in 1828	68 70
Travelling expenses to Washington in 1829	68 70
Commission for paying mechanics in dry dock in 1828, at one per cent..	447 41
Commission for paying mechanics in dry dock 1st quarter in 1829.....	174 16
Commission for paying mechanics in dry dock to 30th September, 1830..	1,279 51
Clerk hire from May, 1826, to 30th September, 1830	1,325 00
Commission for paying mechanics in navy-yard	900 00
Overcharge for travelling expenses in 1831	22 20
	$5,035 68

Mr. Swann, Dist. Atty., for the United States, after the evidence was closed, prayed the court to instruct the jury that there was no law which authorized the defendant to make these charges against the United States.

Mr. R. S. Coxe, contra. These are equitable claims against the United States, which he has a right to set off, according to the case of U. S. v. Wilkins, 6 Wheat. [19 U. S.] 143. The duty of paying laborers, &c., was assigned to him in 1817, and until 1829 he was allowed by the department a commission of one per cent.

Mr. Coxe then prayed the court to instruct the jury, in substance, that if they should be satisfied by the evidence that the disbursement of this money was not a part of his duty as purser, and he was requested by the United States to disburse it, he is entitled to so much money for that service as he deserved to have therefor.

THE COURT (THRUSTON, Circuit Judge, contra) refused Mr. Swann's prayer, because it was not predicated upon any fact to be found by the jury; and because the court could not, as a matter of law, say what the duties of a purser were, or whether this disbursement was part of the defendant's duty as purser, independent of all facts to be found by a jury; as there is no statute defining the duties of a purser stationed at a navy yard.

THE COURT (THRUSTON, Circuit Judge, contra) gave the instruction prayed by Mr. Coxe.

Mr. Swann, having given in evidence the rules and regulations made by the commissioners of the navy, with the consent of the secretary of the navy, and approved by the president of the United States in 1817, prayed the court to instruct the jury that they were binding upon the defendant as a purser, and

[1] [Reported by Hon. William Cranch, Chief Judge.]

that he was thereby bound to make the disbursement without any commission or other compensation than his regular pay as purser; which the court (THRUSTON, Circuit Judge, contra) refused, unless accompanied by the following qualification, namely, "unless the jury should be satisfied by the evidence, that when the disbursements were made, there was an agreement or understanding between the defendant and the secretary of the navy, or other officer competent to make such agreement, that he should receive a commission or other compensation for such disbursements beyond his fixed and regular pay as purser."

With that qualification, the court gave the last instruction prayed by Mr. Swann.

Verdict for the defendant. Mr. Swann took a bill of exceptions, which is not now with the papers of the case.

No writ of error has been issued.

Case No. 15,108.

UNITED STATES v. FIVE BARRELS OF WHISKEY.

[11 Int. Rev. Rec. 11.]

District Court, S. D. New York. 1869.

INTERNAL REVENUE—FORFEITURE—CONDEMNATION BY DEFAULT.

BLATCHFORD, District Judge. Returns of process having been made, and no claimants appearing for any of the following described property, it was condemned by default: Five barrels of whiskey, found at No. 548 West Seventeenth street; one still, etc., found in a saloon at No. 145 Bowery; 47 half boxes manufactured tobacco, found at No. 80 Front street; 25 boxes of snuff in bottles, found at No. 104 Pearl street; 2,000 cigars, found in Liberty street; 15 boxes cigars, found at No. 148 Water street; and 12 boxes cigars, found at No. 75 Fulton street.

Case No. 15,109.

UNITED STATES v. FIVE CASES OF CIGARS.

[41 Hunt, Mer. Mag. 74.]

District Court. S. D. New York. 1859.

CUSTOMS DUTIES—CIGARS—UNDERVALUATION.

Before BETTS, District Judge.

This was a suit to forfeit the cigars for being undervalued in the invoice, with intent to defraud the United States of the legal duty on them. The cigars were imported from Havana in October, 1857, in the ship Crosby, and were consigned to Mervin & Yeaton, of Philadelphia, by Cornell & Co., of Havana, who now claimed them. The cases contained, amongst others, 3,100 Regalias, Lord Wellington, and were invoiced at $19, and appraised at $26, and reappraised at $26; 11,000 Loudres Comercianti, invoiced at $18, and appraised at $25, and reappraised at $25; 17,000 2da, invoiced at $15, and appraised at $20, and reappraised at $22; 2,000 3a 6,000, and 6,000 invoiced at $12, and appraised at $18, and reappraised at $18; 4,000 Garatizada flor, invoiced at $13, and appraised at $20, and reappraised at $20; 1,500 2a, invoiced at $11, appraised at $17, and reappraised at $17; 1a, 10,100 of another brand, invoiced at $12, appraised at $18, and reappraised at $18; 7,900 2a, invoiced at $11, appraised at $15, and reappraised at $16; 21,000 Vegueritas, invoiced at $15, and appraised at $18, and reappraised at $20; 1,000 2a, appraised at $18, and reappraised at $20. The whole importation was invoiced at $1,308, and appraised at $1,846.40, and reappraised at $1,877.30. Several merchants and importers of cigars were examined for the prosecution, and testified that such cigars could not have been purchased at Havana, at the time they were imported, at anything like the prices at which they were invoiced.

For the claimants, several witnesses were examined, who testified that these cigars were invoiced at their fair market value, at the time, in Havana. Evidence was also adduced to show that similar cigars, invoiced at a similar price, had passed the custom-house in New York and Philadelphia. To account for the low price at which these cigars were purchased, it was alleged that the panic, which had then reached Havana, lowered the price of cigars, in many instances, $5 per thousand.

Verdict for the United States.

Case No. 15,110.

UNITED STATES v. FIVE CASES OF CLOTH.

[2 N. Y. Leg. Obs. 84.]

District Court, S. D. New York. Oct. 5, 1842.

NEW TRIAL—VERDICT AGAINST EVIDENCE.

Where a verdict was rendered turning upon the credibility of the witnesses, and it appeared that at the trial all the evidence was fully and fairly before the jury, and that they had been charged that the consideration of the credibility of the testimony belonged exclusively to them, the court refused to grant a new trial. It is only in cases imputing gross inattention, prejudice, or misconduct on the part of a jury that the court will interfere to disturb their verdict.

This was a motion for a new trial on a case made by the defendant [William Broadbent], and was submitted on written points. The circumstances of the case, and the point upon which his honor's opinion was sought, sufficiently appear in the adjudication.

O. Hoffman, for the United States.

S. Cambreleng, for defendant.

BETTS, District Judge. The defendant applies upon a case made to set aside the verdict rendered in this cause, and for a new trial, because the verdict is against evidence.

I am satisfied, from a reperusal of the proofs, that if the testimony is entitled to full

credit, the verdict is clearly against the weight of evidence, and ought for that cause to be set aside. Kohne v. Insurance Co. of North America [Case No. 7,921]; Judiciary Act, Sept. 24, 1789, § 17 [1 Stat. 73].

It appears to me, also, that there is no proof in the case which could shake my faith in the witnesses for the claimant; and, had it been submitted to my judgment as matter of fact, I should have found for him.

With this distinct statement of the position of the case, the point arises for decision whether the court is called upon or can properly interfere to disturb the finding of the jury. The gist of the information was that the goods were undervalued upon the invoices, with intent to evade or defraud the revenue. In reply to the testimony on the part of the United States, the claimant offered evidence to prove that he purchased the goods in England, and that they were charged on the invoices at the actual cost prices, and also that they were invoiced at their true market value abroad. The vendors of the goods were examined on commission, and testified that they sold the goods to the claimant at the prices stated in the invoices, and that he was the bona fide purchaser and owner of them. Each of these witnesses also swore the goods were charged at their true market value, and that like goods at the time could have been purchased at the same places at these prices.

Testimony was presented to the jury, on the other hand, to show that the goods were very greatly below the foreign market value, and a witness called by the claimant, although he rated the goods much lower than the public appraiser, yet, examining them two years after they were exported, appraised the market value at the time of their purchase at 19 per cent. above the invoices.

The points submitted to the jury were, whether the testimony established the cost prices of the goods, and they were charged by the court that if the goods were actually purchased by the claimant at the invoice prices, then they could not be condemned, whether that price corresponded with the market value or not. So, also, the charge was explicit that, if the goods were invoiced at their fair market value, the claimant would be entitled to a verdict, unless the government proved they had been purchased at higher prices; and the jury were instructed that the testimony on the part of the claimant, taken on the spot where the transactions occurred, being direct and explicit on both points in his favor, entitled him to a verdict if the witnesses were believed. The decision of the jury turned then upon the credibility of the witnesses swearing directly for the claimant, and that point was given to the consideration of the jury as belonging exclusively to them, with the instruction that the depositions were to be read and received with like effect as if the witnesses had made the same statement in open court.

No exception is taken to the charge of the court, and the single question is, whether the court, upon its own judgment of the bearing and credibility of the testimony, will set aside the decision of the jury upon that very point.

The courts have proceeded with great caution in granting new trials upon allegations that the verdicts are without or contrary to evidence, or against its weight. It will not be done because the case is a hard one (3 Burrows, 1306); nor that the verdict is contrary to the inclination of the court (2 Bin. 495; 4 Maule & S. 192); or opinion of the judge who tried the cause (3 Johns. 271; 3 Taunt. 232; 5 Mass. 353; Ex parte Hurst [Case No. 6,924]; Blagg v. Phœnix Ins. Co. [Id. 1,478]; 3 Bin. 317); nor that it is against the weight of evidence, unless manifestly and palpably so (4 Cow. 426).

The adherence to the finding of the jury in actions of a penal character, or where the question depends on the credit of witnesses, is still more strict, and the verdict will not be disturbed except in some very extraordinary case, importing gross inattention, prejudice, or misconduct on the part of the jury. 2 Bin. 495; Grah. New Trials, 394; U. S. v. Duval [Case No. 15,015]. The witnesses whose testimony was attempted to be impugned had sworn directly to two classes of facts,—the sale prices of goods and their market value. Evidence tending to contradict these witnesses as to the latter fact was submitted to the jury, and, if the jury were satisfied that fact was not correctly given, their testimony upon the other point might also be reasonably placed in doubt. At all events, it was legitimate means of impeachment, and courts must defer to the opinions of juries in matters of fact appropriately within their province to decide.

There is no palpable and flagrant disregard of evidence in this case, evincing any prepossession or prejudice on the minds of the jury. It is at most only allowing, in their estimate of the credibility of witnesses, a greater influence to contradictory testimony than the court might have been inclined to give. The law, however, supposes the jury the more competent tribunal to adjust and dispose of that matter, and I am not inclined to introduce a new rule of adjudication on this point, and assume the right to review the finding of a jury on the single question of the credit of witnesses, when all the evidence bearing upon the inquiry was fully and fairly before them, and they were charged to find their verdict according to their belief or disbelief of the witnesses.

New trial denied.

Case No. 15,111.

UNITED STATES v. FIVE CASES OF LINEN TABLECLOTHS.

[Cited in U. S. v. 10 Cases of Shawls, Case No. 16,448. Nowhere reported; opinion not now accessible.]

Case No. 15,112.

UNITED STATES v. FIVE CASKS OF FILES.

[3 Hunt, Mer. Mag. 439.]

District Court, S. D. New York. Oct., 1840.

VIOLATION OF CUSTOMS LAWS—FALSE INVOICES—FORFEITURE OF GOODS—INTENT—WHO ARE MANUFACTURERS.

[1. The tariff law contemplates two classes of importers,—purchasers, and those who procure otherwise than by purchase. In their invoices the former class are to represent the actual cost of the goods, the latter, the actual market value.]

[2. A purchaser whose invoice truly states the actual cost is not subject to any forfeiture for this cause, although the valuation may be raised by the customs officers for the purposes of imposing the duty.]

[3. In the strict sense a "manufacturer" is the artisan by whose skill and labor the raw material is formed into an article prepared for sale or use; but, in a broader sense, and for the purposes of the tariff laws, a manufacturing importer is one who controls, directs, or superintends the artisans, or who is the general head or proprietor of an establishment in which articles are manufactured.]

[4. In determining whether a certain house in Sheffield, England, which imported certain packages of files into this country, were to be regarded as purchasers or as manufacturers, for the purpose of invoicing their goods, it appeared that, according to a practice in Sheffield, they did not themselves manufacture the files, or have them manufactured in a factory owned and controlled by themselves, but that they purchased and owned the steel bars from which the files were made, and placed them in the hands of makers of files, charging the steel to them, and crediting the files, when received back, in cash, and paying cash for the balance. *Held* that, if this charging and crediting was a mere form, while the steel bars and files remained the property of the importers, they were to be regarded as manufacturers; but if, when the steel was delivered, it belonged to the file makers, so that they might sell it, or the files made from it, to whom they pleased, then the importers were to be regarded as purchasers.]

[5. If, under this course of dealing the importers, under a misapprehension of the law, supposed themselves to be purchasers, when in fact they were manufacturers, and under this supposition invoiced the goods at the cost price, as in case of an actual purchase from the file makers, and such invoicing tended to evade or defraud the revenue, then an intent to defraud must be imputed to them, so as to require a forfeiture, though they in fact had no such intent.]

This was an information against merchandise, to obtain its forfeiture on several allegations: (1) That the goods, being procured otherwise than by purchase, were not invoiced at their actual value at the time and place where procured. (2) That the invoices were undervalued. (3) That by the invoice the goods were represented as owned by Joseph Ellison, who was not the owner, and that in each particular the invoice was made up with intent, by a false valuation, extension, or otherwise, to evade or defraud the revenue; contrary to section 4 of the act of May 28, 1830 [4 Stat. 410]. The goods were claimed by Joseph Ellison as consignee, who traversed the causes of forfeiture. The invoices were produced in evidence, and were made up with this heading: "Jos. Ellison bought of Wilson, Hawkshurst & Moss," and dated at Sheffield, in February, 1839. It was admitted that Ellison was only a consignee of the goods for sale, for the house of Wilson, Hawkshurst & Moss. The latter were extensive dealers in cutlery and steel at Sheffield. It appeared that the course of the trade in files at Sheffield was to sell by a tariff of printed prices, established some time ago, and the price at this time was designated by rates of discount from the tariff. The customhouse appraiser, on examination, reported the discounts in the invoice to be greater than the actual current prices at Sheffield; in some articles, ten per cent., in others seventeen, in others twenty, and, on an average, twelve per cent. Upon this the goods had been seized. Invoices of Wilson, Hawkshurst & Moss to other dealers in New York were produced at discounts confirming the appraiser's judgment. Some of the articles were marked with the name of W., H. & Moss; some with a mark used by them in files sent from their establishment at Sheffield.

On the part of the claimant, evidence was given that it was the course of business at Sheffield, with W., H. & Moss and others, in cases of consignment, to head the invoices in the manner in this case practised. Evidence also was given from Sheffield, by the manufacturers of the files in question, that they had sold the same to W., H. & Moss, at the prices stated in the invoice, and that was also proved by their clerk. These and other witnesses also proved that similar goods could be purchased at Sheffield by dealers there for cash, at similar prices. It also appeared that W., H. & Moss were not themselves manufacturers directly of the files; that they were dealers in steel; that it was the course of business of persons in their line at Sheffield to deliver steel to the manufacturers of files, which was charged at a cash price; that files were returned to them, made usually out of the same steel, at certain cash prices, and the balance was paid in cash; that the dealers to whom the files were thus returned were not themselves proprietors of the machinery, tools, or establishments where the files were made; that the actual manufacturers were often persons of small credit, whom the dealers would not trust, except with the steel to be paid by manufactured files; that the mark put on files was sometimes that of the maker, sometimes that of the purchaser for sale or exportation.

Mr. Lord, for the claimant, insisted that the house of Wilson, Hawkshurst & Moss were purchasers of the files, and had invoiced them at the purchasing prices; that they were not bound, nor, indeed, under the

law, and the oath to be taken by the importer, warranted, in invoicing them at any other value; that they were not manufacturers; that, even if they might, in a constructive legal sense, be so deemed, yet this was one of those new and nice questions in which, if they erred, it was not evidence of intended fraud; that all their conduct and course was to the contrary.

Mr. Butler, Dist. Atty., insisted that W., H. & Moss were manufacturers, and not purchasers; that they were therefore bound by law to put the current actual value, instead of actual cost, in the invoices; that this was done understandingly, and not by any mistake of fact, and if the mistake was one of law, it was at their peril; that, if this was so, then the naming of Ellison in the invoice as a purchaser tended to mislead the officers of the customs, because, if true, it warranted an entry at the actual cost, when the duties ought to be levied on actual values.

BETTS, District Judge, charged the jury that the offence here proceeded for was a falsehood in the invoice, produced upon entry, with intent to defraud or evade the revenue. The falsity was alleged to exist in the heading of the invoices, and in the prices at which the articles were there valued; the intent, that of evading the revenue by passing the goods at a less rate of duty than they were in truth and by law subject to. That the invoices, it is true, were not controlling on the customhouse officers, but they might, nevertheless, raise the value, and charge the duties accordingly. But the invoice was one circumstance or document which the government exacted upon entry, for the information of its officers, and required it to be true, on penalty of forfeiting the goods. The forfeiture is not because the government is actually defrauded, but because the invoice has been falsely made to this effect.

The law contemplates two classes of importers,—purchasers, and those who procure otherwise than by purchase. The one class are to represent the actual cost, the other the actual value, in their invoices. If the actual cost be truly stated by the purchaser importing, then, although the valuation may be raised for the purpose of imposing the duty, yet the goods could not be for this cause forfeited. But, if the importer be not a purchaser, his invoice must show the actual market value, whatever may have been its cost of manufacture. Then, were W., H. & Moss, who are here to be regarded as importers, manufacturers or purchasers? If they were purchasers, then the evidence is clear that the invoice contains the actual cost, and there is no difficulty in the case. If they were manufacturers of these goods, then, if the invoice does not show the actual value, the goods are not properly invoiced. Whether manufacturers or not, is a mixed question for the jury, under the advice of the court as to what constitutes a manufacturer.

"Manufacturer" is a word not perfectly limited in its meaning. The artisan, by whose skill and labor the raw material is formed into the article prepared for sale or use, is, in a strict sense, the manufacturer. But he who controls, directs, or superintends the artisans, and the general head or proprietor of the establishment, is a manufacturer also, although he may not conduct any of the mechanical processes, nor indeed be acquainted with them. So, too, there are persons in a mixed position, being dealers in the raw material, selling all the articles made from it, and manufacturing some of the articles they deal in. In relation to the present case, if W., H. & Moss were originally proprietors of the material delivered to the file maker, and the latter was to return to him the same material in its manufactured shape, according to their orders, so that the material did not cease to belong to them, then they were manufacturers, although the mode of conducting the business was by charging the steel and crediting the files in cash, and paying cash for the balance. But if, when the steel was delivered to the file makers, it belonged to the latter, so that they might, at their pleasure, either sell it, or sell the files made from it, to whom they pleased, then W., H. & Moss would be rather purchasers than manufacturers of the files.

If the jury should, on the evidence, find that they were manufacturers, then the next question would be, whether the price in the invoice was the actual market value at Sheffield at the time; such as any ordinary purchaser would have to pay for the article in the market there. On this the evidence was conflicting, and was for the jury to consider. But if it was not the actual value, still the claimant contends that, if W., H. & Moss supposed that they were purchasers, and, under this supposition, inserted the actual cost, instead of actual value, they were merely mistaken in the law, and not guilty of an intent to defraud or evade the revenue. The court, however, is of opinion that this mistake of the law cannot be looked to in their exculpation. They are bound to know the law, and if, without mistake of fact, they make an entry in their invoice contrary to the law, it must be regarded as intentional; and, if tending to evade or defraud the revenue, that intent must be ascribed to the false invoice. The jury are not, in this particular, to inquire as to the actual private intent to defraud the revenue, but whether the importers were in such a relation of manufacturers as bound them to enter the goods, not at actual cost, but at actual value.

As to the representation of Joseph Ellison being the purchaser, instead of Wilson,

Hawkshurst & Moss, if that was false, and with intent to evade or defraud the revenue, then that was also a ground of forfeiture.

The claimant's counsel excepted to so much of the charge as related to the intent under mistake of law.

The jury found a verdict for the claimant of the goods.

Case No. 15,113.

UNITED STATES v. FIVE HUNDRED AND EIGHT BARRELS OF DISTILLED SPIRITS.

[5 Blatchf. 407; [1] 5 Int. Rev. Rec. 190.]

Circuit Court, E. D. New York. June 10, 1867.

INTERNAL REVENUE—ILLEGAL REMOVAL OF SPIRITS — PERMIT OF COLLECTOR — SEIZURE — NEW TRIAL—FORM OF TESTIMONY TAKEN.

1. Under an information, on a seizure of distilled spirits, under the 45th section of the internal revenue act of July 13, 1866 (14 Stat. 163), the burden of proof is on the claimant, to show that the spirits have been lawfully removed from the place where the same were distilled, or that they have been lawfully removed from the bonded warehouse of the distillery, and that the taxes on them have been paid.

[Followed in U. S. v. Six Barrels of Distilled Spirits, Case No. 16,294. Cited in Boyd v. U. S., Id. 1,749.]

2. A permit of a collector, to transport such spirits from the bonded warehouse of the distillery to a general bonded warehouse, is not evidence of a compliance with the prerequisites to a removal of the spirits, required by the 38th and 40th sections of said act.

[Cited in Boyd v. U. S., Case No. 1,749.]

3. Where the claimant fails to show such compliance, the court may, on the trial of the case before the jury, properly dispose of it as involving simply questions of law.

4. The adoption by the government of a seizure under the internal revenue laws, cures any defect, in the competency to seize, of the person who made the seizure.

5. In making up a case, on which to move for a new trial, oral testimony taken at the trial by way of question and answer must be reduced to the form of a narrative, or the court will refuse to hear the motion.

[6. Cited in Coffey v. U. S., 116 U. S. 433, 6 Sup. Ct. 435, to the point that the circuit courts have jurisdiction in suits in rem for penalties and forfeitures arising under the internal revenue laws.]

This was an information against certain distilled spirits, seized on the 8th of January, 1867, for a violation of the internal revenue laws. At the trial, the court directed a verdict for the government [Case No. 15,114], and the claimant now moved for a new trial.

Benjamin F. Tracy, Dist. Atty., for the United States.

Sidney Webster, for claimant.

Before NELSON, Circuit Justice, and BENEDICT, District Judge.

NELSON, Circuit Justice. The charge in the information in this case is, "that the said spirits were removed from the place where the same were distilled, otherwise than into a bonded warehouse, as provided by law; and, further, that the said spirits were found elsewhere than in a bonded warehouse of the distiller of the said spirits, the same not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid."

The 45th section of the act of July 13, 1866 (14 Stat. 163), provides, "that any person who shall remove any distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse as provided by law, shall be liable to a fine of double the amount of the tax imposed thereon, or to imprisonment for not less than three months. All distilled spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may, immediately upon discovery, be seized, and, after assessment of the tax thereon, may be sold by the collector for the tax and expenses of seizure and sale." In another part of the section, it is provided as follows: "And the burden of proof shall be upon the claimant of said spirits, to show that the requirements of law in regard to the same have been complied with." The 29th section of the act requires, that an inspector shall be appointed for every distillery established according to law, who shall inspect, gauge and prove all the spirits distilled, and shall take charge of the bonded warehouse attached to the distillery, which shall be in the joint custody of the inspector and owner. The 38th section requires the inspection, gauging and proving of the liquor, after the same has been drawn off into casks, &c., and the marking or branding of the casks, or barrels, in a particular manner; and no cask or barrel is to be taken from the warehouse unless it is branded in the manner prescribed. The 40th section provides that distilled spirits, inspected, gauged, proved and marked or branded, may be removed, without payment of the tax, from the bonded warehouse owned by the distiller, upon the execution of transportation bonds or other security, and may be transported to any general bonded warehouse used for the storage of distilled spirits, established under the internal revenue laws, and that, immediately after the arrival of such distilled spirits at the district of the collector to which they have been transferred, they shall be again inspected and placed in the bonded warehouse. The distilled spirits may be withdrawn from the bonded warehouse after being inspected, &c., and after payment of the tax, and, when so delivered, must be branded "U. S. Bonded Warehouse, Tax Paid;" or they may be removed from said warehouse without the payment of the tax, for the purpose of being exported, or for the purpose of being rectified, &c.; but the removal for rec-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

tification, &c., is allowed but once, and all spirits thus removed must be returned to the same warehouse and again inspected.

The five hundred and eight barrels, in the present case, were removed, as is claimed on the part of the defence, from the bonded warehouse of the distiller, in the city of Chicago, to a general bonded warehouse in the Third district of New York, C. C. Pratt, collector—the general bonded warehouse owned by John Croghan, in said district. The counsel for the claimant gave in evidence the permit of the deputy collector of Chicago, for the transportation of the whiskey from the bonded warehouse of the distillery to the general bonded warehouse in the Third district of New York, and insisted, that it furnished evidence of the regularity and sufficiency of all the preliminary steps to justify the removal. The prerequisites to a removal are: (1) The casks or barrels must be inspected, gauged, proved and marked or branded, as prescribed by law; and (2) the execution of a transportation bond or such other security as may be prescribed.

We are inclined to think that, upon the seizure of the goods for an alleged violation of the law, if the claimant relies upon a conformity with it, as a defence, he is bound to establish the affirmative by proof; and that it would be unreasonable, and not consistent with the rules of evidence, to call on the government to establish the negative. The means of furnishing the evidence are in the possession of the claimant. All the steps to be taken in order to justify a removal, as well as the removal itself, have been under his direction, or within his cognizance; and, especially are we bound to so hold, under the 45th section, which declares that the burden of proof shall be upon the claimant, to show that the requirements of the law have been complied with.

It was strongly argued, that the officer who seized the whiskey was not competent to seize within the particular district in which the article was found. But, without examining or deciding whether this be so or not, we are satisfied that the adoption of the seizure by the government cures any defect in this respect, which may have existed. Any person may make the seizure, as in the case of seizures under the customs, as the direction in this statute is no more specific than is the direction in that one, as to an officer of the customs being required to make the seizure, in case of a forfeiture.

The claimant wholly failed to show that he had complied with the requirements of the act, which he was bound to do, under the 45th section, and the court was, therefore, right in disposing of the case as involving simply questions of law.

There are other grounds upon which the verdict might be sustained, but we prefer placing the decision upon the one stated.

We feel bound to say, that the mode of making up the record of the evidence in this case, with a view to a motion for a new trial, is very objectionable. The whole of the testimony is taken by way of question and answer, and is carried along in detached parts, without much order, system or connection, so that is exceedingly difficult to make out of it the questions presented in the case. If the testimony at the circuit is taken this way, it should be reduced to the form of a narrative in the case made to be used on the motion for a new trial. In the Southern district, I have, in the circuit court, refused to hear such a motion in the form in which this case is presented. This is mentioned, that the error may not hereafter be repeated.

The motion for a new trial is denied.

Case No. 15,114.

UNITED STATES v. FIVE HUNDRED AND EIGHT BARRELS OF SPIRITS.

[5 Int. Rev. Rec. 166.]

Circuit Court, E. D. New York. 1867.

INTERNAL REVENUE—COUNTERFEIT BRANDS—BONDED WAREHOUSE—REMOVAL OF SPIRITS.

This was an action to forfeit the spirits for alleged violation of the internal revenue law. The matter was before the court once before, under an exception interposed on behalf of the government to the claim made by Hubbell & Tallent, who represented themselves to be the owners of the spirits. The court decided to allow the claim to stand and now the cause came on for trial on the merits.

The testimony for the government showed that the goods were seized on the 7th of January last in the cellar of No. 68 Water street. No. 66 Water street was then a bonded warehouse, and between the cellars of No. 66 and No. 68 an archway had been cut in the wall through which the barrels had manifestly been rolled from No. 66. In the cellar of No. 66 were found some stencil plate brands with paint and brushes, and shavings as if the tops of barrels had been scraped for rebranding. One hundred and ninety-eight of the barrels were branded as follows: "Highwines. M. D. Brice, Inspector, First District. Illinois, Oct. 5, 1866. Northwestern Distillery Co., Chicago, Ill. U. S. Bonded Warehouse. For transportation to Thirty-Second District, N. Y." The remaining 310 barrels were branded "F. A. Stevens, Government Inspector, Thirty-Second Collection District, New York, Dec. 27 and 31, 1866. French Spirits, rectified by C. Smith, New York." Mr. Stevens was inspector of the Thirty-Second district in December, but was not inspector of the Third district, yet it appeared that he branded the barrels at No. 66 Water street. There was no such rectifier as C. Smith in the Thirty-Second district, but the brand with his name was one of those found in the cellar, and the brands had the appearance of having been recently used. There were five entrances to

No. 66, and one of them, the cellar grating in the back yard, had on a government lock. No. 65 Water street was used as a warehouse by Mr. Crogan, who was also the lessee of No. 66, the bonded warehouse.

The testimony for the defence showed that Mr. Boyd, the agent in New York of Shufeldt & Co., who were the Northwestern Distillery Company in Chicago, sold 1,000 barrels of spirits to the claimant; that he got permission from the collector at Chicago to transport them to the Thirty-Second collection district of New York; that they all arrived and 800 of them were put in a bonded warehouse in that district; that application was then made to the collector for their removal to the Third district, which was refused, whereupon Boyd sent his permits back to Chicago, and obtained new ones to send the liquor to the Third district, and it was sent accordingly to No. 66 Water street—500 barrels arriving before Nov. 15 and the other 500 soon after. It also appeared that in October an application was made to Collector Pratt, of the Third district, to make No. 66 a bonded warehouse, and approved by him, and bonds given, but that the application was not approved by the secretary of the treasury till Dec. 29, subsequent to which time no entries had been made of any spirits for that warehouse. It appeared, however, that in November the goods were entered in No. 66 as a bonded warehouse, and bonds given; that afterward transportation bonds were given at the collector's office of the Third district for 500 barrels at one time from No. 66 Water street to California, and afterward similar bonds for 500 more, and that the collector in November appointed a man named Keith storekeeper for the place. Keith's testimony showed that the 508 barrels seized were part of the 1,000 barrels; that after the transportation bonds were given he authorized the cutting of the hole between the cellars and had not reported it till after the seizure, and that he had sometimes left parties in the building alone for hours together; that he had storekeeper's books, which were produced by the district attorney, but he would not swear that he had not made the entries in them all at one time and since the seizure, but they were taken from memorandums kept at the time.

On the close of the testimony, District Attorney Tracy claimed that the goods were forfeited, and that the court should direct the jury to render a verdict of forfeiture. First—They were forfeited under the 38th section of the internal revenue act of July 13, 1866 [14 Stat. 187], because there had been placed upon them counterfeit and spurious brands. The brand purporting to have been put on by Stevens was spurious because he had no right to brand outside of his district, and the brand "Rectified by C. Smith" was spurious because there was no such rectifier. Moreover, the brands tended to show that the spirits were rectified and branded in the Thirty-Second district of New York, while they were rectified in Chicago. Second—They were forfeited under the forty-fifth section of the same act, because they were found elsewhere than in a bonded warehouse, not having been removed therefrom according to law, because (1) it did not appear that they were removed from Chicago according to law. The evidence showed a permit, but did not show that the proper bonds were given. (2) They were illegally removed from the bonded warehouse in the Thirty-Second district. Having been received there, the collector at Chicago had no right to issue a new permit to the Third district. (3) They were not branded for removal to the Third district, but to the Thirty-Second district. (4) No. 66 Water street was not a bonded warehouse when they were placed there. (5) They never were within the jurisdiction of Collector Pratt, never having been legally in bond in the Third district. (6) Conceding all the prior steps to be legal, Collector Pratt had no authority to authorize their transportation from the Third district to California, because the law gives no authority to transport spirits in bond, except from the distillers' bonded general warehouse to a general bonded warehouse. The district attorney also referred to section 29 of the act of July, 1866, and to section 48 of the act of June 30, 1864 [13 Stat. 240], as amended by the act of 1866.

An important question came up during the testimony, as follows: The defendants offered in evidence permits given by Collector Pratt for the transportation of these spirits from No. 66 Water street to California. The district attorney objected to them on the ground that the spirits having been once removed from the distiller's bonded warehouse to a general bonded warehouse, the law did not allow of a second removal to another bonded warehouse, and that the permits therefore gave no authority for the removal.

THE COURT, after hearing argument, held that the law was as claimed by the district attorney, but admitted the permits as evidence of the intent under which the parties were acting in the removal of the spirits.

Sidney Webster, in reply, rapidly reviewed in order each of the sections, 29, 38, 45, and 48, upon which the district attorney relied, and in respect to the forfeiting clause of the 49th section, claimed (1) that this section only applied to spirits distilled subsequent to July 13, 1866, and that there was no evidence in the case on that point; (2) that the removal denounced was either from the distillery or the distillery bonded warehouse, and no other, and there was no evidence of such illegal removal in this case; (3) that the phrase "proper name or brand" referred only to commercial designation, as for example, calling spirits petroleum; and (4) that the forfeiture depended on prior criminal conviction of the offender. Under the thirty-eighth section, Mr. Webster contended that there was no evidence that "inspectors' brands or plates" had been used with "fraudulent intent," and that the phrase "counterfeit or spurious brands or

plates" in the second clause referred only to brands or plates defined, prescribed and required by law, and not to mere trade marks, as substituting the words "French spirits" for Cologne spirits, or vice versa. He also claimed that this section applied only to spirits distilled subsequent to July 13, 1866, and the prosecution must in any event satisfy the jury of intent to evade the tax, and not an honest intent. This was for the jury and not for the court. He further claimed that the forty-fifth section referred only to spirits which, unlike those in controversy, had never been in a general bonded warehouse, as distinguished from a bonded warehouse; that under this section, spirits which have never been in a general warehouse, if found elsewhere than in a distillery warehouse, and proved to have been illegally removed and tax not paid, may be prosecuted for condemnation in court, or seized by the collector and sold under rules of distraint for taxes; and when the latter mode is elected, and not otherwise, is the burden of proof on the claimant to show the taxes paid, and that the forty-fifth section does not, in any case, apply to spirits on which taxes are secured by transportation bonds.

Mr. Webster claimed that under section 48, of 1864, as amended in 1866, the case could not, on the evidence, be taken from the jury; that, under this section, the prosecution must prove: (1) That taxes had been imposed on the spirits in controversy. (2) That the spirits were found in the control of certain persons identified and described. (3) That such person had at the time of such finding a purpose to sell and remove in fraud of law, and a design to avoid payment of taxes proved to have been imposed prior to the seizure, and that issue under this section is one of fact for the jury.

To the point made by the district attorney that the law of 1866 permitted but one removal to a general bonded warehouse, Mr. Webster cited the contrary decision of the department, its long acquiescence in it, its leading the public to suppose that any number of transportations could be made, and its recent sudden change of opinion. He contended that up to Jan. 16, 1867, the department had induced everybody to believe that transportation bonds could be canceled on payment of the tax, and that after a bond was accepted the owner could do what he pleased with the property therein described.

Mr. Webster also contended that under the doctrines laid down by the supreme court in The Favorite, 4 Cranch [8 U. S.] 347, and Three Hundred and Fifty Chests of Tea, 12 Wheat. [25 U. S.] 586, spirits cannot be forfeited by acts done by other person than the owner or some person trusted by him, nor condemned for any removal proved in this case, made while taxes were secured by warehouse bonds, and added, that in no case is the burden of proof cast on the owner till the prosecution has established affirmatively an illegal removal or possession.

THE COURT—I do not propose in disposing of this motion to touch upon many of the questions argued; they may be, and perhaps are, all of them equally important in the case. I feel bound to put the case at present on the 45th section of the act of July 13, 1866. In my judgment the burden of proof under this statute is upon the claimants, and I think that that applies to all cases coming under the 45th section. That being so, I am of the opinion that there are no questions of fact which can go to the jury. It is my present opinion that the whole case must be held subject to review, when it may be argued more fully before a full bench; that this property was found outside of a bonded warehouse; that the claimants have not assumed the burden which the law casts upon them, and that the property must be forfeited under the 45th section. I think that is the wiser way of disposing of this case, in order that all those points may come up and be fully argued, and then disposed of by a full bench. If the views I entertain of section 45, or the views entertained by the district attorney of the other sections are erroneous, then, after a fuller investigation of the law, the case can be tried before a jury.

Mr. Webster—Does your honor take the case away from the jury also under the forty-eighth section?

THE COURT—I do not put it under the forty-eighth section at all; I leave that out of the case; I do not order judgment upon the forty-eighth section; I base my opinion upon the forty-fifth section. My present impression is it will have to go to the jury under the forty-eighth section. It must be a question of law under the other sections, and I will leave the district attorney the opportunity to sustain his verdict upon all the sections he can, except the forty-eighth section,—under that he cannot sustain it.

Mr. Webster—I ask your honor to instruct the jury that upon the first averment of the information in regard to the seizure there is no evidence before them sufficient to warrant the forfeiture of the property; that there is no evidence that the seizure of this property had been legally made. The first averment of the libel is that the deputy collector seized the following described property. That being the averment of the libel a legal seizure must be proved as an affirmative fact like any other proposition. There is no evidence that a legal seizure has been made, sufficient to go to the jury.

THE COURT—I will rule against you on that point.

Mr. Webster excepted.

Mr. Webster—Also that upon the evidence Dailey, the deputy collector, had no authority to seize.

THE COURT also refused this, and Mr. Webster excepted.

THE COURT—Gentlemen, in the aspect in which this case has turned, the claimants have failed to raise any question of fact for your

disposition. The case turns upon a question of law. I, therefore, direct you to find a verdict for the government, condemning the goods.

THE COURT then allowed the claimants twenty days to make a case, or bill of exceptions, to be presented to the full court.

[Subsequently the claimant moved for a new trial, which motion was denied. Case No. 15,113.]

Case No. 15,115.

UNITED STATES v. FIVE HUNDRED BARRELS OF WHISKY.

[2 Bond, 7.] [1]

District Court, S. D. Ohio. Feb. Term, 1866.

DISTRICT ATTORNEY—PERCENTAGE—COMPROMISE.

1. A district attorney of the United States is entitled to two per cent. on all moneys collected, or realized, in any proceeding under the revenue or internal revenue laws of the United States conducted by him.

2. While a proceeding in rem, to forfeit distilled spirits for non-compliance with the provisions of the internal revenue laws of the United States, was pending in the United States district court, the owners of said spirits effected a compromise of the case with the secretary of the treasury by the payment of a large sum of money, and accrued costs, the case being dismissed and the property released to the owners by order of the secretary. Upon motion of the district attorney, for a retaxation of costs in the case, to include a commission to himself of two per cent. upon the sum paid to the secretary of the treasury: *held*, that, under section 11 of the act of March 3, 1863 [12 Stat. 741], the district attorney was entitled to receive from the United States two per cent. upon the sum paid by the terms of the compromise for the release of the property seized in said proceeding, as well as upon the sum paid as penalties incurred upon said property.

At law.

R. M. Corwine, for the motion.

A. F. Perry, for the United States.

LEAVITT, District Judge. This case is now before the court on the application of R. M. Corwine, attorney for the United States in this district. for a retaxation of costs.

The facts necessary to be noticed, in deciding the question before the court, are, substantially, that in September, 1865, five hundred barrels of whisky were shipped from Nashville, Tennessee, by the firm of Stephens & Stone, distillers of spirits in that city, consigned to H. L. Styles & Co., of the city of Cincinnati. After the arrival of the whisky here, it was ascertained by an inspector that the barrels containing the whisky were not branded as required by the internal revenue law, and that there was reason to believe the whole amount of duties chargeable on the whisky had not been paid a Nashville, and that it had been shipped from that place in violation of law. and was therefore liable to forfeiture. The inspector made complaint in due form, and the whisky was seized, and an information filed in this court praying for its condemnation. It is not necessary, in considering the question, to notice all the intermediate proceedings in relation to the whisky thus seized. Notwithstanding the certificate of the collector of internal revenue at Nashville, to the effect that the duties had been fully paid by the manufacturers, and that they had not been guilty of any violation of the law in regard to the whisky, such facts were presented to the commissioner of internal revenue at Washington as to induce the suspicion that the manufacturers had practiced a fraud upon the government; and for the ascertainment of the facts in relation to their transactions, Mr. Spooner, the collector for the First congressional district, and Mr. Kimber, an inspector for the same district, were appointed special commissioners by the head of the bureau of internal revenue at Washington, with authority to proceed to Nashville, and institute a thorough investigation of the doings of the firm of Stephens & Stone in connection with their business as distillers, and report the result to the department at Washington. This duty was promptly discharged by those gentlemen, who reported, after full investigation, that said firm had failed to make a full and fair report of the quantity of whisky manufactured by them, and consequently had subjected themselves to heavy penalties, and the forfeiture of all spirits owned by them, as well as their entire manufacturing establishment at Nashville. By this report, it appears that Stephens & Stone were in default in the payment of duties chargeable on the whisky made by them to the large sum of $77,740, and were liable, under the statute, to the payment of $52,260 on penalties incurred by them; making in the aggregate upward of $130,000. Upon this development, these parties repaired to Washington, and effected a compromise with the secretary of the treasury by the payment of the said sum of $130,000; and an order was therefore made for the discontinuance of the proceedings in this court against the five hundred barrels of whisky, and for the restoration of the same to Styles & Co., on the payment of accrued costs. As one of the conditions of the compromise, it was provided that the percentage due to the district attorney by law, for his services in filing and prosecuting the information in this court, should be paid by the treasury department at Washington. An order was therefore made for the discontinuance of the proceedings in this court, and for the delivery of the five hundred barrels of liquor to the said Styles & Co. On the presentation of his claim by the district attorney to the secretary of the treasury, he doubted his authority to pay it, and referred the question to the attorney general for his opinion. That officer decided, in substance, that the question was one involving the legal taxation of costs; was judicial in its character, and to be decided by the

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

court in which the proceeding was brought. The secretary of the treasury thereupon declined to authorize the payment of the claim until there should be a judicial decision as to its legality. In this state of the case, the district attorney has very properly presented the question for the action of this court, on a motion to include his claim as an item in the taxation of costs. He claims, as legally taxable for his services in the case, two per cent. on $130.000, the sum paid into the treasury by Stephens & Stone under the compromise that has been referred to, amounting to $2,600. This taxation is opposed by the learned counsel who has been retained by the collector for the First internal revenue district, probably with the sanction and approval of the secretary of the treasury. The first position in his argument is, that it is not in the competency of the court to reform or amend the taxation of costs, after the dismissal of the information by order of the treasury department, and the payment of the costs taxed in the case by Stephens & Stone, according to the terms of the compromise. This point would be well taken, if the item now sought to be taxed, if allowed, would be chargeable to them. But, as they have fully complied with the conditions upon which the case was compromised, they are clearly not liable for any additional item in the taxation. It is now a question between the district attorney and the government. If the claim of the district attorney, in whole or in part, is allowed as a proper item of taxation, the government will be liable to pay it, and is willing to pay it, if it is adjudged to be legal. Indeed, it is within the spirit, if not within the letter, of the terms on which the secretary of the treasury ordered the dismissal of the information. And if the district attorney has not this remedy, there is no other course by which he can obtain compensation for his services.

In addition to the point suggested, the counsel resisting this taxation insists: (1) That there is no statutory provision under which compensation for the services of the district attorney can be included in the taxation of costs in this proceeding. (2) That if the district attorney's per centum is properly taxable, it can be estimated only on the proceeds of the whisky seized at Cincinnati, and within the jurisdiction of this court for adjudication, and not upon the whole amount paid into the treasury by Stephens & Stone, as due from them for unpaid duties and the penalties resulting from their violation of the law.

As to the first of the propositions, the court entertains no doubt that the district attorney is entitled to compensation in this case under section 11 of the act of March 3, 1863 (12 Stat. 741). That section provides that there shall be taxed and paid to district attorneys two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, conducted by them, in which the United States is a party. The words of this section are plain and intelligible. It gives to the district attorney two per cent. on all moneys collected or realized in any proceeding under the revenue laws, conducted by him. The argument of the counsel is, that this provision was intended for, and must be limited to, revenue cases arising under that statute, and can not be held to embrace a case arising under the internal revenue laws. But the language of the section does not require this restriction. It includes not revenue cases arising under that statute alone, but all cases arising under the revenue laws; embracing as well such as arise under the internal revenue laws as those that relate to import duties. If congress had not so intended, there would have been words used requiring the restricted interpretation contended for. It is argued that the title and subject-matter of the act impose this restriction. It is entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." It is true the subject-matter of the act relates to external commerce, but the insertion of the words, in the title, for "other purposes," allows of provisions not immediately connected with that subject. And section 9 actually includes a subject wholly foreign to the general purpose of the act, namely, the renting of unproductive lands or other property of the United States acquired under judicial proceedings. I can not doubt, therefore, that section 11, before quoted, was intended to include, and from its phraseology does include, all cases arising under any revenue act, whether it relates to internal revenue or to duties upon imports. And this conclusion is fortified by the fact that the internal revenue laws contain, as I think, no provision for compensation to a district attorney, in the form of taxable costs, as a per centum on moneys collected or realized in proceedings to enforce forfeitures under those laws. And it would result, that if he can not tax the two per cent. authorized by section 11 of the act referred to, there is no provision of law for his compensation for services under the internal revenue laws, however laborious in themselves, or advantageous to the government.

As to the second point stated, namely, on what basis the percentage claimed shall be estimated, I concur with the views urged by the counsel resisting the taxation as claimed by the district attorney. The two per cent. to be taxed as his fees must be upon the moneys realized by the United States as the proceeds of the property seized by the process of this court, and within its jurisdiction. It is alleged by the district attorney, that the $130,000 paid by the Nashville distillers, for unpaid duties and penalties, was secured to the government by his vigilance and that of other government of-

ficials at Cincinnati, in seizing and retaining in the custody of the law the 500 barrels of whisky consigned to Styles & Co. And it is doubtless true, that the stupendous frauds practiced by Stephens & Stone would not have been developed except through the commendable zeal and vigilance of the district attorney and the revenue officials in this city. But I can not see that this fact affords any legal basis for a claim to a per centum by the district attorney on the gross sum paid by the Nashville firm for unpaid duties on spirits distilled, and the penalties resulting from their violations of law, at a place not within the jurisdiction of this court, and for which no decree of forfeiture could have been entered by this court. The jurisdiction of this court in this matter results from the accidental circumstance that a portion of the whisky manufactured was brought within the Southern district of Ohio, and here seized by legal process. Now, it is quite obvious that no per centum can be taxed to the district attorney except on the basis of the proceeds of the whisky seized, and for the condemnation of which the information was filed, and the penalties which, under the statute, attached to it. This will plainly appear from the consideration that if there had been no compromise between the government and the manufacturers, and the case had proceeded in this case to a decree of forfeiture, the district attorney's per centum could only have been taxed on the amount realized from the sale of the whisky. Although in this case there was no sale of the whisky, owing to the compromise made at Washington, and the consequent dismissal of the information filed in this court, yet as the amount claimed by the government was "realized," in the language of the statute, the district attorney is clearly entitled to two per cent. on the sum for which the 500 barrels would have sold in this market. And he is fairly entitled to his per centum on the proportion which the proceeds of the 500 barrels will bear to $52,260, being the sum paid by the Nashville firm to the government as the penalties incurred by them for violating the law. The government has "realized" the amount of penalties which attached to all the whisky manufactured, and I can not see any good reason why the district attorney may not claim a per centum on so much of the penalties as attaches to the 500 barrels proceeded against in this court. I shall direct the taxation to be made on the basis indicated. To make a specific taxation on this principle, the market value of the whisky must be ascertained, as also the proportion of the penalties which attached to the five hundred barrels under the terms of the compromise. And I would suggest the propriety of a reference of this matter to a competent person to ascertain the sum on which the two per cent. shall be estimated, unless counsel can agree upon the amount.

Case No. 15,116.

UNITED STATES v. FIVE HUNDRED BOXES OF PIPES.

[2 Abb. U. S. 500.] [1]

District Court, E. D. Michigan. April, 1870.

ADMIRALTY—JURISDICTION—CUSTOMS DUTIES—LIEN.

1. The admiralty jurisdiction of the district court in revenue cases, extends only to seizures for forfeitures under duty laws; as conferred by section 9 of the judiciary act of 1789 (1 Stat. 76). The payment of duties can only be enforced by proceedings on the common law side of the court.

2. It seems where imported goods have been seized for an alleged violation of the revenue laws, and a decision has been rendered in favor of the claimant, that the United States is not deprived of its lien upon the goods for the duties unpaid.

Motion to rectify a decree.

This was an information in rem on a seizure for undervaluation. A decree on the merits was passed in favor of claimants, with a certificate of probable cause to the collector, and a writ of restitution to claimants, "upon payment of duties, or filing of a re-exportation bond." Motion was now made to strike out the words in quotations, requiring the payment of duties, &c.

A. Russell, for the motion.

A. B. Maynard, Dist. Atty., for the government.

LONGYEAR, District Judge. This case is in the admiralty; and it has been long since settled by the supreme court [U. S. v. 350 Chests of Tea] 12 Wheat. [25 U. S.] 486, that this court possesses no admiralty jurisdiction to enforce the payment of duties. Admiralty jurisdiction in revenue cases extends only to seizures for forfeitures under laws of impost, navigation, or trade of the United States, as conferred by section 9 of the judiciary act of 1789 (1 Stat 76). A suit to enforce the payment of duties must be on the common law side of the court, and not in the admiralty. This precise point was decided on mature consideration, by the supreme court, in the case of U. S. v. 350 Chests of Tea, 12 Wheat. [25 U. S.] 486. That decision is of course conclusive upon the point, so far as this court is concerned. See, also, The Waterloo [Case No. 17,257].

In a case which was before the supreme court in 1809 (Yeaton v. U. S., 5 Cranch [9 U. S.] 281, 284), a decree seems to have been entered very much like the one in the present case; but the point here made does not seem to have been presented to or considered by the court, and the case is entitled to no weight as authority, as against the later decision (1827) in the same court, in the Tea Case, above cited; in which the point was presented and fully considered.

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

The motion is granted, and the decree must be modified accordingly.

As this decision is based upon a want of jurisdiction, the decree as modified, cannot, of course, in any manner affect any claim or lien which the United States may have for duties. Whether any such claim or lien exists, is a question so entirely outside this case that any consideration or decision of it here would seem to be out of place. I will, however, remark in passing, that by the act of July 18, 1866 (14 Stat. 186) § 31, the legal custody of the property seized has been and is now in the collector. If the duties have not been paid, they are of course still due and payable; and with the light that I now have, I can see no reason why they are not a lien now just the same as before the seizure. The doctrine of merger can no more be applied in this case than in the case of a mortgage held by a person claiming the title when it is for his interest to keep the mortgage alive; in which case, on the failure of the title, the mortgage lien can always be enforced. Neither can it be said that like a pledge, the lien is defeated by a voluntary relinquishment of possession, because the United States have all the time remained in full legal possession.

Motion granted.

Case No. 15,117.

UNITED STATES v. FIVE JUGS OF BRANDY.

[See Case No. 15,118.]

Case No. 15,118.

UNITED STATES v. FIVE JUGS OF BRANDY.[1]

[11 Int. Rev. Rec. 5.]

District Court, N. D. Florida. 1869.

VIOLATION OF CUSTOMS LAWS—FORFEITURE AND SEIZURE.

[The fact that foreign distilled spirits and wines are found in considerable quantity in an upper room of a private house, stored for safe-keeping, as alleged by the house owner, and not his property, justifies a seizure thereof, and places the burden upon the claimant to show that they were legally imported, and that the original packages had been inspected, marked, and branded, as required by law.]

Before FRASER, District Judge.

This was an information filed by the attorney of the United States, setting forth that the said liquors or spirits were fraudulently imported, and praying that they be condemned as forfeited to the United States. Held, that a considerable quantity of foreign distilled spirits and wines being found in an upper room of a private house, stored for safe-keeping, as alleged by the proprietor, and not his property, would justify a seizure. That such fact appearing, the burden of proof was upon the claimant to show that they were legally imported, and that the original packages had been inspected, marked, and branded, as required by law. Two witnesses for claimant having testified that the casks out of which the spirits and wines were drawn had an inspector's mark upon them, and one of said witnesses having stated that said inspector's mark was a curious mark, which he should not have noticed had not his attention been particularly called to it, and no other description having been given of said mark by said witnesses, or either of them, and it being in evidence that the said original packages were purchased in New York, and shipped direct to Florida, after verdict for the United States, and upon motion for a new trial, held, that the jury, being the judges of the facts, and of the credibility of the witnesses, did not exceed their province if they came to the conclusion, from the evidence, that the said original packages had no inspector's marks upon them, and that the said spirits and wines were fraudulently imported. Motion for a new trial was therefore denied.

[1] [Not previously reported.]

Case No. 15,119.

UNITED STATES v. FIVE THOUSAND ONE HUNDRED DOLLARS IN SPECIE.

[1 Woods, 14.][1]

Circuit Court, D. Lousiana. April Term, 1870.

APPEAL—ADMIRALTY—TERMS OF COURT.

An appeal in a case of admiralty and maritime jurisdiction not taken to the next term of the circuit court after the rendition of the decree in the district court will be dismissed.

[Cited in The Chatham, 3 C. C. A. 161, 52 Fed. 397.]

Appeal from the district court of the United States for the district of Louisiana.

The specie in this case was seized upon water and within the admiralty and maritime jurisdiction of the district court. The court below having decreed in favor of claimant [case unreported], the United States appealed to this court. Thereupon a motion was made by claimant to dismiss the appeal.

Jos. P. Horner and W. S. Benedict, for the motion.

Alanson B. Long, U. S. Atty., contra.

WOODS, Circuit Judge. In this case, a motion to dismiss the appeal is made upon the ground that the appeal was not taken to the next circuit court of the United States, held within the district after the rendition of the decree. The record shows that the decree in favor of the defendant was signed on January 30, 1864. The law and records of this court show that the next circuit court for the district was held on the 25th of April, 1864.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

An appeal was prayed and allowed on May 13, 1864, returnable on the first Monday of November, 1864, and the record was filed in this court on October 12, 1864. . The law says that appeals are allowed from final decrees in the district court, in cases of admiralty and maritime jurisdiction, to the next circuit court to be held in the district. 1 Stat. 83. This appeal was not taken to the next circuit court after the rendition of the decree, but one entire term of the circuit court was allowed to pass over, and the appeal was taken to the next following term. The causes referred to in the brief of appellee show that it is the practice of the circuit courts to dismiss appeals when not taken to the next circuit court. This practice is founded upon the statute, and seems to be in conformity with the policy of the law in cases of admiralty and maritime jurisdiction. That policy requires speedy administration of justice, and discourages delay. The statute says the appeal may be taken to the next circuit court, it authorizes an appeal to no other term. If we were authorized to depart from the wise rule laid down by the act of congress, there would be no limit to the delay which would follow in this class of cases. Because, therefore, the appeal was not taken to the next term of the circuit court held in the district after the rendition of the decree, the appeal must be dismissed.

Case No. 15,119a.

UNITED STATES v. FLANAKIN.

[Hempst. 30.] [1]

Superior Court, Territory of Arkansas. Oct., 1825.

COSTS — CRIMINAL CASE — WHEN PROSECUTOR LIABLE.

1. In all cases of trespass on the person or property of an individual, where the prosecution is carried on at the instance of the party aggrieved, he is liable for costs, and they may be adjudged against him.

2. The word "trespass," in the Criminal Code, has a technical and definite meaning, as is descriptive of offences of a lower grade only, such as misdemeanors, and does not mean crimes of a deeper dye, such as horse stealing, or the like, in which no prosecutor is necessary.

Indictment [against William Flanakin] for larceny.

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. The defendant, having been prosecuted for the crime of horse stealing, and, upon trial, acquitted by the jury, now makes, by his counsel, the following motion, namely: "That James Lemmons, the principal witness, and at whose instance the prosecution was instituted, should be subject to the payment of costs, as prosecutor." This question must be decided by the statute law. The only provisions upon the subject of which we are aware are to be found in Geyer, Dig. pp. 154, 155, and are as follows: "No bill of indictment for assault, battery, or any other trespass, shall be preferred to any grand jury, unless a prosecutor be endorsed thereon; and if the grand jury do in any such case return the bill, 'not a true bill,' it shall be the duty of the grand jury to decide, and cause the foreman to endorse thereon, whether the county or the prosecutor shall pay the costs; and where the indictment is returned by the jury 'a true bill,' and the defendant on trial is acquitted, the petit jury acquitting such defendant shall return, together with their verdict, whether the county or prosecutor shall pay the costs, and the court shall give judgment accordingly." "In all cases of prosecutions for assault and battery, or other trespasses, where the indictment or presentment shall be made from the knowledge of two or more of the grand jury, or upon the information of any public officer in the necessary discharge of his duty, or on the information of any other person other than he, she, or they, against whom the trespass is alleged to have been committed, it should be so stated at the end of the indictment or presentment, and no prosecutor shall be required."

From the preceding sections, it is manifest that a prosecutor is required only in one class of cases. In all cases of trespass against the person or property of individuals, a prosecutor is required where the prosecution is carried on by the person or persons aggrieved by the trespass; but even in these cases a prosecutor is not necessary, where the information is offered by any person against whom the trespass has not been committed. What, then, is meant by the word "trespass," as used in the statute? This is the only point upon which a doubt can arise. The word "trespass," when used in the Criminal Code, has a technical and definite meaning. It is descriptive of offences of a lower grade only, and is included in the term "misdemeanor." When the law defines the higher crimes,—crimes of deep atrocity,—other words than those of "trespass" or "misdemeanor" are employed. Treason, murder, robbery, and burglary, cannot be committed without committing a trespass, but no lawyer would contend that a conviction for murder could be had upon an indictment for trespass. Indeed, it is too clear to admit of doubt that the term "trespass" is used only to denote offences of a lower grade, and cannot be extended to embrace crimes of a deeper dye, designated and defined by their technical and appropriate appellations. As the word "trespass" does not include the offence of horse stealing, it follows that in the prosecution of that offence the law requires no prosecutor, and consequently this motion must be overruled.

Motion denied.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 15,120.

UNITED STATES v. FLECKE et al.

[2 Ben. 456: 7 Int. Rev. Rec. 206.] [1]

District Court, S. D. New York. June, 1868.

INTERNAL REVENUE—DISTILLING—AUTREFOIS ACQUIT.

1. Where the defendants had been indicted under the twenty-third section of the internal revenue act of July 13, 1866 [14 Stat. 153], for knowingly carrying on the business of a distiller, on June 22, 1867, without having paid the special tax, on which indictment they were tried and acquitted, the ground of the acquittal being that they were not the principals who were bound to pay the tax, and were afterwards indicted under the twenty-fifth section of the same act, for knowingly using a still for the purpose of distilling, in a certain dwelling-house, on June 22, 1867, the evidence on the trial of the first indictment showing that the place of the offence charged was this same dwelling-house:

2. *Held*, that a plea of autrefois acquit, founded on the acquittal under the first indictment, could not be sustained.

3. That the tests as to whether such a plea can be sustained are, whether the defendants could, under the earlier indictment, have been convicted of the offence embraced in the later one, and whether the evidence necessary to support the later indictment was sufficient to produce a legal conviction on the earlier one.

[This was an indictment against Christopher Flecke, John Flecke, and Henry Hildebrand for violating certain internal revenue acts.]

B. K. Phelps, Asst. Dist. Atty., for the United States.

J. Lux, for defendants.

BLATCHFORD, District Judge. The defendants are indicted by an indictment found April 29, 1868 under section 25 of the internal revenue act of July 13, 1866, for knowingly using a still for the purpose of distilling, in a certain dwelling-house situated at No. 189 Essex street, in the city of New York, on the 22d of June, 1867. They plead specially a plea of autrefois acquit, in this, that they have heretofore been indicted in the circuit court for this district, by an indictment found December 23, 1867, under section 23 of the same act, for knowingly carrying on in this district the business of a distiller, on the 22d of June, 1867, without having paid the special tax in that behalf required by the statutes of the United States, and that they have been tried on the indictment first found and acquitted. The earlier indictment specified no place where the business was carried on except this district generally, but it appears that the evidence given on the trial of that indictment showed that the place was the same dwelling-house specified in the later indictment, and that the ground of acquittal was, that the defendants were not principals in the business, and were not properly to be regarded as carrying on the business, and were not the persons bound to pay the special tax, and therefore were not within the twenty-third section. The twenty-third section provides, that if any person shall carry on the business of a distiller, without having paid the special tax as required by law, he shall for every such offence be liable to a fine of not less than double the tax imposed upon the spirits distilled by such person, or found upon the premises where the business is carried on in violation of the section, and to imprisonment for a term not exceeding two years. The twenty-fifth section provides, that no person shall use any still for the purpose of distilling in any dwelling-house, and that every person who shall use such still for the purpose of distilling in any dwelling-house, shall forfeit such still and all the spirits distilled, and pay a fine of one thousand dollars, or be imprisoned for not more than one year, in the discretion of the court.

I do not think there is any thing in the earlier indictment, or in the fact that the defendants were acquitted on it, to prevent their being indicted by the later indictment and being tried under it. The defendants could not, under the earlier indictment, have been convicted of the offence embraced in the later one, nor would the evidence necessary to support the later indictment have been sufficient to produce a legal conviction upon the earlier one. These are the proper tests as to whether the plea of a former conviction or a former acquittal is good or bad. Whart. Cr. Law (2d Ed.) pp. 196–199. Proof on the trial of the earlier indictment, that the defendants used a still for the purpose of distilling in a dwelling-house on Essex street, would not have been sufficient to convict them, under that indictment, of carrying on the business of a distiller, without having paid the special tax required by law; nor would it have been available to convict them, under that indictment, of having used a still for the purpose of distilling in a dwelling-house, because such earlier indictment contained no such charge. The offence created by the twenty-fifth section, is not a minor offence included in the offence created by the twenty-third section, as a greater offence so as to authorize, on an indictment for the offence created by the twenty-third section, a conviction for that created by the twenty-fifth section. The plea is, therefore, overruled.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 7 Int. Rev. Rec. 206, contains only a partial report.]

UNITED STATES (FLETCHER v.). See Cases Nos. 4,868 and 4,869.

Case No. 15,121.

UNITED STATES v. FLINT et al. UNITED STATES v. THROCKMORTON et al. UNITED STATES v. CARPENTIER et al.

[4 Sawy. 42.] [1]

Circuit Court, D. California. Sept. 4, 1876.[2]

MEXICAN LAND GRANT—BOARD OF COMMISSIONERS — JURISDICTION AND DECREES — PURCHASERS — DECREE OF CONFIRMATION—ATTORNEY GENERAL —SURVEY.

1. The obligation to which the United States succeeded, under the stipulations of the treaty by which California was acquired, was political in its character, and provision was made for its discharge by the act of March 3, 1851 [9 Stat. 631]. By this act a special tribunal was created for the settlement of claims to land in California of Spanish and Mexican origin; and the jurisdiction conferred upon the tribunal and upon the courts empowered to review its decisions was, in its nature, exclusive.

2. Final decrees, touching the validity of such claims, rendered by these tribunals, are conclusive and final between claimants and the United States. Such decrees are not open to review in any court.

[Cited in Manning v. San Jacinto Tin Co., 9 Fed. 734.]

3. The frauds for which judgments are impeachable in courts of equity are collateral acts, extrinsic to the merits. They are acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the court has been imposed upon. Collusion between the parties to obtain a decision injurious to a third person; the purloining of an adversary's testimony; the service of process in such a manner as to defeat its purpose; false representations that the parties are really before the court; are examples of such frauds as render the judgment impeachable. But, where the matter involved has been once tried, or so put in issue that it might have been tried, the judgment rendered is the highest evidence that the alleged fraud did not exist, and estops the parties from asserting the contrary. The judgment settled the matter otherwise; it became res judicata.

[Cited in Manning v. San Jacinto Tin Co., 9 Fed. 734; Steel v. St. Louis Smelting & Refining Co., 106 U. S. 454, 1 Sup. Ct. 395; U. S. v. White, 17 Fed. 562; U. S. v. San Jacinto Tin Co., 23 Fed. 280.]

[Cited in Friese v. Hummel, 26 Or. 145, 37 Pac. 458; Morrill v. Morrill, 20 Or. 96, 25 Pac. 365.]

4. Purchasers of lands under final decrees of confirmation cannot be disturbed upon charges of fraud in the prosecution of the claims confirmed and a vague allegation of notice of such fraud. Such purchasers have a right to rest in confidence upon the decrees.

[Cited in brief in U. S. v. San Pedro & Canon Del Agua Co. (N. M.) 17 Pac. 339.]

5. After the decision of the commissioners, the control of proceedings, whether to prosecute an appeal or to dismiss the same, rested exclusively with the attorney-general; and the propriety or legality of his action in any case was not the subject of review by any tribunal, and it could only be revoked by the appellate court upon his own application. In coming to a determination on the subject, he was not restricted to an examination of the transcript transmitted to him; he could look into the archives of the former government, the reports of officers previously appointed to examine into the subject of land titles in the state, the records of the land department at Washington, and any correspondence existing between Mexico and the United States respecting the title.

6. Where the United States enters the court as a litigant, it waives its exemption from legal proceedings, and stands upon the same footing with private individuals; and, therefore, if on a consideration of all the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, though the United States be the suitor.

[Approved in Manning v. San Jacinto Tin Co., 9 Fed. 734. Cited in U. S. v. White, 17 Fed. 564, 565; U. S. v. San Jacinto Tin Co., 23 Fed. 287; on appeal, 125 U. S. 304, 8 Sup. Ct. 867. Disapproved in U. S. v. Rose, 24 Fed. 196. Cited in U. S. v. Wallamet V. & C. M. W. R. Co., 42 Fed. 357, 44 Fed. 240. Distinguished in U. S. v. Adams, 54 Fed. 115.]

[Cited in brief in U. S. v. San Pedro & Canon Del Agua Co., 17 Pac. 339.]

7. In the absence of an act of congress, the power of the attorney general to institute proceedings to vacate these decrees of confirmation is doubtful

8. Whether the issue of a previous grant of eleven leagues to a claimant disqualifies him from receiving a second grant, is a question of law, and any error in its decision could be corrected only on appeal.

9. The subject of surveys of confirmed claims is under the control of the land department, and its action is not subject to the supervision of the courts, however erroneous.

[Cited in Leitensdorfer v. Campbell, Case No. 8,225; Manning v. San Jacinto Tin Co., 9 Fed. 733; U. S. v. Maxwell Land-Grant Co., 21 Fed. 22; U. S. v. San Jacinto Tin Co., 23 Fed. 282; U. S. v. Hancock, 30 Fed. 853; Cragin v. Powell, 128 U. S. 699, 9 Sup. Ct. 206.]

[Cited in Stoneroad v. Stoneroad, 12 Pac. 742.]

10. If the bill showed that the decree had been procured by fraud of the grossest character, the court would still be without jurisdiction, for it has no authority to pass upon the propriety of the decree; i. e., to decide upon the validity of the claim, nor to demand the cause to any other forum where that question may be determined. Per Hoffman, J.

[Cited in U. S. v. San Jacinto Tin Co., 23 Fed. 294; U. S. v. Hancock, 30 Fed. 860; U. S. v. Oregon C. M. R. Co., 41 Fed. 501.]

[11. Cited in Pratt v. California Min. Co., 24 Fed. 878, to the point that it is an inherent principle of courts of equity to refuse to interpose in behalf of stale demands, since from the lapse of time and the nature of the case it is probable justice cannot be done.]

The three cases are suits in equity [by the United States against Benjamin Flint and others, S. R. Throckmorton and others, and H. W. Carpentier and others] to vacate the patents issued by the United States upon confirmed Mexican grants, on the ground that said grants are not genuine, and that their confirmation was procured by fraud on the part of the claimants, in presenting fraudulent grants, and concealing the facts from the officers of the government. They all present substantially the same ques-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

[2] [U. S. v. Throckmorton, affirmed in 98 U. S. 61.]

tions, and were argued and considered together. The opinion of FIELD, Circuit Justice, applies especially to the case of U. S. v. Flint, and the opinion of HOFFMAN, District Judge, to the case of U. S. v. Carpentier. But the reasoning in both opinions applies to all the cases.

John M. Coghlan, U. S. Atty., J. B. Howard, and John B. Felton, for complainant.

Wm. Mathews, T. B. Bishop, J. J. Williams, H. P. Irving, E. R. Carpentier, Volney E. Howard, and Edmond L. Goold, for defendants.

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and HOFFMAN, District Judge.

FIELD, Circuit Justice. The case of U. S. v. Flint is a suit in equity, the main object of which is to set aside and annul the decree of the district court of the Southern district of California, confirming the claim of Teodocio Yorba to the rancho Lomas de Santiago, situated in the county of Los Angeles, in this state, and to recall and cancel the patent issued thereon by the United States. It is brought by the district attorney for California, and purports to be on behalf of the United States. It appears, from the allegations of the bill, and the record to which the bill refers, that in October, 1852, the claimant, who has since deceased, presented to the board of land commissioners, created under the act of congress of March 3, 1851, to ascertain and settle private land claims in California, a petition setting forth his claim to the rancho in question, and stating that the same was granted to him in May, 1846, by the governor of the department; that the grant had been approved by the departmental assembly; that juridical possession of the land had been delivered to him by competent authority, and its boundaries defined; and that he was then and had been previously in its peaceable occupation.

With the petition, and as part thereof, the claimant presented copies of the grant and act of juridical possession, accompanied by a translation of the same, and prayed that the grant be adjudged valid and confirmed to him. The board of commissioners considered the claim thus presented, and took the depositions of several witnesses in support of it, and, in August, 1854, rendered a decree adjudging it to be valid, and directing its confirmation. In November, 1855, a petition was filed on behalf of the United States, in the district court for the Southern district of California, for a review of the decision, alleging that the claim confirmed was invalid, and the decision of the commissioners erroneous; that the allegations of the complainant in his petition were unsupported by sufficient proof; and denying that he had any right or title to the land confirmed, or to any part of it. The claimant answered this petition, joining issue upon its allegations, and the court took jurisdiction of the case, heard it anew, and, in December, 1856, rendered its decree, affirming the decision of the commissioners, and readjudged the claim to be valid. An appeal from this decree to the supreme court of the United States was allowed, but the attorney general, after some months' deliberation, gave notice that the appeal would not be prosecuted; and thereupon the district court, upon the consent of the district attorney, vacated the order allowing the appeal, and gave the claimant leave to proceed upon its decree as a final decree in the case. A survey of the land was subsequently made under the direction of the surveyor general of the United States for California, and approved by that officer; and in February, 1868, a patent was issued to the claimant.

It thus appears that, after a contest for nearly sixteen years before officers and tribunals of the United States, the claimant obtained a patent from the government, an instrument designed to give to its holder security and protection in the enjoyment of the property covered by its terms. All the defendants acquired their interests in the land after the decree of confirmation, and two of them after the patent was issued. Nineteen years after the final decree was thus rendered and eight years after the patent was issued, the present bill was filed. And as grounds for setting aside and annulling the decree, and recalling and canceling the patent, the district attorney alleges upon information and belief: 1. That the grant and act of juridical possession were made subsequently to the acquisition of the country in 1846, and were fraudulently antedated, and that this appears on the face of the original papers on file in the Spanish archives in the custody of the surveyor-general of the United States; that the claimant fraudulently omitted to exhibit a complete record of the proceedings, and only presented extracts from them; and by this suppression the law agent of the United States was misled, the United States deprived of all opportunity to contest the confirmation, and the land commission and court were deceived into a confirmation of the claim; and, 2. That previous to the issue of the alleged grant, and as early as 1840, the claimant had obtained from the Mexican nation a grant of eleven leagues, situated in the counties of Sacramento, San Joaquin and Amador, which was subsequently confirmed by the supreme court of the United States; that by the laws of Mexico, a grant for more than eleven leagues could not be made to the same person, and that the claimant was therefore disqualified from receiving any other grant, and that the existence of this prior grant was fraudulently concealed from the law agent of the United States, the land commission, and the district court.

The district attorney also alleges in the bill, upon information and belief, that the approved survey is not in conformity with the boundaries given in the diseño, or map accompanying the grant and the act of juridical possession, but embraces a much greater quantity, and was made upon the fraudulent instigation and procurement of three of the defendants. The district attorney therefore prays that, in case he fail to obtain the annulment of the decree, and the recall and cancellation of the patent, the boundaries of the tract confirmed may be re-established and fixed in accordance with the views stated by him as to the location intended by the grant and act of juridical possession.

The first inquiry, which naturally arises upon the perusal of this bill, is as to what jurisdiction this court has to interfere with and review the determinations of the land commission and district court upon the validity of claims to land derived from Mexican or Spanish authorities, and of the land department in approving the surveys of the claims confirmed. The questions submitted to the commission and the district court were not within the ordinary cognizance of a court of law or a court of equity. They related to the obligations devolving upon our government from the concessions of the former government to its inhabitants. How far these concessions should be respected, and how far enforced, were the matters to be considered; and in their determination the tribunals were to be governed by the stipulations of the treaty, the law of nations, the laws, usage and customs of the former government, the principles of equity, and the decisions of the supreme court, so far as they were applicable.

By the transfer of California from Mexico to the United States, the rights of private property of the inhabitants were not affected. They remained as under the former government. The public property of Mexico and sovereignty over the country alone passed to the United States. This was in accordance with the rule of public law, which is recognized by all civilized nations when territory is ceded by one state to another. The obligation, therefore, to protect private rights of property devolved upon the United States, without any formal declaration to that effect. But, in recognition of this obligation, Mexico obtained from the United States, in the treaty of cession, an express stipulation for such protection. And the term property, as applied to lands, and as used in the treaty, comprehends every species of title, perfect or imperfect. "It embraces," says Chief Justice Marshall, "those rights which are executory as well as those which are executed." The United States, therefore, took California bound by the established principles of public law, and by express stipulation of the treaty, to protect all private rights of property of the inhabitants. The obligation rested for its fulfillment in the good faith of the government, and required legislative action. It could, therefore, only be discharged in such manner and at such times and upon such conditions as congress might, in its discretion, direct. In its discharge, such action was required as would enable the inhabitants to assert and maintain their rights to the property in the courts of the country as fully and absolutely as though their titles were derived directly from the United States. Where the titles were imperfect (and such was the condition of nearly all the titles held in the country), further action, by way of confirmation or release from the new government, was essential. With respect to all such titles, and, indeed, with respect to all matters dependent upon executory engagements of the government, the ordinary courts of the United States, whether of law or equity, were entirely powerless. They were without jurisdiction, and utterly incompetent to deal with them.

By the act of March 3, 1851, the legislative department prescribed the mode in which the provisions of the treaty should be carried out, and the obligations of the government to the former inhabitants discharged, so far as their rights respected the territory acquired; and thus provided the means of separating their property from the public domain. That act created a commission of three persons, to be appointed by the president, by and with the advice and consent of the senate, for the express purpose of ascertaining and settling private land claims in the state. It gave a secretary to the commission, skilled in the Spanish and English languages, to act as interpreter and to keep a record of its proceedings. It provided an agent, learned in the law and skilled in those languages, to superintend the interests of the United States, and it was made his duty to attend the meetings of the commissioners, to collect testimony on behalf of the United States, and to be present on all occasions when the claimant, in any case, took depositions. To the commission, every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required, on pain of forfeiting his land, to present his claim, together with the documentary evidence and testimony upon which he relied in its support. The commissioners, while sitting as a board, and at their chambers, were authorized to administer oaths and take depositions in any case pending before them. The testimony was to be reduced to writing, and recorded in books provided for that purpose. The commissioners were obliged to hear every case, and decide upon the validity of the claim, and, within thirty days after their decision, to certify the same, with the reasons on which it was founded, to the district attorney of the district. The act provided also for a review of the decision of the commissioners, upon petition of the

claimant or the district attorney, setting forth the grounds upon which the validity or invalidity of the claim was asserted. To the petition an answer was required from the contestant, whether claimant or the United States. Subsequently, in August, 1852, the act was changed in this particular, and, when a decision was rendered by the commissioners, they were required to prepare two certified transcripts of their proceedings and decisions, and of the papers and evidence upon which the same were founded, one of which was to be transmitted to the attorney-general, and the other filed with the clerk of the district court, and this filing operated as an appeal on behalf of the party against whom the decision was rendered. In case the decision was against the United States, the attorney-general, within six months after receiving the transcript, was required to cause a notice to be filed with the clerk that the appeal would be prosecuted, or it was to be regarded as dismissed.

Upon the review by the district court upon the petition or appeal, not merely the evidence before the commissioners was considered, but further evidence could be taken by either the claimant or the government; so that, in fact, the whole matter was heard anew, as upon an original proceeding. From its decision, an appeal lay to the supreme court of the United States.

As thus seen, the most ample powers were vested in the commissioners and the district court to inquire into the merits of every claim; and they were not restricted in their deliberations by any narrow rules of procedure or technical rules of evidence, but could take into consideration the principles of public law and of equity in their broadest sense. When the claim was finally confirmed, the act provided for its survey and location, and the issue of a patent to the claimant. The decrees and the patents were intended to be final and conclusive of the rights of the parties, as between them and the United States. The act, in declaring that they should only be conclusive between the United States and the claimants, did, in fact, declare that as between them they should have that character.

Here, then, we have a special tribunal, established for the express purpose of ascertaining and passing upon private claims to land derived from Spanish or Mexican authorities, clothed with ample powers to investigate the subject and determine the validity of every claim, and the propriety of its recognition by the government, capable as any court could possibly be made of detecting frauds connected with the claim, and whose first inquiry in every case was necessarily as to the authenticity and genuineness of the documents upon which the claim was founded.

We have a special jurisdiction of a like nature in the district court to review the decision made by the commissioner, and investigate anew the claim. We have principles prescribed for the government of both commission and court in these cases, and of the supreme court, upon appeal from their decisions, not applicable in ordinary proceedings, either at law or in equity, and as already stated, every person claiming land in the state was required to present his claim for investigation. The onerous duty thus thrown upon him was relieved of its oppressive characted by the accompanying assurance, that, when his claim was adjudged valid, the adjudication should be final and conclusive.

On principle, such adjudications cannot be reviewed or defeated by a court of equity, upon any suggestion that the commissioners and court misapprehended the law, or were mistaken as to the evidence before them, even if that consisted of fabricated papers supported by perjured testimony. The very questions presented by the present bill were necessarily involved in the proceeding before the commissioners and the district court, and the credibility of the testimony offered was a matter considered by them. Whether the grant produced by the claimant was genuine, and the claim resting thereon was entitled to confirmation, were the points at issue. The bill avers that the alleged grant was not genuine because it was ante-dated. But the genuineness of the document was the matter sub judice, and could not have been established, and the claim based upon it affirmed, except by evidence satisfactory to the commission and court, that it was made at the time stated.

It is to no purpose in such case to invoke the doctrine that fraud vitiates all transactions, even the most solemn, and that a court of equity will set aside or enjoin the enforcement of the most formal judgments when obtained by fraud. The doctrine of equity in this respect is not questioned; it is a doctrine of the highest value in the administration of justice, and its assertion in proper cases is essential to any remedial system adequate to the necessities of society. But it cannot be invoked to reopen a case in which the same matter has been once tried, or so put in issue between the parties that it might have been tried. The judgment rendered in such a case is itself the highest evidence that the alleged fraud did not exist, and estops the parties from asserting the contrary. It is afterwards mere assumption to say that the fraud was perpetrated. The judgment has settled the matter otherwise; it is res judicata.

The frauds for which courts of euity will interfere to set aside or stay the enforcement of a judgment of a court having jurisdiction of the subject-matter and the parties, must consist of extrinsic collateral acts not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the court has been imposed upon.

All litigants are equally entitled to justice from the tribunals of the country; they can claim equal opportunities of producing their testimony and presenting their case, and they can equally have the advocacy of counsel. Whenever one party by any contrivance prevents his adversary from having this equality with him before the courts, he commits a fraud upon public justice, which, resulting in private injury, may be the ground of equitable relief against the judgment recovered. Thus, if, through his instrumentality, the witnesses of his adversary be forcibly detained from the court, or bribed to disobey its subpœna, or the testimony of his adversary be secreted or purloined, or if the citation to him be given under such circumstances as to defeat its purpose, a fraud is committed, for which relief will be granted by a court of equity, if it produce injury to the innocent party. Any conduct of the kind mentioned would tend to prevent a fair trial on the merits, and thus to deprive the innocent party of his rights. So, if the litigation be collusive; if the parties be fictitious; if real parties affected are falsely stated to be before the court, the judgment recovered may be set aside or its enforcement restrained, for in all these cases there would be the want of the actual litigation which is essential to a valid judicial determination. To every such case the words of the jurist would be applicable: "Fabula, non judicium, hoc est; in scena, non in foro, res agitur."

The credibility of testimony given in a case, bearing upon the issue, is not an extrinsic collateral act, but is a matter involved in the consideration of the merits; and the introduction of false testimony, known or shown to be so, does not affect the validity of the judgment rendered. In every litigated case where the interests involved are large, there is generally conflicting evidence. Witnesses, looking at the same transaction from different standpoints, give different accounts of it. The statements of some are unconsciously affected by their wishes, hopes, or prejudices. Some, from defective recollection, will blend what they themselves saw or heard with what they have received from the narration of others. Uncertainty as to the truth in a contested case will thus arise from the imperfection of human testimony. In addition to this source of uncertainty may be added the possibility of the perjury of witnesses, and the fabrication of documents. The cupidity of some and the corruption of others may lead to the use of these culpable means of gaining a cause. But every litigant enters upon the trial of a cause, knowing not merely the uncertainty of human testimony when honestly given, but that, if he has an unscrupulous antagonist, he may have to encounter frauds of this character. He takes the chances of establishing his case by opposing testimony, and by subjecting his opponent's witnesses to the scrutiny of a searching cross-examination. The case is not the less tried on its merits, and the judgment rendered is none the less conclusive by reason of the false testimony produced. Thus, if an action be brought upon a promissory note, and issue be joined on its execution, and judgment go for the plaintiff, and there be no appeal, or if an appeal be taken, and the judgment be affirmed, the judgment is conclusive between the parties, although, in fact, the note may have been forged and the witnesses who proved its execution may have committed perjury in their testimony. The rules of evidence, the cross-examination of witnesses, and the fear of criminal prosecution with the production of counter testimony, constitute the only security afforded by law to litigants in such cases. A court of equity could not afterward interfere upon an allegation of the forgery and false testimony, for that would be to reopen the case to a trial upon the execution of the note, which had already been sub judice, and passed into judgment.

These views are in consonance with the adjudged cases. We have looked in vain through all those cited by the learned associate counsel in the Throckmorton Case for anything infringing upon them. In the Duchess of Kingston's Case [1 Leach, 146] the sentence of the spiritual court was held to be fraudulent and void, because obtained by collusion of the parties. And, in giving the opinion of the judges to the house of lords, Chief Justice De Grey observed that, although a judgment was conclusive evidence upon the point involved, and could not be impeached from within, yet, like all other acts of the highest judicial authority, could be impeached from without, and that fraud was an extrinsic collateral act which vitiated the most solemn proceedings of courts of justice.

In the Shedden Case, 1 Macq. 535, the question was whether a judgment of the court of sessions of Scotland against the legitimacy of the plaintiff, affirmed by the house of lords, could be attacked in another suit in the inferior court, and treated as a nullity for collusive suppression of proof which would have established his parents' marriage. The house of lords held that the judgment could be thus attacked, but that the allegations of fraud and collusion in the case were not sufficiently specific, pointed, and relevant to be admitted to proof. Opinions in the case were given by the chancellor and two of the law lords, Brougham and St. Leonards. The judgment of the house of lords, said Brougham, was to be "dealt with in the inferior court before which its merits were brought; that is to say, not the merits of the judgment, but the merits of the parties who had so fraudulently obtained it—the question being, was it a real judgment or not? For that is the only question in such cases, and that is the question in this case."

In Fermor's Case, 3 Coke, 77, the tenant continued to pay rent to his landlord after he had levied a fine with proclamation to bar the inheritance, and thus kept the latter in igno-

rance of that proceeding. The tenant attempting, after the expiration of the lease, to hold the property on the ground that the right of the landlord was barred by the lapse of time allowed by statute to make an entry or bring his action after the fine, the court, upon a bill filed for relief, held that he was not barred, by reason of the deception practiced upon him. The payment of the rent was in fact a declaration by the tenant that his relation to the landlord had not changed, and operated as a fraud preventing the latter from asserting his rights.

Great stress is placed by the learned associate counsel upon these last two cases; but it is evident, from the statement we have made, that the fraud alleged in both cases was an extrinsic collateral act which prevented the complaining party, in the one instance, from having the merits of his case considered, and in the other instance from taking proceedings for his protection. So in all the other cases, extrinsic collateral acts of fraud will be found to constitute the grounds upon which the court has acted. And on principle it must be so, for if the merits of a case could be a second time examined by a new suit, upon a suggestion of false testimony, documentary or oral, in the first case there would be no end to litigation. The greater the interests involved in a suit, the severer generally the contention; and in the majority of such cases, the recovery of judgment would be the occasion of a new suit to vacate it, or restrain its enforcement. If the present bill could be sustained upon the grounds alleged, and we should set aside the decree of the district court, a new bill might years hence be filed to annul our judgment and reinstate the original decree, on the same grounds urged in this case, that fabricated papers and false testimony had been used before us, which eluded the scrutiny of the counsel and escaped our detection. Of course, under such a system of procedure, the settlement of land titles in the state would be postponed indefinitely, and the industries and improvements, which require for their growth the assured possession of land, would be greatly paralyzed.

For the reasons stated, we are of opinion that there is no ground of fraud presented by the bill for the interference of a court of equity with the decree of confirmation rendered by the district court. It is upon that ground alone that the bill proceeds. It is not a bill of review for new matter, discovered since the decree. A bill of that character can only be filed by leave of the court; and that cannot be obtained without a showing that the new matter could not have been used in the original cause, and could not previously have been ascertained by reasonable diligence. It does not lie where the decree in the original cause was obtained by consent, or where objections to the decree rendered were subsequently withdrawn and consent was given to its execution. And it can only be allowed by a court possessing the power, upon a review of the case, to determine the rights of the parties to the property, or in the matter involved, or, at least, authorized to remit the case to a tribunal having adequate jurisdiction for that purpose. The present bill was not filed upon leave; and this court possesses no power to determine the right of the claimant, upon any review of the case, to a confirmation of his claim, and the only tribunal to which such a determination could be remitted has long since ceased to exist.

But there are other and equally potential grounds against the maintenance of the present suit. The land commission and the district court, though exercising a special jurisdiction, were invested with very large and extensive powers. They were not, as already stated, bound in their decisions to any strict rules of technical law, but could be governed by the principles of equity in their widest scope. The result of their inquiries was to guide the government in the discharge of its treaty obligations. Considerations, therefore, which could not be presented to ordinary tribunals, might very properly be regarded by them.

After the determination of the commissioners, if against the United States, the control of the proceedings was placed with the attorney-general. It rested with him exclusively to determine whether the appeal from the commissioners, taken by filing a copy of the transcript with the clerk of the district court, should be prosecuted or dismissed. So, also, when an appeal was taken from the decree of the district court, he could, in the same way, direct its prosecution or dismissal. Considerations of policy, as well as of strict right, might be deemed by him sufficient to control his action in this respect. In coming to a determination on the subject, he was not restricted to an examination of the transcript transmitted to him; he could look into the archives of the former government, the reports of officers previously appointed to examine into the subject of the land titles of the state, the records of the land department at Washington, and any correspondence existing between Mexico and the United States respecting the title. His power was unlimited, and the propriety or legality of his action in any case was not the subject of review by any tribunal whatever, and it could only be revoked by the appellate court upon his own application.

In the case of Yorba [unreported], the appeal from the decree of confirmation, rendered by the district court, was dismissed upon notice of the attorney-general that the appeal would not be prosecuted, and thereupon the decree became final. The decree was thus assented to by the highest legal officer of the government, specially charged with supervision over the subject. The validity of the decree, and of the grant upon which the claim of Yorba was founded, was thus forever put at rest. From that day it could never be successfully questioned in any form of pro-

cedure, or by any tribunal known to our laws. It was a closed question for all time.

But this is not all. The defendants purchased their interests after the final decree. They are charged in the bill, it is true, generally, with notice of the alleged frauds of the claimant, but when, or where, or in what manner they had notice, is not averred. The vagueness of the allegation gives it only the weight of mere clamor. But, assuming that the defendants had sufficient notice to put them upon inquiry, they had at the same time notice of the decree, which was an adjudication—the highest possible evidence—that the alleged frauds had no actual existence; and that to this adjudication the government, through its attorney-general, had consented. They had a right, therefore, to rely implicitly upon the decree, and rest in confidence upon the assurance of its finality, given by the only officer of the United States who could question it. They can, therefore, justly insist upon protection in the property purchased; and no court of equity, under the circumstances, would lend its aid to the commission of so great a wrong as the destruction of their title.

Where the district attorney of this district obtains authority to institute, in the name of the United States, a suit for that purpose, we are not informed. There is no law of congress which requires it or allows it; and we have sought in vain for the power of the attorney-general to direct it. That officer can, it is true, institute or direct the institution of suits for the revocation and cancellation of patents of lands belonging to the United States, issued upon false and fraudulent representations to the executive officers of the land department, or upon their misconstruction of the law. He is the legal adviser of the heads of the executive departments, and if they are fraudulently imposed upon, or have mistaken the law, he can take the necessary legal proceedings to recall the results of their action. But that is a very different matter from instituting or directing proceedings to vacate or recall patents founded upon decrees of a commission or court exercising a special and exclusive jurisdiction over the subjects investigated, where the law declares that such decrees shall be final and conclusive between the parties, and to which decrees the attorney-general in office at the time assented. Those decrees established the obligation of the United States to the claimants under the treaty; and if the legislative department, which authorized the proceedings before the commission and court, be satisfied with the result, it is difficult to see upon what pretense the attorney-general can seek to disturb it. If the attorney-general, by virtue of his office, possesses any such extraordinary power, as claimed in the case, to disregard the action of his predecessor, and to renew litigation at his pleasure respecting the titles of a whole people, upon a suggestion that false testimony may have been used in the original proceedings, the security which the holders of patents from the government issued upon such decrees have hitherto felt in their possessions is unfounded and delusive. We must have further evidence than is presented to us before we can admit the existence of a power so liable to abuse, and so dangerous to the peace of the community.

But if we admit that the attorney-general is authorized to direct the institution of a suit like the present, in the name of the United States, and that the district attorney has been thus directed, his power in this respect must be exercised in subordination to those rules of procedure and those principles of equity which govern private litigants seeking to avoid a previous judgment against them. The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.

Although, on grounds of wise public policy, no statute of limitations runs against the Uniter States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty, from this cause, of meeting objections which might, perhaps, at the time, have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

The bill in the present case not only does not disclose, as already shown, any extrinsic collateral acts of fraud constituting grounds for equitable relief, but alleges that the antedating of the grant and act of juridical possession, which form the gravamen of complaint, appear on the face of the original documents on file in the archives in the custody of the surveyor-general of the United States. If this be so, the law agent should have shown the fact by the production of the originals. He should have inspected original documents in all cases where copies alone were offered by the claimant, whether suspicions were excited or not as to their gen-

uineness. The law of Mexico with respect to the alienation of her public lands was well known at the time. It had been the subject of reports to the government by agents employed to look into the grants of the former government, and of consideration and comment by the courts in numerous instances. That law pointed out the proceedings required for the acquisition of titles of land from Mexico, and showed that a record of them was required to be kept. That record was in the possession of the United States, and should have been examined by the law agent of the government whenever any of its entries or documents were the foundation of a claim. He was appointed for the express purpose of looking after and protecting the interests of the United States. The allegation that the claimant was guilty of a fraudulent suppression in not producing all the documents in the archives respecting his title is puerile. He produced all that was necessary to present his claim, and if the law agent was not satisfied with them, he should have made his objection at the time. The archives were not in an "unsearchable condition," as alleged, until 1858; but even if they had been, the law agent could still have insisted upon the production of the originals for inspection.

After the archives were arranged and the alleged "unsearchable condition" ceased, nearly eighteen years elapsed before the present bill was filed, and no excuse is offered for this delay. During these eighteen years, which constitute a period equivalent almost to a century in other countries, great changes in the condition and value of real property in the state have occurred. During this period, the original claimant, who might perhaps have explained the alleged alteration of dates, has deceased, and third parties have acquired his interests, and, it is said, have made valuable and expensive improvements upon the property. Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, when there has been unnecessary delay in its institution, and the rights of third parties, as in this case, have intervened in reliance upon the decree. Considerations of public policy require prompt action in such cases, and if, by delay in acting, innocent parties have acquired interests, the courts will turn a deaf ear to the complaining party. This is the doctrine of equity, irrespective of any statute of limitations, and irrespective of the character of the suitor. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property.

It only remains to notice the allegations of the bill with respect to a previous grant of eleven leagues, stated to have been obtained by the claimant from the Mexican nation in 1840, and the allegation that the approved survey of the claim confirmed was not in accordance with the map accompanying the grant, and the act of juridical possession.

Whether the issue of a previous grant to the claimant for the quantity designated would have disqualified him from receiving a second grant, was a question of law, to be determined by the commissioners and district court; and any error committed in its determination could only be corrected on appeal. And the allegation of fraudulent concealment by the claimant of the existence of the prior grant is an idle one in the face of the fact that the Mexican law, of which the court is bound to take notice, required a record of every grant to be kept, and that this record, with other public property, passed to the United States on the cession of the country. If there was any such grant as stated, so far from its existence being concealed by the claimant, the evidence of its existence was in the custody of the government, and its attention had been specially directed to the document by agents appointed to ascertain what grants had been made by the former government, who examined the records and reported a list of all grants found among them. Allegations thus in conflict with the public records and public history of the country need not be specially controverted any more than allegations at variance with the settled law. A fraudulent concealment by the claimant of a public record, never in his possession, but always in the keeping of the government, and open at all times to the inspection of the world, was a thing impossible. The bill might, with as much propriety, have alleged that the claimant concealed from the court one of the public statutes of the country.

As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the supervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it, is a matter with which the courts have nothing to do; that belongs to a department whose action is not the subject of review by the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey when, in a controversy between parties, it is alleged that the survey made infringes upon the prior rights of one of them; and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey, or change that already made.

It follows, from the views we have expressed, that the demurrer to the bill must be sustained; and as no amendment would reach the principal objection, namely: that the alleged frauds are not such extrinsic collateral acts as would justify the interference of equity with the decree of confirmation, the bill must be dismissed.

The principal objection to the bill in this case applies with equal force to the bills in the Throckmorton and Carpentier Cases, and the demurrers in those cases will also be sustained, and the bills dismissed. The allegation in the Throckmorton Case, that the defendant Howard had notice of the fabrication of the papers from the claimant, given in other proceedings before the board, and other allegations imputing guilty knowledge to him and to the other defendants, are too vague and general to merit consideration, made as they are in a bill not verified, and only upon information and belief. The district attorney should at least have stated the sources of his information and the grounds of his belief, that the court might see that the former was something better than idle rumor, and the latter something more than unfounded credulity.

The defendant Howard has filed an answer denying under oath, generally and specifically, every charge against him; but by stipulation on the argument, he is to have the benefit of the decision upon the demurrer.

As the questions presented in the several cases are of vast importance to the people of this state, the district judge, whose great experience in the examination of land cases gives weight to his views, will read a concurrent opinion with special reference to the Carpentier Case.

Our judgment is that the demurrers be sustained in the three cases, and the bills be dismissed; and it is so ordered.

HOFFMAN, District Judge, concurring. As the principal questions involved in these cases are the same, they have been argued and submitted together. For convenience of treatment, I have confined my attention, in this opinion, to the case of U. S. v. Carpentier; but the views expressed will apply to all.

The bill in this case in substance alleges that on the ninth of May, 1852, Victor Castro and Juan Jose Castro presented to the board of commissioners for ascertaining and settling private land claims in California, a petition praying a confirmation of their title to a certain sobrante or surplus of lands lying between the ranchos of San Antonio, San Pablo, Pinole, Moraga and Valencia. That in support of this claim, the defendant Carpentier, as attorney for the other defendants, presented to the board certain documentary proofs in the bill particularly mentioned.

That the board of commissioners considered the claim, and on the third day of July, 1855, rendered an opinion thereon, and, on the same day, rendered a final decree therein, adjudging "the claim of the said petitioners, Juan Jose and Victor Castro, to be valid, and decreeing that the same be and is hereby confirmed."

That afterwards, on or about the sixth day of February, 1856, a certified copy of said proceedings and decree was duly filed with the clerk of the United States district court for the Northern district of California.

That on the fourth of April, 1856, a notice was filed from the attorney-general of the United States, to the effect that the appeal from the decision of the board of commissioners would be prosecuted by the United States.

That on the sixth of April, 1857, a further notice from the attorney-general was filed, to the effect that the appeal would not be prosecuted by the United States, and on the same day a stipulation was signed by Wm. Blanding, Esq., district attorney, and by the attorney for the claimants, consenting that the appeal be withdrawn and dismissed. Upon which notice and stipulation an order was made by the district court, dismissing the appeal and giving leave to the claimants to proceed under the decree of the board of commissioners as under final decree.

That since said date no other proceedings have been had in said case or claim.

The bill further charges that the documentary evidence so presented to the board by the claimants was forged, fraudulent, antedated, and fabricated—in pursuance of a conspiracy entered into by Juan Jose and Victor Castro, Juan B. Alvarado and Francisco Arce, whose names appear on the said documents. That the said simulated petition and grant were so forged, fabricated, and antedated with the full knowledge and consent of the defendants, Carpentier and Adams, and that they have, from the date of said forgery, claimed and asserted title to the said sobrante lands, or a portion thereof.

The bill further charges, that in the proceedings before the board, the defendants, Carpentier, Adams and Castro, and their assistants, intentionally and fraudulently suppressed and failed to present to the said board the grants which had been made by the government of Mexico of the said ranchos of San Antonio San Pablo, Pinole, Moraga, and Valencia, with intent to conceal from the law agent and from the said commissioners the fact that the said pretended sobrante had been antedated as aforesaid, and that if said grants had been presented, it would have appeared that two of the said ranchos were not granted until several months subsequently to the date of the said pretended sobrante grant.

That by the said fraudulent misrepresentations, concealment, and suppression, the law agent was deceived and misled, and the United States deprived of all opportunity to contest the confirmation of said grant, on the grounds aforesaid, and the said commissioners were likewise deceived and misled, and induced to confirm the grant to the manifest detriment of the United States.

The bill further avers that the facts aforesaid were not discovered by the United States until long after the said grant had been confirmed, and not until within one year next preceding the filing of this bill, and "that said facts have been derived from the in-

formation of living witnesses, from an examination of the archives, from court records, and from other sources."

The prayer of the bill is that by the decree of this court the said grant be declared fraudulent and invalid, and that the confirmation thereof was obtained by fraud; that the dismissal of the appeal in the district court was obtained by fraud; that said grant and confirmation be annulled and set aside; and that said defendants, and each of them, be forever estopped from asserting any title to said lands under said pretended grant or decree of confirmation, purchase, or possession; and that the same are public lands of the United States.

The defendants have demurred to the bill on the ground that this court has no jurisdiction of the subject-matter of the suit.

By the ninth article of the treaty of Guadalupe Hidalgo, it was stipulated "that Mexican citizens shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion, without molestation."

To enable the United States to fulfill this obligation, it was necessary to provide means for ascertaining what lands in the ceded territory were held in private ownership, and of what lands the title passed to the United States.

The means adopted were the instrumentalities and proceedings provided in the act of March 3, 1851.

Its title expresses its object. It is entitled "An act to ascertain and settle private land claims in California."

The first section provides that, for the purpose of ascertaining and settling private land claims in California, a commission shall be constituted, consisting of three commissioners, etc. By subsequent sections, it is made the duty of the commissioners to examine the claims submitted to them, and to decide upon their validity, and rules are prescribed by which their decisions shall be governed.

The fourth section provides for the appointment of a law agent, whose special duty it shall be "to superintend the interests of the United States" in the premises, to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend at the taking of depositions by the claimants; and no deposition is allowed to be read in evidence unless taken on notice in writing to the agent or to the district attorney, if the case is appealed to the district court. Other sections confer upon the district court jurisdiction to hear the cause de novo on appeal, and particularly prescribe the manner in which appeals shall be taken and the proceedings conducted; and finally the right of appeal to the supreme court is given to either party.

The final decrees rendered by the commissioners, or by the district or supreme courts, or any patent issued under the act, are, by section 15, declared to be conclusive between the United States and the said claimants, but shall not affect the interests of third persons.

The submission of their claims to the tribunal thus constituted was not left to the choice of the claimants.

By section 8, each and every person claiming lands by virtue of any right or title derived from the former governments of California, was required to present the same, together with the documentary evidence and testimony of witnesses relied on, to the board; and the thirteenth section declares that all lands, the claims to which shall not have been presented to the commissioners within two years after the date of the act, shall be deemed, held and considered as part of the public domain of the United States.

This act, although benevolently designed, has in its practical operation imposed a grievous, though perhaps unavoidable, burden upon the holders of Mexican titles in this state. They have been subjected to the expense and delay of a litigation which, after the lapse of more than twenty-five years, can scarcely be said to have terminated. To whatever criticisms the act of 1851 may be obnoxious, it certainly cannot be reproached for having failed to guard the interests of the United States in the amplest manner.

The appeals to the district court from the decisions of the board gave to both parties, in every case, the benefit of a trial de novo on the merits, with the unrestricted right to take further proofs. Six months were allowed to the party against whom the board had decided to determine whether or not the appeal should be prosecuted. From the decree of the district court an appeal was allowed to the supreme court, to be taken at any time within five years; and even when the cause had reached the supreme court, it might still be remanded for further proof, in case the evidence with regard to the validity of the claim was deemed to be unsatisfactory. U. S. v. Teschmaker, 22 How. [63 U. S.] 392; U. S. v. Pico, Id. 404; U. S. v. Vallejo, Id. 416; U. S. v. Cambuston, 20 How. [61 U. S.] 59.

Such were the means adopted by the political department of the government to enable it to discharge its treaty obligations with intelligence and justice. It, in effect, called to its assistance the courts, and for that purpose invested them with a jurisdiction in all respects special and extraordinary, and which, except for the act, they would not have possessed. Foster v. Neilson, 2 Pet. [27 U. S.] 314; U. S. v. Arredondo, 6 Pet. [31 U. S.] 742; Beard v. Federy, 3 Wall. [70 U. S.] 492.

The treaty is a contract made by the nation acting through the political branch of its government. Its execution is confided to that branch of the government alone. And until it has provided the means and ordained the mode of its execution, no court has authority to decide what cases fall

within its provisions, or what titles the United States is bound to respect. A fortiori must the ordinary courts be without jurisdiction, when the political power has confided the whole subject to special tribunals, whose final decrees it has declared shall be conclusive.

In the case of U S. v. Arredondo, 6 Pet. [31 U. S.] 742, Mr. Chief Justice Marshall says: "Should we be called on to decide on the validity of a title acquired by any Spanish grant not embraced by these laws (i. e., the laws of 1824 [4 Stat. 52] and 1828 [Id. 284], which conferred the special jurisdiction), we should feel bound to follow the course pursued in Foster v. Neilson, in relation to the stipulation in the eighth article of the Florida treaty, that the legislature must execute the contract before it can become a rule for this court."

It is urged that a court of general equity jurisdiction may take cognizance of this bill, because of the fraud it alleges.

The fraud principally relied on is the presentation to the board of certain documentary evidences of title, which the parties presenting them knew to be forged and antedated.

But these documents were presented to a tribunal created for the sole purpose of investigating and deciding upon their validity; and of this, genuineness was the first and indispensable element. The question, therefore, presented to this court on the allegation of fraud, is precisely the question presented to the board and to the district and supreme courts, and of which the act gave to those tribunals exclusive cognizance; and the maintenance by this court of its jurisdiction in this case involves the assumption of jurisdiction to review and reverse the final decisions of the board, the district and the supreme courts, on the very issues presented for their determination.

Nor is this all. The jurisdiction of this court is not claimed to exist by reason of its relation to the district court as a superior tribunal, nor because the law has committed to it any authority to pass upon titles of this description.

Its inherent jurisdiction as a court of general equity powers is alone appealed to. But if it derives its jurisdiction from that source alone, no reason is perceived why the attorney-general might not, had he seen fit, have invoked the same jurisdiction in any state court to which similar powers have been confided. And the anomaly might thus have been presented of a state court determining the rights and duties of the United States under a treaty, and reviewing and reversing the decision of the supreme court of the United States on a subject-matter of exclusively national concernment, and of which the political department of the national government or the tribunals of its selection have exclusive cognizance.

The provision in the act of 1851, which declares the final decrees of the board and of the district and supreme courts to be conclusive as between the United States and the claimants, has already been cited.

It will not be disputed that, if the allegations in this bill are sufficient to show jurisdiction, every case heretofore decided under the provisions of the act may be re-opened for examination in this court on its merits, whenever the attorney-general or those to whom he may delegate his authority consider themselves justified in alleging that false and fabricated documentary evidence of title has knowingly been presented.

Before this can be allowed, we must first deprive the clause in the act, which declares that final decrees made under its provisions shall be conclusive, of all significance and effect.

It is urged, however, that all final judgments of courts of competent jurisdiction are conclusive, and that the conclusiveness attributed by the act to final decrees in this class of cases is no greater than that possessed by other final decrees. All may be impeached for fraud; for "fraud vitiates the most solemn judgments."

The general proposition may be conceded, but the question recurs: Is the fraud charged in this bill such as a court of general equity jurisdiction can take cognizance of under the circumstances of this case, and such as will destroy the conclusiveness of the final decree in the former proceedings?

The validity of an alleged Mexican or Spanish claim depends upon the genuineness of the title-papers, and upon their legal effect as translative of title.

The first is the more difficult, and frequently the only point in controversy.

To deny the conclusiveness of the decree on the question of genuineness is to deny it on the principle point submitted for adjudication.

If Mexico, solicitous to secure the rights of its citizens in the ceded territory, had demanded of the United States what means the latter would adopt for their maintenance and protection; and the United States had stipulated in the treaty that the means should be those provided in the act of 1851, and had further declared that the investigation should be conducted as between equal litigants before a court of justice, and that the result of the inquiry should be conclusive of the rights of both parties—would it be compatible with good faith for the United States to contend that under these stipulations there was tacitly reserved to itself a right, not conceded to its antagonist, to reopen and re-examine before a tribunal not mentioned in the treaty the identical questions which it had agreed should be finally determined in another mode; and that it could do this at any time, however remote from the date of the final determination, and no matter how ample had been its opportunities for investigation, on the plea

that the statute of limitations does not run against the government, and that no laches can be imputed to a sovereign?

Could it maintain the true construction of the treaty to be that the final decrees of its tribunals adjudging grants to be genuine should be conclusive, provided the grants were genuine, and that that question it could always re-open before the ordinary tribunals?

It is believed that no representative of the political department of this government would contend for such a construction of the treaty stipulation supposed; and a similar construction of identical provisions in an act of congress must be equally rejected by the court.

To accept it would be to make the title of the act, "An act to ascertain and settle private land claims in California," a misnomer, and the pledge that the result of the proceedings it directs shall be conclusive a delusion.

By the treaty with Spain of February 22, 1819 [8 Stat. 252], the United States exonerated Spain from all demands in the future on account of certain specified claims of its citizens, and agreed to make satisfaction of the same to an amount not exceeding four millions of dollars. To ascertain the amount and validity of these claims, it was stipulated that a commission, to consist of three commissioners, etc., should be appointed "to receive and examine and decide upon the amount and validity of all claims included with the description mentioned."

With respect to the decisions of these commissioners, the supreme court says:

"The object of the treaty was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of their authority, is conclusive and final If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot again be brought under review in any judicial tribunal. An amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty." Comegys v. Vasse, 1 Pet. [26 U. S.] 212.

If we substitute for the word "treaty" in this extract the words "act of 1851," the language will admit of almost literal application to the case at bar.

The claims to be presented to the commission under the treaty with Spain were claims to indemnity for injuries. The claims to be presented to the board under the act of 1851 were claims to lands. In the former case, the treaty itself provided for the constitution of the commission. In the latter, the treaty stipulated in general terms for the protection of the inhabitants of the ceded territory in their rights of property, and an act of congress confided the duty of ascertaining those rights to a commission established by its own authority, with appeals to the national courts. But these differences make no distinction in principle between the two cases.

The authority of the commission in the one case, and that of the board of commissioners and the courts in the other, are alike exclusive. And the awards of the one and the decrees of the other are alike conclusive of the rights of the parties. The assumption of a jurisdiction by a court of equity to re-examine final decrees made under the act of 1851 involves in principle the assumption of jurisdiction to re-examine all awards made by special commissions constituted under treaties with foreign nations.

Among the great number of claims to lands in the territories ceded to the United States by France and Spain, it is not to be supposed that many fraudulent titles may not have escaped the scrutiny of the tribunals appointed to determine their validity. It is a significant circumstance, that in no case, so far as the judicial history of the country informs us, has the United States, on discovering the fraud, attempted to cause the re-examination before the ordinary tribunals of a finally confirmed claim.

In the Case of Sampeyreac, 7 Pet. [32 U. S.] 222, which is the only reported case where a re-examination was made, it was done by virtue of a special act of congress, which authorized the proceeding, not before the ordinary tribunals, but by bill of review in the special tribunal upon which the original jurisdiction over the cause had been conferred. Whether or not by virtue of that jurisdiction it might have entertained a bill of review to set aside its own decree, the supreme court does not decide. An act of congress seems to have been deemed necessary to confer the authority. But it is nowhere intimated that any court of equity powers, but upon which no authority to pass upon the validity of claims of that description had been conferred, could have entertained such a bill, or in any other form have re-examined the questions finally decided by the special tribunal.

The case was one of admitted forgery. But it was nevertheless contended by counsel, that the decree of the court being conclusive between the parties, congress had no power to authorize the review, or to disturb vested rights. The supreme court, without passing upon the general proposition, overruled the objection, on the ground that Sampeyreac was admitted to be a fictitious person, and that, therefore, there had been no real parties before the court between whom the decrees could be conclusive.

The position taken by counsel in this case may, perhaps, be extreme and untenable. In deciding the case at bar, it is not necessary to assert that, where a fraudulent title has

been confirmed, the United States is entirely without remedy, nor that the political department of the government may not, if it sees fit, invest the courts with authority to re-examine the questions which, as the law now stands, remain finally decided in these cases. But, until congress has so expressed its will and conferred the requisite authority, it may confidently be affirmed that the ordinary tribunals are without jurisdiction.

The counsel for the United States has drawn a vivid picture of the avowed forger glorying in his crime, defying the justice he has duped, and demanding that the officers of the government shall, by issuing to him his patent, assist him in consummating his fraud.

In discussing a dry question of jurisdiction, such appeals are, perhaps, not quite appropriate. But, if the practical bearings of the questions to be decided are fit subjects for consideration, it may be observed that the question is not whether an admitted forger shall be allowed to enjoy the fruits of his crime (for the demurrer admits the truth of the allegations of the bill only hypothetically, and for the purposes of the argument), but whether every title in this state derived from the former governments shall be subjected to the ordeal of a new litigation whenever the attorney-general, or those who may obtain his ear by, it may be, false or interested representations, sees fit to allege in an unsworn bill that the documentary evidence on which the title rests is forged or antedated.

If, without the authority of congress, and on such representations, a cloud can be cast upon titles in this state, the effect would be little short of a public calamity. The repose of ancient possessions would be disturbed, and the security of titles, long since and after protracted litigation adjudged to be valid, would be menaced. A tremendous weapon of vexation, oppression, or extortion might be placed in the hands of unscrupulous persons, and the horde of professional witnesses which has so long infested the courts in this class of cases might resume their trade, and again find a market for their venal testimony.

Compared with evils such as these, the public benefits to be derived from the exposure of the few frauds which may have eluded the vigilance of the court or officers of the government would be insignificant.

It has not been thought necessary to enter into a detailed examination of the cases cited from the English and American reports which determine when and under what circumstances equity will relieve against a judgment obtained by fraud. The question before the court turns upon considerations so peculiar to itself that adjudged cases in England bear to it but a faint and remote analogy. None of them involve the question which is deemed the principal one in this case, and the correctness of the decisions in some may be open to doubt or discussion, "Nil agit exemplum litem quod lite resolvit." Perhaps the nearest analogy is that afforded in the case of a forged will decided to be genuine by a probate court. Even in such a case the supreme court, following the English authorities, has held that equity has no jurisdiction to avoid the will or set aside the probate. Case of Broderick's Will, 21 Wall. [88 U. S.] 503.

In the ordinary course of proceedings in probate courts, the will is often submitted by the executor in the absence of the parties interested to contest its validity, and the time allowed the latter to intervene is necessarily short. But in cases submitted to the board, in the compulsory litigation which the act of 1851 required, the opposing party is in court demanding the investigation of the genuineness of the claim, and consenting in advance to be bound by the decisions of tribunals of its own appointment.

To relieve against a fraud effected by the forgery of a will, as of any other instrument, falls within the ordinary scope of the powers of a court of equity. Its jurisdiction is ousted because the law has given to another tribunal exclusive jurisdiction over the subject. But in the cases at bar the jurisdiction fails, not merely because congress has confided to other tribunals exclusive jurisdiction over the subject, but also because this court would have no power, even if such exclusive jurisdiction had not been vested elsewhere, to decide what are the rights and duties of the United States under the treaty, and to what cases its stipulations apply.

The cases of Johnson v. Towsley, 13 Wall. [80 U. S.] 91, and Niles v. Anderson, 5 How. (Miss.) 366, are much relied on by the counsel for the United States. On examination, they will be found to have no application to the case at bar.

In Johnson v. Towsley, and the succeeding case of Samson v. Smiley [13 Wall. (80 U. S.) 91, note], it was merely held that when a party is deprived of his right of pre-emption, otherwise perfect, by a mistake of law or fact on the part of the land department, equity will relieve, and, if a patent has been issued, control it in the hands of the patentee for the benefit of the party rightfully entitled.

In the case of Niles v. Anderson, it was held that where a person had fraudulently obtained from certain United States officers certificates to an Indian deed, which were necessary to give it validity, equity would restrain him from prosecuting an ejectment suit founded on the deed against a party in possession holding under a prior equitable deed from the same Indian. It is obvious that these authorities throw no light upon the question of the conclusiveness of a final decree of confirmation under the act of 1851, or on that of the jurisdiction of this court, as a court of equity to set aside those decrees, or enjoin against their use. Where in the course of a proceeding before a court having jurisdiction of the subject-matter of the controversy, a judgment is set up as an estoppel, and conclusive of the rights of the parties, its effect may be avoided by proving that it was pro-

cured by fraud and collusion. Such was the celebrated Case of the Duchess of Kingston, in which it was decided that a judgement obtained by fraud would not stand in the way of prosecution for bigamy—that the suit in the ecclesiastical court was a contrivance merely—a link in the chain of fraud and in truth no judgment—according to the phrase used by Lord Loughborough: "Fabula non judicium hoc est. In scena non in foro res agitur.

But here the jurisdiction of the house of peers to try the defendant for the crime of which she was accused, was undoubted. The judgment of the ecclesiastical court was relied on as judicially establishing that the alleged first marriage had not been contracted. The judgment was disregarded because it had been collusively obtained in a sham suit.

But in suits at bar there is no subject-matter of which the court has jurisdiction, in the trial of which the validity of the decrees now assailed is questioned collaterally or incidentally. The very object and prayer of the bills is to obtain a decree declaring the original grants fraudulent and invalid, the lands covered by them to be public lands of the United States, and that the decree of confirmation be annulled and set aside. In the brief filed by the counsel for the United States, he has disclaimed all right to demand the greater part of the relief prayed for in the bills. But he insists upon the right to a decree enjoining those defendants from availing themselves of the decree of confirmation, and from suing out a patent. He admits that as to innocent parties who may have purchased since the final decrees of confirmations, the decrees will stand, and he suggests that they may even obtain patents for their lands, in their own names or in those of the guilty defendants.

But this change in the form of the relief demanded leaves the force of the objections to it unimpaired. Before the court can grant it it must first pass upon the genuineness and validity of the original grants—a subject over which, as has been shown, it has no jurisdiction. In truth, stripped of all disguises, these proceedings are in effect appeals to this court from the decisions of the special tribunals, or they are bills of review to set aside the decrees for newly discovered evidence, and the allegations of fraud, which are supposed to give jurisdiction to the court, only reveal more clearly the true nature of the suits.

It is believed that the foregoing conclusively shows that this court has no jurisdiction to inquire into the fraud principally relied on, because:—

1. The inquiry would involve a re-examination of the very question, exclusive jurisdiction to decide which, has been confided to other and special tribunals;

2. Because the decisions of those tribunals are declared by law to be conclusive of the rights of the parties;

3. Because even if no such jurisdiction had been confided to special tribunals, this court would be without authority under its general equity powers to determine what cases fall within the protecting clause of the treaty, or when and in what mode the political department of the government should fulfill its treaty stipulations.

But waiving for the moment all considerations arising out of the special circumstances of this case, let us briefly examine the more general positions assumed by the counsel of the United States. It is in effect contended that where a party has been forced to commence a suit to establish the genuineness of a document, and the suit is tried on that issue, his adversary may omit to bring forward proofs of its fraudulent character which are in his own possession, and which by reasonable diligence he might have produced; and afterwards, when judgment has gone against him, may ask a court of equity to set aside that judgment and retry the same issue, not on the ground of newly discovered evidence which could not by reasonable diligence have been procured, nor on the ground of fraud practiced in the course of the proceedings, but on the allegation that the document adjudged to be genuine was in fact fraudulent, and that he believed in and was misled by the assertion of its genuineness made by his antagonist. And further, that this belief in the assertions of his adversary should excuse him for his laches in not producing proofs of the fraud in his own possession on the trial of the suit which he has himself compelled his adversary to bring to determine that very issue.

A statement of this position is its own refutation. It is believed that a bill to set aside a final judgment, and to obtain a new trial on such grounds and with such an excuse for laches, would be dismissed by a court of equity without hesitation. On the point whether laches with which a private party would clearly be chargeable, can in this case be imputed to the United States, some suggestions will hereafter be offered.

Again: the allegation in the bill chiefly relied on is, that certain title-papers were forged. But the same bill avers that they have been adjudged to be genuine by a court of competent jurisdiction in a proceeding instituted to try that very question. While that judgment stands, they are in legal contemplation genuine. The proceeding on which they were so adjudged was in the nature of a proceeding in rem to determine the status of the property as public or private land; and the decree, until set aside, "renders the fact what the court adjudicates it to be." 2 Smith, Lead. Cas. 498. It is true that a decree may be avoided by showing that it was obtained by fraud. But there must be fraud in its concoction, such as collusion between the parties, or other circumstances which would establish that what seemed a decree was, in fact, no decree—that it was fabula non judicium. It cannot be shown by re-examining on its merits the very question decided by the decree.

To meet this exigency, the draughtsman of the bill has introduced some allegations, apparently intended to make out a case of fraud used in obtaining the decree, or in its concoction, that is, of collateral fraudulent acts extrinsic to the merits of the cause.

It is alleged that the defendants fraudulently suppressed and concealed from the board the grants for the ranchos of San Antonio, Pinole, San Pablo, Moraga, and Valencia, with intent to conceal from the board and the law agent of the United States the fact, which their production would have disclosed, that two of them were not granted until subsequently to the pretended sobrante grant. On this allegation it is to be observed:

1. That the fact alleged to have been concealed would have been wholly inconclusive if not immaterial. It is well known that in many cases ranchos were established and occupied under permissions to occupy or other provisional titles, and the rights of their owners recognized by the government in subsequent grants of adjoining lands, long in advance of the issuance of the final title. In some cases, the final title was never asked for nor obtained. A notable instance of this is found in the case of Alviso, whose claim was confirmed by the supreme court, on the strength of a permission to occupy, and a very ancient possession. [U. S. v. Alviso] 23 How. [64 U. S.] 318.

2. The documents alleged to have been suppressed were then and have ever since remained in the archives. They were, therefore, in the exclusive possession of the United States.

The allegation is thus, in effect, that the defendants concealed documents among the public records of the country, and suppressed them while in the exclusive possession of their adversary.

3. The very nature of the defendants' claim being for a sobrante resulting from the grants of certain specified ranchos, by inevitable reference directed the attention of the board and of the law agent to those grants, and rendered necessary an inquiry into the fact of their existence and their extent before the merits of their own claim could be determined.

4. The records of the board and of the district court show that in fact every one of these grants had been presented to the board for confirmation more than two years before the date of the decree in this case, and that all had been confirmed some months previously to that date, except one, which was subsequently confirmed on appeal by the supreme court.

But, even if the alleged fraud were undeniably such as would ordinarily vitiate a judgment for fraud in obtaining it, as in cases where the judge is interested or there has been collusion between the parties in a pretended, and not a real suit, fraudulent suggestions that the parties to the suit were before the court contrary to the fact, and the like, the complainant could not in this proceeding obtain the relief prayed for.

It is not enough that fraud in obtaining the decree be proved. The propriety of the decree must still be investigated (Story, Eq. Pl. § 426); in other words, the validity of the claim. The fact that a fraud in procuring the decree has been committed does not convert the land into public land of the United States, nor does the law punish such practices on the part of the claimant by a forfeiture of his estate. If the land was in fact private land at the acquisition of the country, the United States has not been injured by the fraud, however gross. Before, therefore, the court can declare the land to be public land, the validity of the claim must be investigated. And that question congress has conferred upon this court no power to determine.

If it be said that this court may set aside the decree, and restore the parties to their former situation, as is the practice of courts of equity (Story, Eq. Pl. ubi sup.), the answer is that that is impossible. For the board which made the decree has ceased to exist, and the act of congress confers no power on the district or supreme court to entertain bills of review to set aside their decrees in this class of cases; and, even if this fact were otherwise, it would be conclusive to show that the relief now prayed for must be sought in those courts, and not in this.

It is contended on behalf of the United States that the statute of limitations does not run against the government, and that laches cannot be imputed to it. The bill, however, alleges various facts in apparent excuse or explanation of any laches of which the government may have been guilty.

Whether these matters, if true, would constitute a valid excuse, and whether their truth is consistent with notorious facts disclosed by the records of the board, and of the district and supreme courts, and by the judicial history of the country, it is not necessary to inquire.

Nor is it necessary to determine whether the general principle that laches cannot be imputed to the government applies to cases of this nature. It may, however, be suggested as worthy of consideration, whether, if the act of 1851 be construed as tacitly reserving to the United States the right to reexamine and reverse in other tribunals the decrees which that act declared should be conclusive, the second proceeding should not be regarded as a part of, or a sequel to, the first, and that in it, as in the first, the United States has consented to be bound by all the rules which control the rights of equal litigants before a court of justice. It may also be suggested whether it is not a fundamental and inherent principle of the court of equity, at whose hands relief is

now sought, to refuse to interpose in behalf of stale demands, not because they are barred by the statute of limitations, nor because laches can be imputed to the complainant, but because from the lapse of time and the nature of the case it is probable that justice cannot be done. If this be the true ground of the refusal of equity to interfere in such cases, no distinction can be drawn, between suits by the government and those brought by private persons. The ascertainment of the truth may be as impracticable in the one case as in the other. If this principle be applicable to any case where the government is a party, it would seem to be so to the case at bar—so far at least as the allegations of the bill are to be proved by oral testimony.

The grant, if genuine, was made in 1841, more than thirty-five years ago, when the country was sparsely inhabited, and knowledge of the transactions was necessarily confined to a small number of persons. To establish the genuineness of the grants, the claimants would have to depend upon the survival of these witnesses after so long a period, the accuracy of their memories, and their willingness under great temptation to speak the truth. They would labor under disadvantages nearly as great when called on to meet testimony in support of the allegation that the grant was fabricated in 1851.

But it is unnecessary further to consider this point, for I am of opinion that the objections to the jurisdiction would be insuperable, even if these bills had been filed on the very day on which the decrees of confirmation became final.

It is objected that the attorney-general has no authority, by virtue of his office, to commence this suit in the name of the United States. The court is not unmindful that the decision of the question whether the highest law officer of the government has exceeded the limits of his official authority involves grave and delicate considerations. In the view taken of the other questions discussed in this opinion, it is unnecessary to decide it.

But it may be remarked that the institution of these suits seems to commit the United States to a course of proceeding, and to the assertion of supposed rights in a case where it must be admitted that the political power has the exclusive right to determine what shall be the attitude of the government with regard to the claims, and whether this is an appropriate and expedient mode of asserting its rights and performing its obligations under the treaty. If all the titles of this state derived from the former governments were subjected to an indiscriminate attack, like that in the case at bar, diplomatic remonstrance or political complications might result, and the government might be compelled reluctantly to adopt or formally to disavow proceedings, on the propriety of taking which the political branch of it had never been consulted.

The relation of the attorney-general to the United States is not wholly dissimilar to the ordinary relation of attorney to client. That client is in these cases the legislative branch of the government, whose exclusive province it is to determine when and how the political obligations assumed by the nation shall be fulfilled. Until authority is given by that branch of the government, it may be doubted whether the general authority of the attorney-general to represent the United States in ordinary litigations is sufficient to enable him to institute suits like those at bar.

It will not be disputed that congress had the exclusive right to adopt any means it thought fit to ascertain and discharge its treaty obligations, whether by committees of congress, special commissions, or by invoking the aid of the regular national tribunals. If, before congress had taken any action on the subject, the attorney-general being of opinion that certain alleged titles were fraudulent, or so inchoate and incomplete that the claimants had no right of property which the treaty protected, had instituted ejectment suits in the name of the United States against the parties in possession, might it not be urged that he had no more authority to commence the suits than the court would have jurisdiction to try them? And may not the same objection be urged when, after exhausting the ample powers with which he is invested by the act of 1851, he commences, without the direction of congress, an analogous proceeding to attain the same object?

The force of these objections is not diminished by the consideration that, from the necessities of his position, the attorney-general is unable personally to examine into the merits of every suit that may be brought, and that he is forced to delegate the authority to use the name of the United States, in form, to the district attorney, but in fact to special counsel, who, in the cases at bar, has given bonds to pay the expenses of the litigation, and who may smite or spare or threaten any title in this state, at his discretion; or, assuming him to be actuated by the highest motives, according to the conclusion he may on investigation reach, as to the propriety of the final decree of the board, the district or the supreme courts, adjudging the title to be genuine. If this power should by chance fall into unworthy hands, it might afford the opportunity for enormous abuses.

It is objected that the bill is unsworn. If, however, the suit is properly brought in the name and by the authority of the United States, verification of the bill is unnecessary. But it may be observed that if the attorney-general has thought it his duty to authorize these proceedings, it would have been far more satisfactory to the court if the allegations of these unsworn bills had been au-

thenticated by his own signature, affixed to them under the sanction of his personal and official character, and not merely by those of the district attorney, whom he has ordered to bring the suit, and of the special counsel, to whom he has delegated his authority. An assurance would thus have been afforded of the attorney-general's belief in the allegations in the bills, and in the existence of rights on the part of the United States which the bills seek to enforce; that the suits are really, and not merely nominally, brought by the United States to protect its rights, and not merely to promote the interests of private individuals or corporations; an assurance somewhat weakened by the circumstance that the attorney-general seems to have considered the rights of the United States so doubtful, or its interest so unimportant, that he has directed the district attorney to commence these suits "on the giving, by the said John B. Howard, security for, or depositing a sufficient sum to defray, all expenses which may be incurred in said legal proceedings." Bonds have accordingly been given by John B. Howard, special counsel for the United States, which contain the recital just quoted.

The lands covered by the grants in these cases are many thousand acres in extent. The bills pray that they may be adjudged to be public lands of the United States. It is not to be supposed that, if the attorney-general were persuaded that so large and valuable a property belonged to the United States, he would have made the assertion of its rights to depend upon the willingness or ability of private individuals to defray the expense of the litigation. The bill filed in the case of U. S. v. Throckmorton contains the following extraordinary "notice":

"And the said district attorney, in behalf of the United States, hereby gives notice that, in the event of a decree of this court that the said grant was false and invalid, and that the said confirmation thereof was obtained by fraud, and that the said grant and confirmation be annulled and set aside, * * * and the said lands are public lands of the United States, that the 'United States will in such case waive all her right and claim to that portion of said lands on which the town of New Saucelito is located, and also that portion of said lands on which the town of Old Saucelito is represented, as represented on said Exhibit A.'"

"The area and quantity" of these lands is stated not to exceed six hundred and forty acres. To whom this relinquishment of the title of the United States to a large and valuable tract of land is to be made, on what grounds, and by what authority, the bill does not state. It will surely not be claimed that the attorney-general, or his representative, has not only the right, by instituting these proceedings, to cloud every title in this state with the menace of a litigation, but also that he can waive, at his discretion, the rights of the United States to lands adjudged to be public lands. The power to donate the property of the nation is elsewhere vested.

The conclusions embodied in the foregoing may be summarized as follows:

The demurrer must be sustained because:

1. This court has no jurisdiction to determine the genuineness and validity of a Mexican land claim, that jurisdiction having been exclusively vested in other and special tribunals.

2. The final decrees of those tribunals are declared by law to be conclusive, not merely as concluding the litigation, but conclusive of the rights of the parties.

3. Even if no such exclusive authority had been conferred on the special tribunals, this court would have no jurisdiction to determine how the political department of the government shall fulfill its treaty stipulations, or to what cases those stipulations apply; and especially in cases where the grants are inchoate.

4. A court of equity cannot interfere to set aside a judgment for fraud in procuring it, when the fraud alleged is the presentation to the court in which judgment was obtained of false documents, and the sole or principal issue tried by that court was upon the genuineness of the documents so presented.

5. The allegations of fraudulent concealment and suppression, which might, if the allegations were true, be deemed to constitute "fraud in procuring the decree," are shown by the bill itself, and the nature of the documents alleged to have been concealed, to be destitute of foundation in fact.

6. That even if the bill showed that the decree had been procured by fraud of the grossest character, this court would still be without jurisdiction; for it has no authority to pass upon the propriety of the decree, i. e., to decide upon the validity of the claim, nor to remand the parties to any other forum where that question may be determined.

SAWYER, Circuit Judge, concurring. While the courts of California, state and national, are not unaccustomed to deal with cases of great magnitude, I deem it not too much to say, that no question has ever been presented in this state, so far-reaching in its consequences, as that involved in these cases, if the bills filed can be maintained. It is a startling proposition to those who hold patents to lands issued upon confirmed Spanish or Mexican grants, that after twenty-five years of compulsory litigation, intended, in the language of the various acts of congress, to "settle titles to land in the state of California," the holders of all such patents are liable to be called upon to relitigate their claims with the government in the ordinary courts of justice; and that the patent, instead of being conclusive evidence of a "settlement" of the title—the end of litigation—is but the foundation for the beginning of a new contest to unsettle it, in the tribunals of the country, which before

had no jurisdiction whatever over the subject-matter. The very institution of these suits, in the name and by the authority of the government, was well calculated to produce, and, undoubtedly, did produce, a general distrust of such titles, and a widespread, if not a well-founded, alarm. If this court has jurisdiction of the subject-matter as now presented, and the bills filed present proper cases for its exercise, we are undoubtedly bound to entertain them, and adjudicate the matters at issue according to their real merits, as they may finally be made to appear. But I am fully persuaded that these cases are not of a kind to justify the assumption of a doubtful power, or the sustaining of bills which present but doubtful, as well as stale, equities.

Profoundly appreciating the importance of the principles involved in this discussion, and the grave responsibility resting upon the court in their adjudication, I have carefully considered the elaborate arguments of counsel, both oral and printed, and examined the numerous authorities cited, not merely with an earnest hope of reaching a correct solution of the questions presented, but with a desire, and a purpose, to present my own views in a separate opinion. I regret to say, however, that, since the argument, I have been constantly pressed by other official duties, which, together with the time necessarily consumed in a thorough examination of the questions argued, have thus far prevented the accomplishment of that purpose. But upon a full consideration of the opinions of the presiding justice and the district judge, I find that they have so thoroughly, and so satisfactorily, discussed the questions submitted, that I cannot hope to add anything to the force of their reasoning. I, therefore, with less regret, without further delaying the decision, content myself with expressing my entire concurrence in the conclusions reached, in the grounds upon which the decision is rested, and in the line of argument by which they are so conclusively maintained.

It is apparent to my mind, that it is impossible to maintain these bills without going behind the patents and decrees of confirmation, and re-examining the question as to the genuineness of the grants—the very question, the determination of which was exclusively committed to another tribunal; and which that tribunal, in a proceeding wherein the genuineness of the grants was the controlling question directly in issue, examined and adjudicated. To maintain that this court can re-examine that precise question, is to maintain the proposition, that a court may have exclusive jurisdiction of a matter over which another tribunal has concurrent jurisdiction—a proposition as impossible in law, as that in physics two bodies can occupy the same space at the same time.

But, conceding the jurisdiction, the matter is res adjudicata under the ordinary rules of law. The difficulty cannot be avoided by saying that the subject-matter now involved is fraud, and fraud vitiates all proceedings; for the fraud relied on, when we come to the substance of the cases presented, consists in presenting and maintaining fraudulent grants, without disclosing the falsity of the claim to the adverse party; but that is the very fact before in issue, litigated and determined, and not a fraud practiced upon the court in the course of the litigation, by which a real litigation was prevented, as distinguished from the fraud which was itself the subject matter of the litigation. If these bills can be maintained, it would be impossible to present a case wherein a question of fraud constitutes the real question in issue litigated between real parties before the court, and determined, to which the wholesome doctrine of res adjudicata would apply. Under such a rule, every case in which a false claim has been presented, and the question of genuineness litigated and adjudged, would be open to re-examination on the pretense of fraud, and there would be no end to litigation. If the principle maintained by the claimants can be extended to these cases, the doctrine of res adjudicata might as well be abolished.

[NOTE. Subsequently the case of United States v. Throckmorton and others was taken, on an appeal, to the supreme court, where the decree of this court sustaining a demurrer to the bill and dismissing it on the merits was affirmed. 98 U. S. 61.]

Case No. 15,122.

UNITED STATES v. FLOWERY.

[1 Spr. 109; [1] 8 Law Rep. 258.]

District Court, D. Massachusetts. Aug., 1845.

EVIDENCE—CHAIN OF EVIDENCE—CONVERSATIONS—SLAVE TRADE—NEW TRIAL—CIRCUIT COURTS.

1. Facts which, if standing alone, would be irrelevant, are admissible in evidence, upon the statement of counsel, that they constitute a part of a chain of evidence, which, as a whole, would be relevant.

2. The court may direct at what part of such proposed chain of evidence the counsel shall begin.

3. It is no ground for a new trial, that incompetent evidence was admitted without objection.

4. It seems, that where there is evidence tending to show that several persons are combined together in carrying on an unlawful enterprise, such as the slave trade, the conversations of some of them, in relation thereto, in the absence of others, may be given in evidence against such others.

5. Where a witness, in his direct examination, had testified that a certain person was reputed to be a man of large property, counsel were permitted, in cross-examination, to ask in what such property was reputed to consist.

6. A new trial will not be granted, merely because counsel have been indulged in too great latitude in arguing, as to the inferences to be drawn from the evidence.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

7. Whether circuit courts of the United States may be holden by the two judges in the same district, at the same time, in different rooms,—quære.

R. Rantoul, Jr., U. S. Dist. Atty.

J. P. Rogers and P. W. Chandler, for defendant.

SPRAGUE, District Judge. Peter Flowery was indicted under the statute of 1818 [3 Stat. 450], for causing a vessel, called the Spitfire, to sail from the port of New Orleans, with intent to employ her in the slave trade. The jury returned a verdict of guilty, and his counsel now move for a new trial, for several causes.

The most important, and that which has been pressed with the greatest earnestness, is, that evidence was admitted that the Spitfire, on a former voyage, carried a cargo of slaves from Rio Pongo to Cuba.

This was objected to, on the ground that Flowery had no connection therewith. The district attorney thereupon stated, that he should introduce evidence that Flowery had knowledge of such former voyage. It is now insisted that such evidence was not subsequently introduced, and that the testimony objected to should not have been admitted, upon the statement of the district attorney.

It is conceded to be the practice, in civil cases, to admit evidence under such circumstances; but it is urged that it ought to be otherwise in criminal cases. We know of no such distinction. The practice and the prinple, are the same in both. Where a chain of testimony is proposed, the links of which, unconnected, would be irrelevant, counsel must be allowed to begin somewhere, upon the expectation that the other links are to be afterwards supplied, and for this the court rely upon the statement of counsel, professional honor being a guaranty against abuse. But the order in which such evidence shall be introduced, is under the control of the court, who may direct the counsel to begin at any part of the proposed chain of evidence, as the purposes of justice may seem to require.

It is urged, that the court, after the evidence was closed, should have instructed the jury to lay this testimony out of the case.

In the first place, no such instruction was requested; and in the next, the evidence, subsequently introduced, justified the statement of the district attorney, upón which it was originally admitted, and rendered it proper to be submitted to the final consideration of the jury. The evidence tended to show, that the Spitfire was a schooner of about ninety-nine tons burden, built at Baltimore in the year 1841, and there registered in 1842, by the name of Caballera, as the property of one Gordon; that subsequently she was in the Rio Pongo, under his command, where a bill of sale of her was made to one Peter Faber, who had a slave factory on that river, from which, under the command of Gordon, she carried a cargo of slaves to Cuba, and there landed them, and immediately Gordon delivered up the schooner to some Spaniards.

This was supposed to be about the month of May, 1843. The name of Caballera was erased from her counter, when she took on board the slaves. The next that we hear of her, is in September of the same year, when she was at Havana, under the command of Flowery, by the name of the Spitfire, bound, as the shipping-articles state, on a voyage to Key West, New Orleans, and back to Havana. She proceeded on this voyage, with one John Scosure on board, as a passenger. On her arrival at New Orleans, she was stated, in the shipping list, to be for sale, but was carried to the opposite side of the river, where she lay for several weeks, undergoing extensive repairs; both masts were taken out, and new ones put in; she was coppered, painted, and some new sails and rigging furnished. Afterwards, a bill of sale was made, purporting to be from one Falker, of Key West, by one Anquera, as his attorney at New Orleans, to Peter Flowery, in consideration of $7,500; and a charter-party was made between Flowery and Scosure, for a voyage from New Orleans to Havana, and thence to the Rio Pongo, for which Scosure was to pay $5,000. The vessel could not be registered as American, because she had been owned by foreigners. The bill of sale and charter-party appear to have been executed at New Orleans, on the 20th and 25th days of November, 1844, and she sailed from New Orleans on the 26th, for Havana, with Scosure on board as a passenger, and thence proceeded to Faber's factory, on the Rio Pongo, where she was seized.

There was testimony that she was originally constructed with eight places for sweeps, quarter-houses, and a trunk on deck, extending partly over the main hold, and partly over the cabin, with holes in the sides, nine by twelve inches, for ventilation, and that in a former voyage there had been a bulkhead in the hold, to divide the male from the female slaves. There was also evidence, tending to show that the name, Caballera, had been painted in black letters on the taffrail, and that Flowery, while at New Orleans, caused them to be painted over, so as to conceal them.

The question is not, whether all this proves that Flowery knew of the former voyage, but whether there is anything to be submitted to a jury on that point; and in our opinion there is.

Flowery resides in New York, and formerly commanded a vessel running between that place and Havana. Not long after the termination of the first voyage, he is found in command of the Spitfire, at Havana. When, and under what circumstances, did he become connected with this vessel, owned by foreigners? Were there not indications of

the business in which she had been engaged; the marks of the bulk-head in the hold, quarter-houses, row-locks, and especially the trunk on deck, peculiarly adapted to the slave trade, and to no other? Again, upon her arrival at New Orleans, why were such extensive repairs made upon a vessel, then only between two and three years old? If the purpose was to change her appearance, so that she should not be recognized on her reappearance on the African coast, we see a sufficient reason for the new masts, new sails, and new paint The importance of disguising her will be better appreciated, when it is recollected that her seizure was owing to her being recognized by Turner, who, having been mate on her former voyage, discovered her identity, notwithstanding the change she had undergone. Again, Flowery says that he became the purchaser of this vessel, at New Orleans, and gave the extraordinary price of $7,500. Would he have done this, without any inquiry into her previous history? And especially, would he have taken a bill of sale, declaring that she could not have the privileges of an American vessel, because she had been owned by a foreigner, without investigation? And further still, there was evidence that he not only knew of her former name, Caballera, but had himself caused it to be painted over and concealed. Upon the last point, there was, indeed, rebutting evidence of great force; but of the effect of the whole, it was the province of the jury to judge.

It is further urged by the learned counsel, that if Flowery knew of the former voyage, it has no legitimate bearing upon the question whether this was a slave voyage or not, and is, therefore, irrelevant.

We are to bear in mind that there were two propositions to be maintained by the government, both of which were denied by the defendant; first, that this was a slave voyage, and, second, that he had knowledge of, and intended to employ the vessel in it, when he sailed from New Orleans. One question was, whether the sale to Flowery was real, or colorable. If Flowery knew that she had been engaged in the slave trade, and liable to forfeiture, would he, bona fide, have purchased her, and paid the exorbitant price of $7,500? The knowledge of the former voyage tended to show that this sale was fictitious, and in this, as well as in other respects, went to the question of scienter and intent.

The second ground upon which a new trial is asked, is the testimony of one Smith, as to a conversation at Faber's factory between Faber and a Spaniard and a Frenchman, who went from Havana in the Spitfire. To this it is sufficient to say, that the evidence was not objected to; and although we are of opinion that the testimony as to conversations between the Spaniard, Frenchman, and Flowery, on the outward passage, and the part acted by them would, under all the circumstances in evidence in the case, have been sufficient to have authorized its introduction, if it had been resisted, we do not think it necessary to dwell upon it.

The third ground is, that the district attorney was permitted to ask, in what the property of Scosure was reputed to consist.

The facts are as follows: One McLellan, a witness for the defendant, after testifying that he knew Scosure, and that he resided at Havana, was asked by the counsel for the defendant whether Scosure was a man of property? To which the witness answered that he was reputed to be a man of large property; that he was reputed to own property to the amount of three or four hundred thousand dollars. The defendant's counsel then asked him whether Scosure was reputed to own property in this country; to which the witness answered that he was, to the amount of a hundred thousand dollars.

The district attorney, in cross-examination, asked the witness in what the property of Scosure consisted; to which he replied, that he did not know. He then asked in what it was reputed to consist. This question was objected to. The court ruled that it might be put, in reference to the property of which the witness, in his direct examination, had testified that Scosure was reputed to be the owner. The district attorney then asked, whether Scosure was reputed to be the owner of cargoes of vessels. The witness inquired whether he was bound to answer. The defendant's counsel objected to the question, and it was not pressed.

The question put by the district attorney was proper, in order to test the correctness of the original statement made by the witness, and is clearly within the established principles and practice of cross-examination.

The two following grounds are, that the district attorney was permitted to argue to the jury that Scosure had been previously engaged in the slave trade, and that certain passports found on board the Spitfire, were obtained for the purpose of protecting her against seizure. The objection is merely that counsel was allowed too great latitude in arguing, as to the inferences to be drawn from the evidence. If this were so, we should not, for that reason alone, disturb a verdict, rendered upon ample testimony, and with which the judge who presided at the trial, is entirely satisfied.

The course of argument to be allowed, must rest in some degree, at least, upon the judicial discretion of the court. A line of argument, clearly unfounded or irrelevant, would not be permitted. But there are many cases, and especially those which are voluminous and complicated, in which it may well be presumed that counsel perceive bearings and applications of evidence, which are not at once apparent to the court; and when it is made a question whether the evidence tends to a certain conclusion, the views of counsel, in other words, his argument, must be heard, before the court can be called upon to decide. This will be in the presence of the jury, and

it will not generally be material, whether it be in form addressed to them, or to the court; but it will conduce to the convenience and despatch of business, that the argument should at once be addressed to the jury, and the court afterwards should give such instructions as they may deem proper.

But we think there was some evidence, slight perhaps, but still something before the jury, from which counsel might well be permitted to argue that Scosure had been engaged in the slave trade. But it has been urged that, if this fact were established, it would be immaterial and irrelevant. We do not think so. The defendant gave evidence that there was such a person as Scosure, possessing great wealth, in order to repel the suggestion that the charter-party was fictitious. Suppose they had been able to show that his business was a regular and legal course of trade between Havana and the Rio Pongo, would it not have been admissible, at least on the question of the scienter and intent of Flowery? And on the other hand, if the government could show that his business was the slave trade, between Havana and the Rio Pongo, it would be competent evidence to the same point.

As to the passports, it was contended, in behalf of the defendant, that they were perfectly innocent papers, intended merely for the personal protection of the individuals. On the other hand, it was insisted that the persons named in them, were not mere passengers, and that the passports were designed to conceal their true character, and prevent suspicions, if boarded by an American or English man of war, before reaching the Cape de Verde. That one of them was not a passenger, is certain; he was shipped as, and performed the duties of cabin-boy, throughout the voyage. The other two, a Spaniard and a Frenchman, performed most of the duties of mate, there being no person, in the shipping-articles, holding that station; they regularly stood watch, took observations, kept the run of the vessel, and marked her course, one on a French, and the other on a Spanish chart; and had books of navigation, in the French and Spanish languages, respectively. After arriving on the African coast, on seeing a British steamer, the Spaniard concealed certain papers and money, and the Frenchman, being in the boat, threw overboard a flag, appearing to be Spanish, declaring that, if the English found that, they would seize the vessel. On arriving in the Rio Pongo, both these persons went to Faber's slave factory, lived in his house, and were heard bargaining with him for a cargo of slaves. There was testimony that these two persons and Flowery, on the outward passage, had frequent conversations, in which they spoke of the voyage as a slave voyage; and of the amount they should make, if they succeeded in carrying a cargo of slaves to Cuba. All the passports were for persons going from Havana to the Cape de Verde, for which the Spitfire was cleared: yet she passed in sight of those islands, without touching.

We think this not only competent, but strong evidence, that the ostensible, was not the real purpose for which those passports were obtained; that the Spaniard and Frenchman, and the Spanish cabin boy, were represented as passengers, to prevent the suspicions that might arise, if they appeared to be a part of the crew of an American vessel; and that the district attorney had a right so to argue.

The last objection, rests on the supposition that there were two circuit courts, holden separately, by the two judges, at the same time. This is a mistake. Flowery was tried at the regular term holden by the district judge, by adjournment, in the usual manner, from day to day, in the court room. In the meantime the judge of the supreme court was, by agreement of parties, hearing a cause in another room. This was not intended to be a circuit court. No judgment or decree was passed. Had the result of the hearing called for any, it might have been, by consent of parties, afterwards entered in court. Upon this statement of the facts, the counsel, upon a suggestion from the bench, have forborne to press the objection; and we have no occasion to consider whether it be competent for the two judges to hold the circuit courts, in different rooms, at the same time, or not.

[The prisoner, after some remarks had been made by his counsel, was sentenced to five years' imprisonment in the common jail, and to pay a fine of $2,000.] [2]

Case No. 15,123.

UNITED STATES v. FLYNN.

[15 Blatchf. 302.] [1]

Circuit Court, S. D. New York. Oct. 14, 1878.

INTERNAL REVENUE—DISTILLERY—SIGN.

Section 3279 of the Revised Statutes of the United States makes it an offence to work in a distillery on which no sign is placed and kept, as provided in that section, and provides a punishment for such an act.

This was in indictment under section 3279 of the Revised Statutes, charging the defendant [John Flynn] with working in a distillery on which no sign was placed and kept, as provided by that section. A motion was made by the defendant to quash the indictment, upon the ground that no punishment was provided for the act charged. The contention was, that the construction and punctuation of section 3279, and the provision therein for the forfeiture of all horses, &c., used in carrying such property aforesaid, compel the conclusion that there is an omission to provide any punishment for the act of working in a distillery on which no sign is placed and kept.

[2] [From 8 Law Rep. 258.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

Courtland P. L. Butler, Asst. U. S. Dist. Atty.

Louis F. Post, for defendant.

Before BENEDICT, District Judge.

THE COURT held that section 3279 makes it an offence to work in a distillery on which no sign is placed and kept, as provided in that section, and provides for such an act the punishment of a fine of not less than $100 nor more than $1,000, or imprisonment not less than one month nor more than six months.

Case No. 15,124.

UNITED STATES v. FLYNN.

[1 Dill. 451.] [1]

Circuit Court, D. Minnesota. 1870.

CRIMINAL LAW—SALE OF LIQUOR TO INDIANS.

Under the act of congress of March 15, 1864 (13 Stat. 29), prohibiting the sale of liquor to any Indian under charge of an Indian agent, actual control, or immediate personal superintendence by such agent over the individual Indian to whom the liquor is sold, is not essential, if the tribe to which the Indian belongs is under the charge of such agent, and the Indian himself still maintains his tribal relations.

It is provided by the act of congress of the 15th day of March, 1864 (13 Stat. 29), that "if any person shall sell * * * or dispose of any spirituous liquors to any Indian, under the charge of any Indian superintendent, or Indian agent appointed by the United States," he shall be punished, etc., as provided by the act. Legislation of this character has been held by the supreme court of the United States, to be constitutional, and authorized by the power of congress to regulate commerce with the Indian tribes. U. S. v. Holliday, 3 Wall. [70 U. S.] 407; U. S. v. Haas, Id. The evidence shows that the Indian named in the indictment belongs to one of the bands of the Chippewa tribe of Indians, residing in the state of Minnesota; that the Indian to whom the liquor was sold still maintains his tribal relations, and receives his annuities from the United States; that the tribe to which the Indian belongs is regularly under the charge of an agent appointed by the United States. But the evidence also shows that the Indian named in the indictment has not for two years, or thereabouts, resided on the reservation occupied by the tribe, but has been for that period living away from the tribe, and off the reservation. Under these facts, the question arises whether the Indian named was, within the meaning of the act of congress "under the charge of an Indian agent" at the time when the liquor is alleged to have been sold to him.

C. K. Davis, U. S. Dist. Atty.

Mr. Heard, contra.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Before DILLON, Circuit Judge, and NELSON, District Judge.

PER CURIAM. It was held upon these facts, that the Indian to whom the liquor was sold was under charge of an Indian agent within the meaning of the act of congress, and that actual charge and immediate personal superintendence over the individual Indian by the agent, at the time, was not essential to maintain the indictment. This conclusion was considered to be supported by the nature of the previous legislation on the same subject; by the policy of such legislation as declared in the cases above referred to ([U. S. v. Holliday and U. S. v. Haas] 3 Wall. [70 U. S.] 407), and by the principles settled by the decisions in those cases.

Case No. 15,125.

UNITED STATES v. FOLSOM.

[Hoff. Dec. 42.]

District Court, N. D. California. 1859.

MEXICAN LAND GRANT—CONFIRMATION BY BOARD OF COMMISSIONERS—CONCLUSIVENESS.

[If the board of commissioners, in confirming a claim, were misled by the compass marks, or by any other accurate representation on the diseño so that they described boundaries which, when run upon the ground, are found to include a different tract from that described in the grant and delineated on the diseño, the error should be rectified by the court when the survey is submitted for approval.]

[This was a claim by the executors of J. L. Folsom to the Rancho Rio De Los Americanos. The grant was confirmed by the board. Appeal taken by the government, but not prosecuted. Subsequently a motion was made that the survey made in conformity with the decision of the board be brought into court and confirmed. Case No. 15,127.]

HOFFMAN, District Judge. The grant in this case was for eight square leagues of land on the banks of the American river, bounded by the land granted to the colony of Señor Sutter, and by the ranges of hills to the east. In the petition the tract is described as bounded by the lands of Señor Sutter, as shown by the map thereto annexed: "Said place is on the bank of the American river, and consists of four leagues in length towards the east, and two in breadth towards the south." The decree of the board describes the land confirmed to the claimants as follows: "Beginning at an oak tree on the bank of the American river, marked as a boundary to the lands granted to John A. Sutter, and running thence south to the line of said Sutter, two leagues; thence easterly, by lines parallel to the general direction of the American river, and at the distance, as near as may be, of two leagues therefrom, four leagues, or so far as may be necessary to inclose in the tract eight square leagues; thence northerly, by a line parallel to the

one above described, to the American river; thence, along the southern bank of said American river, and bounding thereon, to the point of beginning." The appeal from this decree having been dismissed by consent of the attorney general, a survey of the tract confirmed was made in May, 1857. This survey appears to have been acquiesced in by the United States until September, 1858, when instructions for a new survey were issued by the executive department, in accordance with the opinion of the secretary of the interior. A second survey has accordingly been made, and it is now before the court on exceptions.

The claimants contend that the first survey is substantially correct, and should be adopted by the court. If the petition, the grant, and the diseño be alone consulted, the intention of the governor and the true location of the tract would seem obvious and unmistakable. There can be no doubt that the land was to be a tract four leagues in length, by two in breadth, lying on the southern bank of the American river, and commencing at the eastern boundary of Sutter's land. The position of this boundary line is not disputed. The location of the tract would, therefore, seem certain and easy. But the terms of the decree of the board have given rise to a difficulty which, had the topography of the country been accurately ascertained, would not have occurred. On the diseño the American river is represented as running in direction nearly east and west, until at Alder creek, where it turns abruptly to the north. By the scale of the diseño, the four leagues which were to be the longitudinal extension of the grant terminate at or near Alder creek. It was therefore supposed that the two side lines would run in a north and south direction, perpendicular to the supposed course of the river, while the back line was to be run parallel to it, and in such a way as to include, when the meanderings of the river were computed, the required quantity of eight leagues. The course of the boundary line of Sutter, which was the western boundary of the tract, was admitted to be north and south. The decree, therefore, directed the opposite side line, or eastern boundary, to be also run due north and south, and parallel with the western boundary. On making the survey it was found that the general course of the river was not east and west, but southwest and northeast. The side lines, therefore, if run in a north and south direction, cannot be perpendicular, as supposed, to the general course of the stream. It has also been found that, if a line be measured from the western boundary, in a direction parallel to the general course of the river, to a point four leagues distant from the western boundary, and through the points of termination of this line a due north and south line be drawn for the eastern boundary, the latter will strike the river, not only far above Alder creek, but far above any portion of the stream represented on the diseño. For, the course of the river bending abruptly to the north a short distance above Alder creek, a due north and south line, drawn as described, will run, for a considerable distance, not far from parallel with the river, and the northeastern portion of the track will take the form of a long and narrow tongue of land, running for more than two leagues along the river and due east from it, instead of south of it, as contemplated in the grant, and of an average breadth of considerably less than a league. That the survey must assume substantially this form if the eastern line be run due north and south, in literal compliance with the decree, must, I think, be admitted. But, on the other hand, it is plain that the tract so surveyed will, neither in its shape nor location, resemble that delineated on the diseño, and evidently intended to be granted by the governor. On the diseño Alder creek is represented as lying on the extreme eastern edge of the shaded portion of the map, which indicates the tract solicited. Beyond this creek the river is represented as extending in a nearly northerly direction, but the portion of the stream so represented is in length only about one-fifth of the whole of its course from the western boundary to the eastern edge of the map. But the portion of the river above Alder creek, included in the survey, is in length about six and a half sixteenths, or more than one-third of the whole. Again, the diseño represents Buffalo creek, and a very distinctly marked bend of the stream, as situated about the middle of the tract; whereas, on the survey, it is at the distance of a mile, less than one-third of the whole distance along the river from the western to the eastern boundary.

It has already been remarked that the intention of the governor to grant a tract four leagues in length along the river is too clear to be mistaken. Taking the most liberal view for the claimants, we may construe the grant to mean that a tract of that length shall be measured along the river in its general course, without computing the bends or abrupt elbows. Adopting, then, this mode of measurement, it is found that, from the western point of commencement to the eastern termination of the survey, the distance along the river is sixteen miles, or about six leagues, while, if the whole river front be measured, and the lands meandered, the distance is very considerably increased. It is therefore apparent that the survey under consideration not only extends the grant along the river to a distance much beyond what was contemplated in the grant, but that the eastern line strikes the river at a point very considerably above and to the northeast of any portion of the stream delineated on the map. The tract, also, as surveyed, is in shape wholly dissimilar to the rectangular piece of land, four leagues

long by two wide, lying on the south of the American river, represented on the diseño. For a distance of about two leagues it is located to the east of that river, and the width of this part of the survey is at no point greater than a league, and for a considerable distance less than half a league.

But it is contended that the decree under which the survey was made fixes the eastern boundary at a due north and south line drawn parallel to the western line; that the location of that line is, therefore, res judicata, and cannot now be disturbed. The decree of the board was drawn in advance of any survey, and without accurate knowledge of the course of the river or the topography of the country. The diseño was probably accepted as indicating, with tolerable exactness, the tract solicited; and as a north and south line would, according to the compass marks on the diseño, strike the river at about a right angle to its general course, such a line, drawn at the distance of about four leagues from the western boundary, was naturally fixed upon as the eastern boundary of the tract. But it having been found that the general course of the river is from northeast to southwest, and not from east to west, as indicated on the diseño, a north and south line fails, as we have seen, to strike the river at right angles to its general course, but will, if protracted until it reaches the river, run for a considerable distance nearly parallel to it, and will strike it far beyond the most easterly limits of the diseño. It appears to me, therefore, that the call in the decree for a north and south line as the eastern boundary should be construed to mean the north and south of the diseño; that is, perpendicular to the course of the river represented thereon as running from east to west. The decree itself refers to the grant and diseño for a more particular description of the tract. If, then, the diseño indicates a tract different in form and location from that surveyed, according to the description in the decree, there is an evident repugnance in the latter which is to be explained and reconciled by the court; that neither in this case nor in any other did the board mean to confirm the claim for any other tract than that described in the grant and delineated on the diseño, is clear, and if, misled by the compass marks, or by any other inaccurate representation on the diseño, they have described boundaries which, when run upon the ground, are found to include a different tract from that described in the grant and delineated on the diseño, the error should be rectified by this court when the survey is submitted for approval.

It was also contended by the United States that the Someiras, mentioned in the grant as the eastern boundary, are situated within and to the westward of the eastern line as surveyed. It is, however, clearly shown by the testimony of Goddard, and the accurate profile of the country exhibited by him, that a tract four leagues long and two wide may be laid off along the southern bank of the river, without passing beyond the range of foothills mentioned in the grant as the eastern boundary. It is also contended that the grant was, in fact, for six, and not for eight, leagues. Whatever force there may be in this suggestion, it is now too late to urge it. The quantity of eight leagues has been confirmed to the claimant, and the United States have recognized the correctness of the decree by dismissing the appeal from it, and consenting that the claimant proceed under it as under a final decree.

It is strenuously urged by the counsel for the claimants, and purchasers under them, that the original survey was long acquiesced in by the government; that sales have been effected and rights acquired on the faith of the admission of its correctness by the government; and that sales of public lands have even been made under the authority of the government or its agents, the purchasers under which would be injured if the survey is disturbed. But these considerations, though proper to be urged to the secretary of the interior, when solicited to approve the survey, cannot be regarded by the court when called upon under the act of 1860, to pass upon the correctness of a survey of a confirmed land claim. It is certainly to be regretted innocent parties have been injured by an incautious reliance on the correctness of a survey which, when their rights were acquired, had not received the final approbation either of the higher executive authority, or of the courts having jurisdiction on the subject. But the duty of the court, when the case is submitted, is clear, viz. to direct the survey to be made as in its judgment it ought to be done. It is proper to observe that the survey referred to in the foregoing opinion is the first official survey made in 1857, and approved by John C. Hays, surveyor general. The recent survey, made since the opinion of the secretary of the interior adverse to the Hays survey was delivered, is admitted by all parties to be erroneous.

My opinion is that the eight leagues confirmed to the claimant should be surveyed and located as follows: By drawing a line parallel to the general course of the American river through the center or main body of the tract, commencing at a point on the western boundary as established in both the surveys, and extending four leagues in length. Through the eastern termination of this line a line is to be drawn, at right angles to it, such line to be protracted until it reaches the river, and to extend in the opposite direction until it reaches a point two leagues distant along said line from the river. From this last-mentioned point a line is to be drawn to the termination of the western boundary, as laid down on the Hays survey, in such a way as to make the area

of the entire tract included within the boundaries, eight square leagues and no more. There will thus be measured off to the claimants a tract four leagues long, by two wide, along the southern bank of the American, in a form not far from rectangular, and as near as may be such as the grant and diseño clearly show was intended to be given him.

[Subsequently the survey of 1857 was finally approved. Case No. 15,126.]

Case No. 15,126.

UNITED STATES v. FOLSOM.

[Hoff. Dec. 44.]

District Court, N. D. California. June 25, 1862.

MEXICAN LAND GRANT—CONCLUSIVENESS OF LOCATION.

[Where the decree of the board of commissioners, of the district court, or of the supreme court, locating a grant, is specific and plain, and it has long been accepted as finally and definitely locating the land, and large interests have been acquired on the faith of this finality, the location ought not to be disturbed, except in the case of manifest error, and on clear proof of the incorrectness of the location, and not on the mere ground that, if the question were new, the court might have located the land differently.]

HOFFMAN, District Judge. The official survey in this case having been brought into court under the provisions of the act of 1860, the cause was argued, and a decision rendered setting aside the survey, and ordering a new one to be made, as directed in the opinion. An application for a rehearing was thereupon made in behalf of the claimants and interveners, and the cause has been reargued and submitted. The survey for which the claimants contend is that made by John C. Hays, former surveyor general, in 1857. There can be no doubt that, if this survey be disturbed, the case would be one of singular hardship. It appears that, when the cause was pending before this court on appeal from the board of land commissioners, it was strenuously objected, on the part of the United States and of some other parties who have since intervened in this proceeding, that the decree of the board was erroneous, inasmuch as it required the survey to be made substantially as in the Hays survey, and so as to include Negro Bar and the town of Folsom. On this and other questions elaborate arguments were heard, and on the 23d of February, 1857, an opinion was delivered in this court [Case No. 15,127] declaring the claim to be valid, and directing a decree of confirmation to be entered for the land as described in the grant and delineated on the diseño. Whether the particular description of the land contained in the decree of the board was or was not in conformity with the calls of the grant and diseño, does not appear to have been discussed, or intended to be decided in the opinion referred to. No decree was entered pursuant to this opinion, but, on the 29th of April, 1857, a stipulation was made by the district attorney, pursuant to the instructions of the attorney general, by which it was agreed that the appeal should be dismissed, and that the claimants should have leave to proceed "under the decree of the board of land commissioners as under final decree." A consent order to this effect was accordingly entered, and a survey pursuant to that decree was made by John C. Hays, the then surveyor general. The correctness of this survey appears to have been acquiesced in by the United States from May, 1857, until September, 1858, when an opinion adverse to it was delivered by the secretary of the interior, in whom the right of final decision in such matters was then supposed to reside. In the meantime, lands outside of the survey, and which it is now sought to include within the grant, had been advertised and sold as public lands. The interveners, also, who had resisted the affirmance of the decree of the board, acquiesced in its finality, and large purchases were made, at a very heavy outlay, of portions of the tract included within the Hays survey, but which, up to the time of the final confirmation of the decree of the board, it had been contended should not be included. On the faith of the finality of this decree, the probate court having jurisdiction of the estate of the late Joseph L. Folsom ordered a sale of the land within the boundaries as described in the decree, and the supreme court of this state has in several suits sustained ejectments brought by persons, claiming under the grant, for lands embraced within the boundaries therein set forth. On the various sales effected by the executors of [J. L.] Folsom, his estate has received large sums of money; but, if the location be now altered so as to exclude the lands sold by them, the purchasers will be without title, while the estate will acquire a large body of land the title to which has always been disclaimed, and which has, to a considerable extent, been settled upon as public land. It is proper to observe that the executors have no wish to disturb the location as fixed by the Hays survey, the correctness of which they have so emphatically affirmed by their acts.

In the opinion recently delivered by this court, it was not assumed that the jurisdiction conferred by the act of 1860 enabled the court to set aside or correct a location definitely made by the final decree either of the board, of this court, or of the supreme court, in cases where such decrees declared and established boundaries. But it was held to be clearly within its power to construe and interpret such decrees, and that the petition, the diseño, the grant, and other documentary evidence of title on which the decree was founded, and to which

it refers for greater certainty, were properly to be considered in ascertaining the true intent and meaning of the decree. If, therefore, the decree described a particular tract, but the petition, diseño, and grant, referred to in the decree, indicated a different tract, a repugnancy on the face of the decree would arise, which would give to the court the right to carry into effect the presumed intention of the decree by conforming to the title, and correcting the error in the description. [Case No. 15,125.] On referring to the petition, diseño, and grant, it appeared to the court that the intention of the governor to grant a tract four leagues long by two wide, on the American river, was manifest, and that the board directed the eastern line to be run due north and south, on the supposition that, as indicated on the diseño, the course of the river was from east to west, and that a line drawn north and south would be perpendicular to its general course. It is urged, however, that the board were in fact aware that the general course of the river was from northeast to southwest, and not from east to west, notwithstanding that the latter was stated by Mr. Bidwell to be its general course. If this be so, so much of the reasoning in the opinion of this court as proceeds upon the hypothesis that the board intended to make the east and west lines perpendicular to the general course of the river, and described as running north and south, because they supposed the river to run from east to west, must fail. But the question recurs whether, in thus locating the grant, the board have designated a tract different from that described in the title papers. It must be presumed that they intended to confirm to the claimants the tract granted, and none other. If, therefore, on referring to the title papers, we find the land granted to be different from that described in the decree, the title papers must control, especially as they are in terms referred to and made a part of the decree itself. And this repugnancy or inconsistency in the decree would authorize this court, in the exercise of the duty of construing it, to follow that part of it which refers to the title papers, rather than that part which defines the boundaries. But it is evident that the court, if confined to the mere right of construing the decree, could disregard the specific boundaries mention in it only where a plain and unmistakable repugnance existed between the description in the title papers and that embodied in the decree. That the board and the courts had, under the act of 1851, jurisdiction to determine "all questions as to extent, quantity, location, and boundary," has been expressly decided by the supreme court. [U. S. v. Fossatt] 21 How. [62 U. S.] 449. When, therefore, such questions have arisen and been determined, and the decree has become final and conclusive on all parties, this court cannot, under the power of construing the decree, waive it, on the ground that, in its judgment, the land might have been more correctly located. The repugnance between the decree and the title papers must be plain and irreconcilable before this court, if empowered only to construe, could be justified in disregarding the specific description by which the board have located the land. Even if, as is contended, the act of 1860 gave to the court jurisdiction to determine all questions as to location and boundary, and to disregard all determinations of those questions made in former decrees, either of the board, of this court, or of the supreme court, it is clear that, where those decrees are specific and plain, where they have long been accepted as finally and definitely locating the land, and where large interests have been acquired on the faith of this finality, the location ought not to be disturbed, except in cases of manifest error, and on clear proofs of the incorrectness of the location, and not on the mere ground that, if the question were new, this court might have located the land differently. I proceed to inquire, therefore, whether, in the location made by the board, there is such manifest error and clear repugnance to the description of the land as contained in the title papers as to make it the duty of the court to direct a different location to be made.

It has already been stated that it appeared to this court to have been manifestly the intention to grant a tract along the American river two leagues wide by four leagues long. It is objected that there is nothing in the petition, diseño, or grant to warrant this conclusion. The petition describes the land as bounded by the land of Señor Sutter, as explained in the map. "The place is situated on the bank of the American river, and consists of four leagues in length to the east and two leagues in breadth to the south." Both the decree of concession and the grant describe the land as situated on the banks of the river "called that of the Americans," but the only boundaries mentioned in the grant are the lands of Sutter and the low hills to the east. The diseño, according to the scale, represents a tract four leagues in extent from west to east and two leagues from north to south. As the diseño and the grant show that the land lay on the bank of the American river, and as the petition showed that it was to be four leagues in length to the east and two leagues in breadth to the south, it appeared to the court fair to conclude that the tract was to be four leagues along the river by two in width, especially as of the diseño the river was represented as running from east to west. When, however, it was found that the course of the river was from northeast to southwest it seemed to me reasonable to give to the tract an extension of four leagues in a direction parallel with the general course of the stream, and not in a due easterly direction. It is true that the

description in the petition makes the tract extend "four leagues to the east" (por el este); but, as before observed, that direction appears to have been mentioned from its supposed conformity with the course of the river, and not because it was intended to fix the extent of the track by running a line in a course precisely east. The loose and confused ideas of the former possessors of this country with regards to the points of the compass, are well known, and the diseño before us shows how erroneous was the notion of the petitioner as to the course of the American river. When, therefore, he asked for a tract "upon the banks of the river, consisting of four leagues in length, towards the east, and two in breadth towards the south," and delineated it on a diseño whereon he represented the river as flowing from east to west, the inference seems almost irresistible that he intended to ask for a tract of those dimensions along the river, and running "towards the east," but in a direction parallel to its course. Such seems to have been the opinion of the board in framing the very decree the correctness of which is so earnestly defended. By that decree the eastern boundary is not required to be drawn through a point four leagues distant in a due east direction from the westerly point of commencement. On the contrary, the southerly or back boundary is required to be ascertained by drawing "lines easterly in a direction parallel to the general direction of the American river, and at the distance, as near as may be, of two leagues therefrom, four leagues, or so far as may be necessary to inclose eight leagues," etc. It will be perceived that neither the direction nor the length of this boundary is determined on the principle now contended for by the claimants. For it is required to be composed of lines drawn parallel to the course of the river, which the board seem to have thought would run "easterly," and its length was not to be four leagues at all events, but such as would include eight leagues within the tract. As the American river formed the northern boundary, and lines parallel to it at the distance of two leagues joined the southern boundary, which was to be four leagues in length, or so far as might be necessary to inclose eight leagues, I cannot perceive how it can be doubted that the board, like this court, considered the tract as extending four leagues in length along the river by two in breadth.

But the real question in the case is whether the eastern and western boundary lines should be run in a due north and south direction, or perpendicularly to the general course of the river. In the opinion heretofore delivered, the latter mode was held to be the more correct; and on the following considerations: (1) As the tract was to be situated on the bank of the river, and to extend four leagues in a direction parallel to its general course, it seemed that the side lines, if drawn perpendicular to the course of the river, would best preserve the rectangular shape which the diseño appeared to indicate, and would satisfy the terms of the petition, which described it as four leagues in length by two in width. (2) By running the eastern line in a dué north and south direction, a long tongue of land would be included, which, it was supposed, was not represented on the shaded portion of the diseño, and which gave to the land a river front of about six leagues, without computing the abrupt bends in the stream.

In reply, it is suggested that the location of the western line has never been disputed; that it commences at a marked oak tree on the Sacramento, and runs due south two leagues; that the court has felt compelled to adopt this line, and in that respect to depart from its own theory of location; and that, if the western line be run north and south, the eastern line should be parallel to it. (2) That, on the original diseño produced from the archives, the tongue of land referred to is represented, and the course of the river delineated from a point beyond the eastern limits of the Hays survey. (3) That the only boundaries called for in the grant are the lands of Sutter and the lomerias towards the east, and the Hays survey is within those limits. (4) That the grantee always claimed the lands as high up the river as the Hays survey extends, and that his first settlement was made at or near Negro Bar, which, under the opinion of the court, would be excluded. (5) That, by the Mexican ordinances, the measurements were required to be made from north to south and from east to west, and where the grant is made on the seashore, or on the banks of a river or large lake, such shore was to form the boundary on one side, from whence the measurements shall commence. Ordenanzas de Tierra y Agua, arts. 5, 6, 8. (6) That the land included in the Hays survey is wholly within the boundaries mentioned in the grant, viz. the banks of the river, the lands of Sutter, and the lomerias; and that the claimant has the right of electing the location within those limits. (7) That the grantee in his lifetime, and his representatives since his death, have in the most emphatic manner made their election; that the location directed by the court would give to the claimants six thousand acres of land which they have never claimed, and do not now claim, and would take an equal amount from parties who have purchased since the decree of the board became final,—lands for which they have paid a very large sum, which are worth several hundred thousand dollars, and on which not less than $30,000 have been paid for taxes within the last five years. (8) That even if, under the act of 1860, this court has full authority to review and correct any final decree of the supreme court, of this court, or of the board, so far as the same relates to boundary and location, yet

it ought not to disturb such decrees where important interests have been acquired on the faith of their finality, except in cases of clear error or oversight, arising from the want of sufficient information as to the natural features of the country, and not merely on a difference of opinion, in a doubtful case, as to the most correct mode of locating the land. (9) That the final decrees of either of the tribunals mentioned, when they determine questions of location, boundary, and extent, are made in the exercise of jurisdiction decided by the supreme court to have been conferred on them by the act of 1851, and they are therefore conclusive on the United States and the claimants, especially where, as in this case, they have been accepted and made final by consent; and that, though this court, in interpreting them, may be required to be governed rather by the title papers than by the description of the land embodied in the decrees, yet it is not authorized to disregard such description, when plain and positive, unless where it is clearly repugnant to, and irreconcilable with, the terms of the grant and other documentary evidence of title, which is not this case.

I am much impressed with the force of these suggestions. I still think that, if the question were a new one, the more correct location would be to measure a tract four leagues in length, in a direction parallel to the general course of the river, and bounded on the east and west by lines perpendicular to it; or, if the western boundary along the land of Sutter be considered as established by the long recognition of it, then the tract might be measured four leagues in length in a direction parallel to the course of the river and the easterly line run to the river for quantity. Notwithstanding all that has been urged to the contrary, it is plain that, when the board directed the southern boundary to be run "easterly" by lines parallel with the general direction of the river, and thence northerly to the river, they supposed the course of the river to be nearly "easterly," and that the last line would be at, or nearly at, right angles to it. Nor could they have anticipated that a due north line would include within the tract the long tongue of land referred to, and increase so largely the frontage on the river. But it cannot be said that the survey, as made under the decree, is repugnant to, or inconsistent with, the terms of the grant. It is within the exterior boundaries mentioned in the title papers, viz. "the banks of the river," the "lands of Sutter," and the "lomerias"; and though its shape, and especially the extent of front along the river, render it liable to grave objections, yet, under all the circumstances, I have come to the conclusion that I ought not to disturb it. The survey as made by Mr. Hays is admitted to be substantially in conformity with the decree of the board. By modifying it in some comparatively unimportant particulars, it would be in precise accordance with the decree. That decree has been admitted by the United States to be correct. It has been accepted as finally determining the location and boundaries of the land. Large sums have been paid, and immense interests acquired on the faith of its finality, and in some instances by parties who only bought after exhausting all legal means to procure a correction of its alleged errors. It has been treated by the supreme court of this state, in several suits, as finally determining the boundaries and location of the tract. The representatives of the grantee have received large sums for lands which the proposed change in location would exclude; while the government of the United States has advertised and sold, as public land, lands which the same change would include in the grant.

After much consideration it has appeared to me that, under all the circumstances, it is my duty to approve the survey substantially as made by Hays under the decree, notwithstanding my conviction that, if the question were new, that survey is not such as this court would have directed to be made.

Case No. 15,127.

UNITED STATES v. FOLSOM.

[7 Sawy. 602.] [1]

District Court, N. D. California. June, 1859.

CALIFORNIA LAND GRANTS—JURISDICTION OF DISTRICT COURT—FINAL DECREES—CONFIRMATION OF SURVEYS.

[1. It seems that the decision of the supreme court in U. S. v Fossat, 21 How. [62 U. S.] 445, should not be construed as determining that none of the decrees heretofore rendered by the boards of land commissioners and the district courts are not final decrees because they do not embody and confirm an exact survey of the claims, or as deciding that final decrees, defining with precision the boundaries of the land, must be entered. The decision must, however, be understood as determining that, in all cases where a decree of comfirmation has been entered, and a survey under it has been made, on which a patent is about to issue, which survey is objected to as erroneous, it is the duty of the court to direct the survey to be returned to it, that it may hear and determine the questions of location and boundary which may be raised.]

[2. Quære, as to what parties may be heard to object to the survey.]

[3. Settlers claiming under the United States must make their objections through the district attorney, and cannot be heard as separate parties. See U. S. v. Bidwell, Case No. 14,592.]

[This was an appeal by the United States from a decision of the board of land commissioners confirming the Rancho Rio De Los Americanos to the claimant, J. L. Folsom, now deceased, and represented by his executors.]

The proceedings in this case were supplementary to final decree, and arose under the decision of the supreme court in the case of

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U. S. v. Fossat, 21 How. [62 U. S.] 445, in which the supreme court determined that the power of the district court over the cause, under the acts of congress, does not terminate until the issue of a patent, conformably to the decree. The case was argued on the part of the United States by Edmund Randolph, and on the part of the claimants by R. Aug. Thompson and John J. Williams; and the discussion, generally, was participated in by many other members of the bar. The argument was made before both judges.

HOFFMAN, District Judge. A decree having been entered at a former term, confirming the claim in this case according to the boundaries mentioned in the grant, the appeal therefrom was, by consent of the district attorney, acting under the instructions of the attorney general, dismissed. A motion is now made that the survey be brought into court to be examined and passed upon, and that a final decree be entered confirming to the claimants the lands so surveyed. This motion is made that the court may exercise the jurisdiction which, by the recent decision of the supreme court in the case of U. S. v. Fossat, 21 How. [62 U. S.] 445, it is supposed to possess. As the same proceeding may be taken in the case of every claim confirmed by this court, and as the jurisdiction the court is invited to exercise is one it was not by any one suspected to possess until the decision referred to appeared, an argument on the point was called for, in the hope that, on a full discussion, some of the difficulties and embarrassments which were felt on all sides to surround the subject might be removed. It would be idle to conceal the fact that the question presented and the doubts raised by the recent decision of the supreme court have been found, by this court and the counsel engaged in these cases, in the highest degree perplexing and embarrassing. No construction of the opinion of the supreme court was suggested by which all the difficulties could be obviated or objections answered. But, as the latest decision of the supreme court on a class of cases to us, in California, of vital importance, it is the duty of this court to endeavor to ascertain its true interpretation, and the principles it establishes, and to adopt those principles in all cases to which they are applicable, without pretending to judge of their correctness, or to inquire, except to arrive at its meaning, how far previous decisions of the same court have been followed or overruled.

A brief statement of the case of U. S. v. Fossat [supra], as it was presented to the supreme court, is necessary to a correct understanding of its recent decision. The original decree of this court confirmed the claim to land within four external boundaries mentioned in the decree. Three, only, of these boundaries were designated in the grant, but it appeared to this court that the fourth, or northern boundary, the existence and location of which was not disputed, was sufficiently indicated by the petition and the diseño, to both of which the grant referred, as well as by the name (Capitancillos) of the land granted. The land within these boundaries was found to exceed, by a fraction, the quantity of one square league. But, as that quantity was described in the grant as "one league of the larger size, a little more or less, as is explained by the map accompanying the expediente," and as the supreme court, in the case of U. S. v. Sutherland [19 How. (60 U. S.) 363], has declared "that, in Mexican grants, a square league seems to have been the only unit of estimating the superficies of land," and that "if 'more or less' was intended in the grant, it was carefully stated," it seemed to this court that the whole land within the boundaries, and including an excess of a fractional part of the unit of measurement, might reasonably be considered as intended to be conveyed by a grant which described the quantity as "one league, a little more or less." The supreme court, however, decided these views to be erroneous, and held that, as only three boundaries were mentioned in the grant, the fourth must be run for quantity, "which was the only criterion for determining that boundary furnished by the grant"; that the words "more or less" must be disregarded, "as having no meaning in a system of survey and location like that of the United States," and the precise quantity of one league be considered to be clearly expressed; that "if the limitation of the quantity had not been so explicitly declared," it might have been proper to ascertain the fourth boundary by referring to the petition, the diseño, and to evidence, to ascertain what land was included in and known by the name of Capitancillos, but that no such reference or inquiries were admissible in that case, as the grant was free from ambiguity or uncertainty. The supreme court accordingly affirmed the claim "for one league of land, to be taken within the southern, western, and eastern boundaries designated in the grant, to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the government." It further ordered that the "external boundaries designated in the grant may be declared by the district court from the evidence on file and such other evidence as may be produced before it." U. S. v. Fossat, 20 How. [61 U. S.] 427.

The duty thus imposed upon it this court thereupon proceeded to discharge. It was not suspected by the court, or suggested by any of the counsel, that that duty extended further than to "declare the three external boundaries mentioned in the grant," i. e. to designate them, unmistakably, in its decree, and to decide the vexed and only disputed question in the case, viz. whether the southern boundary was the ridge known as the

"lomas bajas," or the sierra behind it. The fourth boundary was, by the decision of the supreme court, to be determined by quantity alone; nor was this court required to declare it, for it was directed to declare only "the external boundaries designated in the grant, within which the land confirmed was to be located at the election of the grantee or his assigns, under the restrictions established by the executive department of the government. A decree was accordingly made by this court, in which the three external boundaries mentioned in the grant were "declared" and described with as much precision as was possible without a survey; and the only disputed question in the cause, as to what was the southern boundary (viz. the lomas bajas, or the main sierra), was elaborately discussed and decided. An appeal from this decree having been taken to the supreme court, it was dismissed as "improvidently taken and allowed." In its opinion, the court considers at large the nature and extent of the jurisdiction conferred on the district court by the act of March 3, 1851, and it decides that it possesses the power to inquire into and decide all questions of extent, locality, quantity, boundary, and legal operation which may arise in the cause. It further decides that, as, under the acts of 1824 [4 Stat. 52] and 1828 [Id. 284], it was the duty of the surveyor to fulfill the decree of the court, and the court had power to enforce the discharge of that duty, so, under the act of 1851 [9 Stat. 631], the duties of the surveyor begin under the same conditions, and the power of the district court over the same cause "does not terminate until the issue of the patent conformably to its decree."

It would seem that the right and the duty of the district court to control and correct surveys by the surveyor general, in all cases, could not be more explicitly declared. But the supreme court goes further. The appeal was dismissed because this court had not entered a final decree. And this court is directed to "ascertain the external lines of the land confirmed, and to enter a final decree of confirmation of that land." This direction, when taken in connection with the previous remarks of the court as to the power and duty of the district court, with respect to surveys, and also with the fact that this court had already declared the boundaries with as much precision as was practicable without a survey, can only mean that it must direct a survey to be made, and that said survey, when approved, must be embodied in a final decree of confirmation.

The decision of the supreme court is not based on the ground that this court has failed to execute any special mandate directed to it; for, as before stated, this court had been merely directed to declare "the external boundaries," not of the land confirmed, but "designated in the grant, within which the land was to be located at the election of the grantee or his assigns, under the restrictions established by the executive department of this government." As the three boundaries mentioned in the grant were not those of the land confirmed, but of the tract within which the one league confirmed was to be taken at the election of the grantee, subject to executive restrictions, and as this court was directed to declare only those three boundaries, it is clear that it performed all the duties enjoined by the supreme court, and that the case was not remanded because the court had failed fully to comply with the previous mandate of the supreme court. This fact is, by the supreme court itself, admitted in its recent decision. "The district court," it states, "in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made." 21 How. [62 U. S.] 447. The defect in the decree of this court must have been other that a nonconformity with the mandate of the supreme court. I have been unable to give any other construction to the opinion referred to than that this court, after declaring the three boundaries within which the league confirmed was to be taken, at the election of the grantee, and after the grantee had made his election, subject to executive restrictions, should have caused or permitted a survey to be made, and should have, by its final decree, confirmed the land so surveyed to the claimant.

Such being the clear purport of the decision, with regard to the case before the court, we are next to inquire to what extent the principles laid down are to be applied to the other cases. The view generally taken by the bar regards the decision as laying down new rules by which all the land cases in California are to be governed; and the case is considered to decide that the decree of this court, or of the supreme court, by which the authenticity and general boundaries of a grant are declared, are not "final decrees," but that the court is, in all cases, bound to direct a survey to be made, or to revise and to pass upon surveys already made, and by its final decree to adopt a survey, and declare with precision the boundaries of the tract confirmed. In support of this construction, reference is made to that portion of the opinion of the supreme court which decides that this court has, under the act of 1851, jurisdiction to determine all questions of extent, locality, and boundary, as fully as it was possessed by the courts under the laws of 1824 and 1828; to the declaration that the decrees of this court, hitherto supposed to be "final," were not final decrees under the judiciary act of 1789 [1 Stat. 73], and that the supreme court has entertained appeals from them by "a relaxation of its rules," rendered proper by the "peculiar nature of these cases"; and to the order at the close of the opinion that the appeal be dismissed as improvidently allowed, and that this court "proceed to enter a 'final decree' of confirmation of the land confirmed."

If the language of the opinion of the supreme court be alone considered, it is perhaps not easy to avoid giving to it this construction. But the objections to it seem insurmountable. The thirteenth section of the act of 1851 prescribes the duties of the surveyor general with regard to private land claims in California. It is declared to be his duty to "cause all private land claims in California, which shall be finally confirmed, to be accurately surveyed, and to furnish plats of the same," etc. It is obvious, therefore, that the final decree of confirmation must precede the survey, for, until the claim is finally confirmed, the surveyor is not required or authorized to act. Again: The tenth section provides that, in cases of appeals from the decisions of the board of commissioners, the district court shall proceed to render judgment, etc., and shall, on application of the party against whom judgment is rendered, grant an appeal to the supreme court, etc. The authority to entertain such appeals is not explicitly given to the supreme court, but it results, by necessary implication, from the provisions above cited, and from the allusion in the fifteenth section to the "final decrees rendered by the said commissioners, or by the district or supreme courts of the United States." Unless, then, the decrees of this court which have been appealed from were in some sense "final decrees," it is not easy to perceive how the supreme court, by any relaxation of its rules, or from considerations of convenience, could have had jurisdiction to review them on appeal.

The fact that the supreme court has heretofore entertained, and will hereafter entertain, appeals from such decrees, must therefore be taken as proof that they regard those judgments and decrees as "final" and appealable under the act of 1851, though it appears that they are not final decrees under the judiciary act of 1789. It is also evident that such decrees must be final decrees of confirmation, and the lands confirmed must be deemed "finally confirmed," within the meaning of the thirteenth section; for, otherwise, the surveyor would have no authority, nor could he be required, under the provisions of that section, to survey them. A contrary construction would lead to the most important and perhaps disastrous consequences. It is well known that both the boards of commissioners, as well as both the district courts of this state, in common with all the gentlemen of the bar, have hitherto regarded the decrees by which the authenticity and validity and the general boundaries of a claim have been declared, as "final decrees" of confirmation, under which the survey was to be made and a patent issued. In no case has a survey first been made and adopted or embodied in any subsequent final decree of confirmation. In pursuance of such decrees, or similar ones, by the supreme court, many patents have issued. If, then, it should be held that none of those decrees were final, and that the lands confirmed by them were not "finally confirmed," in the sense of the act of 1851, it might follow that the patents have been irregularly issued, and are void, as having been issued without authority of law. There also may be cases in which no appeal has been taken from the decision of the board to the district court, or in which such appeals have been dismissed. If, then, the decisions of the board are not final decisions or decrees, it is difficult to perceive how final decrees in those cases can be made. For the board has ceased to exist, and the district court may never have acquired jurisdiction over the cause. I am persuaded that a construction of the opinion of the supreme court involving such grave consequences, ought, if possible, to be rejected.

By referring to the cases cited by the supreme court in its opinion, viz., those of Mitchel v. U. S., 15 Pet. [40 U. S.] 52, and Sibbald v. U. S., 12 Pet. [37 U. S.] 488, as instances where the court directed, by its mandate, certain lands to be surveyed, and "maintained and declared the duty of the surveyors to fulfill the decree of the court," it will be found that the decrees of the supreme court, requiring those duties to be performed, are expressly called, by the court itself, its "final decrees." In Mitchel's Case, the language of the court is: "On consideration whereof, this court is of opinion that the title of the petitioner, etc., is valid by the laws of nations, etc., and doth finally order, decree, determine, and adjudge accordingly; and this court doth in like manner, order, adjudge, determine, and decree that the title of the petitioner is valid to so much of a certain other tract as shall not be included in an exception hereinafter made." And it proceeds to give particular directions for ascertaining the land so excepted. In Sibbald's Case, after declaring the duty of the surveyor to fulfill the decree of the court, it orders "that the clerk of this court make out a certificate of the final decree heretofore rendered in the case of Sibbald v. U. S., and, also, a mandate according to such final decree, the opinion of the court in that case and on these petitions." 12 Pet. [37 U. S.] 495.

It appears, therefore, that the decree of the supreme court by which the general validity of the claims in those cases was ascertained, and by which directions for a survey of certain tracts were given, were not only regarded by the court, but in terms declared, to be final decrees; although some proceedings subsequent to and in execution of the mandates were required to be had by the inferior court and by the surveyor, the latter of whom, it may be remarked, was, by the sixth section of the act of 1824, required to make a survey after a final decision in favor of a claimant. That the decrees under which the surveyor, by the act of 1851, was required to survey, were not by the legislature intended to contain or embody a precise

description of the land, as ascertained by a previous survey, is further evident from the fact that the same section confers upon the surveyor general a certain provisional and quasi judicial authority to fix and settle disputed boundaries between adjoining ranchos. But if the final decree of this court, under and in obedience to which he acts, has already fixed with precision every line of the claim which is confirmed, the surveyor can never exercise the authority which the lawmakers have been at pains to confer. It would seem clear that the statute contemplated that the claim might be finally confirmed, and the surveyor called upon to survey it, under a decree affirming its validity and fixing its general boundaries, or those of the tract out of which the quantity confirmed should be taken, thus leaving to the surveyor the opportunity to exercise the authority with respect to interfering claims or boundaries which the lawmakers intrusted to him.

On the whole, I incline to the opinion that the decision of the supreme court ought not to be construed as determining that none of the decrees heretofore rendered by the boards, the district courts, and by itself, are final decrees; and that final decrees, defining with precision the boundaries of the land, must in all cases be entered. I am aware that this view is apparently in conflict with some expressions in the opinion, but it has seemed less open to objections than the other construction suggested, to adopt which would involve as consequences: (1) That no final decree has ever yet been made in any land case. (2) That the survey is to be made by the surveyor general of claims not finally confirmed, but which are finally confirmed only after survey, when the language of the statute is express, that the claims to be surveyed by him are those which shall be "finally confirmed." (3) It would leave the regularity and even the validity of all patents heretofore issued open to grave doubts. (4) It requires us to suppose that the supreme court have treated as final, and therefore appealable, decrees which were not final, and this by a relaxation of their rules, which, as the law only gives to that court jurisdiction of appeals from final decrees, it cannot be supposed that they would have felt themselves at liberty to make.

Assuming, then, that the decrees of this court, heretofore rendered, are to be deemed "final" in such a sense as that an appeal from them can be taken, and that the surveyor general, under the thirteenth section of the act of 1851, may be required to survey them, we are next to inquire what further jurisdiction over the case this court is, by the opinion under examination, declared to possess. That the Case of Fossat was remanded in order that a survey might be made, and a decree embodying such approved survey entered, is clear. It may be said, however, that such a proceeding is merely decided to be necessary in that particular case, and that it should not be taken except in cases precisely similar to that of Fossat, viz. where the question of boundary or location has been raised and decided in the regular course of the suit, and where the supreme court has remanded the cause in order that the location might be fixed. But this interpretation of the opinion is inadmissible. It has already been shown that this court had performed every duty required of it by the previous decision of the former court, and that the cause was not remanded because this court had failed to execute the previous mandate in the case. That the supreme court have, in their opinion, laid down principles generally applicable to all cases, I think, is evident.

In the first place, they discuss and decide the point whether this court has, by the act of 1851, any authority to decide questions of extent, location, and boundary. Such questions they declare may be "essential in determining the validity of a claim," and the power to decide upon "validity" involves the power to decide upon all questions of boundary. Secondly. In answer to the objections that this court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, the supreme court decides that this court has such power, and that it is the duty of the surveyor to fulfill the decree of the court; and the court declares "that the power of the district court over the cause does not terminate until the issue of a patent conformably to its decree."

I am aware that, in a previous opinion, delivered in the same case,—[U. S. v. Fossat] 20 How. [61 U. S.] 425,—the same court declared that "the jurisdiction of the board of commissioners in the first instance, and the appellate jurisdiction of the courts of the United States, are limited to the making of decisions on the validity of the claim preliminary to its location and survey by the surveyor general of California, acting under the laws of the United States." No mode of reconciling this declaration with any construction of the last decision in the Case of Fossat, was suggested at the bar or has occurred to either of the judges. It must, therefore, be treated as overruled by the latter case. As, then, "the power of this court over the cause does not terminate until the issue of a patent conformably to its decree," and as it has jurisdiction to determine all questions of extent, location, and boundary which may arise, it is the duty of the court to exert this power, and to exercise the jurisdiction at the instance of a suitor. I therefore think that, in all cases where a decree of confirmation has been entered, and a survey under it has been made, on which a patent is about to issue, which survey is objected to as erroneous, it is the duty of the court to direct the survey to be returned to it, that it may hear and determine the questions of location and boundary which may be raised.

In coming to this conclusion, I have not overlooked the great difficulties of reducing it to practice. The first and most perplexing question is that of parties. By whom can objections to a survey be made? Every party entitled to object to the survey must have a right to take testimony in support of his objection, and a right to appeal from the decision of this court to the supreme court. It is therefore of the utmost consequence to determine who are the proper parties to the proceeding.

At first blush, the answer might seem obvious, viz.: That the parties to a proceeding to correct a survey, are only the original parties to the suit, viz. the United States and the claimant. But the solution of the difficulty is by no means so easy as it might appear. During the long period which has elapsed since the claims were first filed before the board, many changes of interest have occurred. Suppose, then, that the original claimant, has parted with all his interest, or it has been sold on execution. He may have no motive to dispute any location, however erroneous, and he may not be disposed to allow the use of his name to the present owner. Cannot the latter be heard to object to the location of what has become his exclusive property? Or, suppose that the original claimant, though really entitled to only two leagues, to be taken from a tract the boundaries of which contain four leagues, has, through error or fraud, sold out four leagues to two purchasers,—two leagues to each. He, therefore, has ceased to have any interest in the controversy. The real contest is between the purchasers, each of whom desires that the patent may cover the land conveyed to himself. Is neither to be heard? Or only he who has the good fortune to obtain the use of the name of the original claimant? The United States may have no objection to the survey. It will, therefore, be confirmed, unless objected to on the part of the claimant. Which of the parties, in the case supposed, has the right to object? If both have, what limits can be assigned to the rights of intervention? For, in some cases, the grantee may have sold to hundreds of purchasers.

Again: If the right of both subgrantees to be heard in the case supposed be admitted, ought not persons so immediately interested in the result of the inquiry to be heard, notwithstanding that the original claimant may not have sold out his entire interest? The part retained by him may be so situated that any possible location of the claim will include it. He has, therefore, no interest to object; on the contrary, he desires a patent to issue without delay. But the purchasers under him have a direct and vital interest in obtaining a location such as will cover the tracts conveyed to them respectively. Is the court to refuse to hear them?

Again: Grants, in most instances, have, as one or more of their boundaries, the lands of other parties. The court, in fixing the location of Rancho A, necessarily determines one of the boundaries of Rancho B, by which it is bounded. Ought not the owner of the latter to be heard to show what his boundary is? If he is not, he is excluded on the ground that the suit as to the boundaries of his neighbor determines nothing as to his rights. The result might thus be that, when the second rancho is before the court for location, the evidence in that case would compel it to adopt a boundary line different from that fixed in the first case. If the second location were the correct one, the claimant in the first case would lose his land. It would then be too late to extend his lines in another direction so as to give him the quantity mentioned in his grant. But the boundaries of Rancho B, in the case supposed, may involve an inquiry into the true location and boundaries of Rancho C, and several other circumjacent tracts. How, then, can the court, hearing each case separately, unassisted by topographical maps, and unable, except in rare instances, to visit the lands, hope to arrive at any satisfactory conclusion?

Again: Two or more grants are often made within the same general boundaries—an original, or first grant, and one or more sobrante grants. Ought not both grantees to be heard, that the court may, if possible, locate each of the grants, so as to satisfy the just claims of all the grantees? If all these parties have the right to appear, take testimony, and to appeal, it may reasonably be apprehended that the litigation upon which we are entering will be far more protracted than that which has already occurred respecting the validity of the claims. If these parties are excluded, how can justice be done? When we consider the immense interests involved in the location of grants, the vague and indeterminate character of the boundaries mentioned in the grants and delineated in the diseños, the opportunity afforded for plausible objections to any location which can be made, and how impracticable it is for a court to learn, through depositions, the natural features of a country it has never seen, and of which no topographical map is exhibited, and therefore how difficult it will be for it to render any decision in which the parties will acquiesce, or which will be satisfactory to itself, it may well be doubted whether the evident anticipation of the supreme court that few cases will reappear before it on appeal will be realized.

Before dismissing this subject a further observation may be made. The settlers claiming to hold under the United States are heard, if at all, through the district attorney. In many cases they may have just objections to a location which has been made so as to improperly include their claims. In many cases they may object to any location in order that the issue of a patent may be postponed, and that they may continue to enjoy

the use of the land. The number of locations to be passed upon may be some hundreds. The district attorney, like the court, is unacquainted with the topography of the country. How can he determine, when objections supported by affidavits are presented to him, which he ought to urge in the name of the United States, and which he ought to refuse to make, as vexatious and intended for delay? May he not be driven to adopt the rule to make objections which seem plausible and are supported by an appearance of proofs? In such case, it is to be feared that the jurisdiction the court is about to exercise may be as often the means of delaying indefinitely the issue of a patent to a rightful claimant, and of plunging him into a new and protracted litigation, as of correcting errors of the surveyor general in locating claims. For these reasons I would gladly have declined the jurisdiction I am urged to assume. Under the recent decision of the supreme court I have not felt at liberty to do so.

With regard to the particular case more immediately under consideration, it follows, from what has been said, that this court cannot now proceed to examine the survey which has been made. The court, as already stated, regards the decree heretofore made as final, in a sense to authorize an appeal from it, or a survey of the lands as finally confirmed. It is not, however, exhaustive of its power over the case, for that does not terminate until the issue of a patent. The court does not, therefore, proceed, as of course, to enter a decree for the land as surveyed, which would be necessary if the decree heretofore made were only interlocutory. But it will hear objections to the survey. None are made in this case. The survey originally made is satisfactory to the parties now moving to bring it before the court. That survey has been disapproved at Washington by the executive officers of the government, and a new one directed to be made. When that shall have been done, the parties now moving may make their objections, and bring the questions involved before the court.

NOTE. Since the foregoing decision was rendered, Judge Hoffman has decided (in the case of U. S. v. Bidwell [Case No. 14,592], claiming the Rancho Arroyo Chico) upon the rights of settlers with respect to their standing in court. Judge Hoffman says: "In this case, as in all other cases, all persons who allege that any of the land included in a survey of a rancho is public land of the United States, must urge their objections in the name of the United States, and through the district attorney. To that officer is committed the duty of seeing that no public land is improperly embraced within a survey of a private claim. When he has no objections to interpose, the settler cannot be permitted to intervene in the proceeding. When he settled upon that land, and, notwithstanding that it was claimed under a Mexican title, chose to assume it to be public land, he was aware that the United States would assert her rights through her proper officers, and that the judgment of the courts, declaring that the land was not public but private land, would be final and conclusive on the rights of the United States and all claiming under them. When, therefore, the United States, through her officers, admits that the survey is properly made, or declines to make objections to it, no settler can be heard to contest it."

[For subsequent hearing upon the new survey ordered to be made, see Case No. 15,125. At a still later date the survey of 1857 was finally approved. Id. 15,126.]

Case No. 15,128.

UNITED STATES v. FOOTE.

[13 Blatchf. 418.] [1]

Circuit Court, S. D. New York. June 17, 1876.

POST OFFICE — OBSCENE MATTER — "NOTICE" — INDICTMENT.

1. In an indict nent under section 3893 of the Revised Statutes, charging the defendant with depositing in the mail an obscene pamphlet, and also with depositing in the mail a notice giving information how an article designed for the prevention of conception can be obtained, it is not necessary or proper that the indictment should give a definite or detailed description of the pamphlet.

[Cited in U. S. v. Grimm, 45 Fed. 560.]

2. Sufficient information as to the particular article about which evidence is to be given can be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself.

[Cited in U. S. v. Bennett, Case No. 14,571.]

3. A notice in the form of a letter enclosed in a sealed envelope, if it gives the prohibited information, is within the scope of the statute.

[Cited in U. S. v. Gaylord, 17 Fed. 443; U. S. v. Huggett, 40 Fed. 637.]

4. A written slip of paper, without address or signature, giving the prohibited information, is a "notice," within the meaning of the statute, although not volunteered, but sent in reply to a letter asking for the information.

[This was an indictment against Edward B. Foote.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Thomas Harland, for defendant.

BENEDICT, District Judge. This case comes before the court upon a motion to quash an indictment. The questions argued by the counsel are presented to the court upon the indictment, and the bill of particulars filed by the prosecution, in which the accused is charged, under section 3893 of the Revised Statutes, with depositing, and causing to be deposited, in the mail, an obscene pamphlet, and, also, in a different count, with depositing in the mail a notice giving information how an article designed for the prevention of conception can be obtained.

The first ground of objection taken to the indictment is, that it fails to give a definite description of the pamphlet alleged to have been mailed. In respect to this ground of objection, I have only to repeat what I have had occasion many times to say in court, that, in cases of this description, it is neither necessary nor proper to pollute the rec-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ord by a detailed description of obscene matter, and, where the grand jury omit a definite description of the matter, by reason of its obscene and filthy character, such omission furnishes no ground of objection to the indictment. Sufficient information as to the particular article about which evidence is to be given, can be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself. This practice has been repeatedly followed, and has been found adequate to the protection of the accused, while, at the same time, to a certain extent, it prevents the proceedings from being the vehicle of spreading obscenity before the public. The accused, his counsel, the district attorney, the jury and the court must necessarily have knowledge of the obscene matter forming the subject of the charge. Experience has shown that it is entirely possible to go through with a trial of this character without extending that knowledge beyond the limits indicated, and at the same time do full justice.

The next objection raises the question, whether a notice giving information when or how the prohibited articles may be obtained is within the scope of the statute, when such notice is in the form of a letter enclosed in a sealed envelope. The argument is, that no public information is given by such a letter, and that the subsequent mention in the statute, of letters on the envelope of which indecent matter is written, indicates an intention not to interfere with letters by reason of their contents, and shows that the word "notice" was not intended to cover a letter enclosed in an envelope. I cannot accede to this construction. The object of the statute is not to protect the morals of post office employees, but to prevent the mails of the United States from being the effectual aid of persons engaged in a nefarious business, by means used to distribute their obscene wares. To exclude from the statute all letters which, to the outward appearance, are harmless, would destroy its efficacy, for, everything would then take the form of a sealed letter. It is not the form in which the matter is mailed, but the character of the matter itself, which fixes the criminality of the act.

The last ground of objection rests upon the fact, admitted here, that the subject-matter charged in the indictment as a notice was a written slip of paper, without address or signature, mailed by the accused in answer to a letter received by him asking for the information which is given in writing upon the slip of paper. It is not disputed that the writing on the slip gives information as to how one of the prohibited articles may be obtained, but it is contended that such a writing is not a "notice," within the meaning of the statute, because it was not volunteered, but sent in reply to an inquiry. No such limited signification as is contended for can be given to the word "notice." "Notice" means "information, by whatever means communicated; knowledge given or received;" also, "a paper that communicates information." Webster's and Worcester's Dictionaries. The paper in question is within this definition. It gives the information specified by the act, and is plainly within the statute, for, by its terms, the statute covers every kind of notice, whereby is given, either directly or indirectly, information such as this slip affords.

It is said, that, unless some such limitation be given to the language of the statute, medical advice given by a physician in reply to the inquiry of a patient would be excluded from the mails. It is not seen that any considerable inconvenience would arise if such were the result, as other means of communication may be resorted to by physicians, while it is plain that any attempt to exclude information given by medical men from the operation of the statute would afford an easy way of nullifying the law. If the intention had been to exclude the communications of physicians from the operation of the act, it was, certainly, easy to say so. In the absence of any words of limitation, the language used must be given its full and natural significance, and held to exclude from the mails every form of notice whereby the prohibited information is conveyed.

Case No. 15,129.

UNITED STATES v. FORBES.

[Crabbe, 558.] [1]

District Court, E. D. Pennsylvania. March 10, 1845.

SEAMEN—REVOLT—PILOT—INTOXICATION.

1. Wherever, by the overt acts of the crew, the authority of the master in the free navigation or management of his ship, or in the free exercise of his rights and duties on board, is entirely overthrown, and there is intentionally caused, by such acts, an actual or constructive suspension of his command, it is a revolt.

[Cited in U. S. v. Huff, 13 Fed. 637.]

2. But a mere disobedience of orders by one or two of the seamen, without combining with the others, or offensive or insolent language, is not a revolt.

3. The pilot is an officer of the ship when on board in the exercise of his duties, but the captain is still master of the vessel, and the pilot's orders are considered as the captain's.

4. Intoxication is rather an aggravation than an apology for a crime committed during that state; but if an habitual or fixed frenzy is thereby produced, it places the man in the same condition as if it were contracted, at first, involuntarily.

This was an indictment for revolt. It appeared that the ship Farewell sailed from Philadelphia on the 25th December, 1844. When below Chester, the pilot being still on board, the crew, most of whom were intoxicated, became very disorderly and wholly out of the master's control, and, when the officers

[1] [Reported by William H. Crabbe, Esq.]

attempted to seize the liquor in their possession, a portion of them, among whom [Thomas] Forbes was very prominent, refused to do duty. The mate of the ship in attempting to arrest Forbes was stabbed and killed by him, and it was only when he had been shot and wounded by the captain that the prisoner could be secured and sent to Philadelphia. The evidence also showed that Forbes was intoxicated at the time, but not so much so as to be unconscious of what he was doing.

The case came on to be tried, before Judge RANDALL, and a jury, on the 10th March, 1845, and was argued by Mr. Watts, Dist. Atty., for the United States, and by W. G. Smith, for Forbes.

Mr. Watts, U. S. Dist. Atty.

Revolt consists in the subversion of authority of the person in command of a vessel, if for a moment only; and so it has been defined by the courts having authority to describe it. U. S. v. Kelly, 11 Wheat. [24 U. S.] 418; U. S. v. Hemmer [Case No. 15,345]; U. S. v. Haines [Id. 15,275]; Act March 3, 1835 (4 Stat. 2416). This crime may be committed on board a vessel not under sail, or in a place not on the high seas, if it be within the admiralty jurisdiction, wherein it differs from murder, which cannot be punished in any court of the United States, if committed within the jurisdiction of any particular state. If the evidence is to be believed, the prisoner is guilty of revolt within this description of it, and the fact of intoxication is no excuse or palliation.

W. G. Smith, for Forbes.

The evidence shows no attempt to commit the technical crime of revolt, which consists in a resistance of the authority of the master of a ship, with intent to subvert it. At the time of the disturbance, the pilot, being on board in discharge of his duties, was the master of the ship, and there is no evidence of resistance to his authority. Indeed, he himself says that all his orders were obeyed; the resistance was to the mate of the ship. As to the intent, it certainly could not have been to subvert the authority of the master. It is not to be supposed that such an intention could have existed when the ship was in the midst of the Delaware, and within a few miles of this city. None of the requisites of a revolt have, then, been made out, and if the prisoner's acts amount to any crime it is a mere affray. Thorne v. White [Case No. 13,989].

Mr. Watts, U. S. Dist. Atty., in reply.

The command of the mate is the command of the master, and a pilot is only a quasi master, the captain being still regarded as virtually in command. So far as concerns the intention with which the prisoner acted, a certain intent must be presumed from certain actions, and, whether that intent is absurd or not, it must be presumed that parties have weighed the probabilities of success before they act.

RANDALL, District Judge (charging jury). The crime of revolt is punished under the act of congress of 3d March, 1835, and by that act the courts are empowered to give a judicial definition of the crime. I shall give this definition, dispose of the legal points made, and leave the jury to determine whether the evidence for the prosecution does not meet the requirements of the law. A revolt is the overthrowing the legitimate authority of the commander, with intent to remove him from the command, or, against his will, to take possession of the vessel by assuming the command and navigation of her. U. S. v. Kelly, 11 Wheat. [24 U. S.] 418. It is an open rebellion or mutiny of the crew against the authority of the master, in the command, navigation, or control of the ship. U. S. v. Haines [Case No. 15,275]. But a mere disobedience of orders by one or two of the seamen, without combining with the others to produce a deliberate disobedience, although it is highly censurable, and may be punished by the master on board the ship, or by forfeiture of wages,—is not a revolt; nor does mere offensive or insolent language constitute this crime. Wherever, by the overt acts of the crew, the authority of the master in the free navigation or management of the ship, or in the free exercise of his rights and duties on board, is entirely overthrown, and there is intentionally caused by such acts an actual or constructive suspension of his command, it is a revolt. Direct or positive force upon, or constraint or imprisonment of the master, is not essential. A positive refusal to perform any duty on board until he has yielded to some illegal demand of the crew, when it has produced a suspension of his power of command, or when, by a general combination, the crew refuse obedience to the lawful orders of the master, is a revolt. U. S. v. Haines [supra]. There may be a revolt without the appointment of another to the command. If the crew should compel the master, against his will, to navigate the ship or manage her concerns according to their directions, and prevent him from the free exercise of his own judgment, that would be an usurpation or the command and a revolt. U. S. v. Haines [supra]. The pilot is an officer of the ship when on board to pilot the vessel to or from the sea, and the crew are bound to obey his orders as such; but when the captain is on board he is master of the vessel, and the orders of the pilot are, in law, considered as the master's. U. S. v. Lynch [Case No. 15,648]. The artificial, voluntarily contracted, and temporary madness produced by drunkenness is rather an aggravation of than an apology for a crime committed during that state. A drunkard is a voluntary demon, and his intoxication gives him no privilege. If, however, an habitual or fixed frenzy is produced by this practice, though such madness is con-

tracted by the vice and will of the party, it places the man in the same condition as if it were contracted, at first, involuntarily. The wisdom of the law in refusing to recognise drunkenness as an excuse for crime is plain; nothing is more easily counterfeited, no state so irregular in its operation. With these instructions on the law involved, the case is committed to the jury.

A verdict of guilty was rendered, and Forbes was sentenced to six years' imprisonment, a fine of five dollars and the costs, and to stand committed until the sentence was complied with.

Case No. 15,130.

UNITED STATES v. FORDYCE et al.

[13 Int. Rev. Rec. 77.]

District Court, N. D. Alabama. March 11, 1871.

INTERNAL REVENUE—PRODUCTION OF BOOKS AND PAPERS—AUTHORITY OF SUPERVISOR —CONTEMPT.

[1. A supervisor of internal revenue entered the house of a banking firm in Huntsville, Ala., and demanded to see their books and papers. The members of the firm, doubting his right to such inspection, asked time to first consult counsel. This was refused, and, on their failure to at once produce their books, the supervisor served them with a summons requiring them to appear before him at his "office at Huntsville" instanter on the same day. He had no regular office in that city, and no place was specified in the summons. The firm then consulted their counsel, who, though somewhat in doubt, advised them to permit the inspection. They then sought the supervisor to apprise him of their consent, but were unable to find him, and he left the town on the same night. *Held*, that the firm were not unreasonable in asking a short time to consult attorneys, that a compliance with the summons according to its terms was manifestly impossible, that the supervisor acted with undue haste, and that the members of the firm were not punishable as for a contempt for what they had done.]

[2. By the forty-ninth section of the act of July 20, 1868 (15 Stat. 144), a supervisor of internal revenue who attempts to proceed against delinquents in the matter of making the annual returns required to be furnished to the assistant assessor, must proceed in manner and form precisely as the assistant assessor is required to proceed by the ninth section of the act of July 13, 1866 (14 Stat. 101), and not otherwise.]

BUSTEED, District Judge. The application made to me in this matter is that the respondents be punished as for a contempt for the alleged disobedience of a summons issued to them by Nathan D. Stanwood, supervisor of internal revenue for the state of Alabama, requiring them to produce books and papers, and to give evidence according to its exigence. The proceeding is based upon section 49 of the act of July 20, 1868 [15 Stat. 144], and section 9 of the act of July 13, 1866 [14 Stat. 101].

It is contended, among other things, by the counsel for the respondents, that these acts, so far as they authorize a compulsory production of books and papers, and a compulsory examination of a party, are a violation of the fourth and sixth amendments to the constitution of the United States. It is also contended that a true construction of the law of July 20, 1868, limits the power of supervisors to inquiries touching the conduct of assistant assessors and other subordinate officers of the revenue. In disposing of the present application I do not find it necessary to examine or decide either of these points, and hence express no opinion upon them.

The facts in the case are these: On the 5th day of March, A. D. 1870, the relator entered the banking house of the respondents at Huntsville, and asked to see the charter under which they did business. He was told they had no charter of incorporation. He then demanded to see their books and papers. The respondents refused to allow him, stating it was not their habit to exhibit their business or its evidences to straners. Thereupon Stanwood disclosed his official character, and the respondents requested time to consult their legal advisers on the subject of his right, and that, if he were authorized by law to make the demand, they would at once exhibit to him their books of account and other papers. Stanwood, for answer, read from a book what he claimed was the law of the case, and said it was not necessary the respondents should consult their attorneys; that he knew more revenue law than all the lawyers in Huntsville. The respondents, nevertheless, insisted. The supervisor, in a few minutes afterwards, served the respondents with a summons requiring them to appear before him at his "office at Huntsville," on the 5th day of March, 1870, instanter, of the same day, then and there to produce all books of account and papers, containing entire details of business between the bank of Fordyce & Rison and all other persons, from the time of commencing business to the present time, March 5, 1870, and to give evidence, according to their knowledge, respecting the liability of themselves or others to an excise duty or tax under the internal revenue laws of the United States. This was at 20 minutes after 9 o'clock in the morning. The respondents immediately sought their attorneys. During the consultation, and an hour and a half after the service of the first, a second summons of the same tenor as the first was served. The only difference that I can discover between the two is that, while in the first there is no place within the city of Huntsville named as the office of the supervisor, and to which the books and papers of the bank were directed to be brought on the instant, the second summons supplies the deficiency and names room No. 10, in the Huntsville Hotel, as the supervisor's office. It is worthy of remark, as bearing on the legal rights of the respondents upon this hearing, that the supervisor himself relies upon the summons first served in support of the respondents' liability. He annexes a copy of it to his application to me for the warrant of attachment against them.

It is in proof that no less distinguished counselors of this court than L. Pope and Richard Walker, Esqs., examined the question of the supervisor's right to require the respondents to obey his summons, and while both expressed themselves in doubt, they yet advised their clients to yield the point. This was at 4 o'clock p. m. on the 5th of March. The respondents thereupon went to the room of the supervisor in the hotel to offer their compliance. Stanwood was not in. They then went to the office of the collector of internal revenue to see if the supervisor might be there. Neither official was there, but the respondents saw a deputy of the collector, and informed him they had come to give Stanwood their books and papers or invite him to their office to examine them at the banking house. Subsequent inquiry developed the fact that Stanwood left Huntsville on the night of the same day. It is now sought to punish the respondents for their conduct in the premises, and the power of this court is invoked for that purpose.

It is the clear duty of the citizen to obey the laws of his country. There can be no cavil here. It is presumed, also, that every man knows the law. It must be borne in mind, however, that laws are made for the safety of the citizen as well as for the security of the state, and that the right of the subject to have the assistance of counsel in all matters touching his well-being is founded upon the plainest principles of propriety and the manifest dictates of necessity. The demand of the respondents to confer with their lawyers before they complied with the requirements of the supervisor was a reasonable one, and the opportunity should have been given. They were not obliged to accept Mr. Stanwood's estimate of his own legal ability, or his construction of the statute, and their readiness in following the advice of the Messrs. Walker, while it was yet uncertain whether the supervisor had the right which he claimed, shows an excellent spirit, and entitles them to the commendation of the court. Upon the face of the summons the respondents would have been authorized to disregard it. It requires them to produce all the books and papers of a large banking house, without saying where they are to be brought. It requires this to be done on the instant. This was impossible of performance, and "lex non cogit ad impossibilia." If it had been possible, the requirement was oppressive. It requires the respondents themselves to be at a place not named, on the throb of time next after the moment of the service of the summons. This was impossible of performance, and "lex non cogit ad impossibilia." If this were possible, this requirement also was oppressive. It requires them to produce all their books and papers from the time of their commencing business to the 5th day of March, 1870. This may or may not have been authorized, accordingly as the respondents had been doing business for a longer or shorter antecedent period. The revenue laws have nothing to do with what was the "annual income" of the respondents before the laws imposing an income tax were passed. It did not officially concern the supervisor to know whether the business of Fordyce & Rison prior to the date of these congressional enactments represented "articles or objects charged with a special duty or tax." That in what the supervisor did he was actuated by an honest zeal I have no doubt, but his proceedings are marked throughout with irregularity and haste. By the 49th section of the act of July 20, 1868, he may proceed in the matter of the "annual returns," required to be furnished to the assistant assessor, as those officers themselves may proceed, and what they are authorized to do in relation to delinquents is plainly set out in the 9th section of the act of July 13, 1866. The section is free from the least ambiguity, and the supervisor, if he undertakes to perform service under the act, must proceed in manner and form precisely as the assistant assessor is required to proceed, and in no other manner or form.

This matter appears to have given rise to considerable feeling. There should have been no pretext for this. The nonofficial must aid, not embarrass, the servants of the law; and the government official must challenge the consent of the citizen by consideration and courtesy, rather than provoke his opposition by incivility and harshness. Suavity of manners is something more than a personal accomplishment. It is an individual duty. The defendants are not in contempt, and are therefore discharged.

Case No. 15,131.

UNITED STATES v. FORREST.

[3 Cranch, C. C. 56.] [1]

Circuit Court, District of Columbia. Dec., 1826.

INDICTMENT—EMBEZZLEMENT—CERTAINTY—CHARGING IN WORDS OF STATUTE—CHECK—DISTRICT OF COLUMBIA.

1. An indictment under the sixteenth section of the act of congress of March 3, 1825 [4 Stat. 118], "more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," must state that the defendant was employed in the bank, or an office of discount and deposit, &c., in some state or territory of the United States.

2. The certainty required in an indictment is certainty to a certain intent; certainty to a common intent is not sufficient. Nothing material can be taken by intendment. From the averment, that the defendant was a bookkeeper in the office of discount and deposit, the court, upon demurrer to the indictment, cannot infer that he was a clerk or servant employed in such office.

3. A count upon the same section, for embezzlement, must aver that the thing embezzled

[1] [Reported by Hon. William Cranch, Chief Judge.]

came to his hands, or possession, by virtue of his employment. It is not sufficient to state that it came to his hands "as bookkeeper," or "in virtue of his office as bookkeeper," or "while he acted as bookkeeper." It must appear that he had authority from the bank to have it in his custody or possession, at the time of embezzlement.

4. It is not necessary that the thing embezzled should be the property of the Bank of the United States; nor is it necessary to aver it to be the property of any particular person; but it must be averred to have been fraudulently embezzled. "Feloniously" will not supply the place of "fraudulently." The offence must be charged in the words of the act.

[Cited in Holt v. State, 86 Ala. 599, 5 South. 794.]

5. A check is not, by name, made the subject of embezzlement; and quære whether, if it be a paid or cancelled check, it can be included in the description, "other valuable security or effects."

6. Quære, whether the District of Columbia was a territory within the meaning of the act.

Indictment under the sixteenth section of the act of congress of March 3, 1825, c. 65 (Pamph. p. 65; 4 Stat. 118), "more effectually to provide for the punishment of certain crimes, against the United States, and for other purposes," for embezzling a check for $135.

The sixteenth section is as follows: "That if any person, who shall be employed as president, cashier, clerk, or servant, in the Bank of the United States, created and established by an act entitled," &c., passed on the 10th day of April, 1816, or in any office of discount and deposit established by the directors of the said bank in any state or territory of the United States, shall feloniously steal, take, and carry away any money, goods, bond. bill, bank-note, or other note, check, draft, treasury-note, or other valuable security or effects belonging to the said bank, or deposited in said bank, "or if any person, so employed as president, cashier, clerk, or servant, shall fraudulently embezzle, secrete, or make way with any money, goods, bond, bill, bank-note, or other note, draft, treasury-note, or other valuable security or effects, which he shall have received, or which shall come to his possession or custody, by virtue of such employment; every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the aggravation of the offence."

The indictment contained fifteen counts, to which there was a general demurrer. The attorney for United States (Mr. Swann) abandoned the counts numbered 1, 3, 9, 10, 11, 12, 13, 14, and 15. The second count charges that the defendant, [Charles W. Forrest,] "on the 7th of April, 1825, (he the said Charles being then a bookkeeper in the said office of discount and deposit,) with force and arms at the county aforesaid, feloniously did embezzle and make way with the sum of $135 of the money of the president, directors, and company of the Bank of the United States, which came to the hands of him the said Charles, in the office of discount and deposit aforesaid, and while he acted as bookkeeper aforesaid, against the form and effect of the statute in that case made and provided," &c. The fourth count charges "that the said Charles, on the 7th day of April, 1825, he being then a bookkeeper in the said office of discount and deposit, with force and arms at the county aforesaid, and in the office aforesaid, did fraudulently and feloniously secrete a certain check of one George McDaniel, upon said office of discount and deposit, for the sum of $135, which had been paid by the said office, and had become the property of the president, directors, and company of the Bank of the United States; and had come to the hands and possession of the said Charles in virtue of his said office as bookkeeper aforesaid, against the form of the statute," &c. The fifth count charges "that the said Charles, on the 4th of May, 1825, he then being a bookkeeper in the said office of discount and deposit, with force and arms at the county aforesaid, did feloniously embezzle and make way with the sum of $100 of the money of the president, directors, and company of the Bank of the United States, which came to the hands and possession of him the said Charles in the office of discount and deposit, while he acted as bookkeeper as aforesaid, and in virtue of his office aforesaid, against the form of the statute," &c. The sixth count charges "that on the 3d of October, 1825, he being then a bookkeeper in the said office of discount and deposit, with force and arms at the county aforesaid, and in the office aforesaid, did feloniously embezzle and make way with the sum of $250 of the money of the president, directors, and company of the Bank of the United States, which came to his hands and possession in the office of discount and deposit, while he acted as bookkeeper as aforesaid, and in virtue of his office aforesaid, against the form of the statute," &c. The seventh count charges "that he, being a bookkeeper," &c., did "fraudulently and feloniously secrete a certain check for $100, drawn by Lewis Edwards upon the said office, which said check had become the property of the said president, directors, and company of the Bank of the United States, and had come to the hands and possession of the said Charles as bookkeeper aforesaid, against the form of the statute," &c. The eighth count charges "that on the 3d of October, 1825, he being then a bookkeeper in the said office of discount and deposit, with force and arms at the county aforesaid, did fraudulently and feloniously secrete a certain check for $250, drawn by one Lewis Edwards on the said office of discount and deposit, and which said check had been paid by the said office,

and had become the property of the said Bank of the United States, and had come into the hands and possession of the said Charles as bookkeeper aforesaid, against the form of the statute," &c.

Jones & Key, for defendant, objected to the second count, that it does not charge that the defendant fraudulently embezzled the money, nor that he was employed by the bank, nor that he received the money by virtue of such employment, nor that he was "president, cashier, clerk, or servant" of the bank, nor that the money was the property of the bank. To the fourth count, that it states that the check had been paid by the bank, and was, therefore, not a valuable security. That it does not state that the defendant had been employed by the bank, nor that he had received the check by virtue of such employment, &c. That it does not specify the date of the check. They took the like exceptions to the fifth, sixth, seventh, and eighth counts, and cited 2 Hawk. P. C. bk 2, c. 25, §§ 71, 110; 3 Chit. Cr. Law, 936, 980, 986; Rex v. McGregor, 3 Bos. & P. 106.

Swann & Lear, contra, cited 1 Chit. Cr. Law, 168, 173, in the notes; 2 Hawk. P. C. 320; 3 Chit. Cr. Law, 979, 985, 1185.

CRANCH, Chief Judge. The persons liable to be prosecuted under the sixteenth section of the act of congress of March 3, 1825, c. 65 (4 Stat. 118), are persons employed as president, cashier, clerk, or servant, in the Bank of the United States, or in any office of discount and deposit established by the directors of the said bank in any state or territory of the United States. The offences under that section are: (1) Feloniously to steal, take, and carry away any money, goods, bond, bill, bank-note, or other note, check, draft, treasury note, or other valuable security or effects belonging to the said bank, or deposited therein; (2) fraudulently to embezzle, secrete, or make way with any money, goods, &c., (as above stated, but omitting the word "check,") "which he shall have received, or which shall come to his possession or custody, by virtue of such employment." None of the counts states that the defendant was employed either as president, cashier, clerk, or servant in the Bank of the United States, or in any of its offices of discount and deposit. The averment in each of them is, "being then a bookkeeper in the said office of discount and deposit." The word "employed" is not in any one of the counts. It is a very important word in the sixteenth section of the act; for it is the only word which connects the person with the bank as its officer, and designates his appointment and trust. A person may be a bookkeeper in an office of discount and deposit, and yet not be an officer appointed by the bank or by the office. The intention of this section of the act is clearly to punish frauds in the officers of the bank duly appointed and employed by the bank. Perhaps it might be sufficiently certain to a common intent to say that a bookkeeper, in an office of discount and deposit, means a clerk or servant employed in an office of discount and deposit. But certainty to a common intent is not sufficient in an indictment. It must be certainty to a certain intent. Rutland's Case, 8 Coke, 57a; Co. Litt. 303a; Long's Case, 5 Coke, 21a; Colthirst v. Bejushin, Plow. 26-35; Rex v. Stevens, 5 East, 257; Rex v. Mayor, etc., of Lyme Regis, 1 Doug. 158; 1 Chit. Pl. 235, 240; 2 Hawk. P. C. c. 25, § 60; Rex v. Airey, 2 East, 33-35; Com Dig. "Pleader," C, 24; 1 Chit. Pl. 255, 308, 513, 514, 516-518. Every thing material must be positively alleged. Nothing material can be taken by intendment. Non constat by the indictment that a bookkeeper "in" an office of discount and deposit is a clerk or servant employed in such office. None of the counts avers that the things secreted or embezzled came to his hands or possession by virtue of his employment. Here the word employment means his authority from the bank. The thing embezzled must have come to his possession or custody by virtue of his authority from the bank, or he cannot be convicted under this statute. To say that it came to his hands while he acted as bookkeeper, as in the second and fifth counts, without showing that he so acted under an employment by the bank; or to say that it came to his hands in virtue of his office as bookkeeper, as in the fourth and sixth counts; or that it came to his hands as bookkeeper, as in the seventh and eighth counts, without showing that he was employed by the bank, that is, was authorized by the bank to act as bookkeeper, is not a sufficient allegation that it came "to his possession or custody by virtue of such employment." For these reasons we are of opinion that all the counts are bad.

There is another objection which goes to the whole indictment; but as we think the others sufficient and this doubtful, we shall give no opinion upon it. We mean the objection, that the office of discount and deposit at Washington is not established in any state or territory of the United States.

There are other objections also to particular counts. As to those which charge the defendant with embezzlement of money, it is objected that the money is not averred to be the property of the Bank of the United States; and although it is not necessary to constitute the offence of embezzlement under the second branch of the sixteenth section, that the things embezzled should be the property of the Bank of the United States, yet it is said that it must be averred to be the property of some person. This objection we do not think sufficient.

It is also objected that those counts do not aver that the defendant fraudulently em-

bezzled, &c. This objection we take to be good; for it is a part of the description of the offence that it should be done fraudulently; and no allegation that it was done feloniously can supply the place of the word fraudulently; for it was not feloniously unless it were fraudulently done. 2 Hawk. P. C. bk. 2, c. 25, § 110. This objection applies to the second, fifth, and sixth counts.

To the fourth, seventh, and eighth counts, it is objected that it is not averred, that the check was a valuable security, or a draft; and a check, as such, is not within the words of the section upon which this indictment purports to be framed. A check, ex vi termini, is not, ex necessitate, a draft or a valuable security, especially after it has been paid by the party on whom it was drawn, and cancelled The offence must be charged in the words of the act. I think this also a valid objection. The majority of the judges, however, upon this last point, are of a different opinion.

THRUSTON, Circuit Judge, argued against the opinion of the court, upon the other points also, but concluded that he would not dissent.

Judgment for the defendant on the demurrer.

Case No. 15,132.

UNITED STATES v. The FORRESTER.

[Newb. 81.] [1]

District Court, D. Michigan. 1856.

SHIPPING—NAVIGATION LAWS—REGISTER—LICENSE—CHANGE OF OWNERSHIP—CUSTOM—IMPORTS.

1. A distinction exists, in the navigation laws of the United States, between registered vessels and vessels enrolled and licensed for the coasting trade, as regards penalties imposed.

2. On the transfer of a registered vessel to a citizen of the United States she must be registered anew, or she loses her privileges as an American vessel; but a different penalty is imposed by the enrolling act for a neglect to renew a license granted by virtue of that act.

3. Where a vessel has been enrolled and licensed, and prior to the expiration of the time limited by the license is sold to a citizen of the United States, and continues running without a renewal of her license, she becomes liable to port fees and tonnage in every port at which she may arrive, the same as vessels not belonging to the United States; but the vessel does not thereby become denationalized.

[Cited in The Gala Plaid, Case No. 5,183.]

4. The existence of a custom under which purchasers of vessels previously enrolled and licensed have awaited the expiration of the time limited in the license before obtaining a renewal of the same, would not relieve such vessels from liability to the penalty provided by the enrolling act.

5. Custom will not modify an act of congress.

6. The laws of the United States in relation to commerce and revenue use the word "import" in its commercial sense.

7. The importation of merchandise into the United States implies bringing the goods and productions of other countries into the United States from a foreign jurisdiction.

This was a libel of information filed on behalf of the United States, claiming a condemnation and forfeiture of the steamboat Forrester, her tackle, apparel and furniture, to the government for an alleged violation of the revenue laws. The Forrester had been duly enrolled and licensed for the coasting trade, while she was owned by E. B. Ward, a citizen of the United States. A short time after her license had been obtained she was sold by Ward to one Clement, who was also a citizen of the United States. Clement neglected to renew the steamer's license, for the reason, as it would appear, that a custom prevailed on the Western lakes and rivers of allowing vessels once enrolled and licensed to run until the expiration of their license, without regard to any change of ownership that might occur during the life of the license. It was claimed on the part of the government, that by the neglect of the purchaser to renew the vessel's enrollment and license, she ceased to be a vessel of the United States. The Forrester was engaged in the carrying of passengers and freight between Lexington and Detroit, in the state of Michigan, stopping on her trips at various ports in Canada, as well as in Michigan. On one of her trips from Lexington to Detroit, she took on board, at ports in Michigan, a quantity of shingles, wool and fish of the value of more than four hundred dollars, and carried the same to Detroit, where they were landed without a permit from the custom-house officers. On her voyage she touched, as usual, at Canadian landings, having the articles in question on board. It was insisted on behalf of the government, that this was an importation of merchandise into the United States from a foreign country, and that, as the Forrester had lost her American character by failure to obtain new license, after sale, such importation worked a forfeiture of the vessel to the government of the United States, under the provisions of the act of congress of 1817 [3 Stat. 351].

George E. Hand, U. S. Dist. Atty.

(1) By the neglect to renew the registry of the Forrester, after sale, she ceased to be a vessel of the United States. Act 1792, § 14 (1 Stat. 294). See this doctrine fully illustrated in U. S. v. Willings, 2 Pet. Cond. R. 20, 23. True, this act speaks of registered vessels, but vessels enrolled and licensed under act of 1831 (Gord. Dig. 773; 4 Stat. 487, § 3) are liable to the rules and regulations and penalties relating to registered vessels, and such is the construction held by the treasury department. As to what constitutes a United States vessel, see Act 1792, § 1 (1 Stat. 287, 288; Gord. Dig. 713, § 2478). No other vessels are qualified for the coasting trade or fisheries. Act 1792, § 4 (Gord. Dig.

[1] [Reported by John S. Newberry, Esq.]

715, § 2484; 1 Stat. 289), shows what is necessary to obtain a registry; and like qualifications and requisites are necessary for the enrollment as for the registry of vessels. See Act 1793, § 2 (1 Stat. 305; Gord. Dig. 771, § 2678). The Forrester having thus lost her American character by failure to obtain new license after her sale to Clement, and not being a vessel of any other country, by the act of importation of goods into the United States from Canada, a foreign province, became forfeited to the United States by Act 1817, §§ 1, 2 (3 Stat. 351; Gord. Dig. 713, §§ 2475, 2476).

(2) Was there an importation of goods by the Forrester? She came from a Canadian port into Detroit with goods on board. It may be said that there is evidence, on behalf of the claimant, that the goods in question were all shipped from American ports. If that were so, it would not save the forfeiture of the vessel. The goods were imported from Canada into the United States by the Forrester, she not being a vessel of the United States at the time. A voluntary bringing from a foreign country is an importation. The Boston [Case No. 1,670]; 3 Pet. Cond. R. 299; U. S. v. Lyman [Case No. 15,647; Dunl. Adm. Prac. 245. The act of congress of 1848 (9 Stat. 232; Gord. Dig. 770) evidently contemplates that every bringing of goods from a foreign place is an importation, and contains important provisions based on that assumption, as, for example, that foreign goods, on which duties have once been paid, should not, if shipped at an American port in a vessel that touched at a foreign port, thereby again be made to pay duty. If the goods were brought from Canada into the United States it is quite immaterial how the goods came to be in Canada. In whatever way they came to be there, they are, nevertheless, goods imported into the United States from a foreign place, not in a vessel of the United States or of Great Britain, within the act of 1817. The statute makes no distinction in favor of goods of American growth or origin. Whenever a distinction between goods of domestic and foreign production was intended, it is expressed in the statutes. Thus, in Act 1793, § 6 (1 Stat. 307), a vessel offending having domestic goods or products on board, is exposed to tonnage duties, but if the goods are of foreign growth or production the vessel is forfeited. Act 1831, § 3 (4 Stat. 487), uses the disjunctive or, and authorizes a vessel, under the same papers, to be employed, "either in the coasting or foreign trade," but does not authorize a vessel to be engaged in both trades at the same time; and trips made under that act to and from American and Canadian ports, are strictly foreign voyages, and must be conducted as such; and goods taken from an American to a Canadian port, and thence returned to an American port, must be treated the same as goods taken from New York to Liverpool and thence back to New York. The act of May 27, 1848 [9 Stat. 232], for the first time permitted the same vessel to be engaged, at the same time, in coasting and foreign trade, and that only on compliance with the proviso in the first section of the act. And this act treats every vessel that has "touched" at a foreign port as coming from a foreign voyage, for she must conform to the laws touching manifests of cargo and passengers, "and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed." And in case a vessel does not comply with the terms of the proviso to section 1, she enjoys no privilege under this statute. The second section of this act provides that all vessels and their cargoes engaged in the trade referred to in the act, "shall become subject to existing collection and revenue laws, on arrival at any port in the United States." Such an arrival is clearly treated as an arrival from a foreign port, and "the collection and revenue laws" referred to, are none other than the existing collection and revenue laws pertaining to foreign trade; and it is to save certain classes of goods from the operation of "existing collection and revenue laws," to which they are made subject by the first clause of said second section, that the proviso thereto is introduced, saving those from import duties, to which, without such proviso, the "existing collection and revenue laws" would have subjected them. The "touching at foreign ports," alluded to in this act, is evidently intended as equivalent to entering a foreign port for the purpose of landing, and taking in thereat, merchandise, passengers, &c., which is making port for all commercial purposes, as fully as though such port was the only port of destination; and the arrival of a vessel from a foreign port so "touched at," is treated by this statute throughout as an arrival from a foreign country, and the cargo brought in such vessel is treated as imported from a foreign country and made subject (except when saved by the proviso to the second section) to the collection and revenue laws applicable to cargoes imported from foreign countries. The fact that the Forrester made certain Canadian ports, for all commercial purposes mentioned in the statutes, must, upon her departure thence and arrival in a port of the United States, bring her cargo within the statute definition of "imported"; and this, more especially when she came from a foreign, to a port of the United States, without the privileges conferred by the act of 1848.

(3) The bringing into the United States, by a vessel, from a foreign port, goods of the value of $400, and landing the same without a permit, is a distinct cause of forfeiture from the last, whether the importation be in American or foreign vessels, and whether the goods be dutiable or free. See Act 1799, § 50 (1 Stat. 665). The language of this statute is very explicit. The bringing from a foreign place and landing without permit, covers the whole ground.

John S. Newberry, for claimant.

(1) Act 1792, § 14, cited for the government, refers to registered vessels, and so far as this statute is concerned, it is sufficient to say that the Forrester never was a "registered" vessel. She is an "enrolled and licensed" vessel; and there is a broad distinction running through the laws in relation to the two classes of vessels. Assuming that the Forrester was subject to the act in relation to "registered" vessels, the district attorney, in support of his proposition, that a new registry must be obtained, at the time of the vessel's transfer, cites the case of U. S. v. Willing, 2 Pet. Cond. R. 20. This case, however, only decides that a new registry shall be taken out "within a reasonable time," and the facts of each case must decide what is the "reasonable time," and we insist, in behalf of the Forrester, from the evidence in the case, that her new papers were taken out within a reasonable time after the transfer. In order to connect "enrolled and licensed vessels," with the act of 1792, the act of 1831 (4 Stat. 487), is cited. This act provides that a vessel enrolled and licensed on our northern frontier, "shall be liable to the rules, regulations and penalties, now in force, in relation to 'registered vessels,' on our northern, northeastern and northwestern frontiers." Now, we ask, what are the regulations in force on the frontiers described in relation to registered vessels? There are none. See Conk. Prac. (Ed. 1842) 329. On page 230 of the same book, two instances are cited to show that "enrolled" vessels, and "registered" vessels are not subject to the same provisions. There being no laws in force as to registered vessels on our northern, northeastern and northwestern frontiers, except certain general laws which are of no importance in this case, we must look to other sources for the regulations in reference to enrolled and licensed vessels. The license itself shows under what laws the vessel is enrolled and licensed; they are the enrolling act of 1793, one passed in 1831, &c., &c. The Forrester was authorized to run under those acts, and in them are contained the regulations and penalties to which she is subject. In none of the acts referred to in the license, is there any provision that a transfer of a vessel, accompanied with an omission to take out new license, causes the vessel a forfeiture of her American character. There is a provision, however (section 5, Act of 1793), that by such transfer the license becomes void; and section 6 of the same act then provides that a vessel trading without license, becomes subject to port and tonnage duties, but this is the only penalty. Again, section 2 of enrolling act (1 Stat. 308) is cited on behalf of the government, which provides that vessels to be enrolled shall possess the same "qualifications and requisites" as are necessary for vessels to be registered. Now, this section does not enact that the licensed vessel shall be subject to all the "provisions" governing registered vessels. It simply refers to the qualifications, character, &c., of the vessel, prior to the enrollment; it has no reference to penalties, rules, &c., after enrollment.

(2) The Forrester is charged with "importing goods contrary to the true intent and meaning of the act of 1817;" she is charged with "importing goods from a foreign country." It matters not what may have been the character of our vessel, unless we have been guilty of "importing goods," thereupon, "from a foreign country contrary to the true intent and meaning of the act of 1817." We leave the meaning of that sentence to its usual, simple and commercial construction. We leave it for the court to decide, whether, under the facts of this case, there was an importation from a foreign country, in the true intent and meaning of the act of 1817, on board the Forrester, or not. She had the right to touch at foreign ports. 9 Stat. 232. This is conceded on behalf of the government; and it is also conceded that congress, in its legislation, has acted upon the supposition, that domestic goods might go into a foreign port, and be afterwards landed in American ports, without being liable to duty. Why, then, should we be condemned for acting under the same inference and supposition as congress itself? We contend: (1) That by no act on the part of the Forrester, has she lost her American character, or the privileges of an American vessel. (2) We have not been guilty of importing goods from a foreign country, contrary to the true intent and meaning of the act of 1817.

WILKINS, District Judge. This steamer was seized by the collector of the port of Detroit, for a violation of the revenue laws, on the 18th of October, 1854. The libel informs the court, that, at the time of the seizure, "she was not a vessel of the United States; nor a foreign vessel belonging to citizens of the country, from which the merchandise imported in her, at the time of seizure, were first shipped for transportation, or, of the growth, production or manufacture of that country." And also, "that her cargo, consisting of 10 barrels of fish, 128 bunches of shingles, and 25 bales of wool, being merchandise subject to duty, was brought and imported from a foreign place, viz. the province of Upper Canada, into the United States, at the port of Detroit." The answer of S. Clement, claimant, denies the allegations of this information, both as to the character of the vessel, and the importation charged, and sets forth that she was at the time, duly enrolled and licensed at the port of Detroit, and that the merchandise specified was not imported into the United States from a foreign place, but was shipped from ports and places within the United States.

It was in proof, on the trial of the issue thus made in the case, that the Forrester was built at Newport, in this state, by E. B.

Ward, in the month of June, 1854, and was by him enrolled and licensed for the coasting trade, on the 6th day of July following, "for one year from that date"; that on the 12th of July of the same year, only six days subsequent to her enrollment, Ward sold the Forrester to Clement, the conveyance being witnessed by the deputy collector of the port of Detroit, and placed on record in a book in the office, provided for that purpose, called volume A, on page 534; that Clement, the claimant of the Forrester, was at the time, and is still a citizen of the United States; that during the summer of 1854, the route of the Forrester, in navigating the rivers Detroit and St. Clair (a line through the middle of which streams constitutes the national boundary line between the Canadas and the United States), was from Port Huron, St. Clair county, to the port of Detroit; that in her trips she always touched at Port Sarnia and at Baby's Point, villages in the province of Canada, on the east bank of the St. Clair river, for the reception of passengers, baggage and whatever freight might offer; that on her downward trip from Port Huron on the 13th of October, 1854, the fish specified in the libel, was shipped from Port Huron, the wool from St. Clair, and the shingles from Lexington, all consigned to the port of Detroit, these ports being American ports, within the United States; that on the said downward trip, she stopped, as usual, for freight and passengers, at Ports Sarnia and Baby's Point, but took no freight in at either of those places, and that the fish, wool and shingles were not taken from the Forrester from the time they were shipped until they were landed at Detroit, but remained in the hold of the vessel, the steamer only remaining for a few minutes at the Sarnia and Baby wharves, and on the trip in question receiving no additional freight at those ports; that no other freight was landed at Detroit on the 13th of October, 1854, from the steamer, but the enumerated articles described in the libel; that no new license was taken out for the Forrester by Clement, the purchaser from Ward, nor had she been enrolled since the sale, but shortly after the vessel had been seized, Clement called at the customhouse and made application for a new license and enrollment, which was then refused.

With this demonstration in support of the answer, the government seeks the forfeiture of the goods and the vessel, on two grounds: (1) That the steamer forfeited her American character and lost her privileges as an American ship, in consequence of the neglect to enroll her anew after her sale to Captain Clement. (2) That her cargo, landed and seized at Detroit, was merchandise imported from the adjacent province of Canada. There is a very obvious distinction made in the law regulating the collection of the revenue of the United States, between registered vessels and vessels licensed and enrolled. The first class is governed by the act of December 31, 1792, entitled "An act concerning the registering and recording of ships or vessels," and its provisions were designed to apply to vessels engaged in foreign commerce. The second class is governed by the act of the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," and the various subsequent statutory amendments, embracing only vessels in the coasting trade on the Atlantic, and on the northern, northeastern and northwestern frontier waters of the United States. Both statutes were enacted during the same session of congress; and both classes of vessels are restricted, by their respective certificates of registry, and their licenses of enrollment, to the species of navigation and trade described and defined in these documents respectively.

But it is contended that the second section of the enrolling act adopts the provisions and penalties of the registry law. In many respects the two statutes differ, and such enactment, on the very threshold of the statute, if so construed, would render much of the remaining thirty-two sections nugatory and unnecessary. For instance—by the sixteenth section of the registry law, the failure to report a sale to a foreigner works a forfeiture of the vessel; and by the thirty-second section of the enrolling act, the sale of a licensed vessel to a foreigner, whether reported or not, absolutely forfeits the vessel and her cargo. The provision is positive, "if any licensed ship or vessel shall be transferred to any person not a citizen of the United States, the vessel and her cargo shall be forfeited." Here the penalty is imposed on the forbidden act; while in the sixteenth section of the registry law the penalty attaches, not to the act of sale, but "on the neglect to make the same known" in the way indicated in the act. The same penalty is applied, but not under the same circumstances; the sale in the first being the penal misconduct, and the failure to report, the cause of forfeiture in the other. It is considered, therefore, that the provision of this second section of the enrolling act, is merely directory to the public functionary by and before whom the enrollment is to be made, as preliminary to the grant of the license. This is clearly inferable from the language employed. The section declares that "in order for the enrollment of any vessel, she shall possess the same qualifications, and the same requisites in all respects, shall be complied with, as are made necessary for registering ships by the registry law; and the same duties are imposed on all officers, with the same authority, in relation to enrollments, and the same proceedings shall be had in similar cases touching enrollments."

The same qualifications, the same requisites in all respects, and the same proceed-

ings in similar cases, are directed to be observed; but which by no means embrace the penalties of the first act, as applicable to the cases of dereliction enumerated in the second. By the first law, on certain pre-requisites, a certificate of registry is to be given; and by the second, on the performance of similar acts, an enrollment is perfected, and a license obtained. But certainly it would be a forced construction so to interpret these words as to make the penalty prescribed on the omission, under the first statute to re-register, apply to the neglect to re-enroll and re-license. The fourteenth section of the registry law directs "that when any ship or vessel, which has been registered, shall be sold to a citizen of the United States, the said ship must be registered anew by her former name, otherwise she shall cease to be deemed a ship of the United States. And in every case, if she shall not be so registered anew, she shall not be entitled to the privileges of a vessel of the United States." And the sixth section of the enrolling act provides that "every ship found trading between different places in the same district, without enrollment or license as provided in the act, shall pay the same fees and tonnage in every port at which she may arrive, as vessels not belonging to citizens of the United States." Where a vessel has once been enrolled and licensed, and before the expiration of the time limited in the license, is sold to a citizen of the United States, and continues running without a renewal, she certainly occupies in relation to the law, the position indicated, of "a vessel trading without enrollment or license as provided in the act," and is amenable to the special penalty imposed, but to no greater. But "ceasing to be a vessel of the United States," and losing all the privileges of such, as a penalty, widely differs from being made liable to port fees and tonnage at every port she arrives at. In the one case, she loses her national character, and the protection which her certificate affords; in the other, she is made responsive to additional pecuniary obligations.

The object of both statutes, is the protection of the revenue against fraud, to encourage American enterprise, to preserve the rights of the citizen trader, to confine both classes of vessels to the restrictions imposed by their title papers, and to secure the collection of the public dues without confusion; notwithstanding the various transfers to which this species of property is ever subject during the season of navigation. In the commerce on the ocean with foreign nations, a voyage might continue for a year and more, before a return to the home port. In such cases, greater strictness was deemed essential, than in those of domestic trade on the coast, and on the lakes and rivers of the north, the northeast and northwestern frontier. When sold to a foreigner, the registered vessel, therefore, forfeited her national character, and when sold to a citizen, the same consequence ensued, unless the old registry was surrendered, and the vessel re-registered, according to her change of title. The intention is manifest. Why should a privilege solely conferred upon a citizen, be surreptitiously used with impunity by a foreigner? The same necessity did not exist in regard to the other class; it was not to be presumed that foreigners could successfully compete with citizens in the domestic trade, and the exigency did not demand the forfeiture by the American ship of her privileges of national character. So far, therefore, as the registry and enrolling statutes are applicable to the question of the penalties imposed by each, no embarrassment is felt in deciding, that the neglect to renew the license, does not denationalize the domestic vessel engaged in the navigation of our inland frontier waters. The question then arises, how far the subject is affected by the third section of the act of the 2d of March, 1831, which declares "that any vessel of the United States, navigating the waters on our northern, northeastern and northwestern frontiers, shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury; which license shall authorize the vessel to be employed either in the coasting or foreign trade, and no certificate of registry shall be required for vessels so employed on said frontiers: Provided, that such vessel shall be in every other respect liable to the penalties now in force relating to registered vessels on our northern, northeastern and northwestern frontiers."

Now, this proviso expressly embraces the penalties in force in 1831, relating to registered vessels navigating the northern, northeastern and northwestern frontiers. There is no escape from this conclusion. If then the penalty in question, namely, the forfeiture of national character and privilege, was applied at that time by any known provision of law, to licensed vessels; if this class was then, in that respect, synonymous with the former, this express language must control the court, whatever construction is given to the acts of 1792 and 1793. But, in vain it may be asked to what then existing penalties does the proviso refer? Not to the penalty prescribed in the old registry law; for that only applied to vessels engaged in foreign commerce. Not to any new penalty created since 1792, and prescribed to vessels registered for the inland trade. If so, where are they to be found? Professional research and judicial examination alike fail in their efforts to discover them. The difficulty can only be solved by that which seems (from taking the whole law into consideration), to have been the manifest intention of this act; and such clearly was, to enlarge in order to meet the growing wants of western commerce, the privileges of licensed vessels navigating the waters which form our northern, northeastern and northwestern national boundary, and en-

able them to engage in foreign and domestic commerce at one and the same time, under one set of papers, namely the enrollment and license, without the formality of a registry, and not exacting the restrictions, or enforcing the penalties imposed on registered vessels.

The case at bar exhibits the vessel which has been seized, as originally built and owned by a citizen of the United States, regularly enrolled by him, and having a license procured for the coasting trade covering one year from its date; and that, on the 13th of October, 1854 (a little better than two months after), she was seized for an infraction of the revenue laws, charged with the importation of foreign merchandise from a foreign port. Shortly after her enrollment by her owner, she was sold to the claimant, who was a citizen of the United States, of which sale the revenue officer was cognizant. Her purchaser neglected the renewal of her license, not deeming it necessary inasmuch as a custom prevailed, for purchasers of such vessels to await the close of navigation before any application for renewal. Under such circumstances, did this vessel lose her national character as a vessel of the United States? We think not. The registry penalty does not apply. But the penalty directed by the sixth section of the enrolling act, could with propriety have been enforced. The custom alluded to would constitute no defence. It was not a custom but a toleration, and as such was extended by the functionaries of the government to the owners of licensed vessels, but could not modify the law; nor would the time allowed be considered as the "reasonable time" comprehended by Chief Justice Marshall in the case of U. S. v. Willings [supra].

But, independent of this construction of the navigation acts, the libel must be dismissed, because the facts in proof do not amount to an importation within the true meaning and spirit of the act of March 1, 1817. That act specifies as an "importation" merchandise brought into the United States from any foreign port or place. The term used is "import" and legislation employed that term in its commercial sense, which is to "bring" from a foreign jurisdiction into this jurisdiction, merchandise not the product of the country. Its commercial meaning is directly contrary to the term "export." Both phrases have a technical meaning in the law. We "import," teas from China, wines from France. We "export" cotton, tobacco, pork and wheat. The one term signifies etymologically "to bring in," the other "to carry out." The act itself defines the word, viz. "brought into from any foreign port or place." It is in proof that the articles enumerated in the libel, "fish, wool and shingles," were shipped from American ports, within this district, and by respective bills of lading consigned to merchants in Detroit. When the goods were shipped they were stowed away and never removed until they reached their destination. Now, is the meaning of the word "import" to be changed under these circumstances, simply because the vessel freighted with these productions, and engaged in the navigation of the rivers St. Clair and Detroit, temporarily stopped on her downward voyage at Canadian ports for the purpose of receiving in the usual business of a steamer additional passengers and freight, or to take in fuel? Such would not be a fair, just and reasonable construction of the law, the chief intention of which is the imposition of duties, for the support of government, on foreign commerce. The literal signification of the words contained in the law does not admit of such an interpretation; it is contrary to the known policy of the navigation laws.

This libel must, therefore, be dismissed. But although there was no evidence to justify the condemnation of the vessel, yet the seizure was made under circumstances which warranted the suspicion of the officer, that the cargo discharged was imported from Port Sarnia in Canada. The captain called the merchandise "Port Sarnia stuff," and the vessel not having renewed her license under her new owner, and the doubt which existed as to her character, made it the duty of the officer to make the seizure. Libel dismissed, with certificate of probable cause.

Case No. 15,133.

UNITED STATES v. FORSYTHE.

[6 McLean, 584.] [1]

Circuit Court, N. D. Ohio. July Term, 1855.

COLLECTORS OF CUSTOMS—EMBEZZLEMENT—TREASURY TRANSCRIPT—REFUSAL TO PAY OVER—OFFER TO COMPROMISE.

1. To sustain an indictment under the sixteenth section of the subtreasury law, the proof must be clear that the defendant has violated some specific provision of the act.

2. A duly certified transcript from the treasury is made evidence and declared to be, prima facie evidence of embezzlement; but where the items of such evidence have been estimated and made up from hearsay, they are not admissible.

[Cited in U. S. v. Case, 49 Fed. 271.]

[Cited in U. S. v. Swan (N. M.) 34 Pac. 534.]

3. Where the expenditures of the collector's office are greater than its receipts, to convict, the evidence must show beyond a reasonable doubt, that he has used the money or refused to pay it over, in violation of the law.

[Cited in Goodrich v. Hooper, 97 Mass. 6.]

4. An offer to make a deposit of fourteen thousand dollars, to secure the government, for any balance that might be found against him, is nothing more than a proposed compromise, to avoid the prosecution, and cannot be received as evidence of indebtment to any specific amount.

Mr. Morton, U. S. Dist. Atty.

Spaulding & Backus, for defendant.

[1] [Reported by Hon. John McLean, Circuit Justice.]

OPINION OF THE COURT. The defendant [James H. Forsythe] having been appointed collector of the customs for Port Miami, in the state of Ohio, gave bond and security, as the law requires, for the performance of his duty, dated 30th of September, 1848. He remained in office until the 11th of November, 1850, when he was removed, and his successor, Mr. Riley, was appointed. From the 31st of March, 1849, to the time of his removal, one year and seven months, he made no returns, and on this ground he was removed from office, and indicted under the sixteenth section of the subtreasury law. That section provides that if any one charged with the safe keeping of the public money and the disbursement thereof, shall convert to his own use, in any way whatever, or shall use, by way of investment in any kind of property or merchandise, or shall loan or exchange it for other funds, or deposit it in bank, or any failure to pay over or to produce the public moneys intrusted to such person, shall be held to be prima facie evidence of embezzlement, and he shall be sentenced to imprisonment, for a term not less than six months nor more than ten years, and to a fine equal to the amount of the money embezzled. And it is declared that a transcript from the books and proceedings of the treasury, shall be prima facie evidence of the balance in his hands. And it is further provided, that a refusal to pay any draft, order or warrant, whether in or out of office, of the treasurer, for any public money in his hands, shall be deemed as prima facie evidence of embezzlement.

A jury being sworn, it was proved that after his removal, being at Washington, the defendant proposed to deposit fourteen thousand dollars in the treasury to secure the payment of any amount of moneys which should be found in his hands. But the government officers refused to receive the money for the purpose proposed. From the returns entered upon the transcript, the government would appear to owe the defendant above twelve hundred dollars. A number of witnesses were examined who paid duties to the defendant, on imported merchandise from Canada. The transcript being offered in evidence was objected to, on the ground that the items were not set down from the returns of the defendant, but were returned by his successor, from talking with the persons who had paid duties into the office. The treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items of which a considerable part of it is composed, though put into the transcript, are not evidence. They were not ascertained and established by the ordinary official action of the department, and consequently they are not evidence. Many of the items were put down by an estimate, and others had no better proof of their verity than hearsay, which is not admissible. The evidence of the payment of duties was not satisfactory, as it led to no certain result. The expenditure of the office was greater than its receipts, so that it does not appear that the money he had in his hands was greater than the sum he paid out. And the court instructed the jury, that as this was a criminal procedure, the proof must clearly show that he was guilty of appropriating money to his own use, or that he loaned it, or failed to pay it over when demanded. The transcript is no evidence for the reasons stated, nor does the parol evidence show, beyond reasonable doubt, that he has violated any specific provision of the act. The proposal by the defendant to deposit fourteen thousand dollars to secure the government in any amount that might be found due to it, was not an admission of any amount being due, but a proposal of compromise to avoid a criminal prosecution.

The prosecuting attorney has read the first section of the act of March 3, 1849 [9 Stat. 398], which declares that from and after the 30th day of June, 1849, the gross amount of all duties received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States, shall be paid by the officer or agent receiving the same, into the treasury of the United States at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. This act was intended to take away all excuse from collectors to withhold payments into the treasury, under the pretense that they were responsible, as collectors, on various grounds, to individuals for services rendered, &c. This was the evil which the law was intended to remedy. And it was a regulation in civil cases and can have no direct application to the case before us. The law did not take effect, until three months after the default of the defendant is alleged to have commenced. Under the circumstances, it is not perceived how this act can have a serious or direct bearing in the case. It is not a paying office, and there is no evidence, that the defendant received any instructions upon the subject.

The jury found the defendant not guilty.

Case No. 15,134.

UNITED STATES v. FORTY-EIGHT HUNDRED GALLONS DISTILLED SPIRITS.

[See Case No. 15,153.]

Case No. 15,135.

UNITED STATES v. FORTY-SIX CASKS OF CALIFORNIA GRAPE BRANDY.

[5 Int. Rev. Rec. 161.]

District Court, D. California. 1867.

INTERNAL REVENUE—SEIZURE—TIME OF FORFEITURE—INT. REV. ACT JUNE 30, 1864.

Where brandy in casks is purchased from a distiller without having first been gauged and inspected as required by law, and is subsequently seized within the time prescribed by the internal revenue act of June 30, 1864, § 68 [13 Stat. 248], and proceedings for its enforcement are commenced within the time required by section 68 of such act, the claimant takes nothing by his purchase, as the brandy at the time of the sale was forfeited to the United States.

[This was a proceeding for the forfeiture of 46 casks of California grape brandy (G. Sanguinnette, claimant), under the internal revenue act of June 30, 1864.]

DEADY, District Judge. Upon the facts proved in this case, the question of law arose as to whether the forfeiture denounced by section 68 of the internal revenue act of June 30, 1864, takes effect at the time the forfeiture occurs or not until the seizure is made. The claimant maintains the latter alternative, and rests his right to a return of the brandy on that ground. He is a purchaser between the commission of the cause of forfeiture and the seizure. That the goods were forfeited to the United States, or liable to be so forfeited, so far as the original owner and manufacturer is concerned, is not questioned by any one. They were by the manufacturer received from the distillery to the cellar where they were seized, without being gauged or inspected as required by law. The brandy was stored in this cellar, when purchased by the claimants, and at the time, the casks which contained the spirits bore no mark or evidence that the contents had been gauged or inspected. As to the manufacturer, the goods were also forfeited or liable to forfeiture, because such manufacturer refused or neglected to make true and exact entry of the spirits distilled by him during the time this brandy was his property. In the language of Judge Ballard in U. S. v. Fifty-Six Barrels of Whiskey [Case No. 15,095]: "The decisions are uniform both in England and the United States, that when a statute denounces a forfeiture of property as the penalty for the commission of crime, if the denunciation is in direct terms, and not in the alternative, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government." Numerous precedents are quoted in support of the statement. When the forfeiture is not denounced in the alternative, as of the goods or their value, the rule of construction is too well settled to admit of argument or controversy, that the forfeiture takes place at the time of the commission of the cause of forfeiture, and operates to transfer the property in the thing forfeited to the government so as to avoid all intermediate sales made between the commission of the act and the judicial sentence of condemnation. Indeed, the learned counsel for the claimant does not deny this doctrine, but seeks to avoid the effect or the application in this case, on the ground that the forfeiture is denounced in section 68, which reads as follows: "Provided that such seizure be made within 30 days after the cause for the same shall have come to the knowledge of the collector or deputy collector, and that proceedings to enforce said forfeiture shall have been commenced by such collector within 20 days after the seizure thereof." The proviso does not prevent the forfeiture. It does not except the goods mentioned from the previous words of the section, which declare a direct and present forfeiture. It only operates, as the books say, to avoid the forfeiture by way of defeasance or excuse. In this case, by the terms of the proviso, such defeasance or discharge can only occur where it is shown that the seizure was not "made within thirty days after the cause for the same shall have come to the knowledge of the collector or deputy collector," and that legal proceedings were commenced thereon within the farther time limited for that purpose.

As it appears from the facts found in this case that the seizure and subsequent proceedings took place within the time prescribed by the proviso, it follows that the forfeiture which occurred prior to the purchase from the distiller by the claimant was never discharged or defeated, and that consequently the claimant took nothing by his purchase, the brandy being already the property of the United States. If, then, there was any question as to the true construction to be given to section 68, as qualified by the proviso thereto, it would be the duty of the court to reject the construction sought for by the claimant. Such a construction would put it in the power of every dishonest distiller to evade the payment of the taxes due upon his manufactures, by means of private sales to third persons. No seizure would be made, but a claimant would be found alleging that he was a purchaser in good faith; and whether he was or not, and most likely if he was not, he would come into court fortified with bills of sale and all the formal evidence of purchase and possession.

It would be impossible for the government to remove or penetrate the exterior seeming of legality and apparent honesty with which avarice and unscrupulousness would envelope and disguise the most deliberate and gross attempts to defraud the revenue, and, in the end, the law imposing a tax upon the distillation of spirits would become inoperative and of no effect.

At the time of the purchase the goods were the property of the United States. Judgment must be given accordingly, and against the claimant for the costs from the time of his intervention, and which were caused thereby.

Case No. 15,136.

UNITED STATES v. FORTY-THREE GALLONS OF WHISKY.

[19 Int. Rev. Rec. 158.]

District Court, D. Minnesota. May, 1874.[1]

CONSTITUTIONAL LAW—INDIAN TREATIES—RESTRICTIONS ON STATE SOVEREIGNTY.

[After a new state has been admitted into the Union upon an equal footing with the original states, the United States have no authority to abridge its sovereign powers over territory embraced within its limits, by making a treaty with an Indian tribe occupying the same, by the terms of which the acts of congress regulating trade and intercourse with the Indians and providing for the forfeiture of certain goods, stores, etc., of any Indian agent who is about to introduce spirituous liquors into the Indian country, are extended over the lands occupied by the tribe, to the exclusion of the state's jurisdiction.]

The United States has filed a libel of information against forty-three gallons of whisky, sundry peltries, and other goods and merchandise seized as forfeited by virtue of the twentieth section of the act of congress approved June 30, 1834 [4 Stat. 732], as amended by the act passed February 13, 1862 [12 Stat. 338], which, it is claimed, is now in force over the territory where this seizure was made. There are three special counts in the libel. The first, in substance, sets forth that on February 12, 1872, Bernard Lariviere, a white person of the village of Crookston, in the county of Polk, and state of Minnesota, did unlawfully carry and introduce into said village, which is located upon the territory ceded to the United States by treaty with the Red Lake and Pembina bands of Chippewa Indians, made and concluded October 3, 1863, the spirituous liquors particularly described, contrary to the treaty, and the act of congress above cited; that an Indian agent, duly appointed, having reason to suspect, and being informed that spirituous liquors had been introduced by said Lariviere into said county of Polk in violation of the act of congress, searched and caused to be searched, the goods, merchandise, peltries, etc., which he had in his possession at Crookston, in the ceded territory aforesaid; upon which search the whisky was found stored, packed and mingled with and in the packages, goods and peltries, and in the places of deposit of said Lariviere, and was so carried and introduced into the ceded territory, contrary to the form of the statute of the United States in such cases made and provided; and was seized and taken by the Indian agent as forfeited, together with all the goods and peltries, etc., so found. The second count sets forth that the whisky was introduced with the intent to sell, dispose of, and distribute the same to and among the bands and tribes of Chippewa Indians, under the charge of an Indian agent, who frequented the village of Crookston, and who lived upon the reservation near that place. The third count is abandoned. The information prays that the said goods, merchandise, peltries, etc., may be decreed and declared forfeited, and the forfeiture properly enforced. Lariviere and [Charles] Grant have filed claims to the property, and exceptions to the information, and demur thereto.

Wm. W. Billson, U. S. Atty.
Davis, O'Brien and Wilson, for Lariviere.
W. M. McCarty, for Grant.

NELSON, District Judge. It is necessary, to a proper understanding of this controversy, to examine the act of congress admitting the state of Minnesota into the Union [11 Stat. 285], the twentieth section of the act of June 30, 1834 [4 Stat. 732], as amended in 1862 [12 Stat. 338], and the seventh article of the treaty of 1863 [Id. 1250], under which, it is claimed, this proceeding is properly instituted. The state of Minnesota was admitted into the Union May 11, 1858, and the locus in quo is within the boundaries prescribed by the act of congress authorizing a state government. The first section of the act declares: "That the state of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever." There is no proviso or limitation in the act with reference to the jurisdiction of the state over any portion of the territory occupied by the Indian tribes within the boundaries prescribed by congress, and the constitution of the state nowhere intimates that this territory is withdrawn from its general jurisdiction.

If the jurisdiction of this court in this proceeding can be sustained, the fact being undisputed that the introduction of whisky was upon the ceded land, it must exist by virtue of the treaty made with the Chippewa bands of Indians in 1863. The seventh article is as follows: "The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by congress or the president of the United States." The law prohibiting the introduction of spirituous liquors contemplated by this treaty, is found in the second section of

[1] [Affirmed by circuit court. Case unreported. Decree of circuit court reversed in 93 U. S. 188.]

the trade and intercourse act of 1834, as amended February 13, 1862, viz.: "* * * And if any Indian agent * * * has reason to suspect, or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor * * * into the Indian country * * * it shall be lawful for such agent * * * to cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched, and if any liquor is found therein, the same, together with the teams, etc., conveying the same, and the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court and forfeited," etc.

The only defence under the statute to the charge, is the introduction by order of the war department or some authorized officer. The county of Polk is a portion of the territory ceded by this treaty, and has been organized for many years, and all the civil officers recognized by the constitution and laws of the state of Minnesota are residing therein, and in the exercise of their full power and authority. The white settlements are increasing, and towns and villages are springing up with wonderful rapidity. Already a railroad authorized by the state and endowed by its bounty, traverses the entire county, and the village of Crookston, where this merchandise was seized, is one of the stations. The trade and traffic in that part of the state, although sparsely inhabitated, is quite large and the wants of a frontier settlement are supplied by the merchants living in the village.

The question, therefore, involved in this case, is one of no ordinary importance to the people of this state, and particularly the settlers in Polk county. The ultimate decision must depend upon the extent of the power of the federal government, through the executive and senate, to restrict by treaty stipulations with the Indian tribes in our midst, the political and sovereign rights of this state. Until the act of congress of 1871 (10 Stat. 566), the power of the government to make treaties with the Indian tribes residing within the limits of a state has never been questioned, and I will dismiss this part of the case by simply saying, that in my opinion, treaties with the tribes and bands of Indians in our state, by which cessions of wild and uncultivated but arable land are secured to civilization and settlement, were the fulfillment of implied obligations on the part of the United States to this state, when it was admitted into the Union on an equality with the original states. The authority to make treaties, and the subjects embraced therein, must have some limit. This power can not be exercised to override other parts of the federal constitution, or to overturn the fundamental principles of our government. True, the constitution of the United States declares a treaty to be the supreme law of the land, but it has no greater force or effect than a legislative enactment, and may even be annulled by a subsequent act of congress, provided the subject matter be within the legislative power of the latter. [Taylor v. Morton, Case No. 13,799.] It is conceded that treaties with the Indian tribes, although "domestic dependent nations," are of equal vitality with those with foreign nations, so far as the treaty making power acts within the constitutional limits. But it is important to understand, in this connection, that the rights of the Indians, the power of the federal constitution over them and over their property, and the stipulations in the various treaties with them, have never been recognized in the constitution of this state or the act of congress admitting it; so that at the time this treaty was concluded, the jurisdiction of the state over all the territory occupied by the Indians was undoubted, except so far as the regulation of commerce with them might give congress control.

It is claimed that the act of congress above referred to, with the assent of the state to the conditions imposed by the federal government, constitute a compact of guaranty, and limit the power of the United States to treat with the Indian tribes within the boundaries of the state, which would forbid insertion of a stipulation in a treaty, diminishing in any manner the sovereignty of the state without its consent. This treaty of 1863 ceded a large tract of land within the boundaries of the state of Minnesota and the territory of Dakota. So far as the seventh article attempts to interfere with the internal and domestic commerce of the state of Minnesota, or abridge the rights of its citizens, or withdraw its jurisdiction without its assent over the tract of land ceded, it is certainly an interference with the sovereignty of the state. The laws creating courts of justice for the protection of the liberty and property of its citizens would be thereby obstructed to the extent that the laws of the United States recognized by this treaty, may operate upon them. If the jurisdiction of the federal courts to enforce the penalties and forfeitures accruing under the law forbidding the introduction of spirituous liquor is once admitted, it necessarily excludes the jurisdiction of the state courts and all the police laws, and others recognizing the traffic in the interdicted article. It cannot admit of doubt that under such circumstances Minnesota would not stand "upon an equal footing with the original states." The federal government in the treaty with Great Britain, where the contract settled a disputed boundary question, would not undertake to divest any state of territory over which it claimed to exercise jurisdiction, without procuring the assent of the state, in advance, or making the

validity of a particular stipulation conditional upon future favorable legislation by the state interested. See Ashburton Treaty, 8 Stat. 554; Lawr. Wheat. Int. Law, pp. 494, 876, and notes.

It has been urged by some writers that the acquisition of foreign territory under the treaty making power of the United States necessarily concedes that of alienating territory and abridging state sovereignty; but the correspondence of the commissioners and the final conclusion in the above treaty, would seem to deny the power to alienate without the consent of the state interested. The treaties cited by the United States attorney, all relate to the status of foreigners residing within the United States, or to their property. There can be no doubt about the power of the government by treaty to protect the persons and property of foreigners, and remove them from the operation of a particular law of a state, passed for the special purpose of reaching them. So in the case of tribes of Indians; their persons and property could have been protected by treaty stipulations, although within the limits of the state, any law of the state to the contrary. To make such stipulation is within the power of the government under the constitution, for upon congress is conferred the regulation of commerce with foreign nations and with the Indian tribes; and the general treaty-making power could properly contract with reference to these subjects. But to say that a barbarous semi-sovereign community under the protectorate of the United States, and within its geographical limits, can by treaty stipulate away any part of the sovereignty of a state guaranteed by the supreme federal government on its admission into the Union, is, in my opinion, inconsistent with the nature of our government.

I have arrived at the conclusion, therefore, that until the assent of the state of Minnesota is obtained, the seventh article of the treaty of 1863, is inoperative, to the extent of demanding a forfeiture of the spirituous liquor and other merchandise, for any acts charged to have been committed by the person named in the libel. The exceptions and demurrer are sustained, and the property must be restored. See U. S. v. Ward [Case No. 16,639]; U. S. v. Sa-Coo-Da-Cot [Id. 16,212]; U. S. v. Bailey [Id. 14,495]; Kansas Indians, 5 Wall. [72 U. S.] 737.

[NOTE. The judgment of this court was affirmed in error by the circuit court. Case unreported. The United States then sued out a writ of error to the supreme court, which reversed the judgment, and remanded the case with directions to overrule the demurrer. 93 U. S. 188. Upon the new trial in the district court there was a verdict and judgment for the claimants. Case unreported. This judgment was again affirmed by the circuit court (case unreported), and again reversed upon error by the supreme court, which again remanded the cause for a new trial. 108 U. S. 491, 2 Sup. Ct. 906.]

Case No. 15,137.

UNITED STATES v. FOSSAT.

[Hoff. Land Cas. 211.] [1]

Circuit Court, N. D. California. June Term, 1857.[2]

MEXICAN LAND GRANT—"MORE OR LESS"—BOUNDARIES.

The genuineness of the grant in this case not disputed. The ruling in Estudillo's Case [Case No. 15,058], that the words "poco mas ó menos" are operative for such fractional parts of a league as may be in excess of the quantity named in the grant, re-affirmed. The southern boundary of the land granted to Justo Larios declared to be the main Sierra, and not the low hills or lomas bajas.

[This was a claim by Charles Fossat for one league of land in Santa Clara county, confirmed by the board, and appealed by the United States.]

P. Della Torre, U. S. Atty.

A. P. Crittenden, for appellee.

HOFFMAN, District Judge. At the hearing of this case, the court entertaining no doubt upon the points presented, expressed verbally its opinion. At the suggestion of the attorney for the claimants, I have committed to writing the substance of the views then expressed. The genuineness of the grant was not disputed. The only questions discussed were as to the extent and the boundaries of the tract granted. The land is described in the grant as known by the name of the Capitancillos, bounded by the Sierra, by the Arroyo Seco on the side of the establishment of Santa Clara, and by the rancho of citizen José R. Berreyesa, which has for a boundary a line running from the junction of the Arroyo Seco and Arroyo De Los Alamitos southward to the Sierra, passing by the eastern "falda" of the small hill situated in the center of the Cañada. The third condition states that the land herein referred to is one league de ganado mayor, a little more or less, as is explained by the map accompanying the expediente.

It had been urged to the court in previous cases, that where the conditions of a grant mentioned the tract referred to as of so many leagues "a little more or less," the latter words should be rejected for uncertainty, and the quantity of land should be limited to the number of leagues mentioned. But this construction the court had refused to adopt. It was considered that the inquiry in these as in other grants was as to the intention of the grantor, and that the court could not attribute to him an intention to grant so many leagues and no more, in the face of his declaration that he intended to grant the specified quantity, a "little more or less." It is not necessary now to recapitulate the

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 20 How. (61 U. S.) 413.]

various considerations upon which the court determined the question. It was of opinion that where the boundaries of the land granted were designated with reasonable certainty, the mention in the condition of a certain number of leagues, "more or less," as the quantity of land granted, should be considered as indicating an intention to grant the whole tract within the boundaries, provided the excess over and above the number of leagues mentioned was not so great as to indicate gross error or fraud; and that, as under the former government the ordinary unit of measurement was a league, the term "more or less" should at least be construed to embrace such fractional parts of a league as might be found within the boundaries, if no greater excess than some fraction of a league were found within them. It may deserve consideration whether such a mention of quantity should not be considered in all cases, except those of gross error or fraud, rather a conjectural estimate of the quantity previously granted than as a limitation of that quantity, and whether the grant should not be deemed, except in the cases referred to, a grant by metes and bounds, or by boundaries. It is enough, however, for the present to say that this court has decided that under the words "more or less" such fractional part of a league over and above the number of leagues mentioned will pass, as may be contained within the boundaries described in the grant. This point was not discussed at the hearing of this case, the district attorney being aware that it had already been passed upon by the court.

The questions more particularly debated were—1st, whether this court had any power by its decree to designate the boundaries of the tract confirmed to the claimant, or whether the language of the grant must be adopted, leaving the location of the boundaries and the identification of the natural objects called for to the surveyor general. Secondly, what were the boundaries called for.

As to the first point I entertain no doubt. The court is not, it is true, authorized by the act to designate the "extent, locality and boundaries" of the granted land. This, in the absence of a preliminary survey, would be impracticable; but the determination of the validity of a claim to a particular tract of land necessarily involves an inquiry, to a certain degree, into the boundaries or the extent of the tract, the validity of the title to which is in question. If the court decrees that the title of the claimant is valid to a piece of land, it should by its decree identify and designate that land, so that it may be known to what the claim is valid. But surely it is not only its right but its duty to construe by the aid of evidence and argument any ambiguity or uncertainty apparent on the face of the grant itself, and where the grant, as in this case, speaks of a "Sierra" as a boundary, to ascertain and declare what Sierra is meant, and to express in its decree that it confirms a claim to a tract bounded by a particular and specified Sierra, and not by such Sierra as the surveyor general may consider to have been intended. The supreme court, in many of the cases brought up on appeal from this court, have entered fully and freely into the question of boundaries, and appear to have considered their determination not only as within their jurisdiction, but as an appropriate and important part of their duties.

The remaining question to be considered is, what boundaries were intended by the grantor. The only one of those mentioned, the identity of which was debated, is the southern boundary mentioned in the grant as "the Sierra." The point to be determined is—what natural object was meant. The evidence shows that the tract called Capitancillos is a valley lying along an Arroyo or brook; on the southerly side extends a range of low hills, running from east to west. At their eastern extremity, where they are intersected by the Alamitos, these hills attain considerable elevation, but they decline in height towards the west, where they reach and are turned by the Arroyo Seco. Behind this ridge or Cuchilla the main Sierra or mountain chain raises itself to a great height, and is separated from the ridge of "lomas bajas," already spoken of, by the two streams mentioned. These streams rise at an inconsiderable distance from each other, and flowing in opposite directions between the Sierra and the lomas bajas, they turn the eastern and western extremities of the latter and debouch into the plain. Upon the slopes of the ridge of low hills, as well towards the valley on the north as towards the streams behind it on the south, the best or most permanent grazing is to be found, and on this ridge are situated the valuable quicksilver mines, the existence of which gives to this inquiry its chief importance.

The question is—Is the Sierra mentioned in the grant the mountain chain to the south of the lomas bajas, or is it the lomas bajas themselves? If there were no other means of determining this question, the word "Sierra" itself, by its necessary import as well as from the evidence which shows to which of these natural objects it was in fact applied, would leave little room for doubt. The natural and ordinary meaning of the term clearly points us to a great mountain chain, rather than to a ridge of low hills parallel to but separated from it. The evidence is conclusive that such was the meaning and use of the word with reference to these particular natural objects, and that while the mountain range was known as the "Sierra," the ridge of low hills was known as the "Cuchilla la Mina de Luis Chaboya," or as the "Lomas Bajas." The expediente furnishes more conclusive evidence on this point. The tract is described, as we have seen, as of one "league, a little more or less, as is explained by the map accompanying the expediente." On this map is found

rudely delineated a mountain range, and this mountain range is inscribed "Sierra Del Encino," or "of the oak tree." The Sierra mentioned in the grant is therefore evidently the "Sierra Del Encino," for that is the only Sierra delineated on the map. The evidence discloses that there is on the main Sierra or mountain chain an oak tree of extraordinary proportions and striking appearance. Situated on a spur or ridge of the mountain, it is a conspicuous natural object from all parts of the valley and for many miles around. The photograph exhibited in court shows that its size and isolated situation are such as to strike the eye and arrest the attention of the most casual observer. Few who reside in that part of the country but are acquainted with the existence and situation of this tree, and it appears in the speech of many of the former inhabitants to have given a name to the Sierra on which it is situated. If then, as appears indisputable, the Sierra referred to in the grant be the "Sierra Del Encino," the Sierra on which this oak tree is situated must be the one.

A still further confirmation of these views is derived from the map accompanying the expediente of Berreyesa. The grant we are considering mentions as the eastern boundary of the tract granted, "the rancho of citizen José R. Berreyesa, which has for a boundary a line running from the junction of the Arroyo Seco and Arroyo De Los Alamitos southward to the Sierra," etc. This line thus dividing the two ranchos had previously been a subject of dispute between the colindantes or neighboring proprietors. It was finally settled, however, by the government before the grants were issued, and a dotted line, indicating the boundary agreed upon by the parties and fixed by the government, was made on the diseño of Berreyesa. This line is described in both grants in the same terms. That under consideration refers, as we have seen, to the rancho of Berreyesa as the boundary of the rancho of Justo Larios, and then describes the line as the boundary of Berreyesa's tract. The same inverted mode of description is used in the grant to Berreyesa. To determine what the boundary of Justo Larios' land is, we must, in literal compliance with the terms of the grant, ascertain the boundary of Berreyesa's land, and in ascertaining the latter we resort to the map on which the dotted line is marked. In Berreyesa's grant, as in that of Justo Larios, the line is described as extending to the "Sierra," and as the ranchos were coterminous and the eastern boundary of one is the western boundary of the other, the "Sierra" to which their common line of division extends must be the same. On recurring, then, to Berreyesa's map and the dotted line alluded to, all doubt is dissipated as to the range of mountains referred to. On this map two ranges of hills or mountains are rudely but unmistakably delineated. They are separated by a broad valley—far broader than that actually existing, but indicating by its exaggerated delineation the discrimination in the grantor's mind between the ridge of low hills and the Sierra, or mountain range behind it. The lower ridge is inscribed "Lomas Bajas," while the chain behind it and distinctly separated from it is inscribed "Sierra Azul," from the hue which the mountains assume at a distance. The dotted line which by the grant is to terminate at the "Sierra," is produced across the "Lomas Bajas," across the valley beyond them, and terminates at the "Sierra Azul." There can thus be no room for doubt that the Sierra intended was the main Sierra or mountain range, and as the western line of the land of Berreyesa extended to this range, the land of Justo Larios, which has the same line described in the same terms as its eastern boundary, must have the same extent. The Sierra referred to in Justo Larios' grant must necessarily be the same as that referred to in the grant of Berreyesa, and as to the latter, there can be, as we have seen, no question.

Other considerations in support of this view might be urged. I think it unnecessary. There seems to me no room for doubt that the Sierra referred to in the grant was the main Sierra described by the witnesses, and not the range of low hills which has been attempted to be assigned as a boundary.

[NOTE. From the decree entered in this case an appeal was taken by the United States to the supreme court, which rejected the words "more or less" in the grant, and confirmed the same for one league to be taken within the three designated boundaries, east, west, and south. The north boundary to be determined by quantity. 20 How. (61 U. S.) 413. The cause having been remanded, a continuance was granted the United States, in order to produce further testimony in the determination of the location of the boundaries, as designated in the grant. Case No. 15,138. Subsequently the location of the three designated boundaries was determined by the district court; the southern boundary, the one in dispute, being located as in the opinion above. Id. 15,139. From this decree an appeal was again taken to the supreme court by the United States. The appeal was upon motion dismissed, on the ground that the decree of the district court was not a final decree. 21 How. (62 U. S.) 446. At a later date, a survey was made, and returned into the district court, which approved the same, with modifications. Id. 15,140.]

Case No. 15,138.

UNITED STATES v. FOSSAT.

[Hoff. Land Cas. 373.] [1]

District Court, N. D. California. June Term,, 1858.

CONTINUANCE — ADDITIONAL PROOFS — MEXICAN LAND GRANT.

Where a cause is remanded for further proceedings, involving additional proofs, the United States are entitled to a reasonable time in which to close their testimony.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

This was an application by the district attorney for a continuance, in order to produce further testimony.

P. Della Torre, U. S. Atty., for continuance.

A. P. Crittenden, against it.

HOFFMAN, District Judge. This cause having been set for a hearing on this day, a continuance is moved for on the part of the United States, in order that further testimony may be produced. The motion is strenuously resisted on the part of the claimant. To determine whether the court, in the exercise of its discretion, should grant it, the previous proceedings in the cause should be adverted to. The transcript from the board of commissioners was filed in this court on the 2d of November, 1854. A notice of appeal by the United States was duly filed February 20, 1855. The cause remained pending in this court until August 13, 1857, —a period of two years and six months,— when the proofs on both sides having been closed, it was argued and submitted. No suggestion on either side was then made that the cause was not fully ready for hearing, nor any application for further delay, nor was it intimated by the parties that any further testimony was desired or could be obtained. The decree of this court was signed on the 17th of August [Case No. 15,137], and an appeal having been taken by the United States, it was heard by the supreme court at the last term. The mandate and opinion of the supreme court were filed in this court on the 17th of June, 1858. By the mandate the cause was remanded to this court, with directions to enter a decree in conformity to the opinion of the supreme court. [20 How. (61 U. S.) 413.] By that opinion it appears that, in entering the decree, "the external boundaries designated in the grant were to be declared by this court from the evidence on file, and such other evidence as may be produced before it."

The mandate and opinion having been filed on the 17th of June, a motion was made on the 23d of June, that a decree be filed designating the external boundaries, as directed by the supreme court. On the application of the district attorney, the hearing of this motion was postponed until June 30th. On that day the district attorney stated that he desired to produce further testimony on the part of the United States, and an order was made referring the cause to a commissioner to take proofs, with liberty to either party to move to set the cause for a hearing in default of due diligence on the part of the opposite side. Under that order various depositions were taken on the part of the United States. On the 3d of August, notice of a motion to set the cause for a hearing was given by the claimant, and on the 9th of August the motion was heard. It was thereupon ordered by the court, the United States attorney consenting thereto, as appears by the order and the minutes of the court, that the testimony on both sides be closed on the 21st of August, and the cause set for a hearing on the 24th of August. Depositions were accordingly taken by the United States on the 18th and 19th of August. On the 24th of August the district attorney again moved for further time to take testimony, which was opposed by the counsel for claimant. The court, after hearing argument, ordered that further time should be allowed, viz., until the 28th, and that the cause be set for a hearing on that day. The district attorney now moves (August 28th) for further time to take testimony. He does not state to the court the names of any witnesses he proposes to examine, their number, nor the facts intended to be established by them, that the court may judge of their materiality. He declines to indicate any time within which the proofs will be closed, but insists on the right to examine witnesses, so long as it shall appear to the court that he is proceeding therein without unnecessary delay.

On the part of the claimant it is urged that any further postponement of this cause will in all probability prevent its being heard by the supreme court at its ensuing term. It would be deeply regretted by the court if this litigation, so long protracted, and involving such vast interests, should not at the next term of the supreme court be determined. The question, however, for my consideration is, have the United States had such reasonable time for taking proofs as ought to be allowed them? It is to be observed that in the opinion of the supreme court, this court is directed to "declare the external boundaries of the grant from the evidence on file, and such other evidence as may be produced," etc. It is clear that this court was bound to afford a reasonable opportunity to take the further evidence on which its declaration of the boundaries was to be founded. From the 30th of June, the date of the order directing the evidence to be taken, the cause has been prosecuted by the United States with diligence. On the 18th and 19th of August depositions were taken, and on yesterday and the day before witnesses were examined both on the part of the United States and the claimant. Certainly no laches or unnecessary delay can be imputed to the district attorney. He now states that he has other witnesses, whose testimony he will proceed to take at once if the opportunity be afforded.

With the strongest desire to bring this cause to a termination, I do not feel at liberty under the directions given by the supreme court to refuse the application. If two years and a half was not an unreasonable time for the taking the original testimony in this court, less than two months can hardly be deemed sufficient when the supreme court have seen fit to send back the cause, in ef-

fect, for further proofs. The court is assured by the district attorney, in the most emphatic manner, that he has no wish to delay the cause, but that he only desires time to submit proofs important to the interests of the United States, and which are in readiness to be taken. I do not feel at liberty to deny him the opportunity of doing so. An order must be entered allowing the district attorney ten days further time to produce testimony in the case.

[For the subsequent proceedings in the location of the boundaries of this grant, see Case No. 15,139, and note.]

Case No. 15,139.

UNITED STATES v. FOSSAT.

[Hoff. Land Cas. 376.] [1]

District Court, N. D. California. June Term, 1858.

MEXICAN LAND GRANT—DETERMINATION OF BOUNDARIES.

The southern, western and eastern boundaries of the tract granted to Justo Larios declared, leaving the northern boundary to be determined by quantity. The former opinion [Case No. 15,137], with respect to the southern boundary, maintained.

[This was a claim by Charles Fossat for one league of land in Santa Clara county, confirmed by the board, and appealed by the United States. Affirmed by the district court for one league, "more or less." Case No. 15,137. Upon appeal, the supreme court limited the grant to one league within the designated east, west, and south boundaries, the north boundary to be determined by survey. Case remanded. 20 How. (61 U. S.) 413. In the location of the designated boundaries a continuance was allowed the United States in order to take further testimony. Case No. 15,138. It is now heard upon the question of the location of the boundaries in conformity with the opinion of the supreme court.]

P. Della Torre, U. S. Atty., and A. C. Peachy, for the United States.

A. P. Crittenden, for appellee.

HOFFMAN, District Judge. When this case was first submitted to this court on appeal from the board of land commissioners, it was considered that the four boundaries of the tract were indicated with reasonable certainty by the grant and accompanying diseño. It did not escape the observation of the court that only three of those boundaries were designated in the grant, viz., the southern, the western and the eastern; but it was thought that the description of the tract in the decree of concession as the "Cañada de los Capitancillos," and the delineation on the diseño of the two ranges of hills within which it was contained, sufficiently indicated the location of the northern boundary, the mention of which was omitted in the grant. The court was confirmed in this view by the representation of the petition, on the diseño, that the tract delineated upon it was of the extent of one league, a little more or less, indicating, as it seemed, that he solicited not a specified quantity, but a particular tract, the estimated area of which he declared to the governor. When, therefore, the governor granted to him the tract solicited, and described it as "of the extent of one league, a little more or less, as explained by the map," it seemed to the court necessary, to carry into effect the intention of the grantor, to confirm to the claimant the tract delineated on the map, even though, as anticipated by the governor, its extent might be "a little" more than one league; provided such excess did not exceed a fraction of the usual unit of measurement in colonization grants, viz., one league; or in other words, provided that the quantity over and above one league was such as might reasonably be deemed to have been asked for by the petitioner and granted by the governor, under the description "a square league, a little more or less." The clause in the third condition, by which the surplus was reserved to the nation, usually called the sobrante clause, was disregarded by the court, that clause being a formula generally, and almost invariably inserted in all grants, without reference to their nature, and being not unfrequently found in grants where all the boundaries are distinctly defined, and even in grants where no boundaries are mentioned, but which are for tracts of a specified length and breadth, where obviously no sobrante can remain.

On the hearing, the location or existence of a northern boundary was not brought in question, but the discussion chiefly if not exclusively turned upon the location of the southern boundary—the right of the court to locate which by its decree was denied by the attorney for the United States. In that view, however, the court did not coincide; but by its decree it defined and located the southern boundary, and thereby decided the most important if not the only point discussed on the hearing.

The cause having been appealed to the supreme court, the views of this court were in some particulars found to be erroneous. By the judgment of that court it is decided, not only that in the grant itself there is no call for a northern boundary, but that "there is no reference to the diseño for any natural object or other descriptive call to ascertain it; that the grant itself furnishes no other criterion for ascertaining it than the limitation of quantity expressed in the third condition, which thus becomes a controlling condition in the grant." The mention of quantity as "a league, a little more or less," the court regards (after rejecting the words "a little more or less," as having no meaning in a system of location and survey like that of

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

the United States) as so explicit as to render improper any reference to the petition and the diseño, or any inquiry as to "whether the name Capitancillos had any significance as connected with the limits of the grant." As to the propriety of the location of the southern boundary by this court, the supreme court expresses no opinion, but the grant is confirmed for one league of land, to be taken within the southern, eastern and western boundaries mentioned therein, and the cause is remitted that this court may declare those boundaries from the evidence on file and such other evidence as may be produced before it. As this court had already declared the southern and only disputed boundary of the tract, the remanding of the cause, with the directions above stated, appeared to this court to be an instruction to review and reconsider its opinion on that point, and also to allow further evidence to be taken in relation to it. The cause having been originally heard with the consent of both parties, and without any suggestion that further evidence was desired or attainable, the application on the part of the United States for leave to take further testimony was resisted on the part of the claimant. It seemed, however, to the court, that the directions of the supreme court clearly contemplated that such testimony should be taken, if offered, and that the obedience due from this court to the mandate of its superior required it to permit either side to offer such further testimony as might be desired. Additional testimony has therefore been taken, and it now remains for the court again to declare the boundaries as originally declared in its former decree, or differently, if on reconsideration that decree should appear to be erroneous, or if the additional testimony is such as to induce it to change its opinion.

In the opinion heretofore delivered, it was observed—"The evidence shows that the tract called Capitancillos is a valley lying along an arroyo or brook. On the southerly side extends a range of hills, running from east to west. At their eastern extremity, where they are intersected by the Alamitos, these hills attain considerable elevation, but they decline in height towards the west, where they reach and are turned by the Arroyo Seco. Behind this ridge or cuchilla the main sierra or mountain chain raises itself to a great height, and is separated from the ridge of lomas bajas, already spoken of, by the two streams mentioned. These streams rise at an inconsiderable distance from each other, and flowing in opposite directions, between the sierra and the lomas bajas, they turn the eastern and western extremities of the latter and debouch into the plain. Upon the slopes of the ridge of low hills, as well towards the valley on the north as towards the streams behind it on the south, the best or most permanent grazing is to be found, and in this ridge are situated the valuable quicksilver mines, the existence of which gives to this inquiry its chief importance." To this description it may be added, that the range of low hills are not throughout their whole length entirely detached from the sierra, but are connected with it at one point by a spur or ridge running nearly at right angles to the general direction of the sierra and the lomas. This ridge is at its lowest point 1100 feet above the level of the valley. The height of the Almaden peak at the eastern extremity of the lomas is about 1500 feet above the level of the valley, but the lomas as they extend towards the west diminish in height, and are separated by various depressions, which permit easy access from the valley on the north to the Arroyo Seco at the base of the sierra. The average width of the ridge is one mile and four-tenths, and though at the Almaden peak the descent to the valley is abrupt, yet further to the west the diminished height of the hills, and the frequent depressions in the ridge, permit the valley to be reached at many points by easy and gentle declivities. It is proper to add that after the proofs were submitted, the judge, at the suggestion of the district attorney, and accompanied by that officer and the representative of the claimant, visited the premises in order by personal inspection to become acquainted with its topography, and to be able more accurately to understand and to appreciate the testimony.

The question, then, to be determined is—What is the southern boundary designated in the grant? The grant itself describes the land as bounded by the "sierra;" but the question recurs—What is the natural object so designated? Is it the main chain to the south of the lomas bajas, or is it the lomas bajas themselves? The natural meaning of the term "sierra" would seem to point to a great mountain chain, rather than to a range of hills parallel to it and separated from it, except at one point where the two ranges are connected by a narrow ridge or divide. On the diseño presented by Larios, the sierra is described as the "Sierra del Encino." The very remarkable oak tree from which this name was evidently derived is situated on the main chain of mountains, and is a conspicuous object from all parts of the valley. That the "sierra" mentioned in the grant is that on which this tree is situated, cannot be disputed; but still the question arises—Was the term "sierra" or "Sierra del Encino" used by the grantor to designate the lofty chain of mountains on which the oak tree is situated, as distinguished from the lomas bajas or lower ridge to the north of it? Or did he intend to include within it both ranges, and to apply the term as well to the lomas bajas as to the larger mountains behind them? In a certain sense the lomas bajas are evidently a part of the sierra with which they are connected, as has been explained; but the question is not whether they form a part of or belong to the sierra geologically or topographically, but whether they were so known and recognized and so treated by the

governor when he described the tract as bounded by the sierra.

On the part of the claimant, numerous witnesses testify that the part of the Sierra Azul on which the oak tree is situated is called Sierra dei Encino, but that the low range of hills on the south of it and separated from it by the creeks was never known as the sierra. That they were, until the discovery of the mine, called lomas bajas, and subsequently "Las Lomas de Mina de Luis Chaboya," or "Cuchilla de la Mina de Chaboya." They describe the range known as the "sierra" as rising from the streams, and the latter as running between the sierra and the ridge known as the Cuchilla de la Mina. No less than nine witnesses, many of whom have lived in the neighborhood from twenty to forty years, testify to these facts, and to their testimony may be added that afforded by the diseño of Berreyesa, who at the time he presented it had been established in the cañada about nine years. On this map the two ranges of hills are distinctly delineated separated by a broad valley—far broader than the ravine actually existing. The lower range is inscribed "Lomas Bajas," while the upper is marked "Sierra Azul;" thus indicating that in 1842 and at the time when the petitions of both Larios and Berreyesa were before the governor, and before the question had any importance, a marked discrimination was made even in the rude diseño presented by the applicant between the ridge of lomas bajas, and the sierra behind it.

Since the case has been remanded, the testimony of three witnesses on this point has been taken by the United States. Antonio Suñol testifies that he never heard of the Sierra del Encino, nor of any range of hills called the "Cuchilla de la Mina de Luis Chaboya." That the mouth of the mine is in the "Sierra Azul." On his cross-examination he states that the ridge has been called "Lomas" or "Lomas Muertas de la Sierra Azul," and that after the mine was discovered, "we always said the mine of Chaboya which is in the Sierra Azul." José Maria Amador testifies that he does not know the Sierra del Encino, nor "La Cuchilla de le Mina de Luis Chaboya." That the mine is situated on the "Lomas Bajas de la Sierra Azul." "It is in the Sierra Azul itself. The sierra descends regularly; there is no breach nor separation in it. The mine is in a low loma. It is all known as the Sierra Azul, from the foot to the top of it." José Romero testifies that he does not know the Sierra del Encino, nor the Cuchilla de la Mina de Luis Chaboya. That the name of the mountain on which the mine is situated is the "Sierra Azul." On his cross-examination, in reply to an inquiry as to the name of the creek "which passes between the Guadalupe mine and the sierra," he states its name to be the "El Arroyito del Corral del Defunto Rafael." That he knows the loma where the Guadalupe mine is situated, and the sierra in which it is. That "loma and sierra mean the same thing with us."

It is unnecessary to comment on the testimony of these witnesses, for the preponderance of evidence is clearly against the accuracy of their statements, or their recollection.

If then we were to fix the southern boundary of this tract by the calls of the grant alone, the evidence would leave no room for doubt that the grantor meant by the term "sierra" in the grant the lofty chain of mountains on which the oak tree is situated, and which being for the most part covered with chemisal, presents an azure hue at a distance; rather than the lower and parallel ridge known as the "Lomas Bajas" or "Cuchilla de la Mina," and which is for the most part covered with wild oats and suitable for grazing. But the great difficulty in the case is presented by the diseño which accompanies the expediente of Justo Larios. On this diseño a single range of hills, inscribed "Sierra del Encino," is rudely delineated; from this range the two creeks are represented as debouching into the plain. If this sierra be the main sierra, the lomas bajas are entirely omitted on the sketch. I have been much impressed with the very able and elaborate argument on this point submitted by the counsel who appeared for the United States, as also by the testimony of many surveyors that, guided by this map alone, and crossing the valley in a southerly direction, they would stop or fix the southern limit of the tract at the foot of the first hills which rise from the valley—that is, at the foot of the "Lomas Bajas." It is urged that the southern boundary as shown by this diseño is a line drawn at the foot of the range inscribed "Sierra del Encino," and from one creek to the other, and not along the course of either. That if the range delineated was intended to represent the main sierra, the arroyos, and especially the Seco, would have been represented as running below or to the north of it, and not debouching from it; and that the lomas bajas would not have been omitted. It may perhaps be admitted, that if we were to be guided by the diseño alone, it would not be easy to avoid the conclusion so earnestly and ingeniously pressed upon the court in the brief submitted by the counsel for the United States. The indications, however, afforded by the diseño, are not free from all ambiguity. On that sketch the two streams are represented as debouching from the hills at points situated on a line nearly horizontal. The map of Lewis, exhibited on the part of the United States, shows that the Arroyo de los Alamitos, called on the Larios diseño Arroyo de los Capitancillos, issues from the foot hills or lomas bajas at a point considerably to the north of that where the Arroyo Seco turns the western extremity of those

hills and debouches into the plain. If a line then be drawn from the point where the Alamitos debouches, to that where the Seco turns the lomas, it would depart considerably from a horizontal line. Again: The space inclosed between the creeks and the sierras is represented on the Larios diseño as not quite twice as long as it is broad. But if the sierra on the diseño be taken to mean the lomas bajas, the map of Lewis shows that the tract between the Alamitos and the Seco on the east and west, and the Capitancillos and the foot of the lomas on the north and south, is about four times as long as it is broad. Again: The Arroyo de los Capitancillos is represented on the Larios diseño as running towards the south-east diagonally across the valley, and then turning towards the south and running in a southerly direction perpendicularly to the valley, and nearly parallel to the Arroyo Seco for a considerable distance, until it reaches the sierra. But if the sierra which it reaches was intended to be the lomas bajas, it should be drawn as meeting them while running in a south-easterly or diagonal course. No part of its southerly or perpendicular course should be represented. The map of Lewis shows that the course of the stream from a point above or near the hacienda is delineated on the Larios diseño with tolerable accuracy, and that from that point it flows in a northerly direction perpendicularly to the valley for a considerable distance, and it is only after turning and leaving the lomas bajas that it takes a direction diagonally across the valley. If, then, the red line drawn on Lewis' map as the southern boundary of the tract were drawn on the Larios diseño to the corresponding point of the Capitancillos, it would strike the latter not far from the letter "A" on that diseño, and that portion of the stream flowing in a north and south direction would be excluded. Again: By looking on Lewis' map it will be seen that the Arroyo Seco, after running in a westerly direction along the base of the main sierra, and between it and the lomas, on reaching the end of the latter makes a sudden bend to the north and debouches into the valley at a point very near the base of the sierra; in other words, that at this point the flat or valley land extends nearly up to the base of the main sierra. If, then, a line be drawn from this point to the most southerly point of the Arroyo de los Alamitos, or Capitancillos on the diseño of Larios, it would nearly coincide with the base of the sierra as contended for by the claimant; and would moreover be almost a straight line, and in this respect correspond with the indications of the diseño better than the very sinuous and irregular line which is found by following the base of the foot hills which project into the valley. For it is to be observed that neither of the lines run by Lewis as the southern boundary of the tract follow what is claimed to be the boundary indicated by the diseño, viz., the base of the lomas; but run upon the sides of and over those hills at a considerable and apparently arbitrary distance from their base. The slightest comparison between the diseño of Larios and a map of the country shows the former to be in many other respects inaccurate and defective. The angle of the creeks at which the eastern boundary commences is not laid down, and the lomita which is also called for in the description of that line does not appear. It is therefore no very extravagant supposition that the lomas bajas were also omitted, particularly when the circumstances under which the diseño was drawn, as detailed by Petronillo Rios, are considered.

The foregoing observations, I think, warrant me in saying that the diseño of Larios does not afford those clear, certain and unmistakeable indications of the location of the southern boundary contended for by the counsel for the United States. But in determining this question we are not at liberty to confine our attention to the Larios diseño alone. The record shows that Justo Larios and Berreyesa had occupied different portions of the Cañada de los Capitancillos for many years before the date of their applications to the governor for their respective grants. Between them a dispute as to their boundaries had arisen. Before the grant to either was issued, they appeared before José Z. Fernandez and agreed upon the line which should form their common boundary. The description of this line, as given in the report of Fernandez, was inserted in both grants, and the line was marked by that officer on the diseño of Berreyesa "as being the more exact." In the grant to Larios the eastern boundary is described as the rancho of citizen Berreyesa, "which has for boundary the angle," etc., and in the grant to Berreyesa his western boundary is in like manner described as "the rancho of citizen Justo Larios, which has for boundary the angle," etc. The eastern boundary of Justo Larios is thus indirectly described in his own grant, but directly in that of Berreyesa; while the western boundary of the latter is in like manner indirectly described in his own grant, but directly in that of Larios. At the time of making the grant the governor had probably before him both diseños, but certainly that of Berreyesa, on which the boundary line described by him in both grants had been marked by Fernandez for his information. In determining therefore the boundaries of Justo Larios, it seems to me not only proper but necessary to recur to the grant of Berreyesa, where alone the boundary of Justo Larios is described as such, and to the diseño of Berreyesa, upon which it was marked "as being more exact." The governor did not grant to Justo Larios the tract delineated on his diseño, viz., the land between the Arroyo Seco and that of Capitancillos, or a line to the east of the latter. He granted the land between the Arroyo Seco and a line

drawn from the angle of the creeks, passing by the eastern "falda" of the "lomita in the centre of the cañada to the sierra;" and this line was marked on the Berreyesa diseño, and at a considerable distance to the west of the Capitancillos or Alamitos. In declaring this boundary, therefore, which was different from that solicited by Larios and indicated on his diseño, we are compelled to resort to the diseño of Berreyesa, which becomes quoad hoc the diseño to which the grant refers. On the Berreyesa diseño the two ranges of hills are rudely but unmistakeably delineated. The first or most northern are inscribed "Lomas Bajas," while the higher ridge to the south is inscribed "Sierra Azul." The valley represented as lying between them, though its width is grossly exaggerated, yet serves to indicate by that very exaggeration the discrimination in the grantor's mind between the sierra and the lomas bajas. The dotted line commencing at the angle of the creeks is produced across the lomas bajas, across the intermediate valley, and the Alamitos represented as flowing through it to the base of the main sierra If this line be the eastern boundary of Justo Larios, as I think it must be considered, there can be no doubt as to the range of mountains intended by the term "sierra" in his grant.

It is urged that Berreyesa had applied not only for the Cañada de los Capitancillos, but for all the hills which pertain to it; whereas Justo Larios petitioned for a part of the cañada alone. That therefore in the grant to Berreyesa, and on his diseño, the line was extended so as to include the low hills solicited, but that such an extension ought not to be made in favor of Larios, who solicited the cañada alone. This argument assumes that the term cañada as used in these grants does not include the low hills at the foot of the sierra, but that it is bounded and limited by them. But the language of the petition of Berreyesa referred to seems to convey the contrary idea, for it speaks of the low hills "which belong or pertain to the said cañada." He does not ask for the cañada and also a portion of the sierra, but for the cañada and the low hills pertaining to it. It is surely not reasonable to say that he considered and asked for the low hills as not belonging to or a part of the cañada he solicited. Again: the governor, who with respect to Berreyesa, it is admitted, intended to grant the low hills, describes the tract granted to him "as a part of the place know as the Cañada de los Capitancillos," thus showing that in his apprehension at least the place known as the Cañada de los Capitancillos did include the low hills solicited. In the grant to Larios it is described as the "place known by the name of Capitancillos"—the word cañada being omitted in the grant though it is inserted in the decree of concession. Again: the governor, confessedly intending to include within the grant to Berreyesa the lomas or low hills, bounds his grant by the sierra. With both petitions and both diseños before him, and with his attention directed to the discrimination between the sierra and low hills belonging to the cañada, he nevertheless uses the same term "sierra" in describing the boundary of Larios. Can we infer that in the grant to Berreyesa he meant by this term one natural object, and in that to Larios another? I think not. The sierra referred to in both grants must be the same, and as that intended in the Berreyesa grant is unmistakeable, we are enabled to fix with corresponding certainty the sierra referred to in the grant to Justo Larios.

I have given to this case much attention. I have endeavored to decide it uninfluenced by the previous opinion of this court. Upon the best consideration I have been able to give to the questions involved, I have not been able to discover that that opinion was erroneous.

The remaining point to be considered is as to the form of the decree. In the opinion of the supreme court (20 How. [61 U. S.] 426), it is said: "The southern, western and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which those limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call to ascertain it. The grant itself furnishes no other criterion for determining that boundary than the limitation as expressed in the third condition. * * * If the limitation of quantity had not been so explicitly declared, it might have been proper to have referred to the petition and diseño, or to have inquired if the name Capitancillos had any significance as connected with the limits of the tract, in order to give effect to the grant. But there is no necessity for additional inquiries. The grant is not affected by any ambiguity. * * * The grant to Larios is for one league of land, to be taken within the southern, eastern and western boundaries designated therein, and which is to be located at the election of the grantee or his assigns, under the restrictions established for the survey and location of private land claims in California by the executive department of this government." The district court is there directed to declare the external boundaries designated in the grant. From the foregoing it is, I think, evident that the supreme court considered the southern, western and eastern boundaries were alone designated in the grant, and that as the limitation of quantity was explicit, and there was no ambiguity in the grant, the northern boundary was to be determined by quantity alone; and that it was "not authorized to depart from the grant to obtain evidence to contradict, vary, or limit its import." When, therefore, this court has, pursuant to the directions of the supreme court, declared those three external boundaries, it has declared "the southern, western and eastern boundaries of the land granted to Larios," and the remaining boundary is to be ascertained by quantity. It is urged on the part of the Unit-

ed States that the league is to be taken within the three boundaries named, but is not of necessity bounded by them; that its location within them is to be subject to the restrictions established by the executive; and that the northern boundary of the league is to be determined by the northern boundary of the tract within which it is to be located. The supreme court undoubtedly say that the league is to be located within the three boundaries mentioned. But a reference to the preceding part of the opinion dispels any doubt which might be suggested by this expression. It is said, unequivocally, that the southern, western and eastern boundaries of the land granted to Larios—not of the tract within which the league granted to him is to be taken—are well defined, and the supreme court explicitly declare that the northern boundary is to be determined by the limitation of quantity alone. "The grant itself furnishes no other evidence for determining that boundary than the limitation of quantity as expressed in the third condition. This is a controlling condition in the grant;" and they add that no additional inquiries to ascertain that boundary (the grant being free from ambiguity) are necessary or authorized by law. It seems to me that the import of this language is unmistakeable, and the land granted to Larios must be decreed by this court to be but one league of land, bounded by the three external boundaries mentioned in the grant, as the same are ascertained and declared in this opinion. The fourth or northern boundary to be ascertained by quantity, and to be run at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the government of the United States.

[NOTE. From the decree entered in this case an appeal was taken by the United States to the supreme court. The appeal was on motion dismissed, upon the ground that the decree of the district court was not a final decree. 21 How. (62 U. S.) 446. Subsequently a survey made and returned into the district court was, with modifications, approved. Case No. 15,140.]

Case No. 15,140.

UNITED STATES v. FOSSATT.

SAME v. BERREYESA.

[1 Cal. Law J. 315.]

District Court, N. D. California. 1862.

MEXICAN LAND GRANTS—LOCATION OF BOUNDARIES — OBSCURE DESCRIPTIONS — LOCATION OF QUANTITY IN EXTERIOR BOUNDARIES.

[This was a claim by Charles Fossatt for the Rancho Los Capitancillos. The claim was confirmed by the district court for one league "more or less." Case No. 15,137. Upon appeal, the supreme court limited the grant to one league to be taken within the boundaries designated in the grant. Case remanded. 20 How. (61 U. S.) 413. A continuance was allowed the United States in order to take further testimony in relation to the location of the boundaries. Case No. 15,138. Subsequently the district court passed upon the location of three of the boundaries, the fourth (the northern) to be determined by quantity. Id. 15,139. An appeal from the decree was determined to have been brought prematurely, the decree not being final. 21 How. (62 U. S.) 446. A survey having been made, the case is now heard for a final determination of the boundaries and locations.]

OPINION OF THE COURT. By the decree of the supreme court of the United States, there was "confirmed to Charles Fossatt one square league of land, to be surveyed within the southern, western, and eastern boundaries designated in the grant, and to be located, at the election of the grantee or his assigns, under the restrictions established for the survey and location of private land claims in California, by the executive department of this government." The external boundaries mentioned in the grant this court was directed to declare, and the cause was remanded for further proceedings, in conformity with the opinion of the supreme court. Much testimony was taken, and elaborate arguments heard as to the location of the southern boundary, which, at that stage of the cause, was alone disputed. After great consideration, this court, by its decree, determined the location of that boundary, and directed the league of land confirmed to the claimant to be surveyed within that and the other external boundaries of the grant, as ordered by the supreme court. From this decision a second appeal was taken, but the supreme court declined to pass upon the question until an actual survey of the land should be made, and all the boundaries established and laid down in an official plat approved by a final decree of this court. A survey has accordingly been made and returned into this court for its approval. The objections to it are two: First, that the external boundaries of the grant within which the league is to be surveyed are not correctly established; second, that the land is improperly located within the exterior boundaries.

1. Of the three boundaries mentioned, two only are disputed. With regard to one of these, the southern, this court has fully expressed its opinion. The whole subject was elaborately discussed, and I have been unable to perceive any ground for doubting the correctness of the conclusion arrived at.

2. The location of the other boundary, which formed the agreed line of division between the rancho of Berreyesa and that of Justo Larios, has now to be determined. The valley of Capitancillos, a long and narrow tract of land lying between the pueblo hills on the north, and the Sierra Azul on the south, had, from an early day, been in the possession of two persons, of whom one, Galindo, occupied the western portion, and the other, Chaboya, the eastern. Justo Larios succeeded to the

possession of Galindo; José Reyes Berreyesa, to that of Chaboya. Each of them obtained a grant,—Juste Larios for the lower, and Berreyesa for the upper, portion of the valley. Before either grant was issued, a dispute had arisen between the two occupants of the cañada as to their respective limits. It was caused by the abandonment by Larios of the old house of Galindo, and the erection of another house a short distance below the junction of the Arroyos Alamitos and Seco, and within the limits of the tract claimed by Berreyesa. Each presented to the governor a diseño, including the disputed tract, and a grant to either was withheld until the settlement of the controversy. The matter was, therefore, referred to the prefect, José Tenon Fernandez, before whom the parties appeared, and agreed upon a common line of division, which was traced on the diseño of Berreyesa, by a dotted line, and described in the grants subsequently issued to both. The location of the line so delineated and described is the question to be determined. The description of this agreed line first appears in the report of Fernandez to the governor. In this report Fernandez says: "The litigants have agreed before me that the boundaries of both in the direction of the east, as the sketch of Berreyesa shows, shall be by drawing a straight line from the angle, which the Arroyo de los Alamitos forms with the Seco, direction towards the south, the slope (falda) of the hill, situate in the center of the cañada towards the east, and until it reaches the sierra in such a way that, according to the said sketch, which appears more exact, the said line comes to be a parallel which I have marked with points for the knowledge of your excellency,—with which they have remained content and satisfied."

In the decree of concession in the Berreyesa case, the land granted to him is described as bounded on the west by the rancho of citizen Justo Larios, which has for boundary the angle formed by the Arroyo Seco and that of the Alamitos, the slope of the hill (falda de la loma), situate in the center of the cañada and the sierra. In the titulo, or final grant, the boundary is described in language which, literally translated, is obscure. The rancho of Larios is said to have for boundary "the angle formed by the Arroyo Seco and that of the Alamitos, direction towards the south, the falda of the hill situated in the center of the cañada, 'asi al este hasta llegar a la sierra.'" By the translation, or, rather, the construction, given to this phrase, the line would be described in English as "commencing at the angle of the creeks, running thence in a southerly direction along the eastern falda of the hill, and thence to the sierra." It appears to be admitted that the direction of the line was southerly, according to the points of compass, as laid down on the diseño, and the expression, "rumbo al sur," is construed to refer to the course of the boundary line. But the application of the phrase "asi al este" to the falda of the loma, thereby indicating the eastern slope of the hill, is strenuously disputed. The language of the grant is evidently very rude and inartificial. It may be that the words in question were intended to refer to the loma, and to designate the hill situated towards the eastern portion of the tract, as distinguished from another loma, situated on the west, and known as the "Mojonera del Pueblo," or landmark of the pueblo; or, it may be, that the words referred to the whole boundary line, and meant that the angle of the creeks and the falda of the loma formed the eastern boundary of the land of Justo Larios.

I do not deen it material to determine the true construction of this phrase, for, if the description in the grant be ambiguous, or wholly silent on the point, the diseño shows that the dotted line marked by Fernandez passed on the eastern extremity of the small elliptical figure which rudely, but not very inaccurately, represents the loma. This diseño, which Fernandez availed himself of as being the more exact, is drawn with unusual accuracy. The angle formed by the creeks, the lomita, the range of hills called "Lomas Bajas," and the main Sierra Azul are unmistakably represented. From the angle of the creeks, passing by the eastern end of the loma, cutting the range of lomas bajas, and reaching the sierra, the dotted line of Fernandez is drawn, and inscribed "Lindero," or boundary. On a mere inspection of the map, its location would seem indisputable. But it unfortunately happened that the draftsman of the diseño mistook the true position of the loma, situated in the center of the cañada, and represented it as situated to the eastward of its true position. In the then condition of the country the error was insignificant, but it becomes of great importance in view of the subsequent development of the quicksilver veins on the ridge known as the "Lomas Bajas." For, if the calls for the angle of the creek and the "falda of the loma," shown by the diseño to be the eastern extremity of that hill, be taken as controlling the location of the boundary line, the latter will deflect far to the east, and will leave on the westerly, or Justo Larios', side, almost the entire range of the lomas bajas, including the mining peak of New Almaden.

The question, therefore, arises: Is the direction of this line to be determined by those two calls alone, or should it be controlled by other calls and indications of the diseño of higher dignity, and concerning which a mistake was more improbable? It is evident, from the diseño, that the Cañada de los Capitancillos was supposed to run in a direction nearly east and west. As the dispute between Larios and Berreyesa only referred to the mode in which the valley should be divided between them, and as Berreyesa claimed that the recently erected house of Larios should be the boundary, it was most natural that, when the controversy was settled, a

line should be adopted dividing the valley in a direction perpendicular to its length. Such a line was accordingly drawn on the diseño, and described in the grant as running towards the south, i. e. nearly at right angles to the general course of the valley. The object of Berreyesa was to resist the further encroachment of Larios on lands for which, eight years previously, he (Berreyesa) had obtained a provisional title from Figueroa; while the claim of Larios was derived from a purchase of the house (not including the lands) of Galindo, and he had, as observed by Berreyesa to the governor, "room to extend himself outside of the cañada," while the latter "had absolutely nowhere to enlarge." It is, therefore, highly improbable that Larios would have claimed, or Berreyesa assented to, a line which, running diagonally in a southeasterly direction across the valley, would take from the latter a large tract of land, being far to the eastward, not only of the angle of the creeks and the falda, but also of Larios' house, and assign to the latter almost the entire range of the lomas bajas expressly solicited by Berreyesa in his petition. It may, at all events, be confidently asserted that, had such been the intention of the parties, the universal desire of Californians to bound their ranchos by well-known natural objects would have induced them to fix upon the Alamitos creek as their common limit, and thus secure a certain and precise boundary, nearly coinciding with the imaginary line they are supposed to have adopted. That, up to a comparatively recent date, the mining peak as well as a large portion of the lomas bajos were generally recognized as belonging to Berreyesa may be inferred from the fact that, in the denouncement of the New Almaden mine, by Castillero, and in the act of possession, by the alcalde, Pico, it is formally alleged to be "on the land of the retired sergeant, José Reyes Berreyesa." The latter was present at or about the time when possession was given, and claimed to be the owner of the land. Some negotiations between him and the discoverers of the mine appear to have taken place, while neither Justo Larios, nor any one in his behalf, seems to have asserted or been recognized as possessing any rights whatever in the land on which the mine was situated.

3. But the diseño itself affords what has appeared to me incontestable evidence of the location of the line to which the parties intended to assent. On it the range of lomas bajas is distinctly delineated. At the eastern extremity of this range is a hill of greater elevation than the rest, which is turned on the east by the Alamitos. This hill is undoubtedly the mining peak or hill of New Almaden. The Alamitos is represented as issuing through a gorge between it and a mass of hills further to the east, and running across the plain, diagonally, to the junction with the Seco. If, on this diseño, the line as claimed by the representatives of Larios be drawn, it would pass to the eastward of the mining peak, and run in an east-southeast direction, nearly coinciding with the course of the Alamitos. But the line actually marked by Fernandez is essentially different. It is drawn in a nearly southerly direction, and it cuts the range of the lomas bajas at about one-fifth the entire distance from their western to their eastern extremity—leaving on the left, i. e. on the eastern, or Berreyesa, side, not only mining hill, but nearly four-fifths of the entire range. Nor does it at all coincide with the course of the Alamitos, but, on the contrary, makes, with the general course of that stream, an angle of perhaps 45 degrees.

Again: Behind, or to the south, of the lomas bajas, is represented the range of mountains called "Sierra Azul." On their western extremity is the peak known as Mount Umunhum; while, far to the east the lofty mountain now called Mount Bache, is distinctly delineated. If the line contended for by the claimants be drawn on the diseño, it would run in the direction and even to the eastward of Mount Bache. The line, as drawn by Fernandez, strikes the sierra at a point less than one-sixth of the entire distance between Mounts Umunhum and Bache, leaving five-sixths of the entire range of those hills on the eastern, or Berreyesa, side. It is, therefore, evident that, to treat the call for the falda as determining the course of the entire boundary line, we must sacrifice, not only the call for the course of the boundary line as expressed in the grant, but every other indication of the diseño. It does not appear that Fernandez visited the cañada before adjusting the dispute. The line was assented to by the parties, who must have been familiar with the natural features of the country. The direction in which their common line should cross the valley, the portions of the disputed tract to be assigned to each, the course of the boundary, whether towards Umunhum, so as to leave the greater part of the lomas bajas to Berreyesa, or towards Mount Bache, so as to leave nearly the whole range to Justo Larios; whether it was to cross the Alamitos, making a large angle with the general course of that stream, and leaving the gorge through which it debouches into the valley far to the east, or whether it was to run towards the gorge and in a course not far from parallel with that of the Alamitos,—all these were points which we must suppose to have been determined, and on which it is highly improbable that the diseño would have erroneously represented the agreement of the parties.

It is urged that the lomita was a well known and conspicuous object in the center of the valley, and that, in selecting its eastern falda as the western limit of Berreyesa's land, the litigants adopted the boundary concerning which there could have been no misapprehension or mistake. The observation is just, and a similar one can be made with regard to the angle formed by the two creeks

also adopted as a boundary. But the mistake which occurred was as to the relative position of these objects. It was supposed that the angle of the creeks lay nearly north from the "falda," and that a line drawn through these two objects would run in a direction nearly southerly, and at right angles to the general course of the valley, and would, when produced, cut the lomas bajas, and strike the sierra at the points indicated on the diseño. The question, therefore, is not whether the calls for the angle of the creeks and for the falda shall be rejected, for these natural objects are undoubtedly agreed upon as fixing the limit of the two ranchos; but, whether we shall allow the subsequent direction of the line to be determined by their relative position, concerning which there was an evident mistake, and give to it, when produced, a course entirely inconsistent with the course specified in the grant, and clearly indicated by natural objects on the diseño.

The theory of the claimants is founded on a translation of the language of the grant, which by no means expresses its literal meaning. In the printed translation the words of the description are rendered as follows: "Bounded by the rancho of J. R. Berreyesa, which has, for a boundary, a line running from the junction of the Arroyo Seco, and the Arroyo Seco southward to the sierra, passing by the eastern base of a small hill situated in the center of the cañada." But this, though possibly a correct interpretation, is by no means a literal translation of the original. In the latter no line is, in terms, called for. The rancho of Berreyesa is said to have for boundary "the angle formed by the Arroyo Seco and that of the Alamitos, direction towards the south, the eastern falda of the loma, situated in the center of the cañada until the sierra is reached." It has already been observed that the application of the words "asi al este" to the falda, and the interpretation of them as indicating the eastern falda is disputed, and, perhaps, doubtful. But, admitting this interpretation to be correct, the words of the description seem merely to indicate two natural objects which formed the boundary, from the second of which a line was to be drawn to the sierra, in a southerly direction according to the compass marks on the diseño. It is certainly not explicitly stated, as in the translation, that the boundary was to be "a line running from the junction of the creeks southward to the sierra, passing by the eastern base of the hill," etc. The language of the report of Fernandez, however, may perhaps justify the interpretation that has been given to the words of the grant. Fernandez describes the common boundary of the litigants as "a line from the angle of the creek, direction south, the eastern falda of the lomita, and until the sierra is reached." That he supposed a line drawn from the junction to the falda, and thence produced, would be a straight line, cannot be doubted; but he also supposed it would run in a southerly direction, or in the direction marked south on the diseño, and that it would strike the lomas bajas and the sierra at the points thereon indicated. But he does not expressly state that the line from the falda to the sierra is to be the line from the junction to the sierra produced. If the position of the falda was to determine, absolutely, the course of the boundary beyond, Fernandez could hardly have supposed that he had removed all cause of dispute. The term "falda" does not indicate any point on a hill, but a part of it. It signifies the slope, or radex montis. It probably applies, in strictness, only to the lower slope, or that part lying between the plain and a line drawn midway between its base and its summit, though it seems sometimes to be applied to the entire slope. But, giving it the more restricted interpretation, it is insufficient to fix the direction of the line with any certainty. The lomita in question is situated at a comparatively small distance from the angle of the creeks. If the boundary is to be the production of a line drawn from the angle to some point on the falda, a variation of the position of the latter of perhaps a few yards will so change the course of the line, when produced, as to materially alter the dimensions of the tract. The boundary, therefore, would still have been left, within considerable limits, arbitrary and uncertain.

If it be said that the point on the falda intended to be adopted, is shown by the diseño, it may be answered, that the diseño also shows, by unmistakable natural objects, the direction of the line, and that its course is to be determined by those indications, notwithstanding that the parties erroneously supposed, and represented on the diseño, that the line so drawn would pass by the eastern base of the hill. The object of critically examining the language of the grant has been to show that it does not, in terms, require the course of the boundary to be determined by the falda, and that, from the indefinite character of that call it is highly improbable it should have been intended to have such an effect. We are thus compelled to resort to the diseño to ascertain its location, and we at once discover the nature of the error into which the parties fell, and discern what was their intention when the line was agreed upon by the parties. As to that intention, there is, I think, no room for doubt. It was designed to divide the valley between the disputants by a line drawn across or at right angles to its general course. On the north, it was to commence at the angle of the creeks; at the south, it was to terminate at a point opposite, crossing the lomas bajas, and striking the sierra at the points indicated on the diseño. The falda of the lomita was also adopted as the western limit of the flat land on the Berreyesa side; and it was supposed, erroneously, as now appears, that a straight line could be drawn between the points just mentioned which would cross the eastern base falda. As that is found to be impossible, it has seemed to me

that the call for a straight line should be rejected, and the boundary fixed by drawing a line from the angle of the creeks to the falda, and thence across the valley to the points in the lomas bajas and the sierra to which the diseño shows it was intended to be drawn. Having thus ascertained the location of the three external boundaries of the grant, it remains to be determined how the league of land confirmed to the claimant shall be located within them.

It is contended by the New Almaden Mining Company that the tract should be located as far as possible on the flat lands of the cañada, and excluding, except so far as is necessary to make up the required quantity, the lomas bajas on the southerly side. The grounds on which this location is urged are: (1) That the name of the rancho, the nature of the land, and the occupation and cultivations of the grantee, clearly show that the tract of level land between the Capitancillos and the lomas, was that which he chiefly desired, and which constituted the principal value of the grant to a California rancher. That by compelling him to take what he asked for, no injustice will be done; while, on the other hand, it would be unreasonable to permit him to locate the greater part of his league on the lomas bajas, which are only valuable by reason of their metalliferous veins. (2) That the New Almaden Company, as owners of a grant for two leagues on the land of their mining possession, have the right to insist that the adjoining ranchos shall be so located as to permit the grant to them to be satisfied out of the sobrante.

It may be admitted that the level portion of the valley was chiefly desired by both Berreyesa and Justo Larios. But it does not follow that the value of the lomas was on that account overlooked. Berreyesa expressly states to the governor that "his petition had always been for two sitios from the house of Larios to the matadero, with all the hills that belong to the valley," and he is at pains to delineate, with great distinctness, these hills on his diseño. It is not clear that, as a range for cattle, the lomas were at all inferior to the more level land. Towards the west, especially, and within the boundaries of the Larios grant, they are of no great height, and slope towards the plain on the north and the arroyo on the south by gentle declivities. They are covered throughout their whole extent with a growth of wild oats, and during at least a portion of the year must afford more abundant pasture than the more level portions of the tract. That Justo Larios supposed himself the owner of all the tract included within the great natural objects which fix the limits of the cañada, cannot, I think, be doubted; and it is equally clear that, if a judicial delivery of the possession had been given, the officer would, under the grant of "a league a little more or less," have measured to him the whole valley including the inconsiderable fractional excess beyond one league comprised within its boundaries. By the decision of the supreme court the quantity confirmed is restricted to one league; but to compel the claimant to select that league in a particular part of the tract, such as we suppose he might have originally preferred, would be unjustifiably to narrow the right of election accorded by the judgment of the supreme court.

The claim set up by the New Almaden Company for two leagues of land was rejected by this court. In the opinion, however, of one of the judges who concurred, pro forma, in the judgment of the court, the claimants had an equitable title which the United States were not at liberty to disregard. That title was founded on a dispatch addressed to the governor of California by the minister of relations, in which the former was advised that the president had been pleased to accede to the petition of Castillero for two leagues of land on his mining possession, and the governor was directed to put him in possession in conformity with the colonization laws. By one of the judges, this dispatch was considered, under the authority of the case of Castillero v. U. S., 23 How. [64 U. S.] 469, as "operating to adjudicate the title," and as an order to the governor to make the formal grant, as required by the colonization laws, in case the land should be found to be vacant. To have treated it as constituting, per se, a grant of the land would have been to attribute to Castillero a fraud upon the Mexican government; for he was well aware that two leagues of land, measured in every direction from the mouth of the mine, would include a considerable portion of the lands long previously granted to Larios and Berreyesa. It was, therefore, considered as the official expression of the president's assent to the petition of Castillero, and a direction to the governor to make the grant in conformity with the colonization laws, i. e. out of vacant and ungranted public land. A dispatch somewhat analogous, and imposing a similar duty on the governor, had already been decided by the supreme court to "operate to adjudicate the title."

If this be the true construction of the dispatch it would have been the first duty of the governor to inquire whether the land asked for was vacant, or whether it belonged to any private individual, pueblo, etc. On learning that a part of it belonged to two adjoining rancheros, he would either have adopted their external boundaries as the limits of the grant to Castillero or he would have suspended the proceeding until their lands should be measured and their boundaries legally established. In the latter event it cannot, I think, be doubted that Larios would have been put in possession of the whole tract within his external boundaries, and the fraction of the unit of measurement in excess of one league would have been treated as

passing under the words "poco mas ó menos." But, at least, if restricted, as now, to the precise quantity of one league, he would have been allowed to select its location. If it be urged that he is now seeking to locate it on mineral lands, whereas, his grant was for grazing land, it may be replied that the New Almaden Company are endeavoring, with less right, to attain a similar object. Their right to the mine, with the pertinencias allowed by law, was acquired by discovery, registry, and working. Their alleged grant of two leagues was solicited and bestowed merely to supply wood for their burnings. As between them and Larios it is at least as inequitable that, under a grant of this description, which, by Mexican law conveyed no title to the minerals beneath the surface, they should obtain the range of the lomas, in which several mines held under titles derived from Larios are now in operation, as to permit Larios or his assigns to elect to locate his league on the same land.

If the claim for the two leagues should be rejected by the supreme court, the New Almaden Company would cease to have any right or interest to control the survey of the Larios claim. But, even if it be confirmed, I have been unable to perceive any just ground for limiting the right of election of Larios or his assigns, which the supreme court have declared him to possess. But, if the conclusion arrived at as to the location of the dividing line between the ranchos be correct, this question is comparatively unimportant; for it will not be possible to locate a league within the southern, western, and eastern boundaries, without including the greater part of the level land of the valley. It can, therefore, be no longer objected that those lands are not embraced within the survey. The survey returned into court must, therefore, be modified in accordance with this opinion; that is, a league of land must be measured within the western and southern boundaries as established by the present survey and the eastern boundary as declared in this opinion, the last-mentioned boundary to consist of a line drawn from the angles of the creeks to the eastern falda of the lomita, and from thence to the sierra, in such a direction as to pass the lomas bajas and to strike the sierra at the points indicated on the diseño as near as may be, and the fourth line to be run for quantity, at the election of the grantee, or his assigns.

Case No. 15,141.

UNITED STATES v. FOSTER.

[2 Biss. 377;[1] 3 Chi. Leg. News, 113.]

Circuit Court, E. D. Wisconsin. Oct. Term, 1870.

INDIANS—OWNERSHIP OF LANDS—TIMBER.

1. The Indians on the Oneida reservation have the right to cut and use the timber thereon, and to sell sufficient to support themselves and families.

2. They must be treated as owners of the land, their ownership however being subject to the rights of sovereignty of the United States.

3. The power of the United States to sell this reservation commented upon.

Replevin brought by the United States against the defendant for a quantity of logs which, it is alleged, were cut on the Oneida reservation, near Green Bay, in the state of Wisconsin.

Levi Hubbell, U. S. Dist. Atty.
Smith & Stark, for defendant.

DRUMMOND, Circuit Judge. The facts of the case seem to be substantially as follows: On the 8th day of February, 1831, the Menomonee Tribe of Indians, by articles of agreement made with the United States, which were afterwards ratified by the senate with a proviso not affecting the question in this case, which thereby became a treaty between that tribe and the United States, ceded a certain tract of land to the United States for the benefit of the New York Indians. That tract included what is now known as the Oneida reservation. It would seem that at that time, the Oneida Indians were in possession of the Oneida reservation, and have continued in possession ever since. On the 4th day of January, 1836, the Oneida Nation made a contract of lease to Daniel Bread, one of their tribe, authorizing him to construct a dam and saw-mill on Duck creek, within the reservation, and to cut all the timber thereon necessary to build the dam and mill, as well as do lumbering thereat. Any one of the nation had a right to cut and draw logs to the mill, and one-half of the boards were to go to the mill, and the other half to him who cut and drew the logs. This condition as to the division of the property was to continue four years, and after that those who drew the logs were to be entitled to two-thirds of the boards. The lease concludes with this stipulation: "And the said Bread and his heirs and asigns shall have privilege to cut all logs necessary to keep the mill constantly running." By the terms of this lease this arrangement was to be perpetual. It appears the dam and mill were constructed by Bread, and that lumber has been manufactured there from that time up to the present, and that the defendant claims under this lease and is now and has been for some time in possession of the mill. On the 3d day of February, 1838 [7 Stat. 566], a treaty was made between the first Christian and Orchard parties of Indians, by which they agreed to cede to the United States all their title and interest in the lands set apart for them in the first article of the treaty with the Menomonees, already referred to; but by a second article of the treaty of February 3, 1838, there was reserved to the Indians from the foregoing cession, and to be held as other Indian lands, a tract of land containing one hundred acres for each individual, and it is

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

this that is now called the Oneida reservation; and the Oneidas were a party to this treaty of 1838, by the name of the first Christian party of Indians. It will be seen, therefore, that by the terms of this treaty of 1838 the United States contracted with the Oneidas for the purchase of the land which had been ceded to them by the Menomonees in 1831, and that they reserved by express terms to the Oneida Indians what is now known as the reservation. There seems to be no controversy about these facts, and the Indians have been treated from that time as the owners and possessors of the land. Since the lease was made in 1836 it appears that the Indians have resided upon the land, and have cultivated it to a greater or less extent, and have been in the habit of cutting and hauling logs to the mill constructed under the lease. It is to be observed that this lease was made under the direct sanction of Mr. Boyd, the Indian agent of the United States at that time, as is manifest from his signature to a memorandum stating that fact, attached to the lease. The lumber has been cut and used in the manner already described, it would seem, with the acquiescence of the federal authorities.

Recently stringent instructions have been given to the superintendent of Indian affairs that no timber shall be cut upon the reservation, except what may be necessary for the personal use of the Indians. It appears by the evidence that about one hundred thousand feet of the lumber in controversy in this case was cut on the reservation by some of the Indians, and sold to the defendant.

[There is a statement made by the agent of the government that the defendant admitted to him that there was as much lumber at the mill as was replevied in this case which came from the reservation, but it does not distinctly appear who cut or sold the remainder of the lumber in controversy, exceeding the one hundred thousand feet already referred to.] [2]

But it does not distinctly appear who cut or sold the remainder. One of the questions that arise in the case is, whether for the lumber that was cut and sold to the defendant by the Indians themselves, the action of replevin can be maintained by the United States. And I am of the opinion that if it was cut and sold for the purpose of supporting the Indians or their families, the action of replevin cannot be maintained. The Indians were in possession and were the owners of the land, so acknowledged to be by the government of the United States. It is true they were in possession as other Indians, according to the language of the treaty of 1838; but the understanding seems to be that while the ownership of the Indians could not interfere with the rights of sovereignty on the part of the United States, as a nation, and that the Indians might be compelled to sell the lands to the United States, that for all purposes the Indians must be treated as owners of the land, with the right to use it for all the purposes of tillage; to take fuel, wood for building and fences, and for their ordinary support. If this is so, while, perhaps, there may be some question whether the Indians would have the right to commit waste, properly so called, upon the land, or to use the timber for the purpose of speculation, still there can be no doubt they would have the right to clear the land for cultivation; and, if so, it would seem, to sell the wood thus obtained from the land; and to say that they could have the right to cut and use the wood and timber for these purposes, and that they could not sell it to enable them to obtain necessary articles, such as nails and other materials for the construction of their buildings and fences, would seem to be making a very refined distinction and one not warranted under the circumstances of the case.

This land is the only means of support which these poor people have. At the time of the treaty of 1831 [7 Stat. 342], the tribe consisted of less than six hundred persons. There are now about twelve hundred. The contributions of the government to these people are comparatively insignificant, furnishing them really no sufficient means of support, and, therefore, they must rely upon the land itself, and what comes from the land; and to insist that in the case of failure of crops, even if it be contended that it is their duty to cultivate the land, they could not take the wood necessary for their support, would be something not warranted by the principles of equity, and certainly ought not to be sanctioned by a court of justice.

I am therefore of the opinion that these Indians had the right to cut this timber on their own land for the purpose of contributing to the support of themselves and families. It is proved that this right has been exercised for many years with the sanction of the government and with the express consent of the tribe itself in council.

It may be doubted whether this reservation can be sold by the United States in the present condition of the title, even by act of congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the government, until the rights of the Indians are purchased, and with their free consent.

[2] [From 3 Chi. Leg. News, 113.]

Case No. 15,142.

UNITED STATES v. FOSTER.

[2 Biss. 453;[1] 19 Int. Rev. Rec. 5.]

Circuit Court, E. D. Wisconsin. Feb. Term, 1871.

INTERNAL REVENUE—BREWER—FAILURE TO KEEP BOOKS—PENALTIES—HOW ENFORCED.

1. To an information against a brewer filed under the 48th, 49th, 51st and 53d sections of the act of July 13, 1866 [14 Stat. 164–166], it is not a sufficient answer that the neglect to keep the prescribed books and accounts was through ignorance or carelessness, and that there was no wrongful or criminal intent.

2. The object of the law is to protect the government in the collection of the tax. The penalty is for the omission, and the very nature of this business demanded that the brewer should know his duty in the premises.

3. Nor is it a sufficient answer or excuse that he misconstrued the law, and drew erroneous inferences as to his rights.

4. Where the law prescribes as punishment for an offense both a money penalty and imprisonment, it is not true that the penalty can only be enforced by indictment. The government can maintain an action of debt for the money penalty.

5. The words "shall be liable to," &c., are permissive, and not compulsory; they mark the extreme limit of the penalty, and leave it discretionary whether the whole penalty shall be imposed.

This was an information as in a declaration in debt under the 48th, 49th, 51st and 53d sections of the internal revenue act of July 13th, 1866 (14 Stat. 163). The declaration contained two counts. The first alleged that the defendant was the owner and superintendent of a brewery at a place named, within the district, and that he did not keep books showing the amount of beer which he had manufactured and sold, and showing the amount of materials which he had purchased, and claimed the penalty of three hundred dollars, prescribed in the last clause of the 51st section. The second count was that the defendant did not pay the taxes on the beer sold in fractional parts of a barrel, and that they were removed without stamps being affixed, and five instances were charged and a penalty of one hundred dollars claimed in each case, under the last clause of the 53d section. The jury found a verdict for the United States, for the penalty claimed. Motion for a new trial and in arrest of judgment, on the ground that the verdict of the jury could not be sustained under the evidence. and because, under the law, the judgment could not be rendered under the verdict.

Levi Hubbell, U. S. Dist. Atty.
Smith & Stark, for defendant.

DRUMMOND, Circuit Judge. There was an allegation in the first count showing that an offense had been committed under the first part of the 51st section, but the whole of the first count was in debt, and only claimed as a penalty the sum of three hundred dollars. The case did not show that the defendant had any wrongful or criminal intent in neglecting to keep the books as prescribed by the 49th section, but that he omitted to keep the books through carelessness or ignorance, and it is objected that in order to warrant the enforcement of the penalty against the defendant it is necessary that there should be some wrongful or criminal intent. This does not seem to be necessary in the law. The language of the law is, that a party shall forfeit and pay the sum of three hundred dollars if he neglects to keep the books, without any reference whatever to the motive which causes such neglect. It is for the act of omission. The object of the law is to protect the government in the collection of the proper tax from the brewer, and in order to accomplish this there devolves upon him the duty of entering, or causing to be entered, from day to day in a book to be kept by him for that purpose the account of fermented liquors, the description of packages and the number of barrels and fractional parts of barrels manufactured, and also the quantity sold or removed for consumption or sale, and an account of the materials purchased by him. It may be that a party would not be subject to the penalty for an unintentional error or mistake in making the entries, but the very object of the law was to compel the brewer to keep the books and to make the entries as heretofore stated, and it is no answer to the allegation that he has neglected or failed to do so, that he was ignorant of the requirements of the law. The very nature of his business demanded that he should know what his duty was in the premises, and the old and familiar principle so often cited must be considered applicable to this case, that he cannot be excused on account of his ignorance.

The allegation made in the first count of the declaration under the first part of the 51st section seems to be mere surplusage, as no penalty is claimed under that allegation and may therefore be rejected, the count not being framed to enforce the penal part of the law.

The proof under the second count shows that the defendant in several instances had not affixed to the fractional parts of the barrels the stamps as required by the 48th section. There was some evidence tending to show that the defendant was under the impression that he might divide the stamps, putting one part of the same stamp on one fractional part of a barrel, and another on a different fractional part of a barrel, contrary to the provisions of the law. The same rule is applicable here as in relation to the first count. The law is explicit on the subject and a defendant cannot protect himself under an erroneous inference which he drew as to his right to affix stamps, and it is not

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

necessary in this count any more than under the first that what the defendant did should have been done with a wrongful or criminal intent. It is enough that he failed or neglected to do what the law required.

It is insisted that the penalty referred to in the last clause of the 53d section, can only be imposed by indictment, and that it is not competent for the prosecution to institute an action of debt for a violation of this part of the law, where a person refuses or neglects to affix and cancel a stamp required by law. The language of the clause is "that a person who neglects or refuses to affix and cancel a stamp shall be liable to pay a penalty of one hundred dollars in each case where such omission occurs and shall be liable to imprisonment for not more than one year," and it is urged that because the party is subject to imprisonment the penalty can only be enforced by indictment. The general rule, where a money penalty is imposed for the doing or omission to do a particular act, is that an action of debt can be maintained, and the only question is, whether, when imprisonment is added to the money penalty, the government thereby loses the right to maintain the action of debt. In this case the government proceeded only for the money penalty named in the 53d section and has waived the other penalty of imprisonment. There may be a question whether, when the action of debt is brought, any indictment could afterwards be maintained. Without deciding that question, I am of the opinion that the action of debt well lies in this case. The language of the law, it will be seen, is peculiar: "shall be liable" to pay the penalty of one hundred dollars, and shall be liable to imprisonment. The language of the law is not imperative, but permissive, and in looking through the internal revenue laws upon the subject of penalties, it will be observed that the language varies in different cases. Sometimes the law speaks imperatively, as that the party guilty of the offense, or performing or not performing the act, shall suffer in a particular way by a penalty or by imprisonment. In other cases the law speaks in a permissive form, as that the party may be subject or liable to a particular penalty, and it would seem as though there was some object in this different phraseology of the law. For example, where the law made it compulsory on the court to impose the penalty, there the court could not vary from the demands of the law. But where the law only declared that the party might be liable to such a penalty named, and might be liable to imprisonment, there the language of the law does not seem to make it compulsory upon the court to include both. It would seem, in such case, to be a matter within the sound discretion of the court.

Motion for new trial and in arrest of judgment overruled.

Case No. 15,143.

UNITED STATES v. FOULKE.

[6 McLean, 349.] [1]

Circuit Court, N. D. Ohio. April Term, 1855.

CRIMINAL LAW—REASONABLE DOUBT—WHAT IS—EMBEZZLEMENT FROM MAIL.

1. The jury are to weigh the evidence in every case, and where there is a conflict in a criminal case which creates reasonable doubt, they will acquit the accused.

2. These doubts should not arise from our sympathies or hopes, but from a deliberate consideration of the evidence.

Mr. Morton, U. S. Dist. Atty.

Mr. Upton, for defendant.

OPINION OF THE COURT. The defendant stands charged, gentlemen of the jury, with stealing a letter out of the mail containing money, he being a post-master. Mr. Chapman, who acts as special agent for the post-office department, states that the defendant was post-master at Moultrie, situated on the railroad to Cleveland. The witness mailed a letter at New Franklin post-office, Stark county, addressed to the post-master at Osnaburg, with a request that it should be returned to Cleveland. There was but one office, Paris, between New Franklin and Osnaburg. The letter contained a ten dollar bank note. This letter was received by the post-master at Osnaburg, which is thirteen miles west of Moultrie. Mr. Koons, the post-master at Osnaburg, states that he received the letter from Chapman and forwarded it the next day, the 21st July, to Cleveland. It had to pass through Paris and New Franklin before it reached Moultrie post-office, on the railroad. The letter was directed to one Milton, Cleveland, requesting him to make and forward to the writer a plow. A fictitious name was signed to the letter. Mr. Chapman states that on the evening of the 21st of July, he received from Cleveland, by the conductor of the train, the same ten dollar note he enclosed in the above letter. The post-master of Paris, which was the first office after it left Osnaburg, states that he took, on the 21st, no letter out of the mail which was not directed to his office. The post-master at New Franklin also stated that he took no letter out of the mail which was not directed to his office. The next was the Moultrie office. Mr. Cleland, the conductor of the train, states that, on the 21st of July, the defendant was post-master at Moultrie, and kept a tavern. He generally received the mail from the cars and changed it. On the above day, the defendant asked him to change a ten dollar bill, as he wanted small bills, and the witness gave him smaller notes for the bill which he identified, and that was the bill which he on the same day handed to Chapman, the agent of the post-office de-

[1] [Reported by Hon. John McLean, Circuit Justice.]

partment. Mr. Grey, assistant post-master, at Cleveland, was requested by Chapman to look for the letter he had caused to be forwarded, which he did on the evening of the 21st of July, and for several evenings afterwards, but no such letter has been received at the Cleveland post-office. Mr. Meeker was present when Cleland, the conductor, changed the bill at the request of the defendant. Cleland at first objected to the bill as not good, but Foulke assured him it was good and that he would be responsible for it. Mr. Arnold saw Cleland and Foulke talking together on the above day, but did not hear the conversation.

Defendants' witnesses: Mr. Randolph, being called by the defendant, states that he saw defendant on the 21st of July, 1853, in Chambersburg. He was arrested about the 9th of August. On the 21st he saw A. Koons, the post-master at Osnaburg, at Root's, in Chambersburg. Mr. Root came across the street and spoke to defendant, taking him out of the crowd. Witness saw they had money passing between them, and the witness says the defendant got a $10 bill of Root, in the presence of three or four persons who witnessed the exchange. The bill received by Foulke was doubted at first. The witness had the $10 bill in his hand. The bill had two crosses near the letter B. The bill being presented to the witness, he believes it to be the same. Samuel Loder was at Chambersburg on the eve of the 21st or 22d of July, 1853, and heard Randolph, Foulke and Harris talking together, witness being present. They talked about the ten dollar bill. Witness on looking at it thought it was not good. He saw Root in close proximity with Foulke. Witness thought the bill was not good. Witness has known Root five years. Witness stood near Randolph. Mr. Harris was at Chambersburg on the 22d or 23d of July. He thinks Loder took up some work. Witness lived with Loder. Witness saw Mr. Root come down, call Foulke out and change some money with him; handed the bill to Randolph; Foulke had the note, but does not know the size of it; and witness saw Foulke give change for the note; heard Mr. Randolph say it was a base counterfeit. Mr. Thomas lives in Chambersburg. On the 22d of July, 1853, had some hands at work who came to his house on the same evening, and he made an entry of the date as above. Witness saw a bill in the hands of the defendant, who said it did not look like a good bill. Root said if it were not good he would make it good. Witness did not examine the bill, and did not know the amount of it. On the same evening a wagon and sulky were taken away by Mr. Randolph. Joseph Estel was the mail carrier about five months, and was the carrier at the above time, three times a week each way—Tuesdays, Thursdays and Saturdays. Mr. Lever, Mr. Wallace, John McClury, Wm. H. Gill, Wm. W. Hamilton, Charles M. Austin, Judge Riddle, Joseph H. Quinn and Mr. Aster were sworn, all of whom testified to the good character of the defendant. They represented him as having filled various responsible trusts, and exercising great influence with the people of his county.

The plaintiffs called some rebutting witnesses. Mr. Root says he is the brother-in-law of Koons; that he had some dealings with the defendant the latter part of May or the beginning of June; bought a horse from defendant; paid thirty dollars, and gave a note for the balance; that he sold goods, and had more accounts against the defendant. Chambersburg was only a few miles from Moultrie. Mr. Koons says he was not at Chambersburg on the 21st of July; that he was there on the 20th, and a short time afterwards; that he never promised Root to change a bill for him with the defendant.

The defendant then called Mr. Eustine, who says, he heard Root say he had changed with Foulke a ten dollar bill, which was suspected; and that he promised to make it good if it were not so.

This is the substance of the testimony, gentlemen; and it is your duty to consider it well, and to come to a decision as to the guilt or innocence of the defendant. If the postmasters of Osnaburg and New Franklin have sworn truly, the letter was mailed at Osnaburg, and, passing through the New Franklin office, in all probability was received at the Moultrie office: and, if the conductor of the train, Mr. Cleland, and the post-office agent, Chapman, remember correctly, the note which the latter endorsed to test, as he says, the Moultrie office, was received by the conductor from the defendant on the 21st of July, and handed by him to Chapman, the agent, on the same day. And, as the conductor was apprised by the agent of the experiment, both he and the agent would necessarily charge their memories with the facts and the date. These witnesses are not impeached.

The defense rests mainly on the fact alleged, that the identical note was received by the defendant from Roth on the 21st of July, the same day the conductor received the note from the defendant. The witnesses vary somewhat as to the time the note was received by the defendant from Roth. It was sometime in the afternoon. Now, if this note was not received until after the cars had passed the Moultrie office, the defense must fail. Chambersburg is but a short distance from Moultrie. Supposing the note received from Roth was the identical note passed to the conductor by the defendant, there is no question that he must have received it from Roth, and returned to his office before the cars arrived. It is said that the daughter of the defendant, in the absence of her father, generally opened the mail.

The attempt is openly avowed to implicate Mr. Koons, the postmaster at Osnaburg, in this transaction. The letter in question was enclosed to Mr. Koons by Chapman, open, and

he stated the object. It is then suggested that Koons had the power to abstract the letter, hand it to his brother-in-law, Roth, who passed it off to Foulke with the view of entrapping him. Mr. Koons was not suspected by the agent of the postoffice department, nor is there any evidence, beyond what you have heard, to cause suspicion against him. Koons swears he was not at Chambersburg on the 21st of July, and the same is corroborated by the oath of Roth, his brother-in-law; and one or two of the other witnesses state, that it was on the twenty-second or third that the ten dollar note was passed to Foulke by Roth. But, several of the witnesses say that the note was passed to the defendant on the 21st; and they identify the note now presented to them by a mark which was observed at the time; and here, too, the witnesses state facts which would be likely to remain impressed upon their memory. The note was minutely examined by Mr. Randolph and others, as it was suspected to be a counterfeit; and several of them, on looking at the note now, are able to identify it by certain marks which were observed when they saw it at Chambersburg.

If this evidence be false, it has been most ingeniously contrived. But, such a supposition most seriously implicates the defendant's witnesses, who have not been impeached, and who appear to be respectable. It will be your duty, gentlemen, to reconcile the testimony if you can; but, if this can not be done, it will become your painful duty to weigh the facts, and decide where the truth lies. By a large number of respectable witnesses the defendant has shown a good character. This the law permits, from the infirmity of human testimony, and for the safety of the accused. Where an individual has so acted as to secure the confidence and good feeling of his neighbors, and of those with whom he has had intercourse or business, he will not be supposed, except upon the clearest evidence, at once to abandon so desirable an inheritance. There may be such instances, but they form exceptions to the general rule.

You, gentlemen, are to judge of the weight of evidence, and the credibility of witnesses. There is no tribunal but that before which we must all appear, which can rightly judge of the motives of human action. We have no such standard; and, at best, we can only determine matters of controversy, civil and criminal, on the highest probability of facts, from the evidence. But, in every criminal case, where a conviction is utterly ruinous to the accused, a jury will acquit, if they have reasonable doubts of his guilt; but, these doubts must not arise from our sympathies, but from a deliberate consideration of the evidence.

The jury found the defendant not guilty.

UNITED STATES v. FOUR CASES. See Case No. 4,986.

Case No. 15,144.

UNITED STATES v. FOUR CASES CUTLERY.

[1 Hunt, Mer. Mag. 166.]

District Court, S. D. New York. August, 1839.

CUSTOMS DUTIES — FALSE INVOICE — FORFEITURES.

Suit by the United States against four cases of cutlery, Edward Leon and Theodore Myers, claimants and defendants, trading as Edward Leon & Co. The amount of the invoice was £127. 13s. 9d.; the valuation of the custom-house appraisers, £191. 17s. 7d.,—difference, or supposed undervaluation, £64. 3s. 10d.

Various witnesses were examined, and a variety of opinions expressed, as to the value of the goods. The weight of testimony, however, converged to one point, namely, that on manufactured articles, of which labor constituted the principal value, and this fluctuating in price from ten to fifteen, and sometimes twenty per cent., and the articles, when manufactured, being frequently sold by small dealers at reduced prices to raise money, it was possible that the goods in question might have been bought at invoice prices, and more than probable that they were so.

BETTS, District Judge (charging jury). It is not enough for the government to show that goods are invoiced at a low rate, but they are bound to prove that the invoice is made out with the intent to defraud. It remains merely for the jury to decide: (1) Has this invoice been so made out? (2) Have the government shown this, either by proof direct or inferential? Or, (3) have the defendants shown that they were invoiced at their fair market value? It is a simple question of fact which they are to decide.

The jury retired, and made up a sealed verdict instanter for the defendants.

Case No. 15,145.

UNITED STATES v. FOUR CASES OF LASTINGS.

[10 Ben. 371.] [1]

District Court, S. D. New York. March, 1879.

FALSE INVOICES — FORFEITURE — BONA FIDE PURCHASER — REV. ST. §§ 13, 2864.

1. The act of March 3, 1863, c. 76, § 1 (12 Stat. 738), provided that in case of the knowingly entering goods by means of a false invoice, etc., the goods or the value thereof should be forfeited. In embodying this statute in the Revised Statutes (section 2864), the words "or the value thereof" were omitted, and the act of 1863 was repealed. By the act of 1875, c. 80 (18 Stat. 319), passed February 18, 1875, section 2864 was amended by restoring the words "or the value thereof." After the passage of the Revised Statutes, but before the passage of the amending act of 1875, certain goods were knowingly entered by means of false invoices:

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

2. *Held* that, under the statute in force at the time of the entry, the forfeiture of the goods was absolute, and that it was not a case of a forfeiture of the goods or of their value at the election of the United States, and therefore a transfer for value to a bona fide purchaser or pledgee before suit brought gave no title as against the United States.

[Cited in U. S. v. Auffmardt, 19 Fed. 901.]

3. That, if the act of 1875 was a repeal by implication of Rev. St. § 2864, the right of the United States was not thereby defeated, although the act of 1875 contained no saving clause as to forfeitures already incurred, because that act is subject to the provisions of Rev. St. § 13, which provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability under such statute unless the repealing act shall so expressly provide."

At law.

George Bliss, for the United States.
James M. Smith, for claimants.

CHOATE, District Judge. This is a motion for a new trial for error of law after a verdict for the government. The suit was by information to enforce a forfeiture against the goods seized, among other grounds as having been entered by means of a false invoice, under section 2864 of the Revised Statutes. By that section, the forfeiture declared is the forfeiture of the merchandise simply, without the alternative remedy for the value thereof, which was the form of the forfeiture declared by the act of 1863, of which this section is, with some changes, a re-enactment. The alleged unlawful entry took place while section 2864 was in force, and an absolute forfeiture of this kind with no alternative has been held to vest the title to the goods immediately in the United States, although a seizure and judicial proceedings were required afterwards to enforce it; but when these were had, the title of the United States, by relation, takes effect from the time of the unlawful entry, thus excluding any right or title, afterwards and before the seizure, acquired in the goods even by a bona fide purchaser or pledgee for value. Henderson's Distilled Spirits, 14 Wall. [81 U. S.] 57. After the entry but before the seizure or commencement of this suit, the act of February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," was passed, whereby section 2864 was amended by inserting the words "or the value thereof" after the word "merchandise," so that from the time of the passage of this act the nature of the forfeiture declared for this particular illegal act is not an absolute forfeiture vesting the title at once in the United States, but a forfeiture at the election of the United States, not taking effect so as to vest the title till by seizure or suit brought that election is made. Caldwell v. U. S., 8 How. [49 U. S.] 366. Under this later statute the intervening title of a third party acquired in good faith and without notice is protected. Caldwell v. U. S., ut supra. In this case the goods before the seizure had passed into the possession of the claimants, Field, Morris, Fenner & Co., auctioneers, who had made advances thereon to the consignee, and their good faith and entire want of notice of the illegal acts were not contested. The court was asked to instruct the jury that "if they believed that the claimants came into possession of the goods bona fide and without notice of any fraud on the government, the government cannot claim a forfeiture of the goods under section 2839 or 2864 of the statute after said goods came into the possession of the claimants." It is for alleged error in refusing this instruction that the motion for a new trial is made.

It is insisted by the learned counsel for the claimants that the act of 1875 repealed section 2864 of the Revised Statutes, substituting a new and different provision of law in its place, and that the repeal of a law imposing a penalty or forfeiture, even though the forfeiture is declared absolutely by the law repealed, takes away all remedy to enforce such forfeiture, unless the repealing act expressly saves the right to enforce such forfeiture accruing under the repealed statute. This familiar principle, as applied to the repeal of criminal and strictly penal statutes, has been also held applicable to statutes imposing forfeitures of the nature of that declared by the custom laws. The Rachel v. U. S., 6 Cranch [10 U. S.] 329; Yeaton v. U. S., 5 Cranch [9 U. S.] 281. See, also, Hartung v. People, 22 N. Y. 95; U. S. v. Passmore, 4 Dall. [4 U. S.] 372.

It is true that the act of 1875 contained no saving clause, and it may well be held to have operated as a repeal of section 2864 within the meaning of this rule; but it was subject to the provisions of section 13 of the Revised Statutes, which is as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." Motion denied.

Case No. 15,146.

UNITED STATES v. FOUR CASES PRINTED MERINOES.

[2 Paine, 200.] [1]

Circuit Court, S. D. New York. 1835.

CUSTOMS DUTIES — FRAUDULENT ENTRY — OWNERSHIP OF GOODS.

1. Upon the question whether goods were fraudulently entered, the court ought to be liberal in the admission of evidence which has a bearing, even in a remote degree, upon the point to be made out.

[1] [Reported by Elijah Paine, Jr., Esq.]

2. But circumstances which are offered to show the fraud, should be of a character fairly and reasonably tending to make it out. If irrelevant, or relating to a matter immaterial to the point of inquiry, they are not admissible.

[Cited in U. S. v. One Hundred and Forty-Six Thousand Six Hundred and Fifty Clapboards, Case No. 15,935.]

3. Goods were entered by one of the claimants, and the oath taken by him on entry, was the one prescribed by the act of congress to be taken in cases where the goods have been actually purchased. Afterwards, the goods were proceeded against under section 14 of the act of July 14, 1832 [4 Stat. 593], on the ground that the packages were made up with intent to evade and defraud the revenue. Evidence that the claimants were not owners of the goods at the time of entry, but only consignees, and that the real owners were the manufacturers of the goods, who resided abroad, was held irrelevant and inadmissible.

[Error to the district court of the United States for the Southern district of New York.

[This was a proceeding by the United States against four cases of printed merinoes, Harvey & Stagg, claimants, on the charge of an intent to defraud the revenue. The district court rendered judgment in favor of the government (case unreported), and the case is now before this court on a writ of error to that judgment.]

THOMPSON, Circuit Justice. The record in this case is brought up by writ of error from the district court for the Southern district of New York. It is an information filed under the 14th section of the act of July 14, 1832. The information contains three counts, but no question arises in this case under the two first counts. The third count claims a forfeiture of the goods under the allegation that the packages were made up with intent to evade and defraud the revenue of the United States. The entry at the custom-house was made by Joseph Harvey, one of the claimants; and the oath taken by him, was the one prescribed by the act of March 1, 1823 (7 Laws U. S. [Bior. & D.] 123 [3 Stat. 729]), to be taken in cases where the goods have been actually purchased. Upon the trial, it was offered on the part of the United States to prove that the claimants, Harvey & Stagg, were not the owners of the goods at the time of the importation and entry thereof, but that the said goods were then owned by Harvey, Tyrol & Co., the manufacturers thereof, who resided in England, and that the said Harvey & Stagg were merely the consignees of said goods. This evidence was objected to on the part of the claimants, and overruled by the court; and the only question in this case is, whether the evidence so offered was admissible. Upon the question whether the entry was fraudulent or not, the court ought to be liberal in the admission of evidence which has a bearing, even in a remote degree, upon the point to be made out. Generally, the fraud is to be made out by circumstances, but such circumstances must be of a character fairly and reasonably tending to make out the matter of fraud; if irrelevant, or relating to a matter immaterial to the question or point of inquiry, there can be no propriety in admitting such evidence. Under such a course of practice in the trial of causes, there would be no settled rule by which the court would be governed.

An admission of the truth of the fact offered to be proved, could have made no difference in the result; the evidence was irrelevant. As to the effect of the admission of irrelevant testimony, see 2 Grah. & W. New Trials, p. 603 et seq. See the following cases: The Isabella [Case No. 7,101]; The William Gray [Id. 17,694]; The Enterprise [Id. 4,499]; The Cotton Planter [Id. 3,270]; U. S. v. Nine Packages of Linen [Id. 15,884]; U. S. v. Morris [Id. 15,816]; The Active [Id. 35]; The Ann Maria [Id. 427]; U. S. v. One Case of Hair Pencils [Id. 15,924]; Sixty-five Chests of Tea v. U. S. [Id. 12,916]. The point of inquiry was, whether the entry and oath were made with intent to evade or defraud the revenue; but the duties were the same whether the claimants were the real owners or only consignees of the goods, and no fraud upon the revenue could have been intended. The law requiring the invoice to be verified by the oath of the non-resident owner, and authenticated by a consul or commercial agent of the United States, can have no bearing upon the question of fraudulent intent to evade or defraud the revenue. The evidence was, therefore, properly rejected. The judgment of the district court is, accordingly, affirmed.

UNITED STATES v. FOUR CUTTING MACHINES. See Case No. 4,987.

Case No. 15,147.

UNITED STATES v. FOUR HUNDRED AND SIXTY BARRELS FERMENTED LIQUORS.

[11 Int. Rev. Rec. 11.]

District Court, D. Rhode Island. 1869.

INTERNAL REVENUE — FAILURE TO STAMP — FORFEITURE.

This is an information brought by the United States district attorney in a cause of seizure for violation of the internal revenue laws, made by the collector of internal revenue for the First collection district of Rhode Island, on the 6th day of December, 1869. The information alleged, among other things, that the owner evaded the internal revenue laws of the United States by not putting proper stamps upon his barrels of ale at the time of sale, and not paying the taxes imposed by said laws. Said property was taken possession of by the marshal, notice issued for claimants to appear, and, no person appearing to claim said property, it was de-

cleared forfeited, and a warrant of sale issued to the marshal to sell the same, and make return thereof to said court on or before the 19th day of January, 1870.

Case No. 15,148.

UNITED STATES v. FOUR HUNDRED AND SIXTY-NINE BARRELS OF SPIRITS.

[10 Int. Rev. Rec. 205.]

District Court, E. D. Missouri. 1869.

INTERNAL REVENUE — ORDER TO PRODUCE BOOKS —FORFEITURE.

Where the United States in proceeding against certain spirits for forfeiture obtained an order upon the claimants to produce their books upon the day set for trial, or on default thereof the prosecution might have judgment, *held*, such order can properly issue under the act of 1789 [1 Stat. 73], and failure to produce the books accordingly, unexplained, would entitle the United States to have forfeiture.

[Cited in U. S. v. Distillery No. 28, Case No. 14,966.]

At the commencement of the proceedings the district attorney asked for the books of the claimants [G. S. Matteson, of New Orleans, and E. R. Goodell, of Springfield, Ill.], for the production of which the court passed an order on the 4th of January.

Mr. Noble, Dist. Atty., for the United States.

Ex-Senator Doolittle, Col. J. O. Broadhead, and Mr. Sharp, for claimants.

Col. Broadhead said that the notice of the production of the books was served on his partner, Mr. Sharp, and that he found it a few days ago amongst his papers. He overlooked the matter, and when his client, Mr. Matteson, came down a telegram was sent immediately to New Orleans to have the books sent by express. The order should, he thought, have been served on the parties themselves to entitle the government to any right growing out of the fact that the books had not been produced.

Gen. Noble—I hold I am entitled to a default, and a forfeiture of this property, unless they produce those books.

TREAT, District Judge. It was so held by this court, and the point was taken up to the circuit court, elaborately considered and affirmed. [Cases unreported.]

Gen. Noble said he was entitled to the books and could not open the case without knowing what evidence he had. He asked for the action of the court upon the order.

Mr. Doolittle said he understood the learned counsel for the United States contended that if those books were not produced upon the instant, under those circumstances he was entitled to a judgment against the parties for the whole amount of that property.

The District Attorney—I demand that, on the decision of the court affirmed by the circuit court of this circuit.

Mr. Doolittle supposed that if the court had made such a decision, it was where service had been made upon the party, and where the party was supposed to have been guilty of a contempt of the order of the court. There can be no contempt without knowledge. In this case it would seem a very extraordinary hardship, the first notice that the books were required, only having been brought home to the claimants two or three days since, a telegram being sent immediately and the books being expected to reach here. That such a harsh remedy should be sought by the United States, seemed to him a little extraordinary at least, as he supposed the great government of the United States desired to do justice. In such a case service of the order on the attorney was not sufficient; service must be on the party.

The district attorney argued that service on the attorney was sufficient. As for the matter of the justice, the great government of the United States is as much bound and restrained in this court by law as the most humble applicant for justice who appeared within these walls. All he asked was that all parties might be bound by the law as administered in that court, and not that a loose manner of proceeding should be allowed, and the government stagger into a case blindfolded.

Mr. Doolittle admitted that for some purposes service on the attorney was sufficient, but it was not where punishment of a party was asked for contempt.

TREAT, District Judge, said the point under consideration had been fully presented to the court some time ago, and after mature deliberation the court reached its conclusion with respect to it and acted accordingly; as he had said before, the matter was taken to the circuit court, where it was very well considered and an elaborate opinion given in regard to it. Under the act of 1789 a party may procure upon the other party in such proceedings an order of that character, which order has to be complied with, or an excuse given under oath for non-compliance with it. The consequences were determined by the statute itself. The sufficiency or insufficiency of the excuse has to be determined on the incoming of it. In the present case it seemed a matter of oversight to some extent. The difficulty was that the case was now before the court, and that on the incoming of such an excuse, if it was sufficient, it involved a postponement of that matter. The law in regard to it was that at the time of the trial the books must be produced or an excuse given under oath, by the party himself, why he did not produce them.

Col. Broadhead said that Mr. Matteson was expected that evening; he was detained by sickness in his family.

Gen. Noble to Col. B.—Will you produce the books?

Col. Broadhead—We will do so if we can get them.

Gen. Noble said he did not make the motion from frivolity and he desired nothing but

that which the law which he invoked entitled him to.

THE COURT postponed further proceedings to allow the claimant to make an affidavit this morning in regard to the matter.

Case No. 15,149.

UNITED STATES v. FOUR HUNDRED BASKETS OF CHAMPAGNE.

[Nowhere reported; opinion not now accessible.]

Case No. 15,150.

UNITED STATES v. FOUR PART PIECES OF WOOLLEN CLOTH.

[1 Paine, 435.] [1]

Circuit Court, N. D. New York. Sept. Term, 1825.

BONDS—PENAL ACTION—PRINCIPAL AND SURETY—DIVISION OF DISTRICT.

1. Proceedings by libel were instituted upon a seizure of goods, and a bond given for their appraised value on the delivery of the goods to the claimant. Afterwards the libel was by amendment changed to an information, and the goods were condemned. On an application for an attachment against the obligors in the bond, it was *held*, that although the case was not regularly within the 89th section of the collection law, yet a compliance with the stipulations in the bond might be enforced by attachment against the obligors.

[Cited in U. S. v. Three Hundred Barrels of Whisky, Case No. 16,510; Todd v. The Tulchen, 2 Fed. 603.]

2. And the court *held*, that it made no difference that the obligors were only sureties, and had not themselves received the goods.

3. If the claimant is not a party to the bond, all the obligors are to be deemed principals.

4. The bond was taken in the district court of New-York, and under the statute dividing the district the proceedings were transferred to the district court of the Northern district, and by a subsequent statute to this court, where the condemnation took place. The condition of the bond was to pay the appraised value of the goods into the district court, if they should be condemned in that court: *Held*, that a condemnation in this court had the same effect to forfeit the bond.

[Cited in brief in Charter Oak Life Ins. Co. v. Hosmer, 1 Mackey (12 D. C.) 298.]

At law.

R. Tillotson, Dist. Atty., for plaintiffs.

J. O. Hoffman, for defendant.

THOMPSON, Circuit Justice. On the 19th day of July, in the year 1813, Joseph Kauman, John I. Labouisse, and Nicholas M. Delonguemare, entered into a bond to the United States in the penalty of four thousand four hundred and seventy-six dollars, reciting the seizure and libel of certain articles of merchandise in the district court for the district of New-York; and that the goods in question in this case had, by consent of parties, been appraised at two thousand three hundred and eighty-eight dollars, and concluding with a condition, that the bond should be void if the obligors or either of them should pay into the district court the said sum of two thousand three hundred and eighty-eight dollars, in case the said goods should, by sentence and decree of the district court, be adjudged to be forfeited or condemned to the use of the United States, within twenty days after the sentence and decree should be pronounced. With some other stipulations in case of acquittal, not necessary here to be noticed. At the last term of this court a rule was granted, requiring the obligors in the bond to show cause why they should not comply with the stipulation contained in the condition of their bond. That rule has been served only upon Delonguemare, and he appears now, and presents his affidavit, alleging, that he was security only; that he never had the goods in his possession, or the proceeds thereof, and that he has no indemnity.

This appears to be a cause of long standing; and a brief statement of some of the leading circumstances attending it, may be necessary to a right understanding of the decision.

The libel was filed in April, 1813, as upon a seizure made on navigable waters, and the proceedings carried on according to the course of the admiralty. At this time the whole state of New-York was comprised within one district. The seizure having been made in the northern part of the state, it became necessary, under the act of congress dividing the state into two districts, to transfer the proceedings into the district court for the Northern district. And before the determination of the cause, the attorney of that district was appointed the judge of the court, which made it necessary, under another act of congress, to transfer the cause to this court. In September term, 1824, the libel was so amended, as to make it an information in rem, according to the course of the exchequer, in conformity to the rule laid down by the supreme court of the United States in the case of The Sarah, 8 Wheat. [21 U. S.] 391, that in cases of seizures made on land, under the revenue laws, the district court proceeds as a court of common law, according to the course of the exchequer on informations in rem, and the trial of issues of fact is to be by jury; but in cases of seizure on water navigable from the sea by vessels of ten or more tons burthen, the court proceeds as an instance court of admiralty, by libel, and the trial is to be by the court.

The goods in the present case have been condemned in this court; and the question now arises, whether the effect of the decree or judgment of condemnation can be obtained upon the above mentioned bond; and this question divides itself into two considerations: (1) Whether this court has authority to enforce a compliance with the stipulations in the bond by attachment. (2) Whether Delonguemare under the circumstances of the case is exonerated from his responsibility. It

[1] [Reported by Elijah Paine, Jr., Esq.]

was undoubtedly supposed when this bond was given, that it was authorized by the provisions of the 89th section of the act of 2d March, 1799, regulating the collection of duties, &c. (3 Laws, Bior. & D. 221 [1 Stat. 695]), and the whole proceeding in the district court, was under the impression, that it was immaterial whether the seizure was upon the land or water; that in both cases it was according to the course of the admiralty; and such is believed to have been the general, if not the universal course, until the decision in the case of The Sarah. It is equally certain, that this was not a case coming within the 89th section of the duty act. But it does not follow, that the bond is therefore void: It was voluntarily given: It was not in violation of any statute nor against good morals, or any general principles of law: It was for a valuable consideration; and I am not aware of any substantial objection to its validity, that could be made in a direct suit upon it at law. The taking of the bond was the act of the court, and not of the United States, or the custom-house officers who were the parties interested in the seizure; and the obligors in the bond, who have thereby taken the property out of the custody of the court, are estopped from setting up any informality in the taking of the bond. If the proceedings in this cause had properly been upon the admiralty side of the court, there could be no question as to the authority of the court to enforce a compliance with this bond in the manner now prayed for; nor do I think any substantial objection now exists.

In the case of The Alligator [Case No. 248], it was held that the district court, by virtue of its general admiralty powers, may deliver property on bail; and whether the security be taken by bond, or stipulation is immaterial; that on such security a summary judgment may be entered; nor is it material whether there be any statute authorizing the delivery on bond or not. The court having jurisdiction of the principal cause, must possess jurisdiction over all the incidents, and may, by monition, attachment, or execution, enforce its decrees, against all who become parties to the proceedings. So, in the case of The Struggle [Id. 13,550] a bond voluntarily given upon the delivery of property on bail, on the application of the claimant, was held good, although the condition was not in conformity to the 89th section of the duty act; and that the obligors in the bond were estopped from contesting the validity of the security.

The case of Burke v. Trevitt [Case No. 2,163] is still more applicable to the present. It is there held that the district court, as a court of revenue, has jurisdiction of all seizures, under laws of impost, navigation, or trade of the United States, and may entertain suits for the condemnation or acquittal of property so seized; and as an incident to such jurisdiction, may compel a re-delivery of the property, or its value, into the possession of those who may be ultimately entitled to it; and that it was immaterial, whether such a proceeding be enforced by way of original suit, or by a summary decretal order, in a cause already before the court. And the same principle has been fully sanctioned by the supreme court of the United States in the case of Slocum v. Mayberry, 2 Wheat. [15 U. S.] 9, where it is said, that the judiciary act gives to the courts of the United States exclusive cognizance of all seizures made on land and water; and having cognizance of the seizure, may enforce a redelivery of the thing, by attachment or other summary proceeding against the party who should devest such possession. That this court has authority in a summary way, to enforce a compliance with the stipulations in the bond, is fully established by these cases.

2. And the next inquiry is, whether the present is a proper case for the exercise of such authority. Delonguemare seeks to exonerate himself on the ground, that he was surety only in the bond, and has no indemnity, and that he never had any of the proceeds of the goods. If there was any weight in the allegation, that he was only surety, there would be some difficulty under the circumstances of the case, in extending to him any relief on this ground. It does not appear by the bond, who were principals, and who sureties. And if we look into the libel and proceedings in the cause, one Handy, who is no party to the bond, appears to have been the claimant of the goods; and if so, Delonguemare, is as much a principal as any other of the parties named in the bond; all must be deemed principals. The bond is the substitute for the goods; and to permit a party to the bond, to set up that he had not the possession of the goods, would be in effect making such bonds mere nullities; and the surety would in no case be responsible. For it is presumed that the goods always go into the possession of the claimant. It is said, however, that the bond has not been forfeited; that the event has not occurred upon which the obligors in the bond became bound to bring the money into court, because the condemnation was in this court, and not in the district court, according to the letter of the bond. This objection is certainly not well founded. The true sense and legal construction of the bond must be, that the money was to be brought into court within twenty days after the legal and final condemnation of the goods; and when this is pronounced by the court having jurisdiction of the cause, it is all that could be required under the acts of congress in relation to the district courts in this state. This court, for the purpose of hearing and determining the present case, became substituted in the place of the district court. A state of things might have existed, when the obligors in the bond would not have been willing to have been bound by so literal a construction of the bond. Suppose the goods had been condemned in the district

court, and the decree on appeal had been reversed, and the goods acquitted; there would have been a forfeiture of the bond, according to the strict letter; but no one would suppose that the money must, notwithstanding the acquittal, be brought into court. The court must be governed in the interpretation of the bond by its legal effect and operation; and the remedy upon it is the same as if the cause had remained in the district court, and the condemnation taken place there. No sufficient cause to the contrary therefore having been shown, the attachment must be issued.

Case No. 15,151.

UNITED STATES v. FOURTEEN PACKAGES OF PINS.

[1 Gilp. 235.] [1]

District Court, E. D. Pennsylvania. March 5, 1832.

CUSTOMS DUTIES—UNDERVALUATION—FORFEITURE—TRIAL—JURY.

1. Where a seizure is made on land under the laws of impost, the claimant has a right to a trial by jury.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 486; U. S. v. Athens Armory, Case No. 14,473.]

2. On an information for forfeiture of goods, subject to ad valorem duty, the appraisement of the public appraisers is a necessary and preparatory proceeding and is prima facie evidence.

3. The assistant appraisers of goods subject to ad valorem duty, under the act of May 28, 1830 [4 Stat. 409], are in aid of those under the act of March 1, 1823 [3 Stat. 729], and an appraisement by each set is not necessary.

4. A false valuation in an invoice of goods subject to ad valorem duty, is a price charged in the invoice, less than the fair and just buying and selling prices, at the time and place where the invoice was made up.

5. To subject goods to forfeiture, for a false valuation, it must be accompanied by a fraudulent intent and design.

6. Where a new penalty is imposed, for a violation of the laws of impost previously defined, it may be enforced, though unknown to the claimant at the time of the violation.

7. Where, on an information for forfeiture, a claim and answer are filed by an agent and consignee, for the owner, and the jury are sworn to try an issue between the United States and the owner, the court will not, after verdict, grant a new trial, on the ground that the jury were incorrectly qualified.

[Cited in Seabury v. Field, Case No. 12,575.]

8. It is no invasion of the privilege of the jury for the court to present to them their views of the nature, bearing, tendency, and weight of the evidence.

[Cited in Nudd v. Burrows, 91 U. S. 439.]

[Cited in Territory v. Scott, 7 Mont. 407, 17 Pac. 629.]

9. The court are not bound to notice in the charge, a point of law embraced in the argument, unless their opinion upon it was explicitly required.

10. A juror ought to disregard his private knowledge, and to render his verdict solely on the legal and open testimony of the cause.

[1] [Reported by Henry D. Gilpin, Esq.]

On the 17th September, 1830, the attorney of the United States for the Eastern district of Pennsylvania, filed an information against thirteen cases of pins, and one case of needles, imported into the port of Philadelphia, on the 4th August, 1830, from Liverpool in England, on board of the ship Alleghany. The information alleged, that the said goods were subject to ad valorem duty, and that the invoice thereof, and the packages themselves, were made up with intent, by a false valuation, to evade and defraud the revenue of the United States, whereby the same were forfeited; and due process of law for the condemnation of the goods in question, was prayed for. On the 12th November, 1830, William C. Cardwell and John Potter filed a claim to the said fourteen packages, as consignees of the same from, and for and on behalf of, their consignors Kirby, Beard & Kirby, of London, by whom, as they alleged, the said packages were in the regular course of business shipped from Great Britain and consigned to them. In answer to the information, the claimants denied that the invoice and packages were made up with intent, by a false valuation, to evade and defraud the revenue; and they submitted that if the allegation to that effect were true, it would not authorise a forfeiture, but only a reappraisement and increased duty under the act of congress of March 1, 1823. On the 8th April, 1831, the case came on to be tried before the district court, sitting as a court of admiralty and maritime jurisdiction, under the provisions of the ninth section of the act of September 24, 1789 [1 Stat. 76].

Mr. Dallas, Dist. Atty., for the United States, offered evidence in support of the allegations set forth in the information. In the course of this evidence, it appeared that the fourteen packages had not been seized by the officers of the revenue, until after they had been landed, and that the first suspicion of fraud arose on an examination of them in the custom house stores.

Mr. Scott, for claimants.

Upon this evidence the case cannot be tried before the court, as one of admiralty and maritime jurisdiction, but the claimants are entitled to a trial by jury. It is the place of seizure and not of committing the offence that decides the mode of trial. The ninth section of the act of 24th September, 1789, reserves to the parties the right of a common law remedy, where the common law is competent to give it, which is the case here. 1 Story's Laws, 56 [1 Stat. 76]; U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297; U. S. v. The Betsey and Charlotte, 4 Cranch [8 U. S.] 443; Whelan v. U. S., 7 Cranch [11 U. S.] 112; The Sarah, 8 Wheat. [21 U. S.] 394; The Margaret, 9 Wheat. [22 U. S.] 427; Clark v. U. S. [Case No. 2,837]; The Isabella [Id. 7,101]; U. S. v. Nine Packages

of Linen [Id. 15,884]; U. S. v. One Case of Hair Pencils [Id. 15,924].

On the 17th June, HOPKINSON, District Judge, decided for the claimant, that as it appeared that the seizure in this case was made upon the land, it was to be tried by a jury. It was therefore ordered, that it be set down for trial by a jury, and that the information and claim be so amended as to be made conformable to an issue to be so tried.

On the 5th March, 1832, the case came on for trial before HOPKINSON, District Judge, and a special jury.

Mr. Gilpin, Dist. Atty., for the United States.

This information was founded on the fourth section of the act of congress of the 28th May, 1830, which is as follows: "The collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number should he deem it necessary, of goods imported into the respective districts, which package or packages he shall have first designated on the invoice to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order forthwith all the goods contained in the same entry to be inspected; and if such goods be subject to ad valorem duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent by a false valuation, or extension or otherwise to evade or defraud the revenue, the same shall be forfeited." And the fifteenth section of the act of 1st March, 1823, and so much of any act of congress as imposes an additional duty or penalty of fifty per cent. on duties on any goods appraised at twenty-five or ten per cent. above their invoice, are repealed. 3 Story's Laws, 1887 [3 Stat. 735]; Pamph. Laws 1830, p. 106. Evidence was then given of the invoice of the goods in question, made by the manufacturers, Kirby, Beard & Kirby, on the 2d June, 1830, and their arrival in Philadelphia, and entry by Cardwell and Potter as consignees of the manufacturers and owners, on the 7th August following. It was also proved that one of the packages, on being opened and examined, was found to be falsely charged in the invoice, and therefore all the packages were examined and appraised by the public appraisers. On their appraisement being offered, it was objected to.

Mr. Scott, for claimants.

This appraisement is not evidence, because it is improperly made, and because it is no proof of fraudulent intent.

1. By the act of 1st March, 1823, two principal appraisers were appointed for this port, who are the persons by whom this appraisement was made. The act of 28th May, 1830, on which this information is founded, declares that the secretary of the treasury may appoint two assistant appraisers, whose appraisements are to be revised and corrected by the former. It evidently contemplates such a previous examination which did not take place in this instance. It is to give the merchant the benefit of appeal and revision. Though it is said these assistants "may" be appointed, it has been settled that such permission is compulsory in its character where the public have an interest in its fulfilment. 3 Story's Laws, 1887 [3 Stat. 735]; Rex v. Inhabitants of Derby, Skin. 370; Backwell's Case, 1 Vern. 152; Rex v. Barlow, 2 Salk. 609; Com. v. Gable, 7 Serg. & R. 426; Schaeffer v. Jack, 14 Serg. & R. 429; Newburgh & C. Turnpike Co. v. Miller, 5 Johns. Ch. 112; Malcom v. Rogers, 5 Cow. 188.

2. An appraisement is no evidence on a question of forfeiture; it is meant to ascertain what duties are to be charged; it is no evidence of value at the time and place of exportation.

HOPKINSON, District Judge, stopped the district attorney, who was about to reply, and admitted the evidence.

The act of 1st March, 1823, appoints two appraisers for this port; that provision of it has never been repealed expressly, but it is said to be virtually, by the section of the act of 28th May, 1830, which authorises the secretary of the treasury to appoint two assistant appraisers. I think not. The object of the last act was the public convenience; it authorised the appointment of four assistant appraisers in New York and two here. What are they to do, and what are their power and duty? To examine such goods as the principal appraisers may direct, should they be unable themselves to perform all that may be required, and need such additional aid. On the construction which has been given, the public business will not be assisted, but delayed. Every case may be subjected to a double examination. The business will not be distributed among the four officers, but must always pass under the notice of two in the first instance, with a correction or revision of the other two. By a double process the assistants are to report to the principals, and the principals to the collector. Such is not the intention of the law; these officers are to act for and under the principal appraisers when necessary; they are to be appointed by the secretary of the treasury when the public service requires an increased number of appraisers; but there is nothing compulsory upon him to make such increase, and nothing which makes them independent of, or distinct from the principal appraisers in the manner contended for. As to the second objection, it is

sufficient to observe that this appraisement is required by the act of congress as the foundation of a forfeiture, as a preparatory step or proceeding in the course of forfeiture. It is therefore prima facie evidence, and as such properly introduced; but it is not conclusive; it may be rebutted or disproved by the claimants.

Mr. Gilpin, for the United States, in continuation.

The appraisement in question was then read together with a reappraisement by the same officers. The claimants being dissatisfied, a third appraisement was made by the same officers together with two merchants, selected by the claimants and approved by the collector, according to the provisions of the eighteenth section of the act of 1st March, 1823. This was also read; as was a smaller invoice or bill of sale of the same goods left at the custom house, as was alleged, by accident. Several witnesses, who had imported similar articles and received invoices, to which they referred, were examined to prove that the invoice in question was lower than the current market value at the time and place of exportation. 3 Story's Laws, 1888 [3 Stat. 736].

Mr. Scott, for claimants.

Testimony under a commission to England was read to prove, that the invoice prices were the actual value at the time when and place where it was made. But besides, it was said, the preparatory steps necessary to a forfeiture had not been taken. The appraisement by the merchants was under the act of 1st March, 1823. Where this act is inconsistent with that of 28th May, 1830, it is repealed pro tanto. The latter act prescribes a new mode of reappraisement where the owner is dissatisfied, the old mode is therefore repealed, yet it was adopted here. To sustain a forfeiture the law must be strictly complied with. To show that these goods are falsely valued, we must ascertain what the law means by a true valuation. This varies in the different acts relative to ad valorem duties. That of 3d March, 1817, 3 Story's Laws, 1633 [3 Stat. 369], fixes "the net cost of the article at the place whence imported" as the test; that of 20th April, 1818, 3 Story's Laws, 1680 [3 Stat. 433], "the actual cost;" that of 1st March, 1823, 3 Story's Laws, 1885 [3 Stat. 729], "the actual cost, if the goods have been actually purchased, or the actual value if the same have been procured otherwise than by purchase, at the time and place when and where purchased or procured;" that of 19th May, 1828, "the actual value at the time purchased, and place whence imported." The invoice, therefore, must contain the "actual value" of the goods to the manufacturers at the place of manufacture, and at the time they sent them to their agents here. It does so. We have their oath annexed to the invoice; and it is entitled to great weight. There is no evidence even attempting directly to disprove this. As to any fraudulent intent to violate the act of 28th May, 1830, it could not exist, for their invoice is dated 2d June, 1830, long before they could have known of its passage. Pamph. Laws 1828, p. 47; The Isabella [supra]; U. S. v. Nine Packages of Linen [supra]; U. S. v. Hayward [Case No. 15,336].

HOPKINSON, District Judge (charging jury). The information charges that the goods in question, being subject to an ad valorem duty, were imported into Philadelphia from Liverpool, in the ship Alleghany, and that the invoice and packages were made up with intent by a false valuation to evade and defraud the revenue of the United States. Two subjects or questions are thus submitted to your inquiry and deliberation: (1) Is the valuation of these pins, as it appears in the invoice, a false valuation? (2) If it is so, then, were this false valuation and the invoice made up with intention to defraud the revenue of the United States? The information is founded on the fourth section of the act of 28th May, 1830, which has been frequently referred to. The proof in support of the allegations of the information consists of official documents and parol testimony. You have before you a paper called the small invoice. It is dated at London, on the 2d of June; not at Liverpool, where the goods were shipped. It is for you to say what this paper is. Why was it prepared, and what use was to be made of it? It is said to be an estimate made for the export entry; but how could this be, as the particulars were not then known? You will make these inquiries and satisfy yourselves. The regular invoice is dated on the 24th of June. Both papers came with the ship. The first paper is not in form an invoice; the second is in the usual form. The first is like a common bill of sale, headed, "Messrs. Cardwell & Co. of Philadelphia, bought of Messrs. Kirby, Beard & Kirby." In it the valuation of the goods is higher than in the regular invoice. Why was this done? Does it afford ground for a reasonable suspicion, that the first paper contains the real value of the goods, and the price at which they were actually sold; and that the second was prepared for the custom house entry? It was on the second or regular invoice that the entry here was ordered, and the question is on this invoice. Does it exhibit a true or a false valuation of the goods? If it be true, then any suspicion arising from the other, is of no importance: for, if the goods were entered at their true value, by a true invoice, there has been no forfeiture or violation of the law. On the other hand, if this is a false invoice, then the character and object of the other invoice may be important in deciding upon the intention of the second. (The two papers were here referred to, and the prices particularly stated.) The first proceeding under the

law, was the appraisement made by the official appraisers. Compare their valuation of the goods with that given in the invoice. The second appraisement was made by the special appraisers, to whom were added two others appointed by the consignees. This was done under the eighteenth section of the act of 1st March, 1823. From the appraisements, and from the evidence given to the jury by the appraisers, it appeared that extraordinary pains were taken to ascertain the value of the goods, and every means of information resorted to. The attention of the appraisers was particularly drawn to the proper inquiry, that of the value of the goods in the London market; they made all allowances for any change in the market, for any difference in the quality and weight of the pins. You will compare this with the previous appraisement, and can hardly fail to obtain a satisfactory knowledge of the true value of these articles, in the London market, at the time of their exportation.

In addition to these appraisements, numerous witnesses have been examined at the bar, dealers in the article, importers at the time of this importation, as well as before and after it. They produced their invoices, and stated the prices at which they made their purchases. Some of them made their importations at the same time with the claimants, from the same place, and even from the same manufactory. (The judge turned to the evidence of these witnesses, making observations explanatory of each.) You will also give due attention and weight to the testimony on the part of the claimants. It cannot have escaped your observation, that among the numerous importers of pins in this city or country, they have not produced one witness, to verify or support the prices of their invoice; not one importation or invoice; nor a single sale at these prices. They have a commission to England; but they have examined only two witnesses under it, although dealers in, and manufacturers of the article. They have not shown a single sale in London, or any part of England, of any pins of any quality, at the prices of their invoice, or near to them. You have, under this commission the testimony of Donald McIlvaine, with his opportunities of knowledge on the subject, as they appear from his own answers. His evidence, too, is hard to be reconciled with the letter of the claimants to John Bury, and their own invoice sent to him. The other witness, William Broughton, is a pin maker in the employ of the claimants; but says he has no exact knowledge of the prices. All the evidence which has been given of prices, or market value, or fair market value, or current value, or true value, or actual value, is to bring you to the same conclusion, to a satisfactory answer to the question you are trying, to wit, is the valuation of these goods in this invoice a "false valuation," which is the offence described in the act of congress of 1830, on which this information is founded? Were these goods really worth more in the London market? Were the buying and selling prices higher in that market than those charged in this invoice, at the time when this invoice was made up? However the phrases may vary in the different acts of congress, current value, actual value, or market value, the inquiry with you always is the same; does this invoice contain a true valuation of these pins, or a false one? The phraseology of the laws is important on this issue, only as it may assist you in answering and deciding the question whether these pins, or similar pins, were bought and sold in the London market, in June, 1830, at these prices? Or is the valuation false and untrue, and the prices not those at which such pins were bought and sold at that time and place? You are not to take a sale under particular circumstances which may have depressed or raised the price, but the fair and just price of buying and selling in the market.

If, upon a liberal and impartial view of the whole evidence, you shall come to the conclusion that the valuation in the invoice is false, it will then be your duty to inquire whether this has happened by accident, inadvertence, or mistake, or with intent to evade and defraud the revenue of the United States. The fact is not enough; it must be accompanied by the fraudulent intent and design. This is not often capable of direct, express proof, but the intention of the party, as in other similar cases, must be collected from all the facts and circumstances. In this inquiry, the amount of the undervaluation is important, because, if great, it is less likely to be a mistake, and because the difference offers a sufficient temptation in the diminution of the duties, to account for it. This is the part of the case peculiarly belonging to your office, and which you will make with all necessary caution, as the character of the claimants has been strongly pressed upon you to repel the suspicion of a deliberate, contrived fraud. How far these foreign manufacturers regard our revenue laws, or think there is much guilt in getting an advantage of them, you can better judge than the court. We have reason to believe that some dealers think every thing fair in a contest with a custom house, especially abroad. It is due to the consignees of this shipment, Messrs. Cardwell and Potter, to say that if there is any thing wrong in the business, they are not implicated in it. They entered the goods by the invoice which came to them with the goods.

The jury found a verdict for the United States.

On the 15th March, 1832, a motion was made on behalf of the claimants for a new trial, and the following reasons were filed:

I. Because the jury were sworn to try the issue between the United States and Kirby, Beard & Kirby, claimants, whereas no such issue exists upon the record.

II. Because the jury were incorrectly qualified.

III. Because the court erred: (1) In admitting in evidence the three several appraisements, for any other purpose than to prove the United States had taken the steps necessary to seizure (2) In admitting them in evidence for any purpose. (3) In admitting in evidence the invoices of John Siter, William Chaloner, Joseph Brown, and John Bury.

IV. Because the court, in the charge to the jury, erred: (1) In instructing them that there was nothing in the objection that the act of 28th May, 1830, was unknown to Kirby, Beard & Kirby, before they shipped the pins. (2) In instructing them that the appraisements were properly made, and the act of 28th May, 1830, did not, quoad hoc, repeal the section in the act of 1st March, 1823, relating to appraisement. (3) In instructing them that the paper called the small invoice was a suspicious paper, a false one, and such as to throw doubt on the transaction. (4) In instructing them that the appraisements were made with great care, and therefore entitled to great weight in their consideration. (5) In instructing them to consider John Siter's testimony as of special importance.

V. Because the court did not charge the jury on the rule of law pressed in argument by the counsel of the claimants, in reference to the testimony of Donald McIlvaine, viz. that he was entitled to belief unless impeached, and that no such attempt having been made, he stood before the jury entirely worthy of credit: but on the contrary, simply remarked, "it was strange he did not purchase at the prices named."

VI. Because the court told the jury that the claimants had known all the testimony of the United States for eighteen months, and yet produced none to contradict it; there being no proof of that knowledge given at the trial, and the court being entirely mistaken as to the fact.

VII. Because the general tenor of the charge of the court was such as to take away the question of fact from the jury.

VIII. Because the court remarked that it was extraordinary Kirby, Beard & Kirby, should have examined Broughton, a man in their own employ.

IX. Because the court erred in saying: (1) That the various expressions in the acts of congress on the subject of value and the computation of ad valorem duties, were unimportant in the case. (2) That to prove value at London, value at Manchester, Liverpool, and Warrington, could be a guide.

X. Because when the jury came in, and one of them asked whether, in making up his opinion, he was at liberty to avail himself of his own previous knowledge, the court replied "Your oath is to decide according to the evidence, this is the only proper guide for your decision."

XI. Because the court subsequently intimated to the same juror, that unanimity was not to be expected, and that he should endeavour to come to the opinion of his fellows.

On the 31st March, 1832, this motion was argued by Mr. Scott, for claimants, and Dist Atty. Gilpin, for the United States.

Mr. Scott, for claimants. The following cases were cited: Reniger v. Fogossa, Plow. 12; Partridge v. Strange, Id. 83; The Cotton-Planter [Case No. 3,270]; U. S. v. Nine Packages of Linen [supra]; Doebler v. Com., 3 Serg. & R. 237.

Mr. Gilpin, for the United States. The following cases were cited: 3 Bl. Comm. 375; U. S. v. Williams [Case No. 16,723]; Smith v. Parkhurst, Andrews, 321.

HOPKINSON, District Judge. Numerous reasons have been filed in this case against the verdict, and to support the motion on the part of the claimants, for a new trial. Some of them have not been touched, or insisted upon in the argument on the motion, and therefore will not require a particular attention from the court. Such as have been maintained in the argument will be considered and disposed of.

The first and second reasons are: "Because the jury were sworn to try the issue between the United States and Kirby, Beard & Kirby, claimants, whereas no such issue exists upon the record; and because the jury were incorrectly qualified." I have no doubt that the jury were properly sworn, both as regards the real parties in interest, and as they appear upon the record, but I shall put the dismission of this exception on another ground. The first four jurors called to the book were sworn to try the issue between the United States and Fourteen Packages of Goods, whereof Cardwell and Potter were claimants. The counsel for the claimants immediately interrupted the clerk, and observed to him that Cardwell and Potter were not the claimants, but the agents of the claimants, who were Kirby, Beard & Kirby, and that the jury should be so sworn. Under this direction, to which the district attorney assented, the four jurors were re-sworn according to it, and all the other jurors were also so sworn. It is now objected to the verdict, that the jury should not have been so sworn or qualified; that Kirby, Beard & Kirby are not the claimants on the record, but the issue was between the United States and Cardwell and Potter, claimants. Can it be imagined that a court, holding the power to set aside a verdict and grant a new trial, for the purposes of justice, would exercise that power under such circumstances, when the error, if any, was the error of the party who would now take advantage of it; and which is confessedly a mere matter of form, a pure technicality, having no influence or bearing on the merits of the case? It is impossible.

The next, or third class or head of reasons, relates to alleged errors of the court: (1 and

2) "In admitting the three appraisements to be read in evidence." This exception was passed over in the argument. Indeed I know not what could have been said for it, as the appraisements in question were not only a part of the proceedings directed in such cases by the act of congress, but were read to the jury on the express call of the counsel of the claimants. (3) "In admitting in evidence the invoices of John Siter, William Chaloner, Joseph Brown, and John Bury." As to the invoices of Siter, Chaloner, and Brown, they were neither offered nor given in evidence. These gentlemen had severally made importations of articles similar to those in question, and they were examined as to the prices they had paid for them. They did refer, without objection, to their invoices to assist their memory in ascertaining these prices; but the invoices were not read to the jury, nor, in any other manner, made a part of the evidence of the cause. No exception was taken or noted by the claimants to the decision of the court on the admissibility of the question, what were the prices paid by the witnesses for their articles, although the question was objected to; and as to the invoices, they were used in no other way than that mentioned. The invoice of John Bury was offered and read in evidence, and also the letter which accompanied it, because both the invoice and the letter came from the claimants, and were clearly evidence against them. If this were not so, their admission can afford no ground of exception to the verdict, as they were given to the jury without objection.

These are all the reasons founded on supposed errors of the court in the course of the trial.

The next class, the fourth, relates to alleged errors in the charge to the jury: (1) "In instructing the jury that there was nothing in the objection that the act of 28th May, 1830, was unknown to the house of Kirby, Beard & Kirby before they shipped the goods in question." I cannot withhold the expression of my surprise that this reason should be seriously urged to the court, however expedient it might have been to address it to a jury, to enlist their feelings for the claimants, on a supposed ignorance of the law they were offending. What are the purport and effect of the law of 28th May, 1830? Do they create a new offence, or make that unlawful, which was before lawful? Certainly not so. The offence committed was always a violation of the laws of the United States, visited by certain and severe penalties. But these penalties were found not to be adequate to prevent the offence: the temptations to cupidity were too strong to be restrained by an increase of duties on the goods which were falsely invoiced. The penalty was therefore enlarged to an entire and absolute forfeiture of the goods. The plea of the claimants is, we knew that by making up this false invoice, with intent to defraud the revenue of the United States, we were violating a law of the United States, but we supposed that in case of detection we should suffer only by an increased charge upon our goods, and not by their forfeiture, and therefore, we are innocent: therefore we should be acquitted of all penalty, and the jury should so have rendered their verdict. This is a most extraordinary course of reasoning in law or morals. Besides, did Messrs. Kirby, Beard & Kirby require to have a knowledge of the enactments of the act of 28th May, 1830, to teach them that fraud and perjury are crimes every where, under all circumstances, and upon all subjects? Yet it was only by and through fraud and perjury that the offence, charged and proved upon them by the verdict of a most respectable and intelligent jury, could have been perpetrated. But, in their code of morals, fraud and perjury are nothing, unless they are to be followed by a forfeiture of goods. These remarks are reluctantly made; but they are rendered necessary by the perseverance and zeal with which this reason has been pressed, first upon the jury, and now again upon the court. (2) The second reason under the fourth head relates to the appraisements, and was not noticed in the argument. (3) The third reason under the same head, which relates to the small invoice, was also passed by in the argument. As to that paper, I told the jury, that there was a mystery about it, which had not been explained, not merely because it gave a different valuation to the goods from the regular invoice by which the goods were offered for entry, but that it purported to be a bill of sale from Kirby, Beard & Kirby, to Cardwell and Potter, when in truth no such sale was made, but the goods were sent to this country for and on account of Kirby, Beard & Kirby; and Cardwell and Potter were but the consignees, having no ownership in them and no interest but as consignees. I stated other circumstances which threw a cloud of suspicion over this part of the case, together with the explanations that were offered on the part of the claimants; and left the whole to the jury for their consideration with this observation; "The jury must say what this paper means, and whether it affords ground for reasonable suspicion of an unfair intention." (4) The fourth error, under this head, is "in instructing the jury that the appraisements were made with great care, and were therefore entitled to great weight in their consideration." As these appraisements were received in evidence, I cannot perceive in what was the error or the mischief, to say that they had been made with great care. The appraisers appeared before the jury, and made the same appraisements under their oaths taken here, as they had under their official oaths taken at the custom house. They explained particularly the time, which was several days, occupied in the business, and the means they took to obtain information, to assist them in ascertaining the true value of the articles at the time and place required by the law. Was there any error in telling the jury that ap-

praisements thus made, for whatever purpose they were given in evidence, were entitled to their respect in proportion to the care with which they had been made? I think not. (5) The fifth point, under this head, has not been insisted upon; indeed it is a mistake in point of fact. The jury were told to consider John Bury's testimony of special importance, because it came from the claimants themselves; but this was not said as to evidence of the United States.

We come now to the fifth general head: "Because the court did not charge the jury on the rule of law, pressed in argument by the counsel of the claimants, in reference to the testimony of Donald McIlvaine, viz. that he was entitled to belief unless impeached, and that no such attempt having been made, he stood before the jury entirely worthy of credit; but on the contrary remarked, that it was strange he did not purchase at the prices named." If the judge had instructed upon this point, as the exception requires him to do, he might indeed have been charged with invading the rights of the jury. If there be any thing which peculiarly belongs to them in the trial of a cause, it is to judge of the credibility of witnesses, and it is not for the court to direct or instruct them who is entitled to belief or who stands before them entirely worthy of credit. As to the evidence of Donald McIlvaine, if I had told the jury my opinion of it, it would have been, that it was impeached by all the evidence of the cause, and by circumstances testified by himself. I repeat now what I said to the jury; it is difficult to reconcile the evidence of Donald McIlvaine with his conduct; it is difficult to discover why, if he were desirous of purchasing goods for himself, and had orders to do so from others, he did not take them at the prices he says they were offered to him for, as these prices were certainly lower than any other sales or offers we had any account of, and much lower than the actual sales made about the same time. It is difficult also to reconcile his testimony with the letter and invoice received by John Bury, from Kirby, Beard & Kirby, in which the pins are charged at a much higher price than Donald McIlvaine says the same house offered them to him for, at or near the same time, and which prices Kirby, Beard & Kirby assure Mr. Bury were their lowest. After these remarks I told the jury, that nevertheless, Mr. McIlvaine had sworn positively to the fact, and they would give the weight they thought proper to his testimony, under all the evidence and circumstances of the case. There is another answer to this exception to the charge of the court, which I mention, not because it is necessary in this case, but on account of its general importance. If the counsel in a cause desire to have the opinion of the court given to the jury upon any point or matter of law, it is their duty to state it explicitly, and to ask the opinion of the court, or they cannot make the silence of the court, or an omission to instruct the jury upon that point, a ground for a new trial. Misdirection is always a good ground, but not an omission to direct, when no direction is required. It is not enough to say, that the counsel "pressed a point in his argument." He must do more. No court is bound to give specific answers to, or notices of all the matters the counsel may think it expedient to press upon them in the argument. When a charge or opinion of the court is wanted on a particular point, it must be particularly stated and asked for. Such is the practice, and such it ought to be, or verdicts would be perpetually in danger from concealed objections.

The sixth general reason is, "because the court told the jury that the claimants had known all the testimony of the United States for eighteen months, and yet produced none to contradict it; there being no proof of that knowledge given at the trial, and the court being entirely mistaken as to the fact." The entire mistake as to the fact is found in the exception and not in the court. I speak not of my personal knowledge that this case was formerly heard before me, and proceeded on to the close of the testimony on the part of the United States, when it was dismissed on discovering that it was a case for a jury and not for the judge alone. But on this trial of the cause, the former hearing was repeatedly referred to by the counsel on both sides. Indeed in the cross examination of some of the witnesses of the United States, they were questioned by the claimants' counsel as to what they had said, and as to the evidence they had given on the former hearing. I reminded the jury of this fact, that there had been a former hearing at which these witnesses had been fully examined in the presence of the claimants' counsel and cross examined by them; and remarked to them that by this means the claimant had been made acquainted with the evidence by which he was now assailed, and had had full time to repel it, but that he had not produced a single importer of pins in the United States, to prove that he had purchased pins at the prices of his invoices, nor any manufacturer in England to say that he had sold them at such prices. I see no error or extension of the right of the court over the jury box in these observations, or departure from the evidence of the case.

The seventh reason is, "that the general tenor of the charge was such as to take away the question of fact from the jury." The generality of this exception admits only of a general answer, and might be dismissed for the reason that it specifies nothing; but I will take the occasion to state what I believe to be the right and duty of a court in charging a jury, beyond which not a step was taken in this case. That the question of fact should not be taken from the jury

by the court," is too clear to be the subject of a discussion; but I hold it to be equally certain, that it is the right and duty of the court to give its aid to the jury in explaining the evidence, in collating its various parts; in drawing their attention to the most material facts in proof and their application to and bearing upon the important points of the case; in ascertaining, between contradictory testimony, which is best entitled to belief; with such comments as will clearly explain to them the views taken by the court of the case All that is necessary is, that the jury should distinctly and explicitly understand that such observations are to be received by them, merely for the purpose of assisting them in their deliberations, of recalling their recollection to the facts testified, and of turning their attention to the true points of inquiry; but that the decision to be made upon the evidence belongs altogether to them, and that no direction or authoritative instruction is intended to be given concerning them. These doctrines are fully recognised and strongly enforced by Starkie (1 Starkie, Ev. 440). That respectable author says: "The practice of advising the jury as to the nature, bearing, tendency, and weight of evidence, although it be a duty which, from its very nature, must be, in a great measure, discretionary on the part of the judge, is one which does not yield in importance to the more definite and ordinary one of directing them in matters of law. The trial by jury is a system admirably adapted to the investigation of truth, but, in order to obtain the full benefit to be derived from the united discernment of a jury, it must be admitted to be essential that their attention should be skilfully directed to the points material for their consideration." After some further remarks, this author adds that, "jurors unaccustomed, as they usually are, to judicial investigations, require, in complicated cases, all the aid which can be derived from the experience and penetration of the judge, to direct their attention to the essential points, and enable them to arrive at a just conclusion." Again, after saying that the jury should have "excluded from their consideration all such evidence as is likely to embarrass, mislead, or prejudice them in the course of the inquiry," he proceeds: "Much yet remains to be done of a nature which cannot be defined; to divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connection, bearing, and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration, which might otherwise embarrass or mislead a jury; and to do this, in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as well as the most important duties incident to the judicial office." In this powerful delineation of what a charge to a jury ought to be, who is not reminded of the clear and luminous order, of the strong and satisfactory discriminations; of the admirable combinations of facts and circumstances, with which Judge Washington discharged this "most arduous as well as most important duty of the judicial office?"

I have quoted the opinions of this author, which he sustains by authority, thus at large, because I think them replete with good sense and practical utility; and that it is only by following them that the trial by jury will be attended by the invaluable advantages which belong to it. It is a solecism to say that a court may set aside the verdict of a jury, if, in the opinion of the court, it be contrary to evidence, and yet that it is an invasion of the right of the jury over the facts, if the court should present their views of the evidence in order to prevent the error instead of correcting it. In the case in question no instance has been pointed out in which the court exceeded or even filled the space here allowed. The evidence given on the trial was arranged in the order of the points to be considered and decided, but its effect was left fully and without prejudice to the jury. The witnesses were named, and the circumstances alluded to which might detract from or give weight to their testimony; but their credibility, positive and comparative, was distinctly submitted to the judgment of the jury; and finally the allegation of the exception that "the charge of the court was such as to take away the question of fact from the jury," has not been supported by any reference to the charge, or any part of it, found in the notes of the judge, or in those of any of the counsel, nor by the recollection of either as to any fact so taken from the jury.

The eighth reason is, "because the court remarked that it was extraordinary that Kirby, Beard & Kirby should have examined Broughton, a man in their own employ." If any such remark had been made by the court, it would be an extraordinary reason for setting aside a verdict. But no such remark was made. It was said that it was extraordinary they had not examined some other witnesses on the question of market value, but had relied upon him, especially as he knew nothing of the market price and value of the article, but was a workman or manufacturer, and neither a buyer nor seller of the article.

The ninth reason is, "because the court erred in saying, that the various expressions in the acts of congress, upon the subject of value and the computation of ad valorem duties, were unimportant in the case; and in saying that to prove the value in London, value at Manchester, Liverpool, and Warrington, could be a guide." We find in this exception the same error, which attends so many of those we have to consider in this

case, that is, an entire mistake of what was said by the court. I will transcribe from my notes what I did say to the jury on this subject: "All the evidence which has been given of prices, or market value, or fair market value, or current value, or true value, or actual value, is to bring you to the same conclusion, to a satisfactory answer to the question you are trying, to wit, is the valuation of these goods in this invoice a 'false valuation,' which is the offence described in the act of congress of 1830, on which this information is founded? Were these goods really worth more in the London market? Were the buying and selling prices higher in that market than those charged in this invoice, at the time when this invoice was made up? However the phrases may vary in the different acts of congress; current value, actual value, or market value; the inquiry with you always is the same; does this invoice contain a true valuation of these pins, or a false one? The phraseology of the laws is important, on this issue, only as it may assist you in answering and deciding the question, whether these pins, or similar pins, were bought and sold in the London market, in June, 1830, at these prices?" I see no error in any part of these remarks. As to the other branch of this exception, that the court erred in saying "that to prove value at London, value at Manchester, Liverpool, and Warrington could be a guide," the jury were certainly kept in mind that they were to inquire into and decide upon the value at London, and that the prices and value at other places mentioned, of which evidence was given on both sides, were to be considered by them only as auxiliary to that purpose, and they might make it so, as the witnesses had stated what was the ordinary difference of prices in these markets, when any existed. Some illustrations were given to show that the evidence was not to be confined literally to the time and place of exportation, or it would tie us down to the hour, and to the exact spot on which the manufactory or warehouse might stand.

The tenth reason is, "because when the jury came in, and one of them asked whether in making up his opinion, he was at liberty to avail himself of his own previous knowledge, the court replied: 'Your oath is to decide according to the evidence: that is the only proper guide for your decision.'" The language used by the court to the juror was not precisely that stated in the exception; although the difference may not be important. I am willing to give to my answer its full and fair meaning; such as was probably understood by him. It certainly was not, nor was it intended to be, a prohibition to the juror to avail himself of his knowledge of the subject; to his giving his verdict on any ground or for any reason he might think proper, on his own responsibility; but it was a strong intimation to him, that it was his duty to render his verdict on and according to the evidence given in court, under oath, in the presence of the court, the parties and the public, and not to disregard such evidence in favour of his private knowledge or opinions, derived from more uncertain and unsafe sources. It would have been idle in the court to attempt to prohibit what it could not prevent, for a juror may give his verdict as he wills to do, and no body has a right to question him for his reasons. All the court can do is to inform him what the law expects and his duty requires of him, that is, well and truly to try the issue submitted to him, and a true verdict to give according to the evidence; and it cannot be doubted that the evidence, intended by the law and the juror's oath, is the evidence openly given on the trial before the court. Certainly this is the true theory of the open public trial by jury, by witnesses, by evidence, in the presence of the court, of the parties, of the public, with the benefit of cross examination; and the usefulness and safety of this admirable mode of trial will be greatly impaired, if jurors are to understand that it is no usurpation of power, no violation of their duty, when they get secretly, together in their private room, to put aside all the evidence of the cause, and bring together as the foundation of their verdict, all the opinions, prejudices, rumours and hearsays, which they may call their previous and personal knowledge of the subject. The same rule must be applied to criminal as to civil cases, and the accused can never be assured of safety, although the whole evidence given in his presence may testify his innocence, if he is to be tried secretly, by other evidence in the jury room.

These principles find ample support, and no contradiction from every authority in relation to them. In Tidd's Practice (page 936), speaking of the insufficiency of the writ of attaint as a remedy for a false verdict, it is said: "There are numberless cases of false verdicts, without any corruption or bad intention of the jurymen. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it." This hearsay and these prejudices are precisely what a juror might call, and conceive to be, a previous knowledge of the subject; and this error can be guarded against only by excluding them, as far as is practicable, altogether from the mind of the juror, and referring him, for his verdict, to the proper and legal evidence of the case. We find, every where, the principle sustained, that every thing which is to influence the verdict of a jury, should be openly delivered in the presence of the court. Thus in Hale's Pleas of the Crown (2 Hale, P. C. 306) it is said: "If a juryman have a piece of evidence, in his pocket, and, after the jury sworn and gone together, he showeth it to them, this is a misdemeanour in the jury." So, at page 307, it is said: "If the jury send for a witness to repeat his evidence that he gave openly in the court, it will avoid the

verdict." The same law is laid down in the case of Metcalfe v. Deane, Cro. Eliz. 189. Again, it is said by Hale: "If the jury, after their departure from the bar, desire to hear the testimony of a witness again, they may be sent for into court, and the witness may be heard again openly, where the court or parties may ask what questions they think fit." In an anonymous case (1 Salk. 405) it is said: "If a jury give a verdict on their own knowledge, they ought to tell the court so, that they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give."

In the case before us, the question asked by the juror and the answer given by the court are thus stated on my notes. They were read, at the time, to the juror, in the presence of the counsel, and agreed to be correct. "One of the jurors asks, 'whether he may avail himself of any previous knowledge, he has of the subject, in giving his verdict.' The court replied, 'The question is answered by the oath of the juror, to try the cause, and a true verdict give according to the evidence.'" I think I added, although it is not on my notes, that the evidence of a cause is that which is delivered on oath, in the presence of the court and the parties. The question was suddenly put to the court, and immediately answered, as I now think, with too much reserve, and that I might, and perhaps ought to have been more decided and peremptory in my instruction to the juror, to disregard his private knowledge, and to render his verdict solely on the legal and open testimony of the cause.

I am confirmed in this opinion, not only by the cases already referred to, but by others I shall now notice. When a remedy for a false verdict, or a verdict contrary to evidence could be obtained only by attainting the jury, a very severe proceeding against them, every presumption or possibility was resorted to in order to support the verdict, and save the jury from a judgment of attaint. But a salutary and reasonable change has taken place in the law of setting aside verdicts, since the practice of attainting jurors has been disused, and their mistakes are corrected by the more liberal and efficacious remedy of granting new trials. In Bacon's Abridgment (3 Bac. Abr. 778), speaking of attainting juries, it is said: "But to attaint them for finding contrary to evidence is not so easy, because they may have evidence of their own cognizance of the matter before them, or they may find, on distrust of witnesses, on their own proper knowledge." This is the law of the text; and the old authorities are given for it; but in a note it is thus modified and corrected: "If a jury give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give." The anonymous case (1 Salk. 405), already referred to, is here cited. The modern doctrine is more explicitly stated in the first volume of Starkie on Evidence (page 405). He says: "Neither a judge nor juror can notice facts within his own private knowledge: he ought to be sworn and state them as a witness." A note informs us that the law was formerly otherwise; and the case of Partridge v. Strange, Plow. 83, is cited. The ancient doctrine was founded, as I have said, on the law of attaints. The note proceeds: "But this doctrine was again gradually exploded when attaints began to be disused, and new trials introduced in their stead. It is quite incompatible with the grounds on which new trials are every day awarded, viz. that the verdict was given without, or contrary to evidence." Afterwards, in the same volume (page 449), it is added: "It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge: for it could not be known whether the verdict was according to, or against evidence; it is very possible that the private grounds of belief might not amount to legal evidence. If such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross examined, and if he privately state such facts, it will be ground of a motion for a new trial." In the third volume of Blackstone's Commentaries (page 374), the doctrine and reasons of Starkie are recognised as the law of that day. If such be the law, there was no error in the answer given by the court to the inquiry of the juror; at least, none of which the claimants can complain. The court might have been more explicit and direct, in cautioning the juror against making up his verdict on his previous or personal knowledge.

The eleventh and last ground of exception is a most striking misconception of the court, to wit, that the court intimated to the juror who made the foregoing inquiry, "that unanimity was not to be expected; and that he should endeavour to come to the opinion of his fellows." There is mistake in every part of this allegation. The remark which the court did make was addressed to the whole jury, and not to any particular juror. It arose on an occasion having no relation to the question asked as above by a juror; nor, according to my recollection, was it at the time when that question was put to the court, for the jury came in more than once before they gave their verdict. On one of these visits to the court, subsequent, as I think, to that on which the question was asked, but this is not material, one of the jurors expressed himself with much impatience, and in very strong terms, of the obstinacy of one of his fellows, alluding, as I suppose, to the very juror who had made

the inquiry of the court. It was then that I remarked, that it could hardly be expected that twelve men would at once agree upon any subject of any difficulty, and that it was a duty they owed to each other to exercise patience and forbearance in their discussions; to listen calmly to one another, and truly endeavour to come at last to the same opinion.

In making this laborious examination of these reasons for a new trial, I have been governed, as may be seen, not by the difficulties I found in them, but by my respect for the counsel who has considered and treated them as matters of importance.

Rule to show cause why a new trial should not be granted, discharged.

Case No. 15,152.

UNITED STATES v. FOUR THOUSAND AMERICAN GOLD COINS.

[See Case No. 14,439.]

Case No. 15,153.

UNITED STATES v. FORTY-EIGHT HUNDRED GALLONS OF SPIRITS.

[4 Ben. 471; [1] 3 Chi. Leg. News, 130; 13 Int. Rev. Rec. 52.]

District Court, E. D. New York. Jan. 10, 1871.

INTERNAL REVENUE — FORFEITURE — PLEADING — CONSTRUCTION OF STATUTE — EVIDENCE — PERSONAL PROPERTY.

1. The 96th section of the internal revenue act of July 20, 1868 (15 Stat. 164), is to be construed to mean, that where the statute has attached no punishment to the doing or omitting of acts required or forbidden, such act or omission, when knowingly or wilfully committed, shall be punished by the infliction of the penalty and forfeiture provided by that section.

[Cited in U. S. v. One Thousand Four Hundred and Twelve Gallons Distilled Spirits, Case No. 15,960.]

2. Proof that tubs were so placed in a distillery that they could be used contrary to the internal revenue acts, is not sufficient to warrant the court in finding that they have been so used.

3. Where, in accordance with the practice in this district, in forfeiture cases, an information had been filed containing numerous counts, and the district attorney had before the trial filed a specification of the counts on which he intended to rely, but on the trial evidence was offered which it was claimed established an offence not embraced in the specification: *Held*, that the omission to include it in the specification was fatal.

4. Distilled spirits found on the premises on which the business of distilling is carried on, being the product of such business, are not "personal property used in the business" within the meaning of the 19th section of the act of July 20, 1868 (15 Stat. 133).

At law.

B. F. Tracy, U. S. Dist. Atty.

Veeder & Wood, for claimant.

BENEDICT, District Judge. This is a proceeding in rem, to forfeit certain distilled spirits belonging to Mathew Brady, and seized at his distillery. The cause has been tried before the court without a jury, by consent.

The distillery used by the claimant, it appears, was formerly a grain distillery, but was surveyed and accepted, to be used by Brady as a molasses distillery. When used as a grain distillery, it had a mixing tub, placed above the mash tub, known as "tub M" in these proceedings, which was connected with the mash tubs by pipes. When the place was surveyed and accepted as a molasses distillery, this tub M, which, from its character, and location, could be used as a fermenting tub, was permitted to remain as it was, but was not described as a fermenting tub in any plan or description. There was also in the yard a cistern or receptacle, which could be used as a mixing tub for molasses, and which was connected by hose with tub M.

There was also in the cistern room a hole in the wall, through which hose could pass out of the spirit cistern, and also a sort of man hole in the roof, through which ingress could be had to attach the hose. The distillery was, therefore, so arranged, that, by using the cistern in the yard as a mixing tub, and the tub M as a fermenting tub, the capacity of the distillery would be increased beyond the capacity shown on the plan; while any increased production could be removed from the cistern by the hose. Moreover, the distillery was permitted to run for some time without any night watchman, and the day watchman never informed himself of the condition of the cistern room. These facts have been proved, as tending to show that the specific acts and omissions charged against the distiller were accompanied with the intent to defraud, and to conceal from the revenue officers facts required to be stated in his books. They are material only for that purpose, and do not of themselves work a forfeiture of the property in question, under any of the counts in this information. But there are other facts shown, and others offered to be shown, which, it is claimed, do work the forfeiture of the spirits proceeded against. In considering these proofs, it will be convenient first to determine the construction to be put, by this court, upon section 96 of the act of 1868, upon which section many of the present charges depend.

The ground taken on the part of the government is, that section 96 is to be construed as if it read thus: "If no other penalty or punishment is imposed, there shall be a penalty of $1,000; and the offender, if a distiller, shall forfeit all spirits owned by him, whether punishable otherwise or not." But I am unable so to read the law. As I view this section, it manifests an intent to cover, by a general provision, those instances in the statute where acts have been enjoined or

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 13 Int. Rev. Rec. 52, contains only a partial report.]

forbidden, but no punishment attached. I do not find in the section any words indicating an intent to cumulate or to increase punishments; and in the absence of such words, I am of the opinion, that the section must be held to mean, what it appears to me to say, that, in cases where the statute has attached no punishment to the doing or omitting of acts required, or forbidden, such act or omission, when knowingly or willfully committed, shall be punished by the infliction of the penalty and forfeiture provided by this section. I am aware that different constructions have been given to the section, but, to my mind, the more weighty reasons are in favor of the construction I have here adopted. Quantity of Distilled Spirits [Case No. 11,495] Blatchford, J.; U. S. v. One Rectifying Establishment [Id. 15,952] Hill, J.; U. S. v. One Hundred and Thirty-Three Casks of Distilled Spirits [Id. 15,940] Hoffman, J.; U. S. v. Ninety-Five Bbls. Spirits [Id. 15,889] Lowell, J. This view of the effect of section 96 removes from consideration a large portion of the present information, and limits the inquiry, as regards the charges made under this section, to those unlawful acts and omissions for which no punishment is provided by any other section of the act.

Of this class is the charge that the distiller omitted to furnish to the assessor an accurate plan or description of the distillery, showing the number and contents of every mash tub and fermenting tub, as required by section 9 of the act of July 20, 1868. And also the charge that, contrary to the same section, there was an alteration made in the distillery, which was not disclosed by any supplemental plan.

These charges the government claim to have supported by the evidence as to the character, locality, and use of the tub M, which, it is conceded, was never designated on any plan as a fermenting tub.

I have carefully considered this evidence, and, although I think it clear that tub M could be used as a fermenting tub, I do not find it proved that it was, in fact, ever so used. There may be ground for suspicion that it was at times so used, but I cannot condemn property upon suspicion. This portion of the information must, therefore, fail for want of proof.

Again, it is claimed that this property must be forfeited, because it appears that the fermenting tubs were not emptied at the expiration of forty-eight hours after they were filled, that being the fermenting period of this distillery, as required by section 19 of the act of 1868. What should be the true construction of this portion of section 19 is not clear. It would not be unreasonable to hold that the words, "Every tub shall be emptied at the end of the fermenting period," should be taken in connection with the words, "emptied of ripe mash or beer," used in the first part of the paragraph, and the provision construed to mean that mash or beer, when fermented according to the distiller's notice, shall be emptied at the end of the fermenting period, if ripe. Such a construction would probably dispose of the charge under consideration, in the present position of the evidence. But any construction of this provision of the statute is rendered unnecessary in this case, inasmuch as an examination of the information discloses the fact that it contains no averment which will support the charge in question.

The practice in this district, in cases of proceedings in rem to enforce forfeitures arising under the revenue laws, has been, in the first instance, to permit an information to be filed containing numerous counts for violations of various statutes, charged for the most part, in the words of the statute, but to require the district attorney, before the trial, to file a specification of the counts on which he intends to rely, accompanied, when necessary, with a description of the offences intended to be proved, sufficient to inform the claimant of the particular charge which he will be called on to meet. This practice, which is analogous to the practice in certain classes of criminal prosecutions, has proved convenient and conducive to justice, and it has been followed in the present case.

The specification in this case designates the 15th count in the information as one of those relied on, and that under it the charge in question will be sought to be maintained.

Now the 15th count omits to charge any violation of that part of section 19, which requires the tubs to be emptied at the end of the fermenting period, and to remain empty for the space of 24 hours. The omission in this count of any allusion to any violation of that portion of the section on which the count is framed, is fatal. I therefore dispense with any consideration of the evidence which is claimed to show any omission to empty the fermenting tubs at the end of the fermenting period, or to allow them to remain empty for a period of 24 hours.

Again, it is contended that the property is forfeited by virtue of the portion of section 19 of the act of 1868, which declares that if any false entry be made, or any entry omitted from the distiller's book, with intent to defraud, or to conceal from the revenue officers any fact or particular, required to be stated and entered in the book, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property of every kind or description on said premises used in the business there carried on, shall be forfeited to the United States; and it is insisted that the property in question, being distilled spirits seized on the premises belong to the distiller, are covered by the words "personal property on the premises." But these words are qualified by the

subsequent words, "used in the business," and I do not consider that distilled spirits in casks, or in the cisterns of a distillery which has produced them, can be held to be personal property used in the business there carried on. These are the products of the business, and would naturally have been designated specifically, if intended to be within the provisions of the act.

I have thus disposed of all the counts in this information, upon which the government has relied, and the result is that the information must be dismissed, and the property discharged.

A certificate of probable cause for the seizure must be given.

Case No. 15,154.

UNITED STATES v. FOUR THOUSAND ONE HUNDRED AND SEVENTY-FIVE CIGARS.

[25 Int. Rev. Rec. 132.]

Circuit Court, D. Louisiana. 1879.

INTERNAL REVENUE—ILLEGAL USE OF STAMPS—AUTHORITY OF COMMISSIONER.

[One who has cut the internal revenue stamps on boxes of cigars, and taken out and repacked the cigars in the same boxes, with intent to dispose of them, without adding new stamps, cannot justify himself therein on the ground that he had received permission to do so from the commissioner of internal revenue: for, even if such permission were granted, it would be in violation of law, and of no effect.]

[This was a proceeding for the forfeiture of 4,175 cigars because of an alleged violation of the internal revenue laws.]

BILLINGS, District Judge (charging jury). The testimony of the claimant in this case must necessarily terminate it in favor of the government. He testifies that, having received a letter from the late commissioner of internal revenue, giving him permission, he caused the stamps upon a great many boxes of cigars to be cut, and the boxes opened, and the cigars taken out, repacked, and put in the same boxes again, with the view of disposing of them without adding new stamps. It is not within the authority of the commissioner of internal revenue to authorize any such use of stamps. The whole effort of congress to prevent the use of stamps or stamped boxes more than once would be thwarted, and the whole matter left to the imperfection and uncertainty of parol evidence if this were permissible. My duty is therefore clear. I must direct you to find a verdict for the government. If the claimant has really relied upon any letter received from the internal revenue department, he can state that fact in an application for a remission of the penalty. And for that purpose I shall allow him thirty days, before the lapse of which time judgment will not be signed.

Case No. 15,155.

UNITED STATES v. FOX.

[Deady, 579: 11 Int. Rev. Rec. 36.] [1]

District Court, D. Oregon. May 15, 1869.

INTERNAL REVENUE — PENAL ACTION — ORIGINAL PACKAGES—NEW TRIAL—VERDICT.

1. The verdict of a jury is presumed to be correct and should be sustained, if the evidence by any fair construction will warrant such finding.

2. Goods are sold "in the original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed.

3. When the verdict of a jury is directly contrary to the evidence and the law applicable thereto, it is the imperative duty of the court to set it aside; and it makes no difference in this respect that the action is brought to recover a penalty given by statute.

4. What is called "the justice of the case" on a motion for a new trial is not affected by the fact that a moiety of the penalty recovered will go to the person who gave information of the violation of the law, whereby such penalty was incurred.

At law.

John C. Cartwright, for the motion.
David Logan, contra.

DEADY, District Judge. On February 11, 1869, the plaintiff commenced this action to recover from the defendants the sum of $1,300 penalties. The complaint contains three counts. The first charges that the defendants at Corvallis on July 8, 1868, sold twelve bottles of pomade, without the same being duly stamped. The second charges at the place and date aforesaid the sale of twelve bottles of hair oil, without the same being duly stamped; and the third count is upon the sale of two bottles of Lubin's Extract without being stamped. On March 10, 1869, the defendants answered the complaint, and thereby denied that they sold the several articles mentioned in the complaint without the same being duly stamped. On May 4, 1869, the case was tried before a jury, which resulted in a general verdict for the defendants. On May 5, the district attorney filed a motion for a new trial, which motion on the following day was argued by counsel and taken under consideration by the court.

On the trial the government witness—Leander Quivey—testified that at the time and place mentioned in the complaint, he purchased the articles therein specified of the defendant E. Fox, in the store of E. Fox & Bros., and that the same or any of them were not stamped. That at the time the witness, in company with one Culpepper, was traveling through the Wallamet and Umpqua valleys, purchasing these and similar articles at the various stores along the route,

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission. 11 Int. Rev. Rec. 36, contains only a partial report.]

for the purpose of causing actions to be brought against the sellers, to recover the penalties given by law against the persons who sold perfumery, sardines, etc., without the same being duly stamped. That the witness was induced to this, in the expectation of obtaining a moiety of the penalties that might be recovered and for the purpose of compelling the defendants and others engaged in selling unstamped goods, to obey the law. The articles said to have been purchased by the witness, were produced by him before the court. These were a small wooden box containing 12 one ounce and a half bottles of hair oil, and a similar box, somewhat larger, containing 12 bottles of pomade, and 2 bottles of Lubin's Extract. None of the bottles produced were stamped or appeared ever to have been stamped. The boxes were evidently the original packages in which the goods were packed by the manufacturer. In the inscription upon the bottles and the brand upon the boxes there was evidence tending to show that the goods were of French manufacture, and therefore "imported articles." In relation to the circumstances of the purchase, the witness, Quivey, testified that he purchased these articles of the defendant E. Fox. That before the purchase was made, and while the witness was bargaining for the goods, E. Fox opened both the boxes, so as to enable the witness to examine one or two bottles in the small box and five bottles in the larger box. That at the suggestion of Culpepper, who was near by, witness asked Fox to take out three bottles from the larger box and replace them with three smaller bottles of pomade from an unpacked lot of perfumery in bottles, then on the store shelf. That Fox made the exchange as required, when the purchase was completed and Fox nailed up the boxes and delivered them to the witness, who paid him for them. At the same time the witness purchased the two bottles of Lubin's Extract, which Fox took from the shelf. The witness also produced a bill of these articles, made out to himself, dated "Corvallis, July 8, 1869," and receipted in the name of "E. Fox & Bros.," which he testified was written and delivered to him by Fox at the time of the purchase. In this bill, the pomade is charged in two lots—three quarters of a dozen at $3.50 per dozen, and one quarter of a dozen at $2.50 per dozen, thus corresponding to the statement of the witness, that there were nine large and three small bottles of that article. E. Fox, one of the defendants, testified that about July, 1868, at Corvallis, he sold Quivey two boxes of perfumery and two bottles of Lubin's Extract. That the boxes were similar to those produced in court, but could not say positively that they were the same ones. That he opened both the boxes that he sold to Quivey and showed him the contents and then nailed them up again. That before closing one of the boxes he took out three of the bottles and took three bottles off the shelf and put them in the box in place of those taken out. That the two bottles of Lubin's Extract and three bottles of pomade taken off the shelves were stamped, but that the oil and pomade originally in the boxes were not stamped. O. Fox, the brother of E. Fox, testified that he was employed in defendant's store at the time of purchase, and had been for three years previous. That he was not very near to his brother when the sale was made, but that he was in the store and saw that his brother was selling perfumery, some in boxes and some by the bottle. That he did not observe whether the bottles were stamped or not, but he was certain that they were, because he knew that all the bottles on the shelves were stamped.

This action is brought upon the internal revenue act of July 13, 1866 (14 Stat. 144). It substantially provides that any person who shall make, prepare and sell, or remove for consumption or sale, among other things, any perfumery, whether of foreign or domestic manufacture, without affixing a proper stamp thereon, shall incur a penalty of fifty dollars for every such omission; and that any person who shall offer or expose for sale any such perfumery shall be deemed the manufacturer thereof: provided, that when imported perfumery shall be sold in the original and unbroken packages in which the bottle or other enclosure was packed by the manufacturer, the person so selling such article shall not be subject to any penalty on account of the want of the proper stamp.

The grounds of the motion for a new trial as stated therein, are: (1) That the evidence is insufficient to justify the verdict; and, (2) That it is against law, and contrary to the instructions of the court. For either of those causes, when the material rights of a party are substantially affected thereby, the court may and should, upon the motion of the party aggrieved, set aside the verdict. Code, Or. 197.

As to the second and third counts of the complaint, this motion must be denied. Upon the question of whether the two bottles of Lubin's Extract were stamped or not, there was conflicting evidence nearly balanced. The verdict of a jury is presumed to be correct, and should be sustained by the court, if the evidence by any fair construction will warrant such a finding. 3 Grah. & W. New Trials, 1239, 1240. Upon this conflict of testimony, the jury were entitled to decide this question of fact, and the court ought not to disturb their verdict, although it might have come to different conclusions from the same premises.

As to the twelve bottles of oil contained in the smaller box, there was no conflict in the testimony, and the verdict in this respect corresponds with the evidence and the instructions of the court. It was manifest that this box was an original package, within the purview and reason of the proviso to section 169. What constitutes such an original package,

must depend in a great measure upon the circumstances of the particular case. It is apparent that the object of the proviso was to relieve the importer and jobber from the trouble and expense of opening the package immediately enclosing the bottle or other article, and stamping it, and then repacking it. But whoever sells these goods in broken packages, is not within the reason of the proviso. He can stamp them without any unnecessary inconvenience or expense, and he must do it or incur the penalty for the omission. Although the top of this box was taken off by the defendant Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped; and to this effect the court instructed the jury on the trial. Then the only remaining inquiry is, was the package imported? Upon this point the evidence was weak; but from the label on the bottles and the brand on the box, in the absence of anything to the contrary, the jury were warranted in finding in the affirmative of this question. But as to the count upon the 12 bottles of pomade, this verdict must be set aside. True, as to the three bottles which were taken from the shelf and placed in the box, there was a conflict of testimony, as to whether they were stamped or not. But as to the nine bottles, which were a part of the original contents of the package, there is no conflict of testimony. The evidence of the government witness and the defendant agree in every particular. The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury. In this respect, this verdict is directly contrary to the evidence and the law. It is therefore the imperative duty of the court to set it aside. But it is said that this is a penal action—for a penalty—and therefore the court should not disturb the verdict, however plainly against the evidence and law. The provisions of the Code, however, relating to new trials, make no such distinction, nor is there any good reason why they should. The rule prescribed is uniform, whether the action be for a penalty or upon a contract. If the evidence be insufficient to justify the verdict, or the same be against law, it should be set aside.

It may here be admitted, that what is sometimes called "the justice of the case," is also to be considered by the court upon an application for a new trial. But what is this "justice of the case," unless it be the rights which the law would give or withhold from the parties, regardless of any technical advantage which one may chance to obtain over the other. Considered in this light, "the justice" of this case is with the plaintiff, so far as the penalties arising from the sale of the nine unstamped bottles of pomade is concerned. The defendant, upon his own testimony, sold them in a broken package without stamps, and thereby incurred these penalties, which the United States has a good right to recover from him as he has to the profits of the sales of his goods. Nor is the "justice of the case" in any manner affected by the fact, that the United States has seen proper to provide, that a moiety of these penalties, when recovered, shall be given to the person who gave information of the violation of the law, by which they were incurred. With the policy or impolicy of imposing these penalties the court has nothing to do. Whoever has incurred them without fraudulent intent or gross negligence may have them remitted by applying to the secretary of the treasury. But, when in a court of law, the illegal sale of unstamped goods is shown, as in this case, by clear and unquestioned evidence, the verdict should be given accordingly, and if for any reason it is not, the court will not hesitate to set it aside as erroneous. Upon the power of the court to set aside a verdict in an action for a penalty, independent of the Code, see U. S. v. Halberstadt [Case No. 15,276].

An order will be made refusing the motion for new trial, as to the second and third counts, and setting aside the verdict as to the first count, provided that the plaintiff will file a written admission for the purpose of a new trial, that three of the bottles described in said count were duly stamped.

Case No. 15,156.

UNITED STATES v. FOX et al.

[1 Lowell, 199.] [1]

Circuit Court, D. Massachusetts. Jan., 1868.

INTERNAL REVENUE—DISTILLING—FAILURE TO PAY TAX—PROOF GALLONS—SPECIAL TAX—INDICTMENT.

1. In an indictment on section 23 of the act of July 13, 1866 (14 Stat. 153), for carrying on the business of a distiller of spirits, without paying the special tax, it is not necessary to set out the particular acts of distilling or the kinds of spirit.

2. "Then and there distilling and manufacturing spirits to a very large amount, to wit, to the amount and number of one thousand gallons of proof spirit," is a sufficient affirmative allegation that the defendant did distil.

3. Gallons of proof spirit in that connection means the same thing as the proof gallons of spirit mentioned in the statute, that is, the gallons, which if the liquor were of exact proof it would measure; and the evidence will not be confined to spirits which are actually of proof strength.

4. Such an indictment is not open to objection as multifarious if it charges in the same count that the defendants and each of them carried on the business.

5. Where the law substituting special taxes for licenses took effect upon distillers from and

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

after September 1, 1866, and the charge was that the defendants carried on the business of distillers on the first of September, 1866, and thence to the tenth of December, 1866, without paying the special tax required by law, and under the former law licenses were issued for the business, to run from May to May, though for a smaller fee: Quære, Whether a person licensed under the old law, May 1, 1866, may not continue the business without further payment to May 1, 1867?

[Cited in U. S. v. Pope, Case No. 16,069.]

6. Such a person would not be indictable for continuing the business until due assessment of the additional fee, if any, had been made; and an indictment, which showed the business to have been begun under the old law and continued under the new, should negative the payment of the license fee, or of the additional fee, as well as of the special tax.

Indictment against two persons [John J. Fox and another] alleged that they carried on the business of a distiller on the first day of September, 1866, and on divers other days up to and until the tenth day of December of the same year, without having paid the special tax as required by law; they and each of them then and there distilling and manufacturing spirits to a very large amount, to wit, to the amount and number of one thousand gallons of proof spirit. After conviction they moved in arrest of judgment.

L. S. Dabney, for defendants. (1) The indictment ought to charge the particular acts which go to show that the defendants were distillers, with time, place, &c. (2) Then and there distilling and manufacturing is argumentative. (3) Both counts are multifarious, because they charge that the defendants and each of them distilled, &c. (4) The evidence should have been strictly confined to the manufacture of spirit of precisely proof strength, because the only charge is of making such spirit. (5) There should be a charge, either that the defendants began business after the new law went into effect, or that they had paid no license fee under the old law, because the licenses were from May to May, and would protect the business for the first eight months after September 1, 1866.

H. D. Hyde, Asst. Dist. Atty., for the United States. It is not necessary to negative the existence of a license, because, supposing one to have been granted, it would not protect this business after September 1. Section 80 of the new act (14 Stat. 122) provides that where any person has been assessed for a license before the passage of this act, and the amount so assessed is equal to the tax herein imposed for the business covered by such license, no special tax shall be assessed until the expiration of the period for which the license was assessed. This implies that where the tax is increased, as is the fact with distillers, the license does not protect. Besides, the allegation of time is immaterial, and this objection, therefore, comes too late. After verdict we may presume that the evidence proved the acts to have been done since May 1, 1867, the indictment having been found since that time.

LOWELL, District Judge. As I had occasion to observe in another case, the precedents prescribe a very simple form of charging such a crime as this and of negativing the authority or license. And in general, when the charge is, that a certain trade has been carried on, or that the defendant has sustained a particular character, as that of a barrator, scold, &c., it is not essential to set out the particular acts which go to make up the trading or course of life. It would be otherwise if each act were a crime; or if by the statute definition a fixed number of separate acts made up the crime. Under this law, the quantity of spirits distilled is important, because the minimum fine depends upon it; but not the kind of spirits, nor the separate acts of distilling. So as to the time. The acts being continuous, it is well to charge them as having been done on divers days between two certain days. Com. v. Tower, 8 Metc. [Mass.] 527; Wells v. Com., 12 Gray, 327 (per Metcalf, J.).

The objection to the expression "then and there distilling," &c., applies only to the first count; but it is not valid even to that; the legal intent of these words is, that the defendant did then and there distil. Turns v. Com., 6 Metc. [Mass.] 224. The charge that two persons and each of them carried on a business is well enough if they were partners or jointly concerned in the business. Rex v. Dixon, 10 Mod. 335. And this indictment clearly points to a joint trade. I do not decide that in a misdemeanor such an objection can ever be taken at this stage of the case.

It was urged with great apparent confidence, both at the trial and since, that the allegation of distilling one thousand gallons of proof spirit, confines the government to showing the manufacture of spirit at the exact strength of first proof, as established by another part of the statute, that is, one-half alcohol. I am of opinion, on the contrary, that this expression, "gallons of proof spirit," in the connection in which it is found, is not intended to be descriptive of the kind or strength of the spirit distilled, but only of the quantity, according to the statute standard. The mode of taxation, borrowed by congress from the excise laws of England, is to assess spirits by a conventional measure, depending upon the amount of alcohol which they contain. This measure is expressed in gallons, though the precise number of gallons taxed does not exist, excepting when the spirit is of exactly proof strength. Thus, for the purposes of taxation, that quantity, be it more or less, which contains ten gallons of pure alcohol, is twenty gallons of proof spirits. This has been found to be a very fair and convenient method, and it has led to the use of the phrases, proof gallons, gallons of proof spirit,

gallons of spirit at the strength of proof, all of which mean the estimated number of gallons contained in the liquors spoken of, whatever their actual bulk may be. This use of terms I find in Ure's Dictionary, Muspratt's Chemistry, and other works of like character. Our statute taxes the proof gallon, and it is easy to understand what that is, though I have not found any general dictionary of the language that defines any such gallon. This indictment sets out the number of such gallons, in order to enable the court to impose the proper fine.

The last objection appears to be well taken. The indictment ought to show that the business was carried on without due payment. Now every thing here alleged may be true, and yet the defendants may have paid a license fee on the first of May, 1866, and the business may have been conducted under the license. The new act went into operation on the second day of September, and it does require a larger fee to be paid by distillers than was required by the statute of 1864; but it may well be doubted whether the assessors would be authorized to assess the increased amount before the following May, upon those who had licenses under the old act. I find nothing in the new act looking to any such action, excepting the proviso of the eightieth section, cited at the bar, which prohibits a new assessment in certain cases; the implication from that proviso is hardly strong enough to warrant me in adding a positive duty not elsewhere enjoined. I am informed that the practice of assessors has not been uniform in the different districts in this particular; and I can easily understand that this might be so. But of this I am clear, that it cannot have been the intention of the law to render a distiller liable to these severe penalties who was carrying on his business under license when the new law took effect, unless he had been duly assessed and called on to pay the additional fee, and had refused or neglected to do so.

It is said that the time is immaterial, and that on this motion it may be presumed that evidence was given of acts done since May 1, 1867. It is not material to prove the time precisely as alleged, but it is necessary that the time charged should be consistent with the offence charged, so that the indictment shall be good on its face. Thus to lay an impossible time, or one beyond the statute of limitations; or that a crime which can only be committed on Sunday was done on Monday, &c., would be bad. In motions for arrest of judgment, the time is presumed to be truly alleged (Com. v. Hitchings, 5 Gray, 485); and taking this to be so, this indictment shows that the statute had come into full operation only as to those distillers who began business afterwards, or who being assessed for an extra license fee had not paid it, and not as to all distillers; and these defendants should have been shown to be within its operation, by alleging either that they began the business under the new law, or that they were not licensed under the old law, or that having been so licensed and having been assessed an additional fee, they had not paid it. Judgment arrested.

Case No. 15,157.

UNITED STATES v. FOYE.

[1 Curt. 364.] [1]

Circuit Court, D. Massachusetts. May Term, 1853.

LARCENY FROM MAIL—LETTER—BANK NOTE—INDICTMENT.

1. Evidence that the prisoner uttered as genuine, what purported on its face to be a bank-note, is competent proof that it was a bank-note, though it is not otherwise shown such a bank existed.

[Cited in State v. Brown, 4 R. I. 535.]

2. A letter, containing money, deposited in the mail, for the purpose of ascertaining whether its contents were stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by post within the meaning of the post-office act (4 Stat. 102).

[Cited in U. S. v. Rapp, 30 Fed. 822. Distinguished in U. S. v. Matthews, 35 Fed. 895. Cited in U. S. v. Wight, 38 Fed. 109; U. S. v. Bethea, 44 Fed. 803; U. S. v. Grimm, 50 Fed. 531.]

3. The description of the termini, between which the letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid.

[Distinguished in U. S. v. Okie, Case No. 15,916. Cited in U. S. v. Thomas, Id. 16,473; Walster v. U. S., 42 Fed. 893.]

4. It is necessary, in an indictment for larceny from a letter under the 21st section of the act, to lay the property stolen on some person other than the prisoner.

[Cited in U. S. v. Laws, Case No. 15,579.]

[This was an indictment against Mark W. Foye for larceny from the mail.]

CURTIS, Circuit Justice. The prisoner, being a mail carrier, was indicted for stealing a bank-note from a letter deposited in the mail of the United States, and intended to be conveyed by post. Having been found guilty by the jury, he has moved for a new trial, and in arrest of judgment. The first cause assigned for a new trial, is, that the defendant, not having been sworn, was not liable to be convicted as a mail carrier, under the 21st section of the act of March 3, 1825 (4 Stat. 102). This cause is not sufficient. The third section of the act expressly subjects persons employed in the conveyance of the mails to all pains, penalties, and forfeitures, for violating the injunctions of this act, though not sworn. The 21st section, by inflicting a penalty on the act charged in the indictment, must be considered as enjoining mail carriers not to commit that act; and consequently, if they do it,

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

they are subject to the penalty provided in the 21st section.

The second ground of the motion is, that the jury were erroneously instructed concerning certain evidence. The indictment charges that the letter contained "a certain bank-note, of the denomination of five dollars, purporting to be issued by the Casco Bank of Portland, in the state of Maine; the said bank-note being an article and evidence of value, viz.: of the value of five dollars." Evidence was offered by the government, tending to prove that the person who inclosed the note in the letter, received the bill as of the value of five dollars; that the defendant, after taking it from the letter, paid it to a creditor, in discharge of a debt of five dollars; and a broker, who was much accustomed to receive bills purporting to be issued by the Casco Bank, having examined this bill, testified that it was like the bills he was accustomed to receive and pay. The jury were instructed that, if they believed this evidence, it was competent for them to find this note was a bank-note of the value of five dollars. In this instruction, we think there was no error. The act of the defendant, in passing this note in payment of a debt of five dollars, was equivalent to an affirmance by him, that it was what it purported to be. It is a familiar rule, that the indorser of negotiable paper is estopped to deny the genuineness of all signatures which precede his own. And though this rule is not applicable to paper passing by delivery only, and the defendant was not estopped, as against the United States, from showing this was not a bank-note, yet we have no doubt his uttering it as genuine was evidence to go to the jury to prove it to be a bank-note, and of the value of five dollars; and if so, it would warrant, in point of law, in the absence of all other evidence, a finding to that effect.

The next cause assigned is, that the particular letter proved did not support the allegation in the indictment, which charges that one J. Pike Stickney deposited in the post-office at Georgetown a letter, addressed to John Blake, Ipswich, "which was intended to be conveyed by post, and was then and there mailed, to be conveyed in the mail of the United States, to the town of Ipswich aforesaid." The evidence showed that Stickney was the postmaster at Georgetown; that in consequence of the loss of money from the mail on that route, he agreed with the postmaster at Newburyport to deposit in the mail a letter, containing money, addressed to John Blake, Ipswich; if the letter should arrive safely at Newburyport, it was not to be sent on to Ipswich, but was to be returned to Stickney. In pursuance of this arrangement, this letter and money were sent, arrived safely at Newburyport, and were returned to Stickney, who, the next day, remailed the same letter, and the bag containing it was committed to the prisoner, who was the mail carrier between Georgetown and Newburyport. The letter was mailed precisely like other letters; that is to say, a bill was made out, containing the usual entries; this bill and the letter were inclosed in a wrapper, and the packet addressed to Ipswich, and deposited in the mail-bag, with other packets.

The first objection is, that this was not a letter intended to be conveyed by post, within the meaning of the act, and of the indictment. And the prisoner's counsel relies chiefly on the decision of the judges on a question reserved, in the case of Reg. v. Rathbone, 1 Cromp & M. 220. But we consider that case distinguishable from this. By 1 Vict. c. 36, § 47, it is enacted, that "post letter shall mean any letter or packet, transmitted by the post, under the authority of the postmaster-general." The prisoner was indicted for stealing a post-letter. It appeared that an inspector placed the letter which was stolen, among some other letters, which the prisoner, who was employed in the post-office, was to sort, and inclosed in it a sovereign, to try the prisoner's honesty, which was suspected. This letter the prisoner stole; and it was held not to be a post letter, within the meaning of the act; for though, in fact, the letter was in the post-office, it had not come there in the course of business, and so was not transmitted by post, under the authority of the postmaster-general. In the case at bar, the only material difference between the letter stolen, and any others in the same bag, was, that it was not intended to be sent to its address. But it was intended to be conveyed by post from Georgetown to Newburyport, and was regularly mailed for that purpose. We do not think the purpose of the writer, not to have the letter go to its apparent destination, affects its character, or prevents it from being a letter intended to be transmitted by post, or takes it out of the protection of the statute.

But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the termini as Georgetown and Ipswich. The allegation is, in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words, from Georgetown to Ipswich, can be treated as surplusage. It was necessary to allege, that the letter was intended to be conveyed by post. The words, from Georgetown to Ipswich, are descriptive of this intent. They describe, more particularly, that intent which it was necessary to allege. In U. S. v. Howard [Case No. 15,403], Mr. Justice Story lays down the following rule, which we consider to be correct: "No allegation, whether it be necessary or unnecessary, whether it be

more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage." Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no post-office existed, and over a route where no post-road was established by law. Inasmuch as the court must take notice of the laws establishing post-offices and post-roads, the indictment would then have been bad; because this necessary allegation would, on its face, have been false. Words, therefore, which describe the termini and the route, and thus show what in particular was intended, do identify the intent, and show it to be such an intent as was capable, in point of law, of existing.

And we are obliged to conclude that they cannot be treated as surplusage, and must be proved, substantially, as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof; and that, for this cause, a new trial should be granted.

Case No. 15,157a.

UNITED STATES v. The FRANCIS F. JOHNSON.

[20 Niles, Reg. 137.]

District Court, D. South Carolina. April 6, 1821.

SLAVE TRADE — VIOLATION OF LAWS — LIBEL OF FORFEITURE.

[A vessel which cleared from Alexandria for New Orleans with a cargo of slaves, and which had on board two slaves engaged at the time of seizure, and long prior to shipping the cargo, in performing duty as members of the crew, but not rated as members thereof in the ship's articles or log book, *held* not subject to forfeiture under the statute relating to the slave trade, (4 Bior. & D. Laws 97; 2 Stat. 426,) because the said two slaves were not entered in the manifest as part of the cargo.]

[This was a libel of forfeiture against the brig Francis F. Johnson for alleged violation of the laws relating to the slave trade.]

DRAYTON, District Judge. The brig Francis F. Johnson departed from Alexandria in the District of Columbia, laden with negro slaves, to be transported coastwise, and destined for the port of New Orleans, in the state of Louisiana. All the slaves on board, except two, were entered on the manifest. One of those two acted as cabin boy, and the other as cook, and afterwards as an ordinary seaman before the mast. This vessel is libelled under the 9th section of the act prohibiting the importation of slaves into any port or place within the jurisdiction of the United States of America (4 Bior. & D. Laws, 97 [2 Stat. 426]), without having entered in the manifest the said two negro slaves; and the brig having been fallen in with by the United States vessel of war commanded by Capt. Lawrence Kearney, off the Salt Key Bank, in the entrance of the Gulf of Mexico, she has been sent in here for examination.

The claimants contend the vessel and negroes should be discharged, because the evidence will not support forfeiture under the statute, and upon this ground, I shall consider the case, as argued by Mr. Gadsden, district attorney for the United States, and Mr. Dunkin for the claimants.

The object of this act is to throw all proper difficulties in the way of the slave trade, and to close this with other doors of slave importation To that end, the 9th section of the act provides that no ship or vessel of the burthen of forty tons or more shall carry any negro, mulatto, or person of colour from one port of the United States to another for the purpose of transporting them, to be sold or disposed of as slaves, or to be held to service or labor, without the captain, master, or commander making out and subscribing duplicate manifests of every such negro, mulatto, or person of colour on board such ship or vessel; therein specifying the name and sex of each person, their age and stature, as near as may be, and the class to which they respectively belong, with the name and place of residence of every owner or shipper of the same; one of which manifests (executed under the forms prescribed in the act) to be retained by the collector of the port of departure and the other to be returned to the captain, master, or commander; with a permit specifying thereon, the number, names, and general description of such persons; and authorizing him to proceed to the port of his destination. In failure whereof every such ship or vessel, with her tackle, apparel, and furniture, shall be forfeited to the use of the United States; and may be seized, prosecuted, and condemned in any court of the United States having jurisdiction thereof. Besides which, the captain, master, or commander of every such ship or vessel forfeits for every such negro, mulatto, or person of colour so transported or taken on board contrary to the provisions of the act the sum of one thousand dollars; one moiety thereof to the United States, and the other moiety to the use of any person or persons who shall sue for and prosecute the same to effect. In addition to this act, an act of congress was passed on the 3rd March, 1819 [3 Stat. 532], entitled "An act in addition to the acts prohibiting the slave trade," by which the president of the United States is authorized to employ the armed vessels of the United States to cruise on the American coast, or coast of Africa, to enforce the acts of congress prohibiting the slave trade and American vessels employed contrary thereto in traffic or transportation of slaves, may be seized by such armed vessels, and brought into port of the United States for examination and adjudication. Under these acts the seizure has been made by Cap-

tain Kearney, in the performance of his duties; and the cause has been proceeded in before me, argued with much ability by the counsel who are concerned.

From the evidence it appears the two negroes who were the cause of the seizure have been acting on board of the brig Francis F. Johnson, one as cabin boy and the other as cook or ordinary mariner, for months past in the coasting trade of the Bay of Chesapeake, and were in that capacity when the vessel took her departure from Alexandria and was detained by the Enterprize. It also appears they were not entered on the manifest as part of the cargo; neither were they rated on the ship's articles or log book as part of the crew, by reason of which no document appeared on board, when the vessel was seized, exempting the said two slaves from the provisions of the act, or excusing them for not being on the manifest. On behalf of the claimants it was contended they ought not to have been entered in the manifest, as they were not transported for sale, but were acting on board as servants to the master or owner, and that in such capacities they were exempted by the first section of the act for the government and regulation of seamen in the merchant service, passed July 20, 1790 [1 Stat. 131]. That they belonged to a citizen of Baltimore, in Maryland, who was agent of the owner of the vessel; and was either bargaining for, or had bargained for, the ownership of part of the vessel. The evidence also made known to the court that while the vessel was lying in the Potomac, ready for her voyage, the owner of the two slaves had intended to have gone in her to New Orleans, but, owing to sickness or some other cause, he did not. And that in a conversation on board he said, if one of those two negroes did not behave better, he might sell him at New Orleans. This was pressed by the district attorney as prima facie evidence they brought the vessel within the penalties of the act, and as a reason why the plea of exception should not be admitted.

I have considered this case with that attention which is due to its merits and to the mischiefs to be prevented; and being of opinion the case has not been sufficiently made out that these two negroes were to be transported to New Orleans for sale, or personal labor and service, but that they ought to be considered as part of the crew of the vessel, I must therefore discharge her and them from the seizure. I cannot, however, do so without previously mentioning that the conversation of the owner of the two negroes above alluded to throws suspicion on the case, and that, in all vessels engaged in transporting slaves from one state to another, all slaves acting as parts of the crew in any manner whatever should be noted on the vessel's articles as particularly designating them from the slaves on board as cargo, by which seizures, in a case like this, may hereafter be prevented. Captain Kearney has done nothing more than his duty in seizing the vessel and bringing her in for adjudication. It is therefore ordered and decreed that probable cause of seizure be certified; that the libel be dismissed; the costs, however, to be paid by claimants.

Case No. 15,158.

UNITED STATES v. The FRANCIS HATCH.

[4 Am. Law Reg. (N. S.) 289.]

District Court, D. Maryland. Dec. Term, 1864.

PRIZE — PROHIBITED TRADE — TREASURY REGULATIONS—EFFECT OF.

1. Under the act of congress of July 13, 1861, § 5 [12 Stat. 257], goods forming the cargo of a vessel proceeding to a point in the insurrectionary states are liable to forfeiture only while in transitu. And the vessel only while the contraband cargo is on board.

[Cited in U. S. v. Stevenson, Case No. 16,396.]

2. But under the regulations made by the secretary of the treasury by authority of the acts of July 13, 1861 [12 Stat. 257], May 20, 1862 [12 Stat. 404], and July 2, 1864 [13 Stat. 375], a vessel engaging in trade with the insurrectionary districts is liable to forfeiture even after the termination of the prohibited voyage and the discharge of the contraband cargo.

3. The imposing of such forfeiture is within the power to make regulations conferred on the secretary of the treasury by the acts of congress. Congress has the constitutional right to confer such power, though quasi legislative, on the executive

4. Even if it be necessary for congress itself to exercise such power, it may be considered to have ratified and adopted such regulations by the act of July 2, 1864, § 3.

5. Therefore, where a vessel had been engaged in prohibited trade, but, before the libel was filed, had completed her voyage and discharged her cargo, a forfeiture was decreed by virtue of the regulations established by the secretary of the treasury.

Libel for forfeiture.

Addison & Thayer, for the United States.
Carter & Ridgeley, for claimants.

GILES, District Judge. The libel in this case has been filed by the district attorney of the United States, in which it is charged that the schooner Francis Hatch has conveyed passengers and merchandise from the city of New York to that part of the state of Virginia declared to be in insurrection by the president's proclamation, without a license or permit from the proper authorities. There are some nine counts or articles in the libel, propounding the matters relied on as grounds or causes of forfeiture, some drawn under the act of July 13, 1861; the others under the act of May 20, 1862, and its supplements, and the various rules and regulations of the secretary of the treasury, prepared under the authority given to him by said acts. At the commencement of the trial of this case, the various claimants of that part of the cargo which was brought from the city of New York to this city, having satisfied the court by

competent testimony that they were entirely innocent of any intention to violate any of the laws of their country, and had no knowledge of the shipment of goods on board the Francis Hatch, to be delivered in Virginia; and this not being contested by the district attorney, the court said, when it passed a final decree in this case, it would dismiss the libel as to the said cargo, and award the same to the several claimants. Two claims were filed for the vessel: one by John P. Williams, claiming to be the owner of the same, and the other by Messrs. Capron & Co., of this city, claiming as bailees of the vessel by virtue of a mortgage and power of attorney from John P. Williams, dated the 14th day of January, 1864, and also as lien creditors for advances and disbursements, on account of said vessel, to a large amount.

In the answers filed by the claimants it was expressly denied that the said vessel had carried either passengers or merchandise to Virginia, as charged in the libel. But the testimony showed that on three voyages made by the Francis Hatch between New York City and this port, she put out into a yawl-boat passengers and merchandise, just opposite Gwyn's Island, in the Chesapeake Bay; that this was always done at night; and on the several occasions, a man who passed then under the name of Hayden, was one of the party so put out. Gwyn's Island is in the Chesapeake Bay, quite near to the Virginia shore, and just below the mouth of the Piankatank river. A large amount of testimony was given, which it will not be necessary for the purposes of this opinion to refer to, further than to say: it convinced the court that the passengers and goods so put out from the Francis Hatch in the Chesapeake Bay, were intended to be landed, and were so landed, either on Gwyn's Island or on the adjacent Virginia shore. The evidence also shows that the Francis Hatch was not seized until she had completed her last voyage in November, and when she was moored to the wharf and had been entered at the custom-house at this port. The counsel for the claimants contended that as the voyage was ended, and the cargo intended for a state in insurrection, no longer on board; and that as the vessel when seized was not proceeding to a state in insurrection, there could be no forfeiture in this case under the 5th section of the act of July 13th, 1861; and that there can be no forfeiture of the vessel under the act of May 20th 1862, and its supplement, and under the rules and regulations of the secretary of the treasury, because by neither the said act nor its supplement is the vessel declared to be forfeited; and although it is provided by the several series of regulations adopted from time to time by the secretary of the treasury, with the approval of the president, that a vessel violating the same shall be forfeited, such a provision is unconstitutional and void, the secretary of the treasury, under the power given to him by the said acts of congress "to make such rules and regulations as may be necessary and proper to carry into effect the purpose of said acts," had no authority to forfeit the vessel, &c., and that even if congress had intended to impart to him any such authority, they had no constitutional right to do so, as it would be the exercise of a legislative power by a branch of the executive department of the government.

I think I state thus briefly the substance of the learned and able defence made in this case by the counsel for the claimants. They referred the court to two decisions made in this circuit by the late chief justice of the supreme court. Upon the first point made by them they cited the decision of Judge Taney in the case of U. S. v. Two Thousand Bushels of Wheat [Case No. 16,589], Penn & Mitchel claimants, made last June, on appeal from the common law side of this court. That case was this:—The wheat had been brought to this port from St. Mary's county and consigned to the claimants, who stored it here for sale, and who made advances on it to the amount of its full value. They had no reason to suppose that it was not grown in this state, although it appeared from the evidence that it was brought from Virginia across the Potomac into St. Mary's county before being shipped to Baltimore. It was in store here ten days before it was seized. It was tried before a jury in this court, and I instructed the jury that, if they found these facts, their verdict must be for the claimants. From this decision the government took an appeal to the circuit court, and the decision of this court was affirmed. In delivering his opinion Judge Taney construes the act of July 13th, 1861, as follows: His language is: "Taking the different provisions of this law together, it appears to me that the forfeiture attaches to the goods when they are on their passage, and adheres to them while they remain in that condition, that is in transitu between the forbidden places, and no longer." In a subsequent part of his opinion, he says: "The words 'together with the vessel or vehicle conveying the same' confirm this conclusion. The vessel is not forfeited unless the unlawful cargo is actually on board; and it would be a strained and unreasonable construction of these words to forfeit the vessel when it had a lawful cargo not liable to forfeiture. The vessel is forfeited when and while it is carrying on commercial intercourse between the United States and the interdicted places. The forfeiture adheres to the vessel while she is thus engaged, and no longer. It is only when the cargo is unlawful the vessel conveying the same is forfeited; and when that cargo is landed and separated from the vessel it cannot be said to be conveying the same, and is not forfeited by any provision of the said law."

Now, beside the respect which I should entertain for any opinion to which he gave the sanction of his great name, he was the presiding judge in this circuit; and his decisions,

until reversed by the supreme court, are the law of this court and binding on it. In pursuance of that decision there can be no forfeiture of the Francis Hatch under the 5th section of the act of July 13th, 1861. Now can this vessel be forfeited for a violation of the rules and regulations of the secretary of the treasury? To oppose such forfeiture the counsel for the claimants have referred to the other decision of Judge Taney, mentioned above, which was made in the case of U. S. v. Box of Dry Goods [unreported], Geo. W. Carpenter, claimant. Now, in that case, the dry goods were intended to be carried from this port to the claimant, in Charles county, in this state, and were seized in this port by the collector on the charge that a fraud had been committed in obtaining the permit; and that in such case the goods were forfeited by the regulations of the secretary of the treasury, as well as by the act of May 20th, 1862. The chief justice held in that case that neither congress nor the secretary of the treasury had any constitutional authority to place any restrictions upon the internal trade of Maryland, as this was a subject-matter beyond the jurisdiction of congress, who, under the constitution, had power only "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." He held, therefore, that so far as the regulations of the secretary of the treasury applied to the trade between Baltimore and the lower counties of this state, they were void; and that, therefore, the box of dry goods seized in that case must be restored to the owner. But the question that I am now called upon to decide has not yet been decided by any of the federal courts, so far as I have been able to learn. No case has been cited by the counsel on either side, and I have heard of none. It is presented, therefore, for the first time, and is a question of great importance, to which I have given my most careful deliberation. Neither the act of May 20th, 1862, nor that of July 2d, 1864, provides for a forfeiture of the vessel. But the act of May 20th, 1862, contains a provision forfeiting any goods, wares, or merchandise transported or attempted to be transported in violation of the said act, or of any regulation of the secretary of the treasury, established in pursuance of the authority given to him by said act. But both acts authorize the secretary of the treasury to establish all such general or special regulations as may be necessary to carry into effect the purposes of the acts. The language of the last act (July 2d, 1864) is: "That the secretary of the treasury, with the approval of the president, shall make such rules and regulations as are necessary to secure the proper and economical execution of the provisions of this act." And one of the provisions of said last-mentioned act was, "That no goods, wares, or merchandise shall be taken into a state declared in insurrection, or transported therein, except to and from such places and to such monthly amounts as shall have been previously agreed upon in writing by the commanding-general of the department in which such places are situated, and an officer designated by the secretary of the treasury for that purpose." Four series of rules and regulations have been made and published by the secretary of the treasury, and approved by the president, viz.: Those of the 28th August, 1862; those of the 31st of March, 1863; those of the 11th September, 1863, and lastly, those of the 30th July, 1864. I have not been able to obtain a copy of the first series, but the three last contain provisions for the forfeiture of a vessel found violating any of the said regulations. I shall quote (as far as it may be necessary) only the provisions or regulations of the last series. They were approved by the president, July 30th, 1864. 1st regulation is as follows: "No goods, wares, or merchandise will be allowed to be transported to, from, or within any state or part of a state, under restriction or declared in insurrection, except under permits, certificates, and clearances, as hereinafter provided." The 45th regulation is: "All vessels, boats, and other vehicles used for transportation, violating regulations and local rules, and all cotton, tobacco, or other products or merchandise shipped or transported or purchased or sold in violation thereof, will be forfeited to the United States." It is not pretended in this case that the "Francis Hatch" had on any of the three voyages mentioned, any permit to land goods in Virginia.

Now, the first question is, what power did congress intend to give to the secretary of the treasury, when it authorized him to make such rules and regulations as are necessary to secure the proper execution of the provisions of the act they passed? Did they authorize him to enforce the due observance of the regulations he might establish by penalties? This will depend upon the true meaning and import of the words "to regulate." Worcester, in the last edition of his dictionary, defines the verb "to regulate" as follows: "to reduce to order, to direct, to rule, to govern, to conduct," &c. And in the constitution of the United States, framed by some of the greatest men of their day, and a paper that will command the admiration of all time, this word "regulate" is used several times. In article 1st, section 8, subsection 3, power is given to congress "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." Under which grant of power congress has, from time to time, passed various laws to regulate our foreign and coastwise trade, and enforced their due observance with heavy penalties. No one, I believe, has ever questioned the constitutionality of such laws. Again, in same section, subsection 14, power is given "to make rules for the government and regulation of the land and naval forces." Under this grant of power congress passed and adopted "The Articles of War," which, in many cases

in time of war, provide the punishment of death. And in article 4th, section 3, power is given to congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this grant of power congress has, for more than seventy years, punished all crimes committed in the several territories of the United States until their admission as states into the Union. Without dwelling further upon this point, it appears to me, that the word "regulation" means something more than the mere preparation of a set of rules in reference to any particular subject. It includes the power to enforce the due observance of those rules by penalties and forfeitures. But, say the learned counsel for the claimants, while congress possess this power themselves, they cannot impart or delegate it to any branch of the executive department of the government. Now, I am free to admit that this is a question of some difficulty. But the rule which governs courts of justice, when deciding upon the constitutionality of an act of a co-ordinate department of the government, is, "that unless the contrary is clearly demonstrated, the presumption must always be in favor of the validity of such act. Now, we have four series of regulations to govern the commercial intercourse between the states in insurrection and the rest of the United States. The three first of these regulations were prepared and sanctioned by the late secretary of the treasury, a gentleman who is now placed at the head of the judiciary of the United States; and the last regulations prepared by the present secretary of the treasury—both gentlemen of large experience in the public service. In a case of doubt, therefore, it is the duty of the federal judiciary to uphold and maintain these regulations; as it would be their imperative duty, if their unconstitutionality was clearly demonstrated, to refuse to recognise or enforce them. I grant that the construction I give to the word "regulations" includes the exercise of a quasi legislative power. But this is nothing new in the history and operations of our government. The president, by and through the secretary of war, prepared the regulations for the government of the army; many of which prescribe punishments and define offences not specified in the articles of war. And the supreme court, in [Gratiot v. U. S.] 4 How. [45 U. S.] 117, say: "As to the army regulations, this court has too repeatedly said that they have the force of law," &c. In this state, as in most of the states, its constitution or bill of rights contained a provision that the legislative, executive, and judicial powers of the government ought to be separate and distinct from each other. Yet in a late case which came before the court of appeals of this state, in which the constitutionality of the Baltimore police bill came under review, a bill in which the power of appointing the commissioners was reserved to the legislature, the court maintained the validity of the said law, although the article in the bill of rights to which I have referred, was much relied upon in the argument. And also in this state, the legislature has again and again granted to municipal corporations of its own creation the power of imposing taxes, one of the highest powers belonging to the legislative department. And the exercise of this power by the municipal corporation has been sustained. This provision in the bill of rights to which I have referred is intended, no doubt, to prevent one department of the government from usurping the power confided to either of the other departments. It was so held in the case of Crane v. Meginnis, 1 Gill & J. 463, and in the case of Regents of the University of Maryland v. Williams, 9 Gill. & J. 410; and is not to be construed as a prohibition upon the legislative department from authorizing a branch of the executive department to exercise quasi legislative powers in a prescribed case. Speaking of this article in the bill of rights, Justice Tuck, in delivering the opinion of the court in the Police Bill Case, to which I have referred (15 Md. 457), says: "But this article is not to be interpreted as enjoining a complete separation between these several departments. Practically, it has never been so in any of the states in whose fundamental law the principle has been attested." And he further says: "Entire practical separation was not designed." And that it was designed to engraft this principle in our system "only so far as comported with free government, as an inhibition upon the exercise by one department of powers conferred on any other by the constitution." And in the case of State of Pennsylvania v. Wheeling & B. Bridge Co., 18 How. [59 U. S.] 429, the supreme court sustained congress in the exercise of what was certainly a quasi judicial power. The supreme court in a previous case (13 How. [54 U. S.] 518) had decreed that the Wheeling bridge was a nuisance, and should be removed. Since the passing of said decree congress had, by the act of August 31st, 1852, declared the said bridge to be a lawful structure in its present position and elevation. A bill was filed to enforce the decree for the removal of the bridge, and the supreme court, in 18 How. [59 U. S.] 429, refused to enforce it, and sustained the action of congress in the premises. Sustaining the law, it is true, upon the ground that it was the exercise by congress of the power to regulate commerce between the states.

There is another view of this question which seems to me to be very clear. If the authority of the secretary to enact these regulations and enforce their observance by forfeitures, be doubtful, congress possessed the power to ratify and adopt them. This doctrine is discussed by Judge Grier, in delivering the opinion of the supreme court in the Prize Cases, reported in 2 Black [67 U. S.] 679. The question in those cases was the validity of the blockade proclaimed by the

president before the meeting of congress in 1861. That learned judge held that, if it were necessary to the technical existence of a war, that it should have a legislative sanction, such sanction was found in the various laws subsequently passed by congress for carrying on the war. Now congress, by the 3d section of the act of July 2d, 1864, provides for the disposition of money received from the sales of captured property, &c., or from fees collected under the rules and regulations made by the secretary of the treasury, and approved by the president respectively, 28th August, 1862, 31st March, 1863, and 11th September, 1863. Now each of these series of regulations contained a provision forfeiting any vessel engaged in their violation.

I am of the opinion, therefore, that the regulations of the secretary of the treasury, to which I have referred, are valid, and that by them this vessel must be forfeited to the United States, and I will sign a decree to that effect. As I said before, the evidence has convinced me that this vessel, on her last voyage, conveyed passengers and goods on their way to Virginia, who reached there; that this was done with the knowledge of Hayden (whose true name is Snowden), and who was himself on board, and who was the real owner of the "Francis Hatch," the name of John P. Williams being used for the purpose of deception. I shall not now pass upon the claim of Messrs. Capron & Co. for advances under their power of attorney. This is not the proper time to do so. That claim, if it exists and can be maintained, must be filed under and subject to the requisitions of the act of congress of March 3d, 1863 [12 Stat. 759]. I shall not pass upon it now for another reason: Mr. Capron is, I understand, held in custody, charged with a violation of certain provisions of the act of July 2d, 1864, and may be indicted by a grand jury and tried on the charge. I would not, therefore, discuss the facts proved in relation to his connection with this vessel at this time, lest I might do him injustice, or prejudice any defence he might be able to make on such trial.

Case No. 15,159.

UNITED STATES v. FRANK.

[2 Biss. 263;[1] 3 N. B. R. 175 (Quarto); 17 Pittsb. Law J. 140; 2 Chi. Leg. News, 236.]

District Court, N. D. Illinois. April, 1870.

BANKRUPTCY — INDICTMENT FOR FRAUDULENTLY OBTAINING CREDIT.

1. The forty-fourth section of the bankrupt act [of 1867 (14 Stat. 539)] construed.

2. A man who, while carrying on a retail trade, buys large quantities of goods and ships them under the pretense of needing them in his regular business, but ships them off and sells them at wholesale at a sacrifice, is guilty under the act.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

In bankruptcy. This was an indictment found under the following clause of the bankrupt law: "If any debtor," etc., "shall within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, obtain on credit from any person any goods and chattels, with intent to defraud," etc., "he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years."

J. O. Glover, U. S. Dist. Atty.
Silver & Willard, for defendant.

BLODGETT, District Judge. Gentlemen of the jury: To constitute the offense, the accused must (1) obtain goods and chattels from some person or persons, on credit, under the false pretense of carrying on business and dealing in the ordinary course of trade; (2) such credit must be obtained within three months from the commencement of proceedings in bankruptcy; (3) such goods and chattels must be obtained on credit, as aforesaid, with intent to defraud.

The obvious purpose of this statute is to prevent a person from obtaining goods on credit, with the expectation on the part of those who give the credit that they will be disposed of in the ordinary course of business, when, in fact, he intends to dispose of such goods in some extraordinary or unusual manner, or knows that he is insolvent, and that the goods would go into the hands of his assignee in bankruptcy, and be disposed of for the benefit of his creditors generally, and not in the usual course of trade. It was to prevent men from abusing their credit, and imposing, by means of it, upon others, that this act was passed to compel, as far as law will do it, the observance of good faith in commercial transactions between business men.

In this case it seems from the evidence, and may be taken as undisputed, that during the latter part of 1866, and until the 6th of January, 1868, the firm of E. Frank & Bro. was engaged in business as retail dealers in boots and shoes at Springfield in this state, and that the defendant was the active, and so far as the evidence in this case goes, would seem to have been the principal member of the firm. About the 16th of October, 1867, the defendant appears, from the evidence, to have been in this city, and to have purchased on credit of from thirty to ninety days, from the several firms named in the indictment, quite considerable bills of merchandise, mainly in the direct line of his business, and with the statement that such goods were to be used for resale in his business at Springfield, stating to some that he expected to open another store at Alton, in

this state. While making these purchases he made representations as to his financial condition, showing that, if true, he was then fully worthy of the credit he asked. And the witnesses testify that these goods were obtained upon the faith they placed in these representations, and with the belief and expectation that the goods so sold him would be retailed in due course of business at the store of said firm; that on the faith of these representations then made he continued to obtain still further bills of goods up to the 18th of December, 1867, the last bill amounting to $468.91, being ordered on that day from Hardenburg & Page, of this city, and shipped to him pursuant to such order.

It also appears in proof that on the 5th of October, 1867, defendant commenced shipping the goods from his store in Springfield, by express, to St. Louis, directing them in cypher, such shipments amounting to over seventy packages. And that on the 6th of January, 1868, the defendant applied to the United States district court for the Southern district of this state, for the benefit of the bankrupt act, rendering a meagre schedule of assets, and a much larger schedule of liabilities than he had represented at the time he had obtained the goods on credit; that Emil Frank, one of the members of the firm, could not be found, and had probably absconded about the time of the application for the benefit of the bankrupt act.

These are the main features of the case on the part of the prosecution.

There seems no dispute that the goods were obtained on credit under the pretense that the defendant was carrying on business in the ordinary way, and that these goods were to be used in the ordinary course of business —that is, for retail purposes from the store of E. Frank & Bro. The main question now is, were these pretenses false, and did defendant at the time he obtained these goods, or any of them, on credit, intend to use them in some different manner from that of his ordinary and apparent course of trade.

Usually we can only ascertain a man's intentions from his acts. Criminal intentions are not as a rule divulged except as they are to be inferred from the conduct of the parties, and developed thereby. There is no positive evidence showing the time when the idea of obtaining these goods from the firms in Chicago, for the avowed purpose of selling them at retail in his store at Springfield and in violation of that faith, shipping them off to St. Louis and selling them at wholesale was conceived. But from the circumstances surrounding the whole transaction, you are to infer what his probable intent and purpose was at the time he obtained the goods. In examining these circumstances you will properly note the short time that elapsed between the obtaining of the goods and the shipment of a large part of defendant's stock in trade to St. Louis to be disposed of in an extraordinary manner. The fact that this process of shipment was going on at the time, part of the goods were ordered and obtained, is evident, one lot of goods having been ordered on the 17th or 18th of December, when he was daily shipping his goods away by express.

The fact that he made false and conflicting statements to his creditors, as to his financial condition when he obtained the goods (if you shall believe them false from the evidence,) is also an important circumstance tending to show fraudulent intent. You will remember that in making statements of his means, he stated to some firms that he was worth $18,000, over and above all debts, and to others that he was worth $20,000, and did not owe a cent, and to others that he was worth $15.000, over all his debts; and that these creditors were put off by false pretexts when they personally visited him to investigate his affairs. Any subterfuges or acts resorted to, to keep creditors quiet while this process of depleting his stock was going on, are circumstances which you can consider, and from which, if cogent enough in your minds, you may infer an intent to defraud, reaching back to the time when the goods were obtained.

But you must at the same time be careful not to presume criminal intent, or an intent to defraud, without evidence. The law presumes every one innocent until proven guilty, and it is your duty in examining the conduct of the defendant in these transactions to give him the benefit of every reasonable doubt, and to construe circumstances in his favor rather than against him, if susceptible of two constructions.

The law makes you the especial judges of the weight of evidence, and the question of intent is a question of fact to be settled by you under the proofs. But while you are bound to give the defendant the benefit of every reasonable doubt, it must be a reasonable doubt, a doubt engendered by the insufficiency of the evidence for the prosecution to establish in your minds a belief of guilt. In other words you must deem it unreasonable to believe him guilty under all the proofs in the case. If, then, the evidence satisfies you that the defendant obtained any portion of these goods on credit, under the false pretense of carrying on business, when in truth he was not at the time carrying on business in due course of trade. but was then secretly shipping and selling them at a sacrifice at less than cost, and that said purchase was so made with intent to defraud, you will find the defendant guilty. But if the evidence does not establish these facts of false pretense of carrying on business and intent to defraud, you will find the defendant not guilty.

And I take occasion to say that if the proof is deemed by you sufficient to establish the facts which I have told you must combine to make out the offense, I hope you will not hesitate to say so by your verdict.

The interests of the community require that offenses of this character shall, when duly proven be condignly punished, and no feeling of sympathy for the individual should prevent the due visitation of the penalties of the law upon those who are proven guilty. You owe it to every business man, to yourselves, and the community, to punish offences of this character, which if suffered to go unpunished, would destroy the confidence of all men in the efficacy and majesty of the law, and to see to it that when a case is fully made out, punishment shall follow the offense. Men should be taught that it is as dangerous to commit crime, under the guise of commercial transactions as with the false key of the burglar, or the slung-shot of the midnight marauder.

If you shall, therefore, find that the prosecution has made out their case, you will simply find the defendant guilty. It will be for the court to fix the term of imprisonment, and whether it shall be at hard labor or without it.

The defendant was found guilty [and sentenced to the late county jail for sixty days.] [2]

See U. S. v. Geary [Case No. 15,195a].

Case No. 15,160.

UNITED STATES v. The FRANKLIN.

[Reported sub nom. The Orono, Case No. 10,585.]

Case No. 15,161.

UNITED STATES v. FRAZER.

[10 Ben. 347.] [1]

District Court, S. D. New York. March, 1879.

CUSTOMS DUTIES — RELIQUIDATION — LIMITATION.

1. After the collector has liquidated the duty on imported goods, and the duty has been paid and the goods delivered to the importer, no part of the same nor any samples being retained by the collector, he has no power to make a reliquidation upon a subsequent report of an appraiser who never saw the goods.

[Cited in U. S. v. McDowell, 21 Fed. 564; U. S. v. Doherty, 27 Fed. 733.]

2. The year, within which, under Act 1874, c. 391, § 21 [18 Stat. 190], the collector can reliquidate the duty, runs from the time of the presentation to the collector of the "entry" by the importer, and not from the time of the first liquidation of the duty.

At law.

S. L. Woodford, U. S. Dist. Atty., and J. D. Jones, Asst. U. S. Dist. Atty.

Nash & Holt, for defendant.

CHOATE, District Judge. These were two actions to recover balances of duties alleged to be due upon goods imported by the defendant [James Frazer] by virtue of an alleged reliquidation of the duties by the collector. The collector having, upon the report of the appraiser, liquidated the duty, the goods were delivered to the defendant and the duty thus ascertained was paid, not even samples of the goods remaining in the possession of the collector. Afterwards another appraiser, who had never seen the goods nor samples of them, made another report, classifying the goods differently, whereby, if the new classification was correct, they would be subject to a higher rate of duty, and thereupon the collector made what is claimed to be a reliquidation of the duty, and on this reliquidation the suits are brought. In one of the cases this attempted reliquidation was more than one year after the entry of the goods, but less than a year after the first liquidation.

The plaintiffs now move for a new trial, on the ground of a misdirection in matter of law, verdicts having been ordered for the defendant.

Upon a careful review of the briefs of counsel and of the cases cited, I adhere to the opinion expressed upon the trial, that there is no power in the collector after the goods are delivered to the importer, and neither the goods nor any part of them, nor samples, are accessible for examination for the purpose of appraisement or classification, to reliquidate the duty upon the report of an appraiser who never examined the goods. I think the cases of Westray v. U. S., 18 Wall. [85 U. S.] 322; U. S. v. Cousinery [Case No. 14,878]; Iasigi v. The Collector, 1 Wall. [68 U. S.] 375; Watt v. U. S. [Case No. 17,292],—do not sustain the proposition of the learned district attorney that the collector has any such power. Acts 1874, c. 391, § 21 (18 Stat. 190), and 1875, c. 136, § 1 (18 Stat. 469), appear to recognize some authority on the part of the collector to correct mistakes in the liquidation of duties, but neither statute nor decision of any court is cited which extends that authority to a case like the present, and the exercise of such a power might introduce into the customs revenue system intolerable abuses, and would be in itself most unreasonable.

Whatever power of reliquidation the collector has, it seems to me that the year within which the exercise of this authority is limited begins to run, not from the first liquidation, but from the date of the presentation to the collector by the importer of the "entry." The words "one year from the time of entry," in Act 1874, c. 391, § 21, cannot, in my judgment, be construed, either from reference to other parts of the act or otherwise, as "one year from the time of liquidation." The language of the section shows clearly that the distinction between these two points of time was present to the minds of the legislators who framed this law, and the words used are too plain to call for construction by reference to extraneous considerations. Motions for new trial denied.

[2] [From 3 N. B. R. 175 (Quarto).]

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

UNITED STATES v. FREEL. See note to Case No. 15,624.

Case No. 15,162.

UNITED STATES v. FREEMAN.

[4 Mason, 505.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1827.

HOMICIDE—SEAMEN—DUTIES OF MASTERS—CHARACTER—WITNESSES.

1. If a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master who, notwithstanding, compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast and is drowned thereby, and his death was occasioned by such misconduct in the master, under such circumstances, it is murder in the master.

[Cited in U. S. v. Trice, 30 Fed. 492.]

2. If there be no malice in the master, the crime is reduced to manslaughter.

[Cited in brief in State v. Conley, 39 Me. 83.]

3. Of the rights and duties of masters as to the punishment of seamen.

[Cited in Fuller v. Colby, Case No. 5,149.]

[Cited in Buddington v. Smith, 13 Conn. 336.]

4. In what cases general character may be given in evidence.

5. Seamen are deemed in law credible as well as competent witnesses, and their testimony is to be weighed like other witnesses'.

Indictment against the defendant [William D. Freeman] for the murder of one David Whitehead, on the high seas, on board of the brig Floyd, of which the defendant was master, and Whitehead a seaman, and one of the crew, on the 28th of April, 1827. The indictment laid the charge in two counts. The first stated, that the prisoner made an assault upon Whitehead, and threw him overboard, and he was drowned. The second stated, that the prisoner, being master of the brigantine Floyd, and Whitehead an ordinary seaman on board the said vessel, but in a weak state of body, and unable to perform the duty of a seaman, and the prisoner, knowing that Whitehead was unable to perform his duty, wilfully ordered and compelled him, without his consent, and against his will, to go aloft upon the mainmast and rigging of the vessel, and that Whitehead, by said compulsion, attempting to go up aloft, by reason of his weakness of body fell overboard into the sea and was drowned, whereby said Freeman wilfully murdered said Whitehead.

Six witnesses were produced and examined on the part of the government, all of them sailors on board of the brig at the time of Whitehead's decease, and who, together with Whitehead, the prisoner, and the mate of the brig, made up the complement of the brig's crew. These witnesses, together with the mate, who was examined on behalf of the prisoner, concurred in testifying, that the prisoner had uniformly treated the deceased with great severity and brutality. The following was the testimony of the first witness examined on the part of the government, which was confirmed by the other witnesses, and does not differ materially from the evidence given by the mate, who was examined on the part of the prisoner:

Thomas Richardson, of Southborough, was on board the Floyd, shipped in Charleston, S. C., went on board 10th of April, bound to Antwerp. The crew consisted of all that had been sworn as witnesses, and one more, also a young man named David Whitehead, who shipped as cook; nine in all, officers included. William D. Freeman, prisoner, was commander. Shipped at $18 a month, with small stores; Whitehead at $16. He was a young man about 23; had not been to sea long; don't know whether he was able to perform the duty of cook, for he had not a chance to try. The crew went on board the 10th, and sailed the 15th. Whitehead served as cook till the 23d or 24th. He then exchanged with John B. Davison, who had shipped at Philadelphia at $10 a month; understood that Whitehead agreed to take the $10. Witness never heard the captain agree to, or object to the exchange. Before they went over the bar, W. was beat and cuffed, so that he became so stupified, that he had no chance to do any thing. The captain was continually calling on him, beating him, cuffing, and pulling him by the hair. He never went into the cabin without being beat. Never had a chance to do any thing without being called upon, interrupted, and ordered to do something else. On the 25th, he was sent up, with another hand, to let a reef out of the foretopsail, and by accident he left one point untied, which, in hoisting the sail, split the topsail. When the captain came on deck and saw the hole, he asked how it came, and being informed, took Whitehead and beat him with his fist and a piece of rattling stuff, and kicked him. Witness afterwards saw marks, where the skin was broken, on his head, and black spots on his arms, and other parts of his body. The captain then sent him to the galley, and the next day lashed him to the ring bolt, where he was kept 24 hours, and afterwards lashed him 24 hours to the rail. His hands were lashed behind him with spun yarn, and he was lashed round his middle with a rope to the ring bolt. When he was lashed to the rail, the captain took a stick from the tar bucket, and put it into his lips, then laughed at him, and asked him where he had been stealing molasses. The weather at this time was very cold and severe. The captain asked him if he wanted a dram. He said he should like one. The captain replied, "I will give you a dram that will fix you," and then put two doses of tartar emetic into a glass of New England rum, and gave it to him. It made him vomit very

[1] [Reported by William P. Mason, Esq.]

much. The captain swore fifty times, that he would never be satisfied until he saw his end. Before being tied, the captain sent him up to scrape the main topgallant mast. He did not scrape to the captain's satisfaction, and he went up after him with a piece of rope in his hand, and took hold of the rigging and tried to shake him off, while he was holding by the mast with one hand and scraping with the other. When lashed to the ring bolt he had nothing to eat; and when lashed to the rail nothing but half a biscuit and about a pint of water, or half a pint. The biscuit was broken up and laid upon a cask, and he was obliged to eat it like a beast. The weather was cold, and the captain obliged W. to pull off one pair of trowsers, and he was exposed to the cold and wet with only a pair of duck trowsers on; the sea continually breaking over him. In the afternoon of the 27th, after taking the tartar emetic, the captain took off the rope, and asked him if he was able to perform his duty as cook. He said he was. The captain said he lied; took him by the hair of his head and whipped him; then holding up the rope to the crew, said, "Antwerp and Boston will uphold me in this." After he had done beating him, he tied him to the rail with an inch and a half or two inch rope, in the middle of the deck, so that he should have nothing to lean against, set him to watch the sea gulls, and asked him what colour their heads were, and when he answered, said he lied. Witness examined the spun yarn, having made it himself, was two or three yarn spun yarn; was tied by the captain as tight as he could draw it, and the hands of the deceased were very much swollen, and as black as a hat. Witness examined his hands previous to his going up aloft; they were stiff and much swollen, so that he could hardly close his thumb and finger. He was so weak, that when the vessel rolled he could not stand properly on his feet. On the morning of the 28th, the captain ordered the mate to make a large scrubbing brush, too large for any man to use, and with that ordered W. to scrub the deck on the weather side. He appeared then unable to do duty. Immediately afterwards, at 8 or 12 o'clock, the hands were called to hand the mainsail; five went on to the yard. Witness at the helm. W. being then scrubbing, the captain asked the mate why he did not send that damned soldier aloft to hand the mainsail. The mate replied, that he was not able to go aloft. Witness also told the captain, that so sure as that man went aloft, he would never come on deck again alive. The captain said, "Damn him, send him aloft;" and took up a piece of rigging and struck him, saying, "Damn you, start along. I never shall be satisfied until I do see the end of you. Now, damn you, away with you aloft." The man crawled up the rigging very slowly, and reached the yard. He went upon the lee yard, and had just got to the end of the yard. A man next to him said, "David, come try and hand me in the beck if you can." He attempted to get hold of the beck of the sail, and he fell overboard, not being able to hold on any longer. He struck upon the rail, and fell overboard. Witness heard him after he was overboard, luffed the vessel, made some attempt to get the jolly boat down, but found it would be of no use; and besides the sea was heavy, and it would have been dangerous to put to sea in it. The vessel was then a little to the westward of the Grand Banks, and there was no vessel in sight. The crew said, "The poor fellow is gone." The captain said nothing. Witness told the captain, he hoped he would now be satisfied, he had said he would be the death of him, and by his means he was now dead. The captain made no reply. Whitehead, on board of the vessel, was as civil a man as witness ever was with. Had not much skill as a sailor. In answer to a question, how he knew that the captain put two doses of tartar emetic in the drink that he gave to the deceased, said, that he told the mate, and mate told the witness. When Whitehead came on board, he was very hearty, strong, and lively. On being cross-examined: Whitehead, with Fearson, one of the crew, attempted to escape from the vessel before she left the harbor of Charleston, but they were retaken and brought back. The captain did not, on the voyage from Charleston to Antwerp, and thence to St. Ubes and Boston, strike any other of the crew, but used very harsh language to them. Witness had a quarrel with the captain about some twine. He had been, with the other witnesses, confined in jail for the last three weeks, to secure their attendance at this trial. When Whitehead was tied to the ringbolt, he was lashed down, in a sitting posture, so that he could not get up; when to the rail, he was standing, and at a distance from the rail, so that he should have nothing to lean against. There was some complaint of the cook, by the crew, before they left Charleston harbor, that he did not cook well.

Several very respectable witnesses were examined in the defence, who testified to the general good character of the prisoner, for many years previous to this event. Several other witnesses also testified, that some of the sailors, who were witnesses on the part of the government, had expressed to them, or in their presence, great enmity towards the prisoner, and one of them testified, that Richardson, whose testimony is given above, gave the witness an account of the transaction, and said, that the captain was a damned rascal, and ought to be hung, and that he meant to do the best he could to get him hung; that the crew had all sided against the captain, and he offered to bet with the witness ten dollars against five, that he would be hung. The defendant pleaded not guilty.

The trial was conducted by Mr. Blake, U. S. Dist. Atty., for the United States, and by Messrs. Sewall and Bassett for the prisoner. The former cited Act Cong. 1825, c. 67, § 3; 8 Laws [published by authority, 4 Stat. 115]; 4 Bl. Comm. 194; 1 Hale, P. C. 431; 2 Strange, 856; Palmer, 545; Fost. Crown Law, 32, 322; 3 Chit. Cr. Law, 725; Hawk. P. C. bk. 1, c. 31, § 4; 2 Ld. Raym. 1578. The latter cited 1 East, P. C. 218, 225, 226, 262; 1 Russ. P. C. 755; 3 Chit. Cr. Law, 842, note; 1 Starkie, Ev. 506, 511; 2 Starkie, Ev. 959. It was admitted, that the brig Floyd was owned by American citizens resident in Boston, and was duly registered, and that the defendant, Freeman, was master on the voyage.

STORY, Circuit Justice, in the course of his summing up to the jury, stated his opinion as follows:

This is an indictment for murder on the high seas; and it is competent for the jury, upon a view of the whole matter, either to acquit the defendant of all guilt, or to convict him of the crime, as alleged in the indictment, or to find him guilty of manslaughter. There are some general considerations, upon which the arguments at the bar render it necessary for the court to bestow a passing comment. In the first place, the general good character of the defendant may be properly brought into the cause, and ought to have weight with the jury in all cases, where the facts are doubtful, or admit of different interpretations. But where the evidence is positive, and satisfactory to the jury, such good character certainly cannot overcome the just presumption of guilt arising therefrom; for such is the infirmity of human nature, that men, even of exemplary life and character, are sometimes suddenly betrayed into excesses, and hurried on, by their passions, to the commission of the grossest offences. Previous good character is therefore a circumstance entitled to the consideration of the jury, and ought to be thrown into the scale in favor of mercy; but if the facts, which establish the guilt of the party, are supported by proofs entirely credible and unexceptionable, there is no pretence to say, that a jury is bound to acquit the party merely because of such character In the next place, as to the position, which has been so strongly urged at the bar in defence of the accused, that common seamen are not entitled to belief, though their testimony is given under oath in a court of justice. There is no such rule of law in respect to this class of persons. Seamen, like other persons, if not interested or infamous, are competent witnesses in the trial of criminal as well as civil causes. The law has pronounced no general sentence of exclusion against them; and there is nothing, in their course of life, or general characters, which would warrant such a harsh and vindictive proceeding. They are competent witnesses, and their credit is to be left to the jury, to be judged of under all the circumstances of each case. Their testimony is open to every suggestion arising from their individual characters, their station in life, their manner of testifying, the nature of the facts related by them, their prejudices, and passions, and feelings, and indeed all the considerations which abate the force of evidence in every other case. They have a right to be heard in what they testify under oath, like other men; and the jury, who should wholly disregard their testimony, simply because they were seamen, and thus involve the whole class in one indiscriminate proscription of discredit, as contended for at the bar, would betray their proper duty, and supercede, instead of enforcing the law.

In the next place, as to the rights and duties of masters of ships, in relation to the crew, during the voyage. It is doubtless true, that the master has a right to require of them a prompt and ready performance of duty, and an habitual obedience to reasonable commands at all times. The safety of the ship and the success of the voyage essentially depend upon the due enforcement of this right. And in proportion as the urgency of the occasion, and the necessities of the sea service, require instant compliance with such commands, the duty of the seamen to obey becomes more pressing and obligatory. If obedience does not follow, the master may compel it by punishment, and the nature and extent of the punishment must be decided by the exigency of the case. The master may also apply punishment, by way of correction, for past as well as present offences, to preserve the good order and discipline of the ship. But, after all, however summary or strict may be his power, it is not unlimited, nor is it to be exercised in an arbitrary, cruel, or revengeful manner The authority of the master, on board the ship, is nearly allied to that of a parent, and is to be used with reasonable tenderness and humanity. No punishment can be inflicted unless for reasonable provocation or cause; and it must be moderate, and just, and proportionate to the nature and aggravation of the offence. The law does not permit the master to gratify a brutal and low revenge, or to inflict cruel and unnecessary punishments. It allows no excess, either in the mode, or the nature, or the object of the punishment. It upholds the exercise of the authority only when it is for salutary purposes, not when it arises from personal prejudice, caprice, or dislike, or from gross and vindictive passions. In every case, therefore, where punishment is applied, the master is responsible, both civilly and criminally, if he wantonly exceed the measure of justice.

In respect to the general principles of law, applicable to cases of homicide, there has

been no controversy at the bar; and I am spared the necessity of expounding them beyond what has been read from approved authorities. But the circumstances of this case call for an explicit instruction to you upon the points made in the defence. These are: (1) That the death of Whitehead (the seaman, whose death is feloniously charged in the indictment), was solely owing to accident and misadventure in the course of his duty, the fall from the yard not being occasioned by his debility, but by circumstances which might have occasioned it to a healthy seaman. (2) If his death was not owing to accident or misadventure, but simply to his debility, yet the circumstances of the case do not show, that such debility was so known to the master, that the order, that he should go aloft, was unjustifiable or wantonly wrong. (3) That if the order was not strictly justifiable, still the act was not the result of personal malice to the deceased in particular, nor of brutal and malignant passions or feelings, which establish general malice, and, therefore, in no event can the facts justify a conviction of murder. (4) That it is not a case even of manslaughter; for there was not such a want of caution, or such gross negligence in the master, as would, in the absence of malice, justify a verdict of manslaughter.

The first inquiry proper for the jury then is, whether Whitehead came to his death by mere accident or misadventure; or whether it was occasioned by his debility and exhaustion, arising from physical infirmity at the time of his fall from the yard. If occasioned by such debility and exhaustion, the next inquiry ought to be, whether that state of debility and exhaustion was fully known to Capt. Freeman, when he gave the orders for his, Whitehead's going aloft. If so, were the circumstances such as, that Capt. Freeman must, and ought to have foreseen, that the enforcement of his order to go aloft would probably be attended, either by death or enormous bodily injury by falling, to Whitehead, so that the jury can justly infer, that it must have been persisted in from personal malice to the deceased, or from such a brutal malignity of conduct, as carries with it the plain indications of a heart regardless of social duty, and fatally bent on mischief. If so, it was murder. And it would not vary the case, that the moral force of the authority of the master to compel performance, instead of physical force, produced compliance with the order on the part of Whitehead, although the latter was sensible of his own extreme debility.

If the jury are not satisfied, that there was either actual malice to the deceased, or constructive malice, arising from brutal malignity, as before mentioned; still, if the circumstances of the case show, that there was gross heedlessness, want of due caution, and unreasonable exercise of authority on the part of Capt. Freeman, and that he ought to have known, and could not but have known, that Whitehead was unfit to go aloft, and that there was probable and immediate danger to his life in his so doing, then, notwithstanding the absence of such malice, the offence is at least manslaughter. For every act done wilfully, and with gross negligence, by any person, the known effect of which, under the circumstances, must be to endanger life, is, if death ensues, at least manslaughter.

(The judge then proceeded to sum up, and comment at large, upon the facts, in the various aspects thus presented of the case, and concluded by leaving it to the jury, upon the whole evidence, under the foregoing instructions as to the law.)

Verdict, guilty of manslaughter, and sentence accordingly.

See, as to what constitutes murder, 1 East, P. C. 214, 225, 226, 231, 256, 257. As to what constitutes manslaughter, 1 East, P. C. 218, 219. 227, 231, 257. As to the effect of negligence in cases of homicide, when it makes the act felonious or not, 1 East, P. C. 227, 231, 257, 261. 265.

Case No. 15,163.

UNITED STATES v. FREEMAN.

[1 Woodb. & M. 45.] [1]

Circuit Court, D. Massachusetts. Oct. Term. 1845.

MARINE CORPS—DISBURSING OFFICER—RESPONSIBILITY FOR FUNDS—PAY AND ALLOWANCES.

1. If an advance of money is made to an officer of the marine corps, he becomes liable as a debtor for the amount, to be applied, and vouchers furnished as directed, or to return what is not thus accounted for; and he is not to be treated as a bailee of the money, and responsible for only ordinary care in respect to it.

2. If he deposits it in a bank, which afterwards fails, whether the bank was or was not a public depository, it does not exonerate him as a debtor without a special act of congress to that effect.

3. Where a captain in that corps acts as captain, and has charge of clothing, he is entitled to an allowance therefor: but while he acts as brevet lieutenant colonel, and is paid as such, he cannot, during the same period, receive either the pay or allowances attached to the duties of captain.

4. Such an officer, while in the command of a separate post, is entitled to double rations, if the post be one designated by the president as entitled to extra rations,—and a post so designated by the navy department, is presumed to be by direction of the president.

5. Additional brevet pay is not to be allowed to such an officer, at such a post, unless there be at it, at least, two organized companies of men with suitable officers, though the whole number of men present may average enough for two companies.

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

This was an action of assumpsit for a balance appearing due on the books of the treasury, from the defendant to the United States, for money advanced to him as an officer in the marine corps, to be used in the Florida war, whither he was detached in 1836. There was an agreement by the counsel for the parties as to the facts, which were, in substance, as follows: That [William H.] Freeman received a draft from the paymaster of the corps, on the Commonwealth Bank in Boston, for the purpose aforesaid, in May, 1836, for $2500. That he drew the money thereon, and had it deposited to his credit in the same bank, without any designation that it was public money, or belonged to him in his official capacity. That he drew out all of it except $222.67. That the bank failed in January, 1838, and when Freeman was called on to pay said balance, he offered a check on the bank for the amount. That the bank, at the time of his deposit, was one of the banks selected by the government for holding its funds; but not knowing that Freeman considered this deposit as public, it did not sue or recover from the bank any thing on this account, though it did for what appeared to be public deposits. The defendant relied on these facts to exonerate him from paying the balance. Another sum of $73.10 had been charged against Freeman, by the comptroller of the treasury, which the quartermaster of the marine corps had credited to him on his books, and which Freeman contended he did not owe. No evidence was offered showing the impropriety of said credit. On the other hand, the defendant claimed certain allowances, and pay, and rations, under the following facts: He was appointed captain in the marine corps July 17th, 1821, and was made a brevet lieutenant-colonel February 30th, 1832, to take rank from July 17th, 1831, and was appointed major in the line from June 30th, 1834. His first claim was for responsibility for arms and clothing as a captain, from July 17th, 1831, to June 30th, 1834, amounting to $354, at $10 per month. This claim had been duly presented to the treasury, and disallowed, on the ground that he received during that period pay in the grade of lieutenant-colonel, and not as a captain. His second claim was for $1669, for double rations, while in command of the Boston station, from June 30th, 1834, to April 1st, 1842. His third claim of $1013.93, was for brevet pay and emoluments, as lieutenant-colonel in command of said station, from June 30th, 1834, to April 1st, 1842. These last two claims had also been presented to the proper officer of the treasury, and disallowed.

Some of the facts in this case have before been agreed on, and the opinion of the supreme court rendered on them, as reported in [U. S. v. Freeman] 3 How. [44 U. S.] 556. But more facts are now added, and some new points raised. Colonel Freeman has since died, and it is agreed by the counsel for his representatives and the district attorney, that the various documents and regulations there referred to, constitute a part of this case with the others now annexed to it. All the other facts necessary to a full understanding of the case appear in the opinion of the court.

Mr. Rantoul, Dist. Atty., for the United States.

Mr. Aylwin, for defendant.

WOODBURY, Circuit Justice. The right of the government to recover the balance of the money advanced to the defendant, is the first question presented, and it seems well settled on principle. This was not a case of bailment of any specified article, to be kept, or to be used and then returned. In such cases, a borrower or bailee, unless a public carrier for hire, might not, as is argued for the defendant, be responsible for any loss, if he exercised ordinary care in keeping the property. Such care was probably exercised in this instance. Nor was the present transaction a mere fiduciary one, a trust of funds, to be kept, or invested, loaned out and returned, like that of guardians or administrators, as to the money of those they represent. In such cases only ordinary vigilance and prudence, in making loans or investments, are exacted. But in the present case, the advance was made in order to be expended, not invested, nor returned specifically. It was an advance, therefore, which created a debt or liability, to be extinguished by showing its proper expenditure, and repaying what was not thus expended. There was a promise implied in equity as well as law, to repay such amount as remained unexpended. Like the case of all other mere debtors, then, whether public or private, and whether liable on express or implied obligations, it constitutes no defence for the debtors if they have unsafely deposited their money, or lost it by the insolvency of those in whom they confided. The danger of collusion, and fraud, and neglect, in any other view, is great, and to be avoided; and is as great under implied as under express liabilities of this character.

In U. S. v. Prescott, 3 How. [44 U. S.] 578, the court go to the full extent of these principles in the case of an express contract or bond by a collecting officer, or receiver, and did not exonerate him from liability for public money under facts indicating even a robbery. Hence, if Colonel Freeman had been a regular disbursing agent, he would doubtless come within the analogy of that case, and be held responsible; and we see no difference in the principle between that and the present case, regarding both as they are, not bailments, but debts. Some reliance has been placed on the fact, that this balance was deposited by him in a bank selected by the government for its collecting and disbursing officers, and it is inferred, by the counsel for the defendant, that such officers so depositing are

not answerable for losses by the insolvency of a public depository. Whether this would be the decision in such case, is not clear, and need not be decided here; though if held liable in law, when thus depositing officially, congress would probably consider such losers as entitled to equitable relief. But here Colonel Freeman was not an officer whose general duties were either to collect or disburse, and had no orders where to make his deposits; he did not make them in this case in any public capacity, and by such a course disabled the government, when it sued the bank, from knowing that this was public money, and regaining it under the indemnities and securities it held against the bank. His case is not so much like a bailment as that of Prescott's. We therefore think the defendant is liable for the $222.67.

For the other sum of $73.10, we see no reason to charge him again, he having been once credited for the amount by the proper officer, and no cause being shown why the amount has been recharged.

Our next inquiry must be in relation to the claims, made by the defendant in set-off. We think, that the first one, for responsibility and care of the clothing, ought to have been allowed under the ruling of the supreme court in this case, in [U. S. v. Freeman] 3 How. [44 U. S.] 556, if he had acted and been paid only as captain during the time. But it is admitted, that during the same period for services in which he makes this claim as captain, viz., from July 17th, 1831, to June 30th, 1834, he has already demanded of the government to consider him as acting in his brevet station as lieutenant-colonel, and to pay him, for doing duty as such, a higher compensation, and that this higher compensation has already been allowed to him. It seems to us, then, that he cannot equitably receive two compensations attached to different stations or commands for services performed only at one place and time. If he claims an allowance as only a captain in command of a company, or as attached merely to such a command, he should not have claimed an allowance during the same period as lieutenant-colonel, commanding more than a company, and doing duties, not of a captain, but of a higher grade. But, as he has insisted on the latter, and received extra pay as a lieutenant-colonel, doing duty as such by commanding more than a company during the period in which he now asks to be allowed extra compensation for duty as a captain, we think the two claims are inconsistent. And as that for extra pay has been granted, the other, founded on a different hypothesis as to the grade, extent and nature of his command during that time, must now be disallowed.

The second claim, which is for double rations, must be allowed or not, according as, during the period from June, 1834, to April, 1842, he was or was not in command of a separate post, where the president has directed that such rations shall be allowed. The claim is under the act of congress of March 16th, 1802, c. 9 (2 Stat. 132), in relation to the army, and which applies to the marine corps, by subsequent enactments. And the pertinent words in relation to it in that act are, "to the commanding officer of each separate post, such additional number of rations as the president of the United States shall from time to time direct, having respect to the special circumstances of each post." Id. § 5. It will be seen, that by the language of the act, both a separate post and the direction of the president are necessary to confer the right to double rations. Such, also, has been the decision in Parker v. U. S., 1 Pet. [26 U. S.] 293, 297. Colonel Freeman had the command of a separate post, but it does not appear that any allowance for extra rations was directed by the president there till June 30th, 1841. The only evidence of the last, even after that time, is an order to such effect, issued at that date by the navy department. We acquiesce in the opinion of the supreme court ([U. S. v. Freeman] 3 How. [44 U. S.] 556, 563) that such an order from the proper department is to be presumed to have been issued by the direction of the president himself. U. S. v. Eliason, 16 Pet. [41 U. S.] 291, 302; Parker v. U. S., 1 Pet. [26 U. S.] 293. This order, though not a part of the case as originally submitted, is now by agreement to be considered as in it, and entitles the defendant to those rations from July 30th, 1841, to April 1st, 1842, valued, it is believed, at about $130.

His last claim is for pay as a lieutenant-colonel by brevet beyond that of a major, and is limited to the period from June 30th, 1834, to April 1st, 1842. During a part of this time he was at the same separate post near Boston, and had under him a number of men, ranging from forty and fifty to one hundred and sixty or more, and averaging near the latter number at the close of each month. But it is not shown that he had over one company organized as such, or more than one captain. The act of April 16th, 1818, c. 64 (3 Stat. 427), on which the claim depends, requires that brevet officers, in order to receive pay as such, must be then "on duty, and having a command according to their brevet rank, and at no other time."

What then constitutes a command according to their brevet rank? By the army regulations of 1825, which governed this question till 1836 ([U. S. v. Freeman] 3 How. [44 U. S.] 564) it was provided that a lieutenant-colonel by brevet must be considered to "exercise a command equal to his brevet rank," when he commanded a battalion. We entertain an opinion, that whatever meaning may at times be affixed to the word "battalion," it must, by the spirit of this regulation and the laws connected with it, be construed to mean here, at least two organized compa-

nies, with their requisite officers as well as men. Any other construction would lead to daily fluctuations and uncertainty, as the number of men might change from fewer or more than forty-two and twenty-eight, the number fixed at different periods for one company. The reason of the rule would cease in a great measure, without also such organization and subordinate officers; as without the latter, the mere increase of men would add nothing to the expenses of the lieutenant-colonel's station or command in intercourse and civilities with the officers of the corps. A battalion, then, should consist, however large the number of men, of nothing short of two organized companies and their officers; and as it does not appear that these existed there at that time, he is not entitled to the additional pay from 1834 to 1836, under the regulation of 1825. In 1836 a new order was issued by the war department, requiring a still larger command for a brevet lieutenant-colonel, in order to entitle him to extra pay, viz., "four companies instead of two, or to command as lieutenant-colonel to a regiment." A like construction must be given to the word "company" here, in order to come within the spirit and reason of the allowance. It should be an organized company, and have a suitable number of officers as well as men. Hence, as there is no evidence in the case of there having been four such companies under the command of the defendant at the Boston station, between 1836 and 1841, he cannot receive any extra pay as a brevet lieutenant-colonel for his services at that station during that period. But it is stated, that while detached from that station in Florida, after the spring of 1836, Lieutenant Colonel Freeman was in the actual command there as lieutenant-colonel of an organized regiment, or, at least, of four companies of men. The particulars on that point are not given, but may be added to the case, and for whatever period he may have exercised such a command in Florida, and has heretofore been allowed only the pay of a major, we think he is entitled to the additional compensation of a lieutenant-colonel. But it must be an actual command by himself, equal to his rank.

Upon these principles let the judgment on the case be made up.

First charge the defendant with only the	$222 67
Then deduct from this for double rations, to which he is entitled for parts of 1841 and 1842	130 00
This leaves to the United States..	$ 92 67

Allow him any sum found to be proper on the facts and principles stated, for services in Florida; and if it be less than the above amount, make up judgment for the balance against the defendant. If it be more, enter judgment generally for the defendant.

Case No. 15,164.

UNITED STATES v. FREMONT.

[Hoff. Land Cas. 20.] [1]

District Court, N. D. California. Dec. Term, 1853.[2]

MEXICAN LAND GRANTS—SEGREGATION—SETTLEMENT ON LANDS.

1. It is a sufficient severance from the public domain, when the grant itself designates by unmistakable natural boundaries the limits of the district within which it is to be located, and where the particular land granted is specified by name.

2. The time for making a settlement on the lands granted is limited to one year. The danger from savages before and after the grant, is no excuse for not complying with that condition.

The claim was for ten square leagues of land granted to Juan B. Alvarado, and confirmed by the board of land commissioners. The United States appealed.

S. W. Inge, U. S. Dist. Atty.

V. E. Howard, Jones & Strode, and Lockwood, Tyler & Wallace, for appellee.

HOFFMAN, District Judge. This case came up on appeal from the board of commissioners for ascertaining and settling the private land claims in California, by whom the claim of the petitioner was confirmed. The title of the claimant [John C. Fremont] is derived by a mesne conveyance, the execution of which is not disputed, from Juan B. Alvarado. The original petition of Alvarado upon which the grant issued, bears date February 22, 1844, and represents that being desirous of increasing his land and contributing to the spreading of agriculture and the industry of the country, he solicits the governor, according to the colonization laws, to grant him "ten leagues of land north of the river San Joaquin within the limits of the Sierra Nevada mountains, in the same direction as the river Chowchillas on the east, that of the Merced on the west, and the before mentioned San Joaquin, with the name of the Mariposas." He also represents that he is unable to present a plan or draft of said land, because it is on the confines of the wild Indians and a wilderness country. On the twenty-ninth of February, 1844, the grant issued subject to the approval of the departmental assembly and upon the usual conditions. The land granted is thus described: "The tract of land known by the name of Mariposas, to the extent of ten square leagues, within the limits of the Sierra Nevada, and the rivers known by the names of the Chowchillas, of the Merced, and the San Joaquin." The approval of the departmental assembly was not obtained, nor does the grant appear to have been submitted to that body. The genuineness of the grant is not disputed.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 17 How. (58 U. S.) 542.]

Among the conditions of the grant are the following: "(3) He shall solicit from the proper magistrate the juridical possession of the same, by virtue of this title, by whom the boundaries shall be marked: on the limits of which he (the grantee) shall place the proper landmarks." "(5) The tract of land granted is ten square leagues as before mentioned. The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper purposes." No juridical possession was ever given by the magistrate, nor was the land surveyed during the existence of the former government.

It is objected by the district attorney that the claim cannot be confirmed, because the land was not segregated from the public domain before the change of sovereignties. But upon the assumption that the cases decided under the act of 1824 [4 Stat. 52] apply to the case now under consideration, the inquiry presents itself whether, under the rules of decision laid down by the supreme court, this claim must be rejected for vagueness of boundaries. The land is described in the grant as "the tract known by the name of the Mariposas, to the extent of ten square leagues, within the limits of the Sierra Nevada and the rivers Chowchillas, Merced and San Joaquin." The district of the country embraced by these exterior boundaries is shown to contain nearly one hundred square leagues. If the grant contained no other means of designating on what part of this extensive district the particular ten leagues granted were to be taken, I should strongly incline to the opinion that, under the decisions of the supreme court, it would be void for uncertainty. But the tract granted is called in the grant, "Las Mariposas." If, then, within the general exterior limits a particular tract by the name of "Mariposas" can be found and identified, that tract must be taken to be the subject of the grant. From the testimony taken, it appears that within the general limits mentioned in the grant a smaller tract, situated on the Mariposas creek, is well known, and seems to have been understood to be the tract granted to Alvarado. This tract, joining the valley of the Mariposas, is that delineated on the map of Pico, which, though merely a private map, and made from memory, yet when accompanied by a survey by the surveyor general, made in conformity with it, and taken in connection with the testimony, shows that there is a tract of land known as Las Mariposas, situated within the general limits of the grant, and capable of identification. The valley seems to be easily distinguishable, being narrow and shut in by high and barren hills. This, Gen. Vallejo swears to be the tract generally known to have been granted to Alvarado. In O'Hara's Case, 15 Pet. [40 U. S.] 283, the court say: "The place where the survey is to be made, must first be made certain; if not as to fixed boundaries, at least so certainly by evidence of general or popular apprehension, as to show what was the grantor's notion of the limits of country within which he intended to grant." In this case, not only are the general limits of the country specifically shown by the exterior boundaries mentioned in the grant, but the particular part is designated. In the case of U. S. v. Clarke, 8 Pet. [33 U. S.] 467, the grant was for "five miles square of land on the west side of St. John's river, above Black creek, at a place called White Spring," and this the supreme court held valid as to the whole land within its limits, as well that which had not been surveyed, as the 8,000 acres which had. I do not perceive that the description in that grant was more specific than that under consideration. In Boisdoré's Case, 11 How. [52 U. S.] 86, the claim was rejected for a vagueness of description, but in that case the quantity of land was not designated, and the uncertainty of the boundaries left it liable to be enlarged or diminished at the discretion of the surveyors.

In the case at bar, the quantity of land granted is fixed. The limits of the district within which it is to be located, are designated by unmistakable natural boundaries, and the particular land granted is specified by name. It does not seem to me that in directing a survey to be made in the valley of the Mariposas, or in adopting that already made, the court would be exercising the granting power, but rather be determining the extent and locality of land already severed from the public domain by the grant itself.

The other objection urged by the district attorney to the confirmation of this claim is, that the conditions of the grant have not been complied with, and therefore the title of the claimant being inchoate or imperfect, not having been approved by the departmental assembly, no equitable obligation rests upon the United States to perfect it. In the Case of Cervantes [Case No. 14,768] it was considered by this court, that the only solid equity which the claimant under an unconfirmed grant could urge upon the government was the fulfillment of the conditions, or the performance of those acts which, under the Mexican system, were the only motives and considerations for the grant—and that whereas in that case the conditions had been wholly unperformed, and the grant apparently abandoned for a great number of years, without an effort or an excuse, the claimant could not appeal to the justice of the government to confirm his claim, however much his application might commend itself to its generosity. In the Case of Reading [Id. 16,127] the efforts of the plaintiff to perform, and his excuses for his failure to perform completely, were deemed sufficient to entitle him to a confirmation within the rule laid down in Sibbald's Case [10 Pet. (35 U. S.) 313], to which it seemed most analogous. The facts in the case at bar are as follows: The grant was issued to Alvarado on the twenty-ninth

of February, 1844, on condition, among other things, that "he should build a house within a year, and that it should be inhabited." Immediately on receiving his grant, Alvarado (as appears from his own testimony) applied to the governor for a military force to enable him to take possession, reminding him of the fact already known to him, that the country was infested with hostile Indians, and could not be occupied except with the aid of a military force. The governor, as Alvarado testifies, offered to erase the conditions from the grant, but this the petitioner declined, alleging his desire and intention to occupy and cultivate his land. The governor then agreed to furnish the necessary force, and a military post was soon after established on the San Joaquin, near the granted land. Owing to the depredations of the Indians, this post was after a short time abandoned. Shortly after there was a political revolution, and Gen. Micheltorena's affairs becoming embarrassed, no more troops were sent. This occurred during the year 1844. Alvarado further testifies, that in August, 1845, while commander at Monterey, he collected the cavalry and took them to his rancho, near Monterey, and was organizing them for the purpose of taking possession, by their aid, of the Mariposas. While thus engaged, he received orders from Gen. Castro to return to Monterey, there being rumors of war. From that time Alvarado made no other attempts to take possession—his military duties occupying all his attention during the war which immediately ensued. In the beginning of 1846 the war between the United States and Mexico broke out, and on the seventh of July of that year, the American flag was hoisted and the Mexican authorities deposed. On the fourteenth of February, 1847, Alvarado conveyed to Fremont, the present claimant. On receiving his conveyance, Fremont seems to have taken some measures to settle and cultivate his land, but being ordered home under arrest, he employed an agent to go upon the land, and cultivate and inhabit it. That agent was, by Fremont's direction, supplied with money, agricultural implements, provisions, etc.; but on going to the land in the spring of 1847, found the Indians so hostile that he was obliged to abandon the enterprise. The same agent twice visited the land during the following summer, but found the Indians so hostile that he was unable to make any settlement. The land was not finally settled until after Fremont's return from the United States in 1849. But since that time, the claimant has erected upon it numerous valuable improvements—consisting of dwelling houses, farm houses, machine shops, etc., and is now in possession of the tract. The whole testimony leaves no room to doubt but that the settlement was effected at as early a time as the hostility of the Indians, and the circumstances of the country rendered it practicable to do so without a large military force.

It is urged by the district attorney that hostility of the Indians affords no excuse for nonfulfillment of the condition, and in support of this position, the case of De Villemont v. U. S., 13 How. [54 U. S.] 266, is relied on. The Case of De Villemont bears the strongest analogy to the one under consideration. The concession was granted in consideration of the petitioner's intention and promise to establish a stock farm and plantation. It was made under the express condition that he should make the regular road and clearing, within the peremptory term of one year, the concession to be null if at the precise expiration of three years the farm should not be established. From the date of the grant, until the delivery of Louisiana to the United States, he had completely failed to comply with the conditions. In excuse, he showed that during all that time he was the civil and military commandant of the fort of Arkansas; that his presence there was constantly required by the threatening aspect of the Indian tribes by whom he was surrounded; and his correspondence with the governor showed that even a temporary absence from his post would not have been tolerated. He further showed that the hostility of the Indians prevented a settlement by his agents. It was also established by proof, that the common usage of the Spanish authorities was to insert the conditions, as to making a settlement and a road within a given time, mechanically, and as mere matter of form; that no land was ever forfeited under the Spanish government for noncompliance with these conditions; and the testimony on this point was confirmed by that of a judge of the supreme court of Louisiana, of great experience and reputation. It further appeared, that the claimant had, as in this case, attempted to make a settlement by an agent, but the hostility of the Indians prevented it. It is apparent that in almost every particular that case resembles the one now under consideration.

The court, in commenting on the duty of performing the conditions, say: "It was undoubtedly necessary that an establishment should have been made within three years—such being the requirements of the grant in concurrence with the regulations." The evidence of usage in that case was at least as strong as that relied on in this; and the attempt to settle seems to have been made in that case as in this, and to have been abortive for the same reason. The court was also in that case required to be governed in its decisions by the laws, usages, and customs of the government under which the claim originated. But the claim was rejected, notwithstanding the excuses offered, and the evidence of the uniform usage of the Spanish authorities. Boisdoré's Case is, if possible, stronger; for in that case there was a partial performance of the conditions; but the court held that inasmuch as the claimant had stipulated to remove his family to the land, and take there all his force of negroes, the occu-

pation by a single mulatto, by whom some cattle were kept, and a few acres cleared, was wholly insufficient. With respect to the excuse that the state of the country and Indian hostilities prevented the settlement, the supreme court held as early as Kingsley's Case, 12 Pet. [37 U. S.] 483, that the excuse could not be received, if the same obstacles existed at the time of the concession; and the decision in De Villemont's Case but reaffirmed that doctrine. The Case of Sibbald, 10 Pet. [35 U. S.] 313, is relied on by the counsel for the claimant, as furnishing an instance analogous to that in this case, of a good performance cy prés. But the difference between the cases is obvious. The grant in that case was on condition that a mill should be established; and it declared, that until the petitioner should establish his mill, this grant should be of no effect. It was dated in 1816, but no specific time was limited by the decree within which the mill was to be erected and put in operation. It appeared that a mill was built in 1819, and carried away by a freshet, but that $5,000 had been expended in the construction; that in 1827, another mill was built and in operation, which was destroyed by fire in 1828; that in October of 1828, another was built, which went into operation in June, 1829, and had ever since so continued. The court held that the petitioner had begun the erection of the first mill in time to save a forfeiture, and that the other acts amounted to a compliance with the condition, according to the rules of equity.

But in the case at bar, the time for making the settlement is limited to one year. So far as appears, Alvarado never saw the tract he assumed to convey to Fremont; nor was any settlement effected by the latter until a year after the ratification of the treaty. It cannot be urged in this as in other cases, that the grant was not made complete by the assent of the assembly, owing to accident, or the neglect of the governor, for Alvarado himself says it could not be submitted to them without the diseño or plan, which on account of the hostilities of the Indians he was unable to furnish; and yet the danger from that source existed at the time of his application, for he assigns it to the governor as a reason why the diseño did not accompany the petition. It is urged that the political disturbances of the country contributed to prevent the settlement. But I think it clear from the evidence, that the principal, if not the only reason why it was not effected by Alvarado or Fremont, until after the treaty, was the danger from the savages; and that this danger existed to substantially the same degree before and after the grant.

Upon the whole, after a most careful consideration of this case, and with every desire to give the claimant the full benefit of every favorable consideration to which he is entitled, I have been unable to resist the conclusion that the Cases of Glen, of De Villemont and of Boisdoré, lay down for me rules of decision applicable to this case, and from which I am not at liberty to depart.

[NOTE. The case was taken on appeal to the supreme court, where the decree of the district court rejecting the claim was reversed. 17 How. (58 U. S.) 542. A mandate was issued to the district court, where it was filed, and the decree entered. Case unreported. A second appeal was taken to the supreme court, which was dismissed. 18 How. (59 U. S.) 30.]

Case No. 15,165.

UNITED STATES v. FRENCH.

[1 Gall. 1.] [1]

Circuit Court, D. New Hampshire. May Term, 1812.

HABEAS CORPUS—STATE CUSTODY—BAIL.

The circuit court has no authority to issue a habeas corpus for the purpose of surrendering a principal in discharge of his bail, where the principal is confined in gaol merely under the process of a state court. Ex parte Cabrera [Case No. 2,278]; 1 Kent, Comm. 412. Nor will the court discharge the bail of such party, who have become bound by recognizance in the circuit court to answer, &c. merely on account of such impediment; but in their discretion the court will respite the recognizance.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Re McDonald, Id. 8,751; U. S. v. Van Fossen, Id. 16,607; Taylor v. Taintor, 16 Wall. (83 U. S.) 371; Re Fox, 51 Fed. 432.]

Information against the defendant [Jonathan French] for a misdemeanor, in loading merchandize in a sleigh, with intent to export the same to Canada, contrary to Act Jan. 9, 1809, c. 72 § 1; 9 Laws [Weightman's Ed.] 185 [2 Stat. 506]. At a former term the defendant had been arrested, and had recognised in court with sureties for his appearance to answer to the information.

Edward Cutts, Jr., and J. Mason, for the bail, moved for a habeas corpus to the sheriff and gaoler of Grafton county, to bring up the body of the defendant to surrender him in court in discharge of the bail, on an affidavit that the defendant was confined in the gaol in said county on mesne civil process, under the authority of the state of New Hampshire.

U. S. Dist. Atty. Humphreys, opposed the motion.

BY THE COURT. We have no authority in this case to issue a habeas corpus. The authority given by Judicial Act 1789, c. 20, § 14 [1 Stat. 81], is confined to cases, where the party is in custody under color of process under the authority of the United States, or is committed for trial before some court of the United States, or is necessary to be brought into court to testify. It does not extend to cases where the process is from a state court, and the object is to surrender the party in discharge of bail.

The counsel for the bail then moved to

[1] [Reported by John Gallison, Esq.]

discharge the bail from their recognizance, on the ground that as it had become impossible to bring the defendant into court, without any default on his or their part, they ought not to be sufferers; and in support of the motion they cited 6 Term R. 50; Id. 247; 1 Tidd, Prac. (Ed. 1790) 149; 2 Sell. Prac. 126; 1 Sell. Prac. 183; 10 Mod. 279; 2 Hawk. P. C. c. 15, "Bail," p. 179.

BY THE COURT. There is no sufficient ground for the application. There is no physical or legal impossibility of producing the defendant. The cases cited may be good law; but they proceed on the principle, that by operation of law the defendant had been discharged of the process, or had been placed beyond the reach of the bail. Nor can it be said that the defendant has been guilty in the present case of no default. His very confinement may have been the result of his own negligence or wrong. The circumstances of the case may furnish reasons for a respite of the recognizance to the next term, and a continuance of the information. How can the court foresee, that at another term the defendant will be in civil confinement? If the bail were now discharged, and the defendant should ultimately be released from his imprisonment, we have no means to prevent his escape from punishment under the act of congress Motion overruled.

Case No. 15,166.

UNITED STATES v. FRERICHS.

[16 Blatchf. 547;[1] 8 Reporter, 391; 25 Int. Rev. Rec. 319.]

Circuit Court, S. D. New York. July 21, 1879.[2]

INTERNAL REVENUE—DISTILLER—POSSESSION OF STILL—CERTIFICATE OF REASONABLE CAUSE.

1. Under section 3247 of the Revised Statutes, which enacts that every person who, "making or keeping mash, wort or wash, has, also, in his possession or use a still, shall be regarded as a distiller," to make one in possession of a still a distiller, because he keeps mash, wort or wash, the mash, wort or wash kept must be such as will produce spirits, on distillation.

2. Whether an order of the district court refusing a certificate of reasonable cause of seizure, under section 970 of the Revised Statutes, can be reversed by the circuit court, on a writ of error, quere.

[Appeal from the district court of the United States for the Southern district of New York.]

[The government brought a suit to condemn premises for violation of the internal revenue law. The court below, at the close of the evidence for the government, directed a verdict in favor of the claimant [Frederick Frerichs], and refused to give a certificate of probable cause. [Case unreported.] The government appealed.] [3]

Edward B. Hill, Asst. U. S. Dist. Atty.

Edward Salomon, for defendant in error.

WAITE, Circuit Justice. The issue made below was, as to whether the claimant was a distiller of spirits, within the meaning of section 3247 of the Revised Statutes; and the first error assigned here is upon the order of the court directing a verdict for the claimant, at the close of the evidence on the part of the government. That section of the statutes is as follows: "Every person who produces distilled spirits, or who brews or makes mash, wort or wash fit for distillation or for the production of spirits, or who, by any process of evaporization, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort or wash, has, also, in his possession or use a still, shall be regarded as a distiller."

It cannot be seriously contended, that the evidence was sufficient to warrant a jury in finding that the claimant actually produced distilled spirits, or that he brewed or made mash, wort or wash fit for distillation or the production of spirits, or that he actually separated alcoholic spirit from any fermented substances. All that can be insisted upon by the government is, that there was evidence tending to prove that he had in his possession or use a still, and that he kept mash, wort or wash, within the meaning of this statute. The still he had in his possession was put up for the manufacture of acetic acid, and was duly registered as such. About this there is no dispute. To make one in possession of a still a distiller, because he keeps mash, wort or wash, the mash, wort or wash kept must be such as will produce spirits, on distillation. The evidence in this case was clear, to the effect that the substance complained of would not produce distilled spirits. It was intended for the manufacture of vinegar, and, when distilled, did not, and could not, yield spirits. It had already gone through such a process of fermentation in another place, where there was no still, as to render it impossible to convert it, or any part of it, into spirits, by distillation or any process of evaporation. This was the uncontradicted testimony of the only witness examined on that subject. The process through which it was to be put by the claimant was only for the purpose of cleansing it of impurities, and thus fitting it for use in the manufacture of vinegar. It was, in fact, a weak acetic acid, mixed with foreign substances, which must be removed before it could be converted into marketable vinegar. One who produces a substance which can be converted into vinegar by the use of a smaller quantity of spirits than is ordinarily employed, is not, necessarily, a distiller of spirits. To become such in law, he must actually produce spirits, or keep with the still he uses that which will produce them. Such was not the case here. Had the jury found, from the evidence, a verdict against the claimant, it would clearly have been the duty of the

[1] [Reported by Hon Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 106 U. S. 160, 1 Sup. Ct. 169.]

[3] [From 8 Reporter, 391.]

court, on motion, to set the verdict aside and grant a new trial. Under such circumstances it was not error for this court to direct a verdict in favor of the claimant.

If an order of the district court refusing a certificate of reasonable cause of seizure, under the provisions of section 970 of the Revised Statutes, can be reversed by the circuit court, upon a writ of error, it ought not to be done except in a clear case. The evidence which has been embodied in this bill of exceptions is not such as to satisfy me that any error was committed in this particular. The judgment of the district court is affirmed.

[NOTE. A writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 106 U. S. 160, 1 Sup. Ct. 169. Frerichs subsequently recovered a judgment for damages against Charles R. Coster, internal revenue collector, in the circuit court. Case unreported. See 124 U. S. 315, 8 Sup. Ct. 514.]

Case No. 15,167.

UNITED STATES v. FRICTION-MATCH MACHINERY.

[1 Hask. 32.] [1]

District Court, D. Maine. Dec., 1866.

INTERNAL REVENUE—FORFEITURE—PERSONAL PROPERTY.

1. A water-wheel, used for propelling machinery in the manufacture of friction-matches, is not personal property and liable to forfeiture under section 48 of the act of 1864 [13 Stat. 240], as amended by chapter 184 of the act of 1866 [14 Stat. 98].

2. Machines, used in a mill for such purpose, are implements and instruments within the meaning of the act, and are liable to forfeiture.

Information by the United States, claiming a forfeiture of tools and machinery used in the manufacture of friction matches, in violation of the internal revenue laws. The claimant alleged, that the articles seized were fixtures and not liable to seizure under the acts of congress as personal property.

George F. Talbot, U. S. Dist. Atty.
Irving W. Parker, for claimant.

FOX, District Judge. This is a proceeding in rem under the act of 1866, c. 184, against certain machinery, seized by the collector of internal revenue of the First district as forfeited under the provisions of the acts relating to internal revenue, being found on the premises of Mason & Smith in Buxton, with a large quantity of friction-matches, there manufactured and to be sold in violation of law. On the return day of the process, one Benj. M. Mason appeared and filed his claim for a portion of the articles seized, viz., one water-wheel, one lathe, lathe-bench and turning tools, one card-planer, one grindstone and bench, one lathe-machine, one machine for making match-splints, one face-planer for planing ends of match-blocks, and one plain crosscut-saw, alleging that he was a bona fide purchaser from Mason & Smith, of the mill and lot on which the above enumerated machinery was at the time of the conveyance, and that all such machinery passed as a part of the realty to him by the conveyance, which was valid Oct. 22, 1866, the seizure having been made on the 7th of Nov., 1866. It is admitted, that Mason & Smith procured this machinery and placed it in the mill for the manufacture of friction-match-blocks, the principal part of it being expressly adapted to that business, and that, previous to the conveyance to the claimant, the machinery had been used by Mason & Smith in manufacturing matches to be sold in violation of law, a large quantity of which was found in the mill with the machinery at time of seizure. This machinery was all driven by the water-wheel, being connected by bands and gearing, and can be removed without damage being done to the building.

The government claims, that this property was subject to seizure and forfeiture under the 48th section of act of 1864 [13 Stat. 240], as amended by act of 1866, c. 184 [14 Stat. 98]. The language is "and also all tools, implements, instruments, and personal property whatsoever, in the place or building, &c., may also be seized by any collector or deputy-collector as aforesaid, and the same shall be forfeited."

Were these articles "tools, implements, instruments," within the meaning of the act? I think most of them were. They were adapted to the business then carried on, and although ordinarily described as machines, yet they were "implements," "instruments," for the manufacture of friction-matches, and as such, were within the mischief to be reached by the law. I am aware, that the supreme court of Maine has decided, that articles, commonly designated as machinery, can not be deemed "tools" under the law of the state, exempting a debtor's "tools of trade" from attachment; and if "tools" had been alone used in the statute, I might have adopted that construction; but we are not restricted to that word; the statute forfeits all "implements and instruments;" lathes, grindstones, cut-saws, although driven by water or horse-power, are still implements and instruments, used in the production of these articles, in violation of law. And I think it is not a strained or forced construction of the statute, to hold them subject to its provisions, the same as smaller tools or articles worked wholly by hand. Under the law of distraint, "implements of trade" are exempt when in use; and I find looms, thrashing-machines and other things of like description have been exempted, and decided to be implements. I prefer to adopt this construction, and as this word is found in the act in question, to hold that all these articles of machinery, specially designed for the match business, are subject to seizure and condemnation.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

It is contended that these articles had become parts of the realty, and so were not personal property, but passed under the conveyance of the mill to the claimant as fixtures.

In themselves they were still of a personal character, liable to be removed from the mill, and to pass, when so removed, by a common bill of sale, as any other article of personal property.

If Mason & Smith had given to another party a bill of sale of these articles, and afterward had conveyed the mill excepting these articles in the conveyance, can there be a doubt, that the purchaser would be entitled to them under his bill of sale? I think not. They were therefore still personal property for certain purposes, and I think for seizure and condemnation under the statute should be so considered, if the same in other respects would be liable.

A grindstone is ordinarily driven by hand, and would be liable to seizure and condemnation. Can it vary the case because it connects by a cord with the shaft and derives its power from the main wheel? A lathe is very commonly driven by a treadle, and if so would be liable to seizure. Shall it be exonerated because it is connected by belting and gearing with the main shaft of the mill?

I am well aware of the decision of the supreme court of this state in Parsons v. Copeland, 38 Me. 537, holding machinery in a woolen mill to be fixtures, although not permanently affixed, and that this decision is not found in Symonds v. Harris, 51 Me. 14; but these are local decisions which cannot control me in the construction of an act of congress, which should receive the same construction in every state of the Union. The supreme court of Maine probably would hold, that the machinery in controversy in this case would pass with the mill as a portion of the realty, if in the mill at the time of the conveyance, but it does not necessarily follow under the act of congress, that it would not be liable to seizure and forfeiture.

I think that the principle to be deduced from Hellawell v. Eastwood, 3 Eng. Law & Eq. 563, should govern this case. It was there decided as late as 1850, by the court of exchequer, that spinning-machines, which were fixed by screws, some into the wooden floor, and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving screws, had thereby become fixtures, so that they were not distrainable. I do not think the gearing made the machinery in the present case fixtures, not liable to seizure.

The water-wheel however, I do not consider as within this class of machinery. Judge Story more than forty years ago, held that the water-wheel of a factory and its gearing was a part of the realty, and I believe no one has ever questioned it since. Most of the other articles, I understand to have been machinery specially designed for the manufacture of matches, and in my view were within the provisions of the statute. Any other construction would tend to defeat the purposes of the act, whereas, by this construction, every inducement is held forth to manufacturers to comply with its provisions, and thereby avoid its penalty. Decree accordingly.

Case No. 15,168.

UNITED STATES v. FRIDENBERG.

District Court, N. D. Florida. 1869.

INTERNAL REVENUE—FERMENTED LIQUORS—DEALERS—STORAGE—PENALTY—ACT JULY 20, 1868.

Held, that the word "receive" as used in the forty-sixth section of Act July 20, 1868 [15 Stat. 144], means "receive for sale," and that where a retail liquor dealer receives more than 20 gallons of spirits from any person other than one authorized by the act to sell such spirits, for storage only, and not for sale, he does not incur the penalty.

[Decided by FRASER, District Judge. Cited in 11 Int. Rev. Rec. 5, to the point as stated above; opinion not now accessible.]

Case No. 15,169.

UNITED STATES v. FRIDENBERG.

[See Case No. 15,168.]

Case No. 15,170.

UNITED STATES v. FRIES.

[See Case No. 5,126.]

Case No. 15,171.

UNITED STATES v. FRINK.

[1 Brunner, Col. Cas. 90;[1] 4 Day, 471.]

Circuit Court, D. Connecticut. 1810.

CONTINUANCE—ABSENCE OF WITNESS—AFFIDAVIT.

Where a witness in a public prosecution having been summoned, and his fees tendered to him, refused to attend, the prosecutor moved to put off the trial in order to afford time for capias; the court ruled that the trial must proceed, unless the prosecutor would make affidavit that he could not, in his opinion, safely try the cause without the attendance of the witness.

This was an indictment [against Daniel Frink] similar to the one stated in the preceding case. [U. S. v. Phelps, Case No. 16,041.] Peleg Palmer, of Stonington, a witness in support of the indictment was summoned last September, and his fees tendered. He now refused to attend.

The district attorney moved for a delay of the cause in order to afford time for a capias.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

LIVINGSTON, Circuit Justice, said the trial must go on, and the party might apply for an attachment, or bring an action for damages. Such was the rule in England and in New York.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

The district attorney stated that it was usual in Connecticut to delay a cause to afford time to bring in a witness.

EDWARDS, District Judge, coming in at this time, it was ruled by the court, after a short consultation, that the trial must proceed, unless the district attorney would make affidavit that he could not, in his opinion, safely try the cause, without the attendance of Palmer. More witnesses are usually summoned than are necessary, and it would be unreasonable to put off a trial on account of the absence of a witness who was not essential, or who could state nothing further than other witnesses in court. Motion denied.

Case No. 15,172.

UNITED STATES v. FROST.

[9 Int. Rev. Rec. 41; 16 Pittsb. Leg. J. 196; 1 Chi. Leg. News, 129.]

District Court, N. D. Illinois. Jan. Term, 1869.

INTERNAL REVENUE—INCOME TAX—FALSE RETURNS—EVIDENCES OF DEBT.

1. Promissory notes, book accounts, etc., due during the year, are the evidences of debts.

2. Whether or not they are gains, profits or income for that year within the meaning of the internal revenue law, depends upon their value intrinsically or their convertibility into money, property or available assets. If they have only a nominal, and not a real value or convertible quality, and a man has realized nothing from them, and, therefore, does not return them as a part of his income, because he fairly and honestly believes they are not real gains or profits, he cannot be convicted of an untrue return.

The defendant [William E. Frost] was indicted for making a false return of his income for the year 1866, under the following state of facts: The defendant was a partner of William E. Hall (who was also indicted) and had returned as income for that year $10,075. The books of the firm showed that there had been entered as the profits of the business for that year $31,295.70, and to the credit of the defendant one-half of that sum, $15,647.85. There was a reduced assessment made against the defendant by the assessor of $3,730.33 (the original assessment being $5,568.84) on which the defendant had paid the tax—the assessor claiming the tax should be paid on all debts and accounts that were not actually carried to profit and loss. It appeared on the trial that the profits entered in the books were made up by adding to the assets of the preceding year all debts and accounts whether good or bad, as well as the receipts of the year 1866, and thus the profits were not all real, but some of them only nominal. When the defendant made up his income returns he included all debts which he considered absolutely good, and threw out those that he regarded as bad, doubtful or comparatively worthless, and thus accounted for the difference between the amount of profits on his books and his returns. It was clearly established that this was done because the defendant did not treat or consider such bad or doubtful debts as real gains or profits.

THE COURT, thereupon, instructed the jury upon the law of the case to the following effect: It might be true in many cases where a man made a charge on his books for debts due as the result of the year's business, they would constitute assets, and come within the definition of gains or profits. For example, instead of money, he might receive promissory notes, bills of exchange, bonds or mortgages, or different kinds of securities, and these, if good, might properly become a part of his income. Even treasury notes and national bank notes were not actually money, but only the representatives of money, though treated as such by the commercial world, and with them the government is carried on and alone supported, except by what gold is received through the customs. Many kinds of securities—as bonds of the United States, for instance—are considered as money or available assets, because convertible at once into money, and therefore when any of these are received as the result of a year's business, they are legitimately a part of a year's income. The rule would be the same, of course, if instead of them, it were property real or personal. In all these cases there are real gains or profits. But when a man, at the end of the year found upon his books amounts charged without having actually received any portion of the same or had bills receivable unavailable, it seemed to be a misnomer to call them gains or profits, which were not, and never might be realized. It was hard, certainly, a man should be convicted for a difference of opinion between himself and the government officer, as to whether he should, in his income returns, give in bad or doubtful debts. The rule of the bureau was understood to be that debts due in the year were to be included as income unless known to be absolutely worthless. It was often a difficult question to decide when that was so, particularly in this western country, and it gave too great a discretion to the party making the return. If a man has invested all his capital in starting a business, and his books at the end of the year showed large nominal profits in accounts and bills receivable, he might not in fact have the money to pay the government tax on those profits. Take another illustration: A man might have a promissory note of a thousand dollars, which was called good when he made his return, and thus pay a tax on it as so much income, and, in fact, it might be all the time worthless, and he would be obliged to pay for what he thought was good, but was not really so. It is said, indeed, that the practice is to allow deductions to be made from the succeeding income returns, but suppose a man never after has a taxa-

ble income, then he never is reimbursed. There had always seemed to be something wrong in the practical operation of this part of the statute; for while it would be proper to include as a part of a man's income what is treated as, or convertible into money, there seemed an injustice in making him pay a tax on book accounts or notes uncollected, and when it was uncertain whether or not they ever could be collected. But, of course, if a man should have good accounts on his books, which, if instead of collecting, he permitted to remain, or if they were real gains or profits, he could not evade the payment of what is justly due the government. The principle would be the same applied to any other kind of evidence of debt, as promissory notes, bills of exchange, etc. No one was permitted to evade the law when he did not realize merely because he would not. But the true rule would seem to be to impose and collect the tax on real gains, profits or income, and not on what was merely nominal. The law could certainly not require the payment of something for nothing.

These were some of the general views of the court on the law of this case, but whether they were all correct or not, for it was confessedly a difficult subject to treat with entire accuracy, THE COURT was of the opinion that the facts would not justify a conviction, and the district attorney acquiescing, the defendant was acquitted by the jury.

THE COURT, in commenting upon the revenue laws, in this case, said: The language of the law is that there shall be levied and collected a tax of five per cent. on the amount derived—over one thousand dollars—from the annual gains, profits and income of every person. The law declares what shall be included in estimating the gains, profit and income of a person; as income derived from interest on notes and other securities of the United States; profits realized from sale of lands, etc.; interest received or accrued on notes, bonds, etc., bearing interest, whether paid or not, if good and collectible. This seems to be the only place where the law speaks distinctively of interest accruing, but not paid. The law then mentions the amount of premium on gold and coupons, and of sales of the farm, except, etc.; and then adds: "All other gains and profits derived from any source whatever, and the share of any person in the gains and profits of all companies, whether divided or otherwise," with certain exceptions. The law, then, in giving the exemption of a thousand dollars, declares that there shall also be deducted the taxes paid within the year; certain losses actually sustained; the amount actually paid for rent of the house; the amount actually paid for repairs, etc. Now in all these deductions allowed the statute seems careful to exclude the amount due for taxes for labor, for rent or for repairs, but requires that they shall be paid. Among the various deductions allowed are "debts ascertained to be worthless." This is the only place where this word debts is used, and it may thence be claimed that debts not ascertained to be worthless are to be included as income, but it is clear, I think, that the debts must be gains or profits, and if hey are not they are no part of a man's taxable income. The language is, "ascertained to be worthless." By whom or how? The law is silent on this important point, and therefore there must be a discretion given to the person making his returns, and if that discretion is used fairly and honestly there would seem to be no just ground of complaint. It certainly can scarcely be contended that every debt must be ascertained to be worthless by a suit at law, or in equity, for that would be impracticable, and therefore such cannot be the meaning of the law. It is undoubtedly very difficult to lay down any rule of universal application to this class of cases, and yet the want of precision in the law may have led to this prosecution, and may lead to others, and, perhaps, on the whole, it would be better to give, by law, a clearer and simpler definition than now exists of the terms "gains, profits and income."

Case No. 15,173.

UNITED STATES v. FRYE.

[4 Cranch, C. C. 539.] [1]

Circuit Court, District of Columbia. May Term, 1835.

MANSLAUGHTER — INDICTMENT — TESTIMONY — PUNISHMENT OF SLAVE.

1. An indictment for manslaughter need not contain the words "in the fury of his mind."

2. The jumping on board of a boat, then in custody of the prisoner, after being warned not to do so, and with intent to do the prisoner some great bodily harm, and actually assaulting him with such intent, and putting the prisoner in fear of such great bodily harm, will excuse the homicide; but the jumping on board the boat, under the circumstances stated, was not an actual assault on the prisoner, who was fifteen feet from the deceased at the time of the shooting.

3. A slave convicted of manslaughter is, by the law of Virginia and of the District of Columbia, to be burnt in the left hand and publicly whipped.

This was an indictment against [Henry Frye] a slave for the manslaughter of Robert Jackson. Verdict, guilty. Motion in arrest of judgment, and for a new trial.

Mr. Brent, for the prisoner, contended that the indictment was defective in not averring that the act was done by the prisoner "in the fury of his mind."

It was an indictment for murder, changed to one for manslaughter, by striking out the allegation of malice prepense, and the word "murdered."

[1] [Reported by Hon. William Cranch, Chief Judge.]

THE COURT (nem. con.) overruled the motion in arrest of judgment, but granted a new trial, (THRUSTON, Circuit Judge, contra,) upon the doubt whether the circumstances did not excuse the homicide.

Upon the new trial, the circumstances, as they appeared in evidence were these: Jackson, the deceased, and one Nightengale, had beaten the prisoner severely on shore, who escaped from them, and fled to his master's boat, which was then in his custody, and under his command, by the authority of his master. They followed him down to the wharf, and Jackson dared him to come on shore, that he might lay his hands on him again. The prisoner refused, and told Jackson to stand off, and not to come on board; and if he did, he would shoot him. The warning and threat by the prisoner were repeated. Jackson said, "shoot and be damned," and jumped on board. The prisoner, who was standing with a gun in his hand at his cabin door, about fifteen feet from Jackson when he jumped on board, instantly shot and killed Jackson.

THE COURT, at the prayer of the prisoner's counsel, instructed the jury (THRUSTON, Circuit Judge, contra) that if they should be satisfied, by the evidence, that the prisoner was and is a slave, and at the time when, &c., had the custody and command of the boat in which, &c., by the authority of his master; and that the deceased, Jackson, entered upon the boat after being warned by the prisoner not to do so, and with intent to do a great bodily harm to the prisoner; and, after being in the boat, actually assaulted the prisoner with intent to do him such great bodily harm; and that the prisoner had good ground to apprehend, and did fear, that the said Jackson would do him such harm, and that the prisoner then killed the said Jackson by shooting him, &c., such killing amounted only to excusable homicide. And also, at the prayer of the counsel for the United States, instructed the jury (MORSELL, Circuit Judge, doubting) that the jumping on board the boat, under those circumstances, was not an actual assault by the deceased, Jackson, on board of the boat.

MORSELL, Circuit Judge, thought that the assault and beating on shore, and the following of the prisoner to the boat, and the threats used by Jackson on the wharf, at the time he jumped on board, evincing the continued purpose of again beating the prisoner, were sufficient evidence of an assault on board of the boat.

The jury could not agree, and by consent were discharged, and the cause continued to the next term, when the prisoner was again tried and convicted. It being stated and admitted that the prisoner is a slave, the sentence was, "that he be burnt in the left hand, and publicly whipped with twenty-five stripes."

See Act Cong. March 3, 1801, supplementary to the act concerning the District of Columbia, § 3 (2 Stat. 115), and Act Va. Dec. 17, 1792, p. 190, c 103, § 24; and the case of U. S. v. Clark [Case No. 14,802], in this court, at November term, 1825.

Case No. 15,174.

UNITED STATES v. FUERS.

[12 Int. Rev. Rec. 43.]

District Court, W. D. Pennsylvania. 1870.

INDICTMENT—FINDING BY GRAND JURY.

An indictment will not be quashed because sent up by the United States attorney, and found by the grand jury, without a previous information, hearing, and binding over; but process will be awarded for the arrest of the defendant, and he will be held to answer.

Catharine Fuers was indicted for carrying on the business of brewing, etc., without keeping the books required by law; selling beer in casks without stamps, and without cancelling stamps. Her brewery was seized by the collector, who reported the seizure and the grounds thereof to the United States attorney, by whom the property was libelled, and an indictment sent up against the owner, which was returned by the grand jury "a true bill."

J. Rose Thompson, who appeared for defendant, moved to quash the indictment, because it was not founded on a previous information, arrest, hearing, and binding over, but was sent up solely at the instance and in the discretion of the prosecuting officer of the government. He argued, and quoted numerous decisions of state courts, to show that defendant could not be held to answer unless a previous information had been made, and he had been confronted by his accuser, so as to have an opportunity to learn the nature of the accusation preferred against him, etc.

H. B. Swoope, U. S. Atty., replied that the practice in the federal and state courts was entirely different; that there were no private prosecutors in the courts of the United States; that all indictments touched matters of great and grave public concern, as the revenue, the post-office, the currency, the customs, etc.; that even in state courts the prosecuting officer of the people could, in such cases, send up bills without a previous information, hearing, etc.; that the practice in the federal courts was regulated by the common law, save in so far as it was changed by congressional enactment; that in England the king's attorney-general could, in all cases not capital, file an information without a previous oath, arrest, or hearing, on which the defendant was held to answer; that the fourth amendment to the constitution, which provided that no warrant of arrest could issue without probable cause being first shown, was not violated in any way by issuing a warrant of arrest after a bill found on sworn testimony by a grand jury; and that there was no force in the argument that defendant was entitled to a

hearing in order to learn the nature of the charges preferred, because it was well settled that the United States attorney could send up a bill for an entirely different offence than that returned to him, if he thought he had evidence to support it.

PER CURIAM. We are very clear that this motion should be overruled. There is very little analogy between the practice of the federal and state courts in regard to the prosecution of offenders. It is but seldom that private interests are involved in bringing to justice those who violate the federal laws. Officers have to be appointed and commissioned for this purpose, and for all their official acts in the discharge of these duties they are amenable to the laws. The rights of defendants will be carefully guarded; but the officers of the government, acting under their official oaths, will not be required to go through all the forms and steps that are demanded of private prosecutors.

The question has been heretofore decided, and the motion is accordingly overruled.

Case No. 15,175.

UNITED STATES v. FULLERTON.

[6 Blatchf. 275;[1] 9 Int. Rev. Rec. 3.]

Circuit Court, S. D. New York. Dec. 19, 1868.

CRIMINAL PRACTICE—DIVISION OF OPINION—POSTPONEMENT OF CASE.

1. The practice stated, in regard to certificates of division of opinion, in criminal cases tried in the circuit court, where the court is held by two judges.

2. The probability that difficult and important questions of law will arise on the trial of an indictment in the circuit court, will not ordinarily justify the postponement of the trial, so as to await the holding of the court by two judges, with a view to a certificate of division of opinion.

This was an application on the part of the defendant [William Fullerton] to postpone the trial of the indictment in this case, until such time as the associate justice of the supreme court assigned to the Second circuit, could sit in the circuit court with the district judge who was now holding it, on the ground that difficult and important questions of law would arise on the trial, so that, if a division of opinion should occur between the judges, the point or points could be certified to the supreme court, under the 6th section of the act of April 29, 1802 (2 Stat. 159), that being the only mode of sending questions of law, arising on the trial of a criminal case, to the supreme court for revision.

[2] [On the 19th of December, when the case of the United States against William Fullerton et al. came up before Judge Benedict on a motion to quash the indictment, an order of Judge Nelson staying proceedings in the case until further orders was received, and the case was taken off Judge Benedict's calendar.

[The affidavit upon which Judge Nelson made the order, is as follows:

["The United States v. William Fullerton et al. Southern District of New York—ss: William Fullerton, the defendant above named, being sworn, says that he has fully and fairly stated his case herein to Messrs. Charles O'Conor, D. D. Field, John K. Porter, Clarence A. Seward, G. T. Jenks and John E Burrill, the counsel of this defendant herein, and that after such statement made as aforesaid he is advised by his said counsel in the manner and to the effect herein after stated; that the indictment herein contains nine counts, which have been framed under and with reference to different and distinct statutes of the United States; that several important questions of law and some of great intrinsic difficulty are involved in the construction of the said statutes and of the said indictment, and will necessarily arise in the prosecution of these proceedings; that in view of the facts charged against this defendant, and the circumstances under which the said indictment has been found, it is desirable that it should be in this deponent's power to obtain, should it become necessary, the opinion of the supreme court of the United States thereon; that under the laws of the United States there is no mode of obtaining such opinion except upon a certificate of division, and that no such certificate can be obtained unless the cause shall be tried before one of the associate justices of the supreme court of the United States, sitting as circuit judge; that if the cause be tried before one of the district judges of the United States, there is no authority for such judge to associate with him any other district judge on the trial, and that even if the court were held by two district judges, such court would have no authority to make a certificate of division as before mentioned; that notice of motion has been given herein on behalf of this defendant to quash the indictment, but that if the cause can be tried before a full bench of a circuit court such motion will be withdrawn, and the defendant will seek a trial of the indictment.

[This deponent further says that great publicity has been given to the proceedings against this defendant, and the fact that an indictment has been found has been extensively circulated, and that such publicity and circulation has been brought about by those who instigated the said indictment. And he further says that the charges against this defendant have been much discussed in the newspapers of the city of New York and elsewhere, and that apparently great efforts have been made to create a public opinion in regard thereto unfavorable to this deponent. And he further says that he has reason to believe, and does believe, that those who instigated these proceedings against de-

[1] [Reported by Hon. Samuel Blatchford, district Judge, and here reprinted by permission.]

[2] [From 9 Int. Rev. Rec. 3.]

ponent have been influenced by personal feelings against this defendant on account of certain proceedings with which this deponent is professionally connected; that in the discharge of what deponent conceived to be his duty, arising out of the professional employment which he had undertaken, charges were made against the district attorney of the United States for the Southern district of New York, and by reason and on account thereof this deponent has incurred the personal ill-will and hostility of said district attorney; and deponent is justified in the belief which he entertains that the district attorney aforesaid is thereby influenced, even if it be unconsciously, to the prejudice of this deponent, and that the litigation in which this deponent has thus been involved has assumed a personal character to a degree in no wise favorable to the due administration of mere justice or public duty. Deponent further says that the result of these proceedings to deponent personally is of the greatest importance; that he has been a counselor at law, and in a close practice in this city and its vicinity for more than twenty years; that during that period, for most of the time, his professional engagements have brought him prominently before the community; that his character or reputation has never heretofore been assailed; that he has secured the confidence of those by whom he has been professionally employed, and, without solicitation on his own part, has been honored by an elevation to a high judicial position, and he feels that it is due to those to whose good will and confidence he is in a good measure indebted for whatever success may have attended his labors, as well as to himself and those whose interests are still more strongly connected with his own, to meet and disprove the charges made against him; he has perfect assurance that he will be able to exculpate himself from every charge which has been made, and he will be ready and willing to meet his accusers and go to a trial at any time whenever such trial may be had before the full bench of the circuit court of this circuit. In view of all the circumstances of the case, he believes it to be important and necessary to public justice and the public interest that the trial of the indictment herein be had before such a court, and so far as he knows or believes, no public interest can be in any wise prejudiced if his request in this regard be granted William Fullerton.

["Sworn to before me, this 19th day of December, 1868. Joseph Gutman, Jr., United States Commissioner S. D. of New York."

[On the 28th of December, Judge NELSON filed the following:][2]

NELSON, Circuit Justice. The practice in question has heretofore been confined, with few exceptions, to the trial of capital cases; and, even in those, I do not now recollect an instance where any division of opinion occurred on the trial, resulting in a certificate of a question to the supreme court. Generally speaking, motions in arrest of judgment, or for a new trial, which are liberally indulged, afford sufficient security against errors or mistakes at the trial. A division of opinion may be certified on a motion in arrest of judgment (U. S. v. Kelly, 11 Wheat. [24 U. S.] 417), though it cannot on a motion for a new trial. But, where there is a difference of opinion on a motion for a new trial, such a direction will be given to the case as will enable the defendant to obtain a certificate of a division under the statute. A new trial will be granted, and the cause will be again submitted to a jury in the presence of the two judges, and the question or questions will be regularly certified. This has occurred in a very few instances in the Northern district of New York, and also in the Southern district of New York, and, indeed, as far as I can remember, in every case where a serious and well-grounded difference existed.

I think that, under these guards and securities against error, on the trial of the current and ordinary offences against the laws, the contingency or possibility of a difference of opinion between the two judges on the trial does not present a case which would justify an interference with the trial of the cause in the usual way, in conformity to the practice in criminal cases.

[2] [From 9 Int. Rev. Rec. 3.]

Case No. 15,176.

UNITED STATES v. FULLERTON.

[7 Blatchf. 177.][1]

Circuit Court, S. D. New York. March 16, 1870.

CRIMINAL LAW—INSTRUCTIONS TO ACQUIT.

On the trial of an indictment for a misdemeanor, after testimony had been given on both sides, and the evidence was closed, the court directed the jury to acquit the defendant, on the ground that the evidence did not warrant a conviction.

[Cited in U. S. v. Anthony, Case No. 14,459; U. S. v. Babcock, Id. 14,487.]

In this case, which was an indictment for a misdemeanor, after testimony had been given, at the trial, on the part of both the prosecution and the defence, and the evidence was closed, the counsel for the defendant requested the court to instruct the jury to acquit the defendant [William Fullerton], the ground of the request being that the evidence was such as not to warrant a conviction.

Edwards Pierrepont, Dist. Atty., and Benjamin F. Tracy, for United States.

Edwin W. Stoughton, John K. Porter, John E. Burrill, Grenville T. Jenks, and Clarence A. Seward, for defendant.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

THE COURT, after hearing a discussion by the respective counsel as to the power of the court to give such an instruction in any case, and thus take the case from the jury, held that, inasmuch as the court would have the power, if the defendant were convicted by the jury on the evidence, to grant him a new trial, if it should be of opinion that the verdict was against the evidence, it had the power, if it was of opinion that a verdict of guilty would not be warranted by the evidence, to direct the jury to acquit the defendant on that ground. The court, being of opinion that the evidence did not warrant a conviction, directed the jury to acquit the defendant, which was done.

Case No. 15,177.

UNITED STATES v. FUNKHOUSER et al.

[4 Biss. 176.] [1]

District Court, D. Indiana. May, 1868.

INFORMERS—THEIR RIGHTS—SHARE IN PROCEEDS.

1. The information must be given to some government official who has the power and duty to act thereupon, and if several causes exist information of any one of them is sufficient.

2. The information must be a plain statement in writing of some one substantial cause, matter, or thing, whereby a fine, penalty or forfeiture shall have been incurred. And it should be sworn to, if required by the officer.

3. A party claiming to share in the judgment must be the first informer, and his information must be substantially true, and capable of proof.

4. Whether, under any circumstances, a special agent of the revenue is entitled to claim as an informer,—quære.

[Cited in U. S. v. Simons, 7 Fed. 714.]

5. The claim of an informer can only date from the time when he actually gave the proper formal information—not when he ascertained the facts.

6. The share of the informer must be taken from the net, not the gross, proceeds.

At law.

Hanna & Knefler, for claimant Little.

J. W. Gordon, for claimants Lamb and Chadwick.

McDONALD, District Judge. This was a proceeding for the adjudication of a forfeiture of a distillery, distilling materials, machinery and apparatus, and a large quantity of whisky, the property of Funkhouser & Co., of Lafayette, for violation of the internal revenue law.

The libel was filed September 27, 1867, and on the 20th of December following, a judgment of forfeiture of the property in question was pronounced. Under this judgment, the property has since been sold; and the proceeds remain in the hands of the marshal.

Several persons have preferred claims, as informers, to a portion of said proceeds. And the question to be decided is whether any of said claims—and, if so, which—shall be allowed.

Among the various claims preferred, there are only two which, according to the evidence, are entitled to the least consideration of the court,—that of George L. Little, and that of Charles Lamb and Rufus Chadwick. The contest is, therefore, between Little of the one part, and Lamb and Chadwick of the other.

The libel recognizes Little as the informer. It commences thus: "Alfred Kilgore, attorney," &c., "who prosecutes for the United States, as well as for George L. Little, the informer herein, exhibits this his libel," &c. And it concludes with a prayer of process against the property, and that all persons in interest be required to appear and show cause "why said forfeiture should not be decreed in manner and form as by law provided, one-half of the proceeds of sale for the use of George L. Little, the informer."

On the 15th of January, 1868, Little filed under oath what he calls "a supplemental claim and answer." In this he asserts that he is the first informer; that on the 9th of September, 1867, he proceeded to Lafayette "in the capacity of a special agent of the treasury department," to investigate the manner in which Funkhouser & Company carried on their business of distilling, and to ascertain whether they had violated the internal revenue laws; that he spent several days in that investigation, and ascertained all the facts on which the judgment of forfeiture was rendered; that, on the 12th of September, 1867, he embodied the result of said investigation in a report to the collector of the proper district, and promptly advised the internal revenue commissioners of said result; that, on the facts developed by said investigation alone, the seizure of the property was made, the libel filed, and the judgment of forfeiture rendered; and that Lamb and Chadwick furnished no information which led to these results.

On the 19th of December, 1867, the day before the judgment of forfeiture, Lamb and Chadwick filed their claim. In it they allege in general terms that they are the first informers and entitled to a moiety of the proceeds; and that Little is not the first informer, and is not entitled to any of the proceeds. And they pray the court to protect their interests and to allow their claim.

On the 20th of March, 1868, Lamb and Chadwick amended their claim by alleging that they discovered the frauds out of which said forfeiture arose before the first of September, 1867, and gave information thereof to the assessor and collector of the proper district before Little made his said investigation and discoveries at Lafayette, and before that in-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

vestigation, gave to Little, in his character of a special agent of the treasury department, full and complete information of said frauds; and they aver that "said Little then and there undertook and faithfully promised, in consideration of said information, and the communication thereof by them to him, that he would see that their rights as informers against the said distillery of Funkhouser & Co. should be protected; and they say that, relying on said promise and undertaking * * * they took no steps to protect or secure their own rights as such informers, until they learned that said Little, in direct violation of his aforesaid promise and undertaking, had fraudulently and falsely set up a claim as informer" in the premises; and that, confiding in said promise, they were induced to give their claim no further attention till they discovered Little's said fraud on them, whereupon they immediately filed their claim.

It is understood that the district attorney takes no part in this controversy.

A great mass of testimony, in the form of depositions, has been filed by the contending claimants. This evidence, I think, establishes the following facts:

On the first of September, 1867, Little was, and has ever since continued to be, a special agent of the United States treasury department. In that capacity, he was employed at St. Louis early in that month. While there, he received from the treasury department a letter dated September 4, 1867, instructing him to proceed to Lafayette and investigate whisky frauds suspected to have been perpetrated there. He arrived at Lafayette about the 10th of December, and forthwith commenced said investigation. In a few days he discovered that Funkhouser & Co., who had carried on a distillery at Lafayette, had been guilty of divers frauds on the revenue, and had thereby forfeited said distillery and its appurtenances, with large quantities of whisky, to the government, and had defrauded the revenue to the amount of forty-nine thousand three hundred and thirty dollars. On the 12th of September, 1867, he made out a detailed written statement of said frauds and forfeitures, and delivered the same to Williams, the collector of the district in which the distillery was situate. At the same time, he telegraphed Hon. E. A. Rollins, commissioner of internal revenue, of the same facts. On the information thus given by Little, the property was seized by Williams, the collector, who thereupon forwarded to the district attorney the facts so communicated to him by Little. Little also had communication with the district attorney; and the district attorney, on the information above thus obtained through Little, framed the libel on which the judgment of forfeiture was rendered. Little's discovery of any of the causes of said forfeiture could not have been made earlier than the 10th of September, 1867; and he did not, in any sense, become an informer till the 12th of that month.

About the first of September, 1867, and certainly before the 10th of that month, Lamb and Chadwick, by a joint inquiry, discovered that Funkhouser & Co. were shipping whisky in barrels from their distillery in duplicate serial numbers, in violation of the 38th section of the internal revenue act of July 13, 1866, and immediately gave information thereof to Thomas W. Fry, assessor of the district, and delivered to said Fry a written statement of the serial numbers so duplicated, with the dates of the shipments. In July or August, 1867, Lamb and Chadwick gave like information and written statements to one G. W. Giesey, a special agent of the treasury department residing in Cincinnati, and then at Lafayette investigating these whisky frauds; but he, as it seems, made no use of the information they gave him. They also, before the 10th of September, 1867, wrote to the district attorney concerning these frauds; but they stated nothing with sufficient definiteness to enable him to act on it, and he did not act on it. About the 10th of September, 1867, while Little was making said investigation, and after he had discovered enough to effect said forfeiture, Lamb and Chadwick informed him that they knew of important facts relative thereto. He requested them to give him these facts. At first they refused. But afterwards, and before the 12th of September, 1867, they communicated to him the same facts in writing which they had, as aforesaid, given to Fry and Giesey; and Little embodied them in his said report to Williams; and these facts, as to duplicate serial numbers, were, among other causes, stated in the libel as grounds of the forfeiture aforesaid. Lamb and Chadwick both swear that they gave Little the said information in consideration that he then promised them to protect them in their rights as informers. But Little, under oath, denies this promise. The promise, I think, must be considered as proved.

The parties claim as informers, under the 179th section of the act of July 13, 1866 (14 Stat. 145). That section provides that a portion of the judgment in cases like the present, "shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing, whereby such fine, penalty, or forfeiture shall have been incurred."

To entitle any person to a share of the judgment as informer under this section, I think the following things are necessary:

1. The information must be given by the claimant to some officer of the government on whom the law devolves the power and duty of acting on such information. Thus, I suppose that information to the district attorney, or to the proper assessor or collector, or to a special agent of the treasury department char-

ged with the duty of inquiring into the matter to which the information given relates, is sufficient so far as the person to whom it is given is concerned.

2. The information must be a plain statement of some one substantial "cause, matter, or thing whereby a fine, penalty, or forfeiture shall have been incurred."

It is certainly not sufficient to state a general suspicion or rumor of a fraud on the revenue, although such statement might lead to inquiries disclosing facts sufficient to incur the liability. Nor would a sound, positive statement that a fine, penalty or forfeiture had been incurred be sufficient without a statement of the "cause, matter, or thing" for which the same was incurred.

It is probable that, as a general rule, the information ought to be written; for officers of the revenue could hardly be expected to act on verbal assertions in such a case. Indeed, it appears to be the practice in some places to require the information not only to be in writing, but to be supported by affidavit. And I would think that the revenue officer would not be bound to pay any attention to information to which the informant, if required, refused to swear. But if he was not required by the officer to swear to it, I think it would not be invalid for not being under oath.

3. If several causes exist, by either of which a fine, penalty, or forfeiture is incurred, information of any one of them properly given to the proper officer, would entitle the informer to his claim, if he is the "first" informer.

4. None but the first informer is entitled to any share in the judgment. And the first informer is he only who, in the language of the act, "shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred."

5. The information thus first given must be true in substance and in fact; and it must be capable of proof. If it be false or if it cannot be proved to be true, it can be of no value to the government. The policy of the government is to reward the person who shall first furnish valuable information of the act of forfeiture. And if the information given be untrue or incapable of proof (which is the same thing in effect), it is of no value, and cannot, therefore, entitle the informer to a reward.

Against the claim of Mr. Little, it is insisted that whatever information he may have given, and how early soever he may have given it, his official position precludes his claim as being a common informer. The 179th section above cited gives the share to the person "who shall first inform," without excluding revenue officials or any other class of men. But it is objected that the claim of Mr. Little is precluded by the 9th section of the act of July 13, 1866 (14 Stat. 101), amending section 5, act of June 13, 1864 [13 Stat. 224], in which it is declared that "any inspector or revenue agent, or any special agent appointed by the secretary of the treasury, who shall demand or receive any compensation, fee or reward other than such as are provided by law, for or in regard to the performance of his official duties, shall upon conviction be fined," &c. The 14th section of the act, March 3, 1865, provides for the appointment of revenue agents, "who shall be paid, in addition to the expenses necessarily incurred by them, such compensation as the secretary of the treasury may deem just and reasonable, not exceeding two thousand dollars per annum."

In a case very similar to the present, Judge Blatchford, of the Southern district of New York, has allowed a special agent of the treasury to make claim as a common informer; though it does not appear that any objection to his right to claim was made under the acts above cited. One Hundred Barrels of Whiskey [Case No. 10,526]. It is understood also, that in cases of forfeiture and penalties compromised before judgment, the treasury department has been in the habit of allowing assessors, collectors, and special agents of the revenue, as first informers, a share in the proceeds of the penalty or forfeiture.

In view of the acts of March 3, 1865, and July 13, 1866, above referred to, as well as of general principles and policy, I entertain great doubt whether a special agent of the revenue, who, in pursuance of instructions given him, first discovers facts working a forfeiture under the revenue laws, can by reason thereof be allowed to share in the proceeds of the thing forfeited. The act of July 13, 1866, seems to forbid it. Such agent is paid for his services, whether his investigation be successful or not, without this additional reward. It hardly seems good policy, after paying such special agent fairly for his services, to add the stimulus of a share in the spoils, thus making him a sort of speculator, and laying before him a temptation to carry things beyond just and reasonable bounds. Besides, when the special agent, by any means, discovers a "cause, matter, or thing" whereby a fine, penalty, or forfeiture has been incurred, has not the government at that moment, in legal contemplation, information of the fact? Is not the knowledge or information in the mind of the special agent identical with knowledge or information on the part of the government? If, at that moment the government can be said to be informed, how can the special agent be said first to inform? Is he entitled to the share because he informs himself? Will he be so entitled because, after he has made the discovery and the government has by consequence already received the information, he communicates the fact to some other revenue officer or to the district attorney? Can an informer be rewarded in any case where he gives information to the government after it is in possession of that information?

I know that there are cases in which acts of congress have expressly allowed revenue

officers to share as informers. But in regard to frauds of the kind now under consideration, I am not aware of any act expressly making such provision. Nevertheless, as the usage appears to be so, and as this case may well be decided on other grounds, I make no decision on the point whether Mr. Little's claim is precluded merely because he is a special revenue agent.

It is urged by Mr. Little that the claim of Lamb and Chadwick cannot be allowed, because they are too late in preferring it.

We have seen that these gentlemen did not bring their claim to the notice of the court till the day before the final judgment was rendered, and then, not by asking to be made parties to the original proceeding, but by a petition to be allowed to share in the proceeds of the forfeiture.

In support of this objection, we are referred to the case of Francis v. U. S., 5 Wall. [72 U. S.] 338. In that case, the proceeding was under the act of August 6, 1861 (12 Stat. 319). The 3rd section of that act provides that "the attorney-general, or any district attorney of the United States * * * may institute proceedings of condemnation; and in such case they shall be wholly for the benefit of the United States. Or any person may file an information with such attorney, in which case, the proceeding shall be for the use of such informant and the United States in equal parts." In that case it was held that, under this provision, the informer must become a party to the proceeding in its inception, else the proceeding would "be wholly for the benefit of the United States." This was the necessary result of the words of that act. It made no provision concerning a first informer. It contemplates no controversy between different informers. And it provides that unless the information be filed with the attorney for the government, the proceeding shall be wholly for the benefit of the United States. No such provisions are found in the acts under which the present proceedings were had. As we have already seen, these only provide that the first informer—"to be ascertained by the court"—shall be entitled to share in the proceeds. I think, therefore, that the case in 5 Wall. [72 U. S., supra], is inapplicable to the point under consideration.

It is true that, since, in these cases, informers are liable for costs when the prosecution fails, it would be right to require them to become parties to the proceedings at an early stage. But I do not think that they are bound to be named in the libel. If so, there could be no such contention and decision between different informers, as seems to be contemplated by the 179th section of the act of July 13, 1866. For in that case, the person named in the libel must be taken to be the first informer, and no other person could contest the right with him.

Though Lamb and Chadwick came late into the case, I think they are not thereby precluded, especially as they seem to have been prevented from coming earlier by the promise of Little to protect their interests.

The only remaining question is, Who "first informed of the cause, matter, or thing whereby" the forfeiture in question was incurred? That Little, on the 12th of September, 1867, gave to Williams, the collector, the information on which the prosecution proceeded, and on which the judgment was pronounced, there can be no doubt. That he never at any earlier date, informed of the facts to any one, is equally certain. Nor can it be claimed that the mere ascertainment by him of the facts on which the forfeiture was adjudged, amounted to an information within the meaning of the act of congress. We must therefore consider him as having informed on the 12th of September, 1867, and not before.

Now, did Lamb and Chadwick, within the meaning of said act, inform before the 12th of September, 1867? It is certain that whatever information they gave was given before that date; and that prior to that time they informed Giesey, a special revenue agent, Fry, assessor of the district, and Little, another special agent of the revenue, in writing, of facts concerning said forfeiture. Were the facts, thus given in writing to these three revenue officials, such an information as is contemplated by the 179th section of the act of July 13, 1866? If so, they are the first informers. These facts, as we have seen, were a written statement to the effect that Funkhouser & Co. had shipped divers barrels of whisky in duplicate serial numbers in fraud of the revenue. The duplicate serial numbers and the dates of the shipments were stated in the writings; and the writing handed to Little was, under his directions, certified to be true by the party who took the numbers from the barrels.

Such a duplication of numbers is a violation of the 38th section of act of July 13, 1867, which requires that all casks or packages of distilled spirits manufactured in any distillery shall be numbered for the current year, beginning with number one for the first cask or package inspected on or after the first day of January; and that no two or more casks shall be marked with the same number.

This prosecution was founded on the 25th section of the act of March 2, 1867 (14 Stat. 483). It provides: "That the owner, agent, or superintendent of any still, boiler, or other vessel used in the distillation of spirits, who shall neglect or refuse to make true and exact entry and report of the same, or to do or cause to be done anything by law required to be done concerning distilled spirits, shall, in addition to other fines and penalties now by law provided, forfeit for every such neglect or refusal all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation," &c.

Thus, we see that by this provision of law, any neglect to perform any requirement of law concerning distilling, operates as a for-

feiture of the whole concern. The device of the duplicate serial numbers in question was undoubtedly such a neglect; for the parties not only neglected to number serially as the law requires, but falsely numbered the casks.

This false numbering, therefore, if alone averred in the libel and proved on the trial, would of itself have as effectually worked a forfeiture to the full extent to which it was adjudged, as it and the four other causes of forfeiture therein averred actually did.

It is clear, then, that the information given by Lamb and Chadwick was such information as is contemplated by the 179th section of the act of July 13, 1866; and, to my mind, it is equally clear that Lamb and Chadwick are the first informers within the meaning of that section.

A question has been made whether the informers' share shall be taken from the gross or net proceeds. I hold that it must be from the net proceeds. All the expenses of the litigation must be ascertained and deducted from the gross sum on hand. Then the share of Lamb and Chadwick must be proportioned according to the remaining net proceeds, pursuant to the circular of the secretary of the treasury, of August 14, 1866. And the matter is referred to the master to ascertain the share coming to Lamb and Chadwick according to the rules above laid down, and to the provisions of said circular; and he is ordered to report the result to this court.

Case No. 15,178.

UNITED STATES v. FURLONG.

[2 Biss. 97;[1] 9 Int. Rev. Rec. 35; 16 Pittsb. Leg. J. 213. 243.]

District Court, N. D. Illinois. Jan., 1869.

INTERNAL REVENUE—DISTILLER—FALSE RETURNS—ESTIMATES.

1. Under an indictment under the act of 1866 [14 Stat. 98], the government, claiming that a distiller must have used more material and manufactured more spirits than he returned, is bound to prove that such was necessarily the fact, and must exclude any other conclusion.

2. To sustain the theory that a given amount of material will produce a certain quantity of spirits, it must be shown that this is a necessary and unavoidable inference from the facts proved.

The defendant was a distiller in the spring of 1868. In accordance with instructions from the commissioner of internal revenue, two officers of the government visited his distillery on each of ten successive days, measured his tubs, and calculated how much spirits he should have made on the theory now incorporated into the act of July 20, 1868 [15 Stat. 125], that forty-five gallons of the meal and water combined represented one bushel of grain. This was an indictment for false returns. There was no evidence to impeach the returns other than the above calculations.

Jesse O. Norton, U. S. Dist. Atty.

George C. Bates and Leonard Swett, for defendant.

DRUMMOND, District Judge (charging jury). There is no question as to the amount of material reported, and the quantity of spirits returned. The questions are: 1st, whether defendant did not use in the distillation of spirits more grain than he reported, and, 2nd, whether he must not have made more spirits than appear by his returns. As to the first, the prosecution claiming that from the nature, character and number of the mashes proved he must have used more material than he reported, it is necessary that the testimony exclude any other conclusion than that insisted upon by them.

As to the second—the theory of the prosecution is that every bushel of material must produce and does produce at least twelve quarts of spirits. Various witnesses have testified that a certain quantity of material will generally produce a certain quantity of spirits, but the estimated produce of a bushel varies from seven to eighteen quarts. The general effect of the testimony is that the usual product is about thirteen or fourteen quarts, varying according to the character of the machinery, the state of the weather, and other circumstances. The reports of defendant show that he made about nine and a half quarts. If he actually made more than that, or has manufactured more than he has returned, of course he is guilty. The prosecution seeks to draw a certain inference from a given state of facts, and it is incumbent upon them to show that such inference is necessary and unavoidable from the facts proved. They must show that considering the machinery operated by defendant, the material used, and all the attendant circumstances, the product must necessarily have been greater than returned, and must effectually negative any other conclusion.

Verdict—Not guilty.

[The charge of DRUMMOND, District Judge, as published in the Chicago Journal, and reprinted in 9 Int. Rev. Rec. 35, was as follows:]

DRUMMOND, District Judge. The defendant was a distiller in the spring of 1868. The law at that time made it the duty of the defendant to make or cause to be made true and exact entries, in a book to be kept by him, of the number of pounds or gallons of materials used by him; the number of gallons of spirits distilled, and the proof thereof; the number of gallons sold, with the proof thereof, and the name and place of business or residence of the person to whom sold.

The first count in the indictment is that the defendant violated these provisions of the law in neglecting to enter in a book kept for

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

that purpose, the true quantity of the number of pounds or gallons of material, and, also, that he neglected to enter in such book the number of gallons of spirits distilled; the number of gallons sold; the name and place of business or residence of the person to whom sold. The law also declared that the distiller should, on the 1st, 11th, and 21st day of each month, or within five days thereafter, render to the assessor or assistant assessor, an account in duplicate, taken from his books in the particulars hereinbefore recited, and verified by oath of all the facts occurring after the last day of the account preceding. The second count charges the defendant with having violated this provision of the law, in that he neglected to make to the assessor a true return on the 1st, 11th, and 21st days of each month, or within five days thereafter, from the 17th day of April, 1868, until the 1st day of May. The law also declared that if any person removed any distilled spirits from the place where the same were distilled, otherwise than into a bonded warehouse, he incurred a certain penalty, and was liable to punishment. The third count in the indictment charges the defendant with having violated this provision of the law. So that the offence charged in the indictment consists of these several items: In the first place, that he neglected to make the entry in his books, as required by law, of the amount of his material used, and the quantity of liquor that he distilled, and what he had sold, and the name and place of business of the person to whom sold; secondly, that in the particulars just named, to wit: in the quantity of material, and the quantity of spirits, and of the amount sold, true returns were not made to the assessor; thirdly, that he removed the spirits that he distilled to a place other than to a bonded warehouse.

The question is whether the defendant is guilty of all or any one of the offences charged in the indictment. Every defendant, when he is arraigned before a court of justice, is presumed to be innocent. It is incumbent on the prosecution to satisfy the jury beyond a reasonable doubt that he is guilty of some one of the offences set forth in the indictment; therefore it is incumbent on the prosecution in this case to satisfy you, beyond a reasonable doubt, that the defendant is guilty in all or in some one of these particulars. The question for you to determine is, whether he is or is not guilty of all or any one.

It is alleged that he is guilty on two grounds: First, that he has not made a proper entry in his books as to the material that he used, because it is claimed that upon the evidence which is before you as to the mashes which were made, that it is a conclusion following from that evidence that he had more material than he has returned. Secondly, that he has not returned the proper quantity of spirits distilled, because if he had made the proper entries and returns, he would have shown that he distilled more spirits than there appears to have been returned, because the material which it is clear he used would have produced a greater quantity of distilled spirits.

You will observe that the prosecution seeks to draw an inference from a given state of facts. That inference, as I have already said, must be the necessary and inevitable inference from that state of facts, in order to warrant the conclusion. That is to say, it must necessarily follow that the product, under the circumstances which existed as shown by the evidence, under which this material was manufactured, that there ought to have been a greater product. As for example: Taking the distillery of the defendant, the machinery he operated, the material that he used, taking all these together, that the product ought to have been greater. If you think that the evidence tends to that conclusion, and there are certain circumstances which were within the knowledge and ability of the defendant to establish which might thrown light upon it, and he has not done so, then, of course, the inference would be against the defendant; as, for example, if it appeared that in a case where the same kind of grain was used, and the same sort of machinery, the product was greater than the defendant has shown that he produced on this occasion, then it would seem, if there was any special character connected with it which has not been shown, and which it was incumbent on the defendant to establish, and he has not done so, the inference would be against him, precisely as in the case of the prosecution.

If there is evidence which it is in the power of the prosecution to bring forward to indicate that the defendant has committed the offence which is charged in the indictment, and it has not been done, then, of course, the inference is against the prosecution. For example, if there were government officials examining the operations of this distillery and they had it in their power to see it operate, and what was going on and make manifest any wrong which the defendant was committing, and then have not done so, then the inference would be against the prosecution. The rule applies to the prosecution as well as to the defendant that if upon a given state of facts there are certain conclusions—necessary, inevitable conclusions—to be drawn, and there were other facts in the power of either party to produce, and they have not produced them, then these conclusions would follow. If there are any facts which would impair or affect those conclusions, and they have not been produced, then, of course, the conclusions would follow. But I mean by that, that the defendant should not be convicted without the conclusions necessarily follow from the nature and character of the evidence and beyond a reasonable doubt.

The jury returned a verdict of "Not guilty."

Case No. 15,179.

UNITED STATES v. The F. W. JOHNSON.

[18 Leg. Int. 334.] [1]

District Court, D. Maryland. Sept. Term, 1861.

CONSTITUTIONAL LAW—REBELLION AND SECESSION OF STATES—BELLIGERENT RIGHTS—PRIZE—ENEMY PROPERTY — ENROLLMENT AS EVIDENCE — BREACH OF BLOCKADE.

[1. Where states have assumed to secede from the Union, and the government has raised large armies, which are engaged in actual war in endeavoring to put down the rebellion, and the functions of the United States courts are entirely suspended in the rebellious territory, the government of the United States is entitled, by the constitution and by international law, to exercise belligerent rights, as determined by the rules applicable in cases of prize and blockade.]

[2. The fact that a vessel is enrolled in a port of a rebellious state is not conclusive that such port is the domicile of her owner, so as to make her enemy property; and it is competent to show that the owner is, in fact, a resident of another port in a loyal state, and thus avoid condemnation.]

[3. The domicile of the owner at the time of the capture of the vessel determines whether she is of a hostile character or not.]

[4. Where a foreign vesel, laden with railroad iron consigned to a port in a loyal state, was driven ashore on the coast of Virginia and wrecked, and thereafter a wrecking vessel was sent in good faith to rescue the cargo, and bring it to the port of destination, *held* that, upon the capture of the latter vessel while taking on cargo from the wreck, there was no ground for condemnation for attempted breach of blockade, although it was the intent to land the rescued property temporarily on the shore, until it could be conveyed to the loyal states.]

Prize.

GILES, District Judge. This is a libel filed on behalf of the United States to forfeit the schooner F. W. Johnson as a prize of war. The bill alleges that the said schooner was captured by a vessel of war of the United States, about twenty-five miles to the southward of Cape Henry, in the Atlantic Ocean, having on board at the time about twenty-eight tons of railroad iron; that the said cargo of railroad iron was saved by the said schooner for the use of the Norwegian bark Albion, which had been cast away about the 1st of May last, at the spot where the capture was made; that the said schooner belonged to the port of Norfolk, in Virginia, and was owned by citizens of said state, a state at that time claiming to have separated from the United States, and, with other Southern states, then waging open war against the United States by the various modes of warfare usual among hostile nations; and that the said schooner left her port in Virginia bound to some port south of Maryland, with intention to discharge her cargo in such Southern port.

Before I discuss the facts of this case, as presented to the court in the pleadings, answers to the interrogatories in preparatorio, and other evidence in the case, I will state what I believe to be the law of nations in reference to the first question which has been so ably argued by the learned counsel. It has been contended by the counsel for the claimants that in the present unhappy division in our country the government at Washington has no power, either under the constitution of the United States or by the recognized principles of the law of nations, to treat the inhabitants of the states which claim to have seceded, as enemies, and to exercise in reference to them those belligerent rights which all concede belong to parties engaged in a public war. And by a public war is here meant a war between independent sovereign states. Now, I am sitting in this case, in a prize court, and the supreme court said, in the case of The Rapid, 8 Cranch [12 U. S.] 155, and The Adeline, 9 Cranch [13 U. S.] 264, "that the law of prize is a part of the law of nations." And I am, therefore, to decide this question by the principles of that universal law to which all civilized princes and states acknowledge themselves to be subject.

In the first place let us see what is the character of the present contest in this country, and in what light it has been regarded by the executive and legislative departments of the government. In the face of all that is passing around us, it needs no argument to show that a civil war of gigantic dimensions is sweeping over the land. We are almost within sound of the cannon of two of the largest armies that have ever been marshalled in hostile array against each other on this continent. More than one-third of the confederacy has claimed to separate from the rest, and they are now fighting about the construction of the organic instrument of the government,—one side alleging that under a true construction of the constitution each state has a right to withdraw from the Union whenever its people so determine; the other, that no such right exists, and that to attempt to secede is rebellion, and not the exercise of any constitutional right. And in the states which have claimed the right to withdraw, there are now open no courts of the United States, and the laws of the United States cannot now be executed in those states by the ordinary course of judicial proceedings.

Is this not civil war? And has it not been so regarded by the executive department of the government? This is clear from the proclamations of the president of the 15th of April, of the 19th of April, of the 27th of April, and of the 3d of May and of the 10th of May,—all recognizing the fact that the civil power of the government is no longer capable of enforcing the laws, and calling to its aid the power intended to be provided by the acts of 1795 [1 Stat. 424] and 1807 [2 Stat. 443], and also, using the power of blockade, a war power belonging only to belligerents either in a civil or foreign war. And the legislative department has also recognized this

[1] [Reprinted by permission.]

contest as a war. For, during the last session of congress, it not only did so by the laws which it passed for the raising of armies and providing means for their support, but in express language, on four different occasions, as will be seen in reference to the laws of the extra session of July last. [12 Stat.] pp. 268, 274, 315, 326. And the last law (page 326) to which I refer, not only recognized a war as existing, but it approved and sanctioned all the proclamations of the president, thereby making valid the blockade declared by the president in his proclamations of the 19th and 27th of April, if the president alone, "as commander in chief of the army and navy of the United States," did not possess this power under the existing circumstances of the country.

The supreme court (Chief Justice Taney delivering the opinion), in the case of Luther v. Borden, 7 How. [48 U. S.] 45, say: "Unquestionably a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of the Union as to any other government. The state itself must determine what degree of force the crisis demands, and if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the state as to require the use of its military force, and the declaration of martial law, we see no ground upon which the court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition."

Now, what say the writers on the law of nations? Vattel says, in book 3, c. 18, p. 425: "When a party is formed in a state who no longer obey the sovereign, and are possessed of sufficient strength to oppose him, or where, in a republic, the nation is divided into two opposite factions, and both sides take up arms, this is called a civil war. Some writers confine this term to a just insurrection against their sovereign, to distinguish that lawful resistance from rebellion which is open and unjust resistance. But what appellation will they give to a war which arises in a republic torn by two factions, or in a monarchy between two competitors for the crown? Custom appropriates the term of civil war to every war between the members of one and the same political society."

And Wheaton, in his great work on International Law, says, on page 365: "A civil war between the different members of the same society is what Grotius calls a mixed war. It is, according to him, public on the side of the established government, and private on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling the contending parties to all the rights of war as against each other, and even as respects neutral nations."

Judge Chase, of the supreme court, in the case of Ware v. Hilton, 3 Dall? [3 U. S.] 199, speaking of the effect of the act of the Virginia convention in June, 1776, and the declaration of independence by congress on the 4th of July following, says: "Before these solemn acts of separation from the crown of Great Britain, the war between Great Britain and the United Colonies, jointly and separately, was a civil war; but instantly, on that great and ever-memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon all the other rights of an independent nation attached to the government of Virginia." Whether the learned judge be correct in his view, that the war became a public war after the declaration of independence, a view he may be excused for taking, if wrong, as his own name was appended to that imperishable document, we have the sanction of his great name to the doctrine that to such a contest there belonged all the rights of war. I am therefore clear in the opinion that as a blockade is an acknowledged belligerent right under the law of nations where war exists, the blockade of the Southern ports was lawfully proclaimed by the president.

In the discussion of this question I have said nothing in reference to sovereign rights of the government: whether it may not at the same time exercise both sovereign and belligerent rights. Such a question does not arise in the case. I have confined myself to the examination of the existence or not of belligerent rights by the government in reference to the present unfortunate state of the country. And Phillemore, in his Commentaries on International Law (volume 3, p. 740), gives us a simple rule by which to determine this question. He says: "In the case of a civil war, the English law furnishes a good criterion as to whether the country is to be considered at peace or at war—that whenever the king's courts are open it is a time of peace, in judgment of law." Judged by this standard, then, as the federal courts are closed in the Southern states, there is a state of civil war. And the government is remitted to its belligerent rights, to be exercised in accordance with those maxims of humanity, moderation and honor, which the law of nations has prescribed to be observed by both parties in every civil war.

Sitting in a court of the captors, adjudging a question of prize, I am to decide whether this vessel and cargo can be condemned upon either of the grounds alleged by the district attorney. He contends that the ship and cargo are to be condemned as enemy's property, and if not such, to be condemned because there was committed a breach of blockade. Now, as both these grounds involve

questions of fact, as well as questions of law, let us see what are the facts of the case as presented in the pleadings and evidence. The schooner F. W. Johnson is owned by a certain Holder Almy, a resident and citizen of the state of Rhode Island. That he has been for the last five years largely engaged in the business of wrecking along the Atlantic coast, owning some other vessels, and was frequently called by his business to Portsmouth and Norfolk, in Virginia. That he married a lady in one of those places, and as his business permitted, passed much of his time there, but left there for his home in Rhode Island about the time of the bombardment of Fort Sumter. That he purchased the F. W. Johnson in Norfolk some five years since, and caused her to be enrolled in Norfolk on the 5th of July, 1856, and losing the certificate of that enrollment, he enrolled her again at the same port on the 29th of September, 1858, under which she has been sailing since. The last coasting license, which recites the enrollment of 1858, was taken out at Norfolk on the 2d of March last.

In the enrollment Holder Almy is mentioned as "of the city of Norfolk, state of Virginia," but he only swears "that he is a citizen of the United States." The said schooner was at the time of her capture, sailing under the flag of the United States, and her captain and crew were all citizens of Massachusetts or Connecticut. These are all the facts in reference to the question of ownership. The district attorney contends that, inasmuch as the enrollment recites Holder Almy as of Norfolk, Virginia, he cannot contradict it, so as to relieve his vessel from condemnation as enemy's property. Now, when this enrollment was made, Holder Almy was for a temporary purpose at Norfolk, where he purchased the vessel, and where it was perfectly legal for him to enroll her, if he was not absolutely required to do so by our registry and enrollment acts. See Act Dec. 31, 1792, § 11 [1 Stat. 292], and Act Feb. 18, 1793, § 2 [1 Stat. 305]. Norfolk was then a part of the United States, acknowledging its allegiance to the government, and where the officers of the government granted the license and made the enrollment which have been given in evidence in this case.

Now, is an enrollment anything more than prima facie evidence of ownership or of the residence of the owner? May not the true state of the facts be shown by the evidence—the question being, was the domicil of the owner at the time of the capture in an enemy's country, and not what may have been his residence at any former period? It is true, the owner who makes the oath in the custom-house, to enable him to obtain the enrollment, would not be heard in a court of justice to dispute the facts he had sworn to, but he could show any facts not inconsistent with the oath he had taken. For instance, he could show, that although he is named as sole owner, the equitable interest in a moiety of the vessel is in other parties (see case of Weston v. Penniman [Case No. 17,455]), or that since the enrollment his domicil has been changed. In the case of the ship Resolution and cargo, in the federal court of appeals in 1781, that court, in [Miller v. The Resolution] 2 Dall. [2 U. S.] 23, say (speaking of the ship's papers), "that every commercial country has directed by its laws that its ships shall be furnished with a set of papers called the 'ship papers.' And this criterion the law of nations adopts in time of war to distinguish the property of different powers when found at sea; not indeed as conclusive, but presumptive evidence only."

Bills of lading, letters of correspondence, and all other papers on board which relate to the ship or cargo, are also considered as prima facie evidence of the facts they speak. They say again, "if the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless they who contest the capture can produce clear and unquestionable evidence to prove the contrary." It will be found on reference to the case of Dudley v. The Superior [Case No. 4,115], that Judge Leavitt (of the United States district court of Ohio) held that as the Superior had been enrolled at Buffalo, the enrollment was prima facie evidence that she belonged to the port of Buffalo at the time of her registry. He says: "It is true, in controversies between the owners of a vessel involving a question of title merely, the enrollment is not even prima facie evidence." "When offered to show title in the person making it, it is wholly inadmissible as evidence, for the reason that it is proof only of his acts, and cannot be received against other parties. But upon an incidental question, not affecting the title of the parties, it is competent evidence, and unless contradicted by clear evidence, will be held conclusive as to the port or place to which the vessel belongs." In the case of U. S. v. Brune [Id. 14,677], Judge Grier decided that in a criminal prosecution against one of the crew of an American vessel, the registry was not even prima facie evidence of ownership, to show the American character of the vessel. I therefore am of the opinion that in this case the enrollment and license were only prima facie evidence that Holder Almy, the owner of the said schooner, was a citizen of Virginia. As further authorities on this question, see the following cases: Bradbury v. Johnson, 41 Me. 582; Brooks v. Minturn, 1 Cal. 482; Stokes v. Carne, 2 Camp. 340.

Now, as I said before, the domicil of the owner at the time of the capture of the vessel, determines its character as hostile or not. In the case of The Ocean, 5 C. Rob. Adm. 91, Sir Wm. Scott decided that a British merchant settled in Holland, at the breaking out of hostilities, but taking early measures to remove, was entitled to restitution of his prop-

erty seized as enemy's property. And the same doctrine was maintained by the supreme court in the case of The Venus, 8 Cranch [12 U. S.] 253. Justice Washington, in delivering the opinion of the court, says, speaking of a domicil acquired in a foreign country: "But this national character which a man acquires by residence may be thrown off at pleasure by a return to his native country, or even by his turning his back on the country in which he has resided, on his way to another. To use the language of Sir Wm. Scott, it is an adventitious character gained by residence and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, bona fide, to quit the country sine animo revertendi."

Now, tested by these decisions, this vessel belonged at the time of her capture to Rhode Island, for Capt. Stoddard swears in his claim and answer that Holder Almy left Norfolk about the time of the bombardment of Fort Sumter, and returned to his home in Rhode Island. And there is nothing in the case to cast the slightest suspicion on this statement. The cargo belonged to certain underwriters of the city of New York to whom it had been abandoned by the Baltimore & Ohio Railroad Company. There cannot, therefore, be any condemnation of either the vessel or cargo as enemy's property.

Now, as to the other ground of condemnation alleged by the district attorney—the breach of blockade. What are the facts in reference to this question? It appears that some time previous to the 1st of last May, upwards of six hundred tons of railroad iron were shipped from England in the Norwegian bark Albion, bound to this port, and consigned to the Baltimore & Ohio Railroad Company, the purchasers thereof, and who had caused it to be insured in the New York insurance offices. That the said bark, while proceeding on her said voyage was, about the first of May, wrecked upon the Atlantic coast, about thirty miles south of Cape Henry, and lay there about one-fourth of a mile from the shore. Under these circumstances the railroad company abandoned it as for a total loss, and James Carey Coale, the agent of the New York underwriters, entered into a contract with Capt. Baker, the mate of said schooner, to send her down to the wreck to save as much of the iron as possible.

That the said schooner F. W. Johnson about that time came up to the port with a cargo saved from a wreck near Smith's Point, in the Chesapeake, and left here about the tenth of May to fulfill said contract, so made with the agent of the underwriters. That they went first to New Inlet for a harbor, and reached the wreck of the Albion about the 1st of June, and found it in a most exposed situation, liable to go to pieces in the first storm. That they proceeded to take iron from her, and had succeeded in getting twenty-seven tons on board when they were captured. That they intended to land said iron, as soon as they could get it out, at New Inlet, being the nearest land on which they could safely deposit it, until it could be removed to Baltimore, to which port they intended to bring it—as it was important, from the exposed condition of the vessel, to remove the iron from it as fast as possible. That New Inlet is an uninhabited part of the coast, one of those small inlets between the ocean and Pamlico Sound, and about twenty miles from the main land and seventy miles from the nearest port of entry, Edenton, in North Carolina. These distances I learn from an examination of the map of that state. It is at the north end of the Chickconacomo bank, that long ridge of sand thrown up by the Atlantic, and which separates it from Pamlico Sound. On a map exhibited in court during the trial, the water in New Inlet was marked 2½ feet deep; through which there is no passage for vessels into the sound, and I suppose it is gradually closing up by the sand washed up from the ocean, as I find, on examination of the map of North Carolina, that two inlets north of New Inlet, Currituck Inlet and Roanoke Inlet, are now closed.

Now it is perfectly clear from all the evidence in the case that there was no intention to violate the blockade by any party connected with the F. W. Johnson. They went there in good faith to save the wrecked property of loyal citizens, and every witness examined negatived the idea that there was any intention to carry this iron or any part of it into North Carolina. Now the purpose of a blockade is to prevent all commercial intercourse with the interdicted port. Says Phillemore (volume 3, p. 292): "The object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place." Now, do the facts of this case show any breach of a blockade, as thus defined? Certainly it would not have been contended that any breach of the blockade had been committed if the master and seamen of the bark Albion had, on their being wrecked, with their small boats made the effort to save the cargo, and to enable them to do so, had carried it to the nearest place of safety with the intention of removing it to the port of destination, Baltimore.

Now, how is the case altered, when, instead of the ship's crew, the effort to save the cargo is made by professional wreckers employed by the owners? Is it not such a case of necessity as excuses the national offense. Says Phillemore (volume 3, p. 61), speaking of a decision of Lord Stowell: "The law of cases of necessity, he observes, is not likely to be furnished with precise rules; and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as a matter of surprise, therefore, if much instituted rule is not to be found on the subject. A clear necessity is a sufficient justification for every thing that is done fairly and with good faith under it."

Now, tested by this standard, is it not rea-

sonable and just that the owner of goods, cast upon the shores of a blockaded country by a storm of the ocean, should be permitted to make every exertion to save them for the purpose of carrying them to the destined port? The principle of excuse from necessity will be found to have received the sanction of the supreme court in the case of The Mary, 9 Cranch [13 U. S.] 126. Chief Justice Marshall, and I can name no higher authority, in delivering the opinion of the court, says: "The Mary was forced into Waterford by irresistible necessity, and was detained there by the operation of causes she could not control. Had her departure been from a neutral port, and she had been thus forced, during the voyage, into a hostile port, would it be alleged that she had incurred the liabilities of a vessel sailing from a port of the enemy? It is believed that this allegation could not be sustained, and that it would not be made."

The same principle was sustained by Sir W. Scott in the case of The Charlotta, Edw. Adm. 252. That was the case of an American ship on a voyage from Boston to St. Petersburg, putting into the Texel, in distress and for repairs, Texel then being under blockade, That learned admiralty judge, on being satisfied that there was a necessity for her going into the Texel, restored the ship and cargo. He also maintained the same principle in the case of The Fortuna, 5 C. Rob. Adm. 27. I think that principle covers this case, and I will sign a decree restoring the vessel and cargo to the claimants upon the payment of the costs of the case. I charge them with the costs, because the enrollment, which was the only evidence the boarding officer had at the time, recited that the schooner belonged to a citizen of Virginia, and justified her capture and her being sent into a prize court for adjudication.

Case No. 15,180.

UNITED STATES v. GADSBY.

[1 Cranch, C. C. 55.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

INDICTMENT—GAMING.

An indictment will not lie under the Virginia act, for suffering gaming in the defendant's house; because the act has given an action of debt to the informer.

Indictment for suffering gaming in his public inn, contrary to Act Va., Jan. 19, 1798, c. 2, § 3. This indictment was quashed, upon the same ground upon which the court instructed the jury in the case of U. S. v. Simms [Case No. 16,290]. See that case in the supreme court of the United States, in 1 Cranch [5 U. S.] 252

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,181.

UNITED STATES v. GALACAR.

[1 Spr. 545.] [1]

District Court, D. Massachusetts. October, 1852.

SHIPPING REGULATIONS — REPORTING ARRIVAL — BURDEN OF PROOF.

1. The report required by St. 1790, c. 35, § 16 [1 Stat. 158], to be made by a master, of the arrival of his vessel, must be made at the office of the chief officer of the customs.

2. A report to an inspector, on board of the vessel, and in a shop on shore, is not a compliance with the statute.

3. In a prosecution for not making the requisite report, the burden is upon the government, to prove that it was not made at the proper office.

This was a libel or information, filed by the district attorney of the United States, to enforce the payment of a penalty of $1.000 by the master of the brig Baltic, for an alleged violation of the act of 1790 (chapter 35, § 16), which enacts:—"That within twenty-four hours after the arrival of any ship or vessel, from any port or place, at any port of the United States established by law, at which an officer of the customs resides, or within any harbor, inlet, or creek thereof, if the hours of business at the office of the chief officer of the customs at such port will permit, or as soon thereafter as the said hours will permit, the master or other person, having the charge or command of such ship or vessel, shall repair to the said office, and shall make report to the said chief officer of the arrival of the said ship or vessel." The only witness was the inspector, who testified that the vessel put into Edgartown on a Friday afternoon, and sailed early Monday morning, and that, in the course of Friday afternoon, he examined and certified the papers on board of the vessel, and again in a shop where he accidentally met the defendant, and that the defendant did not make a report at the custom house, or go there at all. But it appeared, on cross-examination, that the witness was employed in boarding vessels nearly all of the two days the brig lay there, and was not himself at the custom house, if at all, more than a few minutes, and that the defendant landed with his papers. The defence was rested on the ground that, by not summoning the collector who alone had personal knowledge whether the report was made, (it being a verbal report,) the government had failed to introduce satisfactory testimony of any default of the defendant; who must be presumed to have done his duty.

G. Lunt, U. S. Dist. Atty.

R. H. Dana, Jr., for defendant.

SPRAGUE, District Judge (charging jury). It is the duty of the master, not merely to

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

report his vessel within the time specified, but to report her at the office of the chief officer of the customs. His report may be verbal, and only of the fact of the arrival of the vessel, a fuller report being required after forty-eight hours. The duty of the inspector was to board all vessels, examine the manifests and certify them, which duty was performed, in this case on board of the vessel, and at a shop on shore. This was not a report answering the requirement of the statute. The only question for the jury is, whether the defendant did report his vessel, within the specified time, at the office of the collector. The burden is on the government to satisfy the jury that he did not so make a report.

Verdict of not guilty.

Case No. 15,182.

UNITED STATES v. GALBRAITH.

[Hoff. Op. 77; Hoff. Dec. 20.]

District Court, N. D. California. Jan. 22, 1861.[1]

CALIFORNIA LAND GRANTS—EXPEDIENTE AS EVIDENCE—ALTERATION OF TITLE PAPERS—FAILURE TO OCCUPY.

1. If the expediente be genuine, it affords evidence of the issuance of the grant far more satisfactory than the production of the title papers by the party interested: for the only safe and reliable documentary evidence in this class of cases is that afforded by the records found in the archives.

2. A fraudulent attempt to alter the date of a grant so as to obviate an apprehended objection to its validity, can have no effect to take away from a claimant any lands actually granted to him before the acquisition of the country by the United States. U. S. v. West's Heirs, 22 How. [63 U. S.] 319, followed.

3. The grant of the governor vests a title in the grantee which must be confirmed unless he has been guilty of such unreasonable neglect to comply with the conditions of the grant as justifies the inference that he abandoned it during the existence of the former government. But no such inference can be drawn from a neglect to occupy and settle before the conquest, where the grant was made less than a month before the capture of Monterey, especially as the disturbed condition of the country made it dangerous for the grantee to remain in the vicinity. U. S. v. Fremont, 17 How. [58 U. S.] 442, applied.

[This was a claim by James D. Galbraith to the Rancho Bolsa de Tomales, five square leagues, in Marin county, granted June 12, 1846, by Pio Pico to Juan N. Padilla; claim filed April 29, 1852, confirmed by commission April 11, 1854, by the district court December 1, 1854. Case unreported. Decree reversed by the supreme court, and cause remanded for further proofs. 22 How. (63 U. S.) 89. The case is now heard upon further proofs taken.]

HOFFMAN, District Judge. The claim in this case was confirmed by the board, and by this court; but, on appeal, the decree of this court was reversed, and the cause remanded for further proofs. Further proofs have accordingly been taken, and the case is again presented for decision. The documents relied on by the claimants, are:

Title Papers.

(1) A petition of Juan N. Padilla to the governor, dated at Monterey, May 14, 1846, soliciting five square leagues of land, known as Bolsa de Tomales. (2) A certificate of Castro, prefect of the First district, stating the land to be vacant and grantable; also dated at Monterey, May 10, 1846. (3) A marginal reference for information, signed by Pio Pico, and dated May 20, 1846. (4) A decree of concession dated Los Angeles, June 12, 1846. (5) The borrador, or office copy, of the formal title delivered to the party, which is usually found among the papers remaining on file among the archives.

All the foregoing documents are found in the archives, and compose what is called the "expediente."

The claimants have also produced from their own custody, the original title delivered to the grantee, and a certificate of approval by the departmental assembly.

Frauds in Title Papers.

With respect to these last two documents, there can be no doubt that the first or formal title has been altered, the date having been changed from June 12th to February 12th, 1846. The certificate of approval is also evidently a forgery. No minute of any such action can be found in the journals of the departmental assembly, and the signature of Pio Pico, with which the court is very familiar, and the various forms of which, as shown by the archives, were considered at large in the case of Luco v. U. S. [23 How. (64 U. S.) 515], has, I am satisfied, either been forged or signed by him long subsequently to the date of the document.

Expediente Genuine.

The expediente, however, found in the archives, bears every mark of genuineness. The petition is partly in the handwriting of Arce, and partly in that of Padilla, the grantee. The marginal decree of concession and the borrador of the title are in the handwriting of Moreno, the secretary, and the signatures of that officer and of Pio Pico, the governor, are evidently genuine, and such as were used by them at the date of the documents. The certificate of Castro and his signature are also in his handwriting; and from an examination of the original documents in the archives, I can see no reason to doubt the genuineness of the entire expediente. Such is the opinion of Mr. Hopkins, the keeper of the archives, on whom, for his great intelligence, long familiarity with the archives, and unquestionable integrity, it is not too much to say that more reliance should be placed than on almost any

[1] [Reversed in 2 Black (67 U. S.) 394.]

number of the hackneyed and professional witnesses, who usually testify in this class of cases.

This opinion is corroborated by several facts.

1. On the back of the expediente is found an endorsement: "Bolsa de Tomales, concedido a Juan NePomunceno Padilla, No. 571." This endorsement is in the handwriting of Mr. W. E. P. Hartnell, by whom and Maj. Halleck the expendientes on file among the archives in 1847 were examined and numbered. The numbering was continued from the last number in Jimeno's index. Endorsements were made on the expedientes made up subsequently to the date of the last on that index, and a list similar to that of Jimeno was prepared. On that list the grant in this case is noted. and its number, No. 571, exactly corresponds with its date; No. 570 being dated a few days before the 12th of June, the date of this grant, and No. 572 a few days after. It has been frequently proved, and the fact is undoubted, that this numbering was effected by Mr. Hartnell, early in 1847, and the list prepared shortly afterwards. There can, I think, be no doubt of the existence of this expediente in the archives, in 1847.

There are some other, but slighter, corroborations of this conclusion furnished by the documents themselves. The petition, as has been stated, is dated Monterey, May 14th. The certificate of Castro is dated May 10th. Both purport to have been written at Monterey. They must therefore have been taken to Los Angeles to be submitted to the governor. On examining the marks or creases in the paper, it is evident that both documents were folded together, precisely as would have been the case if made into a single package and placed in one envelope. The appearance of the paper, the color of the ink, &c., in all respects correspond with other documents of unquestionable authenticity dated about the same time; and the handwriting of Castro, which is somewhat peculiar, bears a like resemblance to other official documents written by him about the same time. If, then, this expediente was in the archives in 1847, it follows that it must have been executed by Pio Pico before his flight from Los Angeles to Lower California, in August, 1846, for he did not return to this country until 1848, nearly a year after this expediente had been indexed and numbered by Mr. Hartnell. That Pio Pico was in Los Angeles on the 12th of June and even so late as the 16th of that month, is clear, from official communications, &c., to the ayuntamiento of that pueblo, signed by himself and Moreno, and dated on the 15th June; and I can see no reason for assuming that the grant was not executed on the day it bears date. It is to be remembered that although the date of the capture of Monterey has been in acts of congress and the decisions of the supreme court fixed, as the period of subversion of Mexican authority and the date of the conquest, its importance could not, in July, 1846, have been suspected. The capital of the department still remained in the hands of the Mexicans. The authority of the governor was recognized and enforced throughout all the southern portions of the department. The departmental assembly had not ceased to hold its sessions, and the most important conflicts which occurred in California took place after the capture of Monterey. Whatever reasons may exist for fixing the date of the actual or rather constructive conquest of the country, it can hardly be supposed that Pio Pico, when asked to sign a grant in July, would have suspected that he imparted additional validity to it by dating it in the preceding month. I am not aware that it has ever appeared that Pico actually signed any grant in July or August, and attached to it an earlier date, although several cases have occurred where the dates of documents, actually signed in those months, have since been altered, so as to make them appear to have been executed before the 7th July.

Some stress was laid upon the fact that the marginal order for an informe is dated May 20th, while the certificate of Castro giving the required information is dated May 10th, and must then have been before the governor. But I find nothing in this not susceptible of easy explanation. The usual marginal order may have been drawn, and the proceedings suspended until the informe was received, without adverting to the circumstance that the information was already furnished by Castro. Such an oversight is by no means improbable. And it is not until the 12th of June, when perhaps the attention of the governor was called to Castro's certificate, and he was urged to issue the grant, that he makes the decree of concession, and signs the formal title paper. If, then, the expediente be genuine, it affords evidence of the issuance of the grant far more satisfactory than the production of the title paper by the party interested. For, as has been so often remarked by this court, the only safe and reliable documentary testimony in this class of cases is that afforded by the records found among the archives.

The Fraud does not Injure Title.

The only question which can be raised is —does the fact that a certificate of approval by the assembly has been forged, and the date of the grant altered, forfeit the land to the United States, or—what is the same thing —prevent this court from confirming the claim? As the duty of this court, under the act of 1851 [9 Stat. 631], is to inquire what lands were private and what public at the date of the treaty of cession, it would seem obvious that the determination of that question cannot be affected by the circumstance that since that date a fraud has been at-

tempted to be perpetrated. If the only evidence of the making of the grant, was the title paper itself, it might be that the court would be compelled to refuse to admit the altered paper in evidence, and then to reject the claim for want of testimony to support it. But we have the further and far more satisfactory evidence furnished by the archives; the petition, which shows that the lands were solicited; the informe of Castrô, which shows them to have been vacant; the decree of concession, which shows that the governor acceded to the petition, granted the land, and directed the formal title to issue, and the borrador or the office copy of the grant actually delivered to the party, in all respects the counterpart of that produced by claimants, except that in the latter the date has been altered from June to February. It is unnecessary, however, to further discuss the question, for the decision of the supreme court in the case of U. S. v. West's Heirs, 22 How. [63 U. S.] 319, is a direct authority on the point. Under the ruling in that case, it must be taken as law that a fraudulent attempt to enlarge a grant —still less an attempt to alter it so as to obviate an apprehended objection to its validity—can have no effect to take away from a claimant, lands actually granted to him before the acquisition of the country by the United States.

With regard to the possession, the evidence is not satisfactory. The proofs, I think, show that Padilla, who was the owner of an adjoining rancho, drove his cattle upon the land now claimed, the pasture on his own having been consumed by fire. The same range was also frequented by the cattle of Bojorques, another adjoining ranchero, and a dispute having arisen between the two, it was decided by the alcalde that Bojorques should remove his cattle, and those of Padilla should remain. This occurred in 1845, and before Padilla had received any grant, or even applied for the land. The decision of the alcalde seems to have been founded on a previous permission to occupy the land provisionally granted to Padilla by the first alcalde. It would seem that the raqueros of Padilla constructed a small hut of poles and tules, to afford shelter while tending their herds. But there was no permanent settlement effected, nor any other occupation than such as has been mentioned. In the spring of 1846, Padilla, having become involved in the disputes between the Americans and his countrymen, was compelled to leave the northern part of the country, and his cattle were sold or withdrawn from the Bolsa de Tomales. It is clear that no possession was ever taken under the grant or as a fulfillment of its conditions. And the only occupation of the tract was such as has been described. But it has been decided that the grant of the governor vests a title in the grantee which must be confirmed unless he has been guilty of such unreasonable neglect to comply with the conditions as justifies the inference that he had abandoned his grant during the existence of the former government. U. S. v. Fremont, 17 How. [58 U. S.] 442. But no such inference can be drawn from a neglect to occupy and settle during the brief period which intervened between the date of the grant, June 12th, and the conquest of Monterey, July 7th, especially as the disturbed condition of the country, owing to the Bear Flag hostilities, and the relations between Padilla and the American settlers, who had risen against the California authorities, made it dangerous for him to return to that part of the country.

Under the views originally entertained by this court, the claim would have been rejected on the ground that the grant, not having been confirmed by the assembly, constituted but an imperfect or inchoate title, which the United States was not bound to perfect unless the claimant could show either some antecedent consideration, or an occupation and settlement effected under and on the faith of the grant, sufficient to give him an equitable right to demand its completion by the United States. But under the ruling in the case of U. S. v. Fremont [supra], evidence of occupation and settlement cannot now be exacted, nor is the inquiry into those facts material, unless it be alleged that there has been unreasonable neglect to fulfill the conditions, amounting to an abandonment. Under any circumstances, I should of course feel bound to govern my decision by the rulings of the supreme court. But in these cases, where the rules of decision as laid down by that tribunal, have long been known and accepted as the law, where the property has been frequently transferred and may have passed into the hands of bona fide purchasers for value, who have invested their money, relying upon the stability of the rules laid down by the highest tribunal of the country, it would be doubly improper in an inferior court to decline to decide in accordance with those rules, whatever might be its opinion as to their original correctness.

As, then, the proof shows that the grant issued on the 12th June, 1846, prior to the date of what has been regarded as the conquest of the country, and the final subversion of the Mexican authority,—as no unreasonable neglect can be imputed to the claimant,—the case appears to me one which, under the decisions of the supreme court, ought to be confirmed. A decree must be entered accordingly.

[The decree confirming the claim was reversed by the supreme court upon appeal by the United States. 2 Black (67 U. S.) 394.]

Case No. 15,183.

UNITED STATES v. GALINDO.

[1 Cal. Law J. 233.]

District Court, N. D. California. 1863.

MEXICAN LAND GRANTS—CLAIM REJECTED.

[An alleged grant made by a priest of the mission of Santa Clara, under authority given in certain communications from the governor and commanding general, rejected, where the only documents were the original deeds produced by the claimant, unsupported by the records of the mission or by any other evidence from the archives.]

[This was a claim by Juan C. Galindo, based upon an alleged grant from a priest of the mission of Santa Clara, for two leagues of land lying in Santa Clara county, Cal.]

OPINION OF THE COURT. The title of the claimant in this case is founded on an alleged deed to him from Padre Real, priest of the mission of Santa Clara. The authority for making this deed is claimed to have been conferred on Padre Real by a communication addressed to him by Jimeno on the 21st of December, 1844; by a communication dated June 16, 1846, from José Castro to Padre Real; and by an order of José Castro dated June 9, 1846, on the margin of a petition addressed to General José Castro, and dated May 12, 1845. The deed of Real to Galindo is dated June 10, 1846. In his letter of June 16, José Castro, after alluding to a copy previously transmitted to Real of a supreme order dated January 14, 1846, in which the commandants general were authorized to dispose of all the resources of their departments, transcribes a dispatch dated June 10, received by himself from the governor of California.

It is evident that neither the dispatch of Castro, dated June 16, nor the communication to him from the governor dated June 10, and which he transcribes for the information of Real, could have constituted the authority for making a deed on the 10th of June, the very day on which the governor's dispatch was written at the capital of the department. The communication of Jimeno of December 21, 1844, purports to be written by the direction of the governor and to order the priest to proceed to the designation and delivery of such lands of the mission as he may think it necessary to concede for the support of divine worship and the maintenance of his reverence, "making an entry in a book of the lands conceded, which book shall be kept in the archives, and which shall serve as a notice when the poblacion of Santa Clara shall be formed." Neither this communication nor that of José Castro to Real is found in the archives of the former government. Nor do we find any trace of the supreme order of January 14, 1846, referred to in Castro's letter, whereby the commandants general were authorized to dispose of all the resources of their departments. No book containing entries of the land conceded under the authority alleged to have been conferred by Jimeno's dispatch of December 21, 1844, is produced, nor do the archives contain any evidence of any other concession made by the priest by virtue of that order.

It is unnecessary to consider whether, under the colonization laws and regulations, the governor had the right to delegate to a priest of a mission the power of conceding public lands. For no clue of the documents by which he is supposed to have done so is found in the archives, or have any higher evidence of authenticity than their production by the claimants, with proof of the handwriting. The dispatch of Jimeno is evidently a mere authority to the priest to designate and deliver the possession of such lands as it may be absolutely necessary to dispose of for the maintenance of divine worship, with an implied promise that the government will respect the rights so conferred when the poblacion is formed and the lands distributed amongst the pobladores. But this authority seems never to have been acted on by the priest, even if the documents produced be genuine—for the deed to Galindo was not made until nearly two years afterwards. And Castro's communication shows that the dispatch it encloses was in answer to a recent application by Real for authority to sell the lands of the mission to pay its debts. It could not have been supposed by Real that all the authority he required was already conferred by Jimeno's dispatch of December 21, 1844. If the genuineness of these documents were undoubted; if it were shown that the mission was in fact indebted to Galindo, and if, acting on the authority conferred by the dispatches, the priest had conceded to Galindo a tract of land which he had occupied and improved, and of which, at the conquest, we had found him in the undisturbed possession, the case would have had strong equitable claims upon the consideration of the United States government, notwithstanding the technical objection that the governor had no right to delegate his authority to grant. It was, probably, on these grounds that the claim was confirmed by the circuit judge.

But the proof of the authenticity of the documents is unsatisfactory; and they are wholly unsustained by archive evidence, which, under the recent decisions of the supreme court, we are justified in exacting. There seems to be no reason why the borrador of Jimeno's dispatch to Real, or of the communication to Castro, and by him transcribed to Real, should not, if genuine, be found in the archives. The deed of Real to Galindo is subscribed by two witnesses, neither of whom has been called: it appears that Galindo never occupied the tract until 1847; nor is there any proof of a notorious and recognized claim of ownership by Galindo during the existence of the former government. An expediente from the archives containing a petition by Galindo for two leagues of land in extent, a marginal order of reference, and a

favorable report, have been produced. But this petition, which is dated April 1, 1846, refers to an entirely different tract from that described in Real's deed, and it appears not to have been acted on. A petition of Galindo to José Castro, dated May 12, 1846, is also produced, in which Galindo prays that the debt due him by the mission may be paid by a grant of the land petitioned for by him two years before. On this petition is a marginal order by Castro, directing Galindo to apply to the priest that the latter may satisfy his claim, if just, by giving him a piece of land. This order is dated June 9, 1846.

But independently of the objection that Castro, as commandant general, had no authority to empower the priests to dispose of mission lands, the document has no sufficient evidence of authenticity. It is not found in the archives, but is produced from the custody of the claimant, and Mr. Hopkins testifies that the date appears to have been originally written July 9th, and altered to June 9th. If the document was, in fact, written in July, it could not have been the authority to Real for making a deed in June. I think that, under the proofs, the claim must be rejected.

Case No. 15,184.

UNITED STATES v. GALLAGHER.

[See Case No. 3,393.]

Case No. 15,185.

UNITED STATES v. GALLAGHER.

[2 Paine, 447.] [1]

Circuit Court, New York.[2] March, 1832.

INDICTMENT—ASSAULT WITH DANGEROUS WEAPON.

The twenty-second section of the crimes act of March 3, 1825 (7 Bior. & D. Laws, 401 [4 Stat. 115]), providing for the punishment of assaults with dangerous weapons, contemplates a misdemeanor and not a felony; and in an indictment under the act for such an offence, it is not necessary to charge that the assault was committed feloniously, or with intent to perpetrate a felony.

The prisoner was indicted under the twenty-second section of the crimes act of March 3, 1825 (7 Bior. & D. Laws, 401 [4 Stat. 115]). The indictment charged "that the prisoner, [James] Gallagher, on the high seas, with a dangerous weapon called a tormentor, (being a meat-hook,) held in his right hand, in and upon Isaiah Hartless did make an assault." &c. Moved, in arrest of judgment, that the indictment was bad, in not charging the assault to have been committed "feloniously," or with an intent to perpetrate a felony; that the mere use of a dangerous weapon, abstracted from the "intent" with which used, was not contemplated to have been made a "felony"; that the twenty-second section had in view the use of a dangerous weapon with a felonious intent, and intended generally to punish "felonious assaults." The phraseology indicated this classification. All the other assaults named were "felonies," and the word "other," in the sentence, "shall, with a dangerous weapon, or to perpetrate any other felony," supposes "the intent to commit a felony" as necessary to be charged on an assault with a dangerous weapon. In support of this construction, the view taken of the twenty-second section by the chairman of the judiciary committee, Mr. Webster (1 Gales & Sea. 330), was referred to, who remarks, "that no provision had been made for that class of offences called 'felonious assaults,' for want of which it had actually happened that a sailor, who cut the throat of his captain with 'a razor' from ear to ear, could receive no punishment whatever, because the captain had recovered." That the omission in the indictment was fatal, 2 Hale, P. C. 170, 184, and Starkie, Cr. Pl. c. 4, pp. 80, 242, were cited.

After advisement, the court, by THOMPSON, Circuit Justice, decided, that the phraseology of the twenty-second section was not free from obscurity; but the court were of opinion that the act contemplated a misdemeanor, and not a felony, in providing for an assault with a dangerous weapon. That the indictment, therefore, was well enough. The prisoner was, accordingly, sentenced.

J. A. Hamilton, for the United States.

W. Q. Morton, for prisoner.

NOTE. In North Carolina, the court may inflict a fine only upon one convicted of an assault and battery, with intent to kill; they are not bound to imprison. State v. Roberts, 1 Hayw. (N. C.) 176. If one man deliberately kills another, to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, it is murder; and consequently an assault with intent to kill, cannot be justified, on the ground that it was necessary to prevent trespass on property. State v. Morgan, 3 Ired. 186. A man shall not even in defence of his person or property, except in extreme cases, endanger human life, or great bodily harm. Id. In criminal, as in civil cases, if there be an assault, it cannot be justified, other than by showing specially, all the circumstances which render the act rightful; and the sufficiency of the alleged justification is a matter of law. Id.

In Pennsylvania, an assault and battery with intent to commit a capital offence, as rape or murder, or an attempt to commit the crime against nature, offences in their nature infamous, would fall within the class of offences described in the fourth section of the act of April 5, 1790, as offences not capital, for which by the laws in force before the act to amend the penal laws of this state, burning in the hand, cutting off the ears, placing in the pillory, whipping or imprisonment for life, was or might be inflicted. Offences of this description might be punished by imprisonment at hard labor for any term not exceeding two years, at the discretion of the court, in pursuance of the fourth section of the act of April 5, 1790; and by the act of 4th April, 1807, the time is extended to a period not exceeding seven years. The court, in giving the opinion in Scott v. Com., 6 Serg. & R. 227, did not decide upon the proper punishment for an assault and battery with intent to kill, but simply determined that this offence did not subject the

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District not given.]

party to the punishment pronounced in that case. It was not usual in Pennsylvania, (nor ever, it is believed, exercised before the act for reforming the penal laws,) to inflict whipping, the pillory, or imprisonment for life, or other ignominious corporal punishments, for any assault, whatever the intention might be, unless committed with very atrocious designs on the person, as with intention to murder, ravish, or commit the unnatural crime; and, therefore, the fourth section of the act of April 5, 1790, and the act of 4th April, 1807, do not authorize imprisonment at hard labor to be inflicted for an assault with intent to steal from the pocket of another. Rogers v. Com., 5 Serg. & R. 463.

In Alabama, an indictment under the second section, fifteenth chapter of the Penal Code, for an assault with intent to kill, must, within the terms of the act, allege that the individual assaulted was a white person; and an indictment which does not contain that allegation, cannot be aided by a verdict finding the fact affirmatively. Nelson v. State, 6 Ala. 394. When a slave is indicted for an assault on a white person with intent to kill and murder, and the verdict is "guilty of an assault with intent to kill" only, it is considered a finding of guilty only so far as it is expressed, and not guilty of an assault with intent to murder. But it is a capital offence for a slave to assault a white person with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only. Nancy v. State, 6 Ala. 483. In the case of a white person such a verdict only amounts to a conviction of assault and battery, and a sentence to the penitentiary is erroneous. An indictment which charges both cruel and unusual punishment of a slave is not bad for duplicity, although the statute declares that "no cruel or unusual punishment shall be inflicted on a slave," but it is not enough that the indictment should pursue the words of the statute; it must state what punishment was inflicted. 8 Ala. 313; 6 Ala. 664.

In Georgia, the black act of 9 Geo. I. is not in force, and an indictment for an assault with intent to murder, is the proper mode of prosecuting offences which, in England, came under that act. State v. Campbell, T. U. P. Charlt. 166.

In Tennessee, the statute of 1820, c. 9, does not limit prosecutions for assaults with intent to murder to twelve months from the commission of the offence. The superior court has jurisdiction of the latter offence; the statute of 1797, which gives exclusive jurisdiction to the county courts of all indictments for assaults and batteries, being held not to apply to such cases. State v. Sharp, 5 Yerg. 245; State v. Anderson, 2 Overt. 6. A conviction upon an indictment for an assault with intent to murder, cannot be pleaded in bar to an indictment for murder, for the offences are distinct in their legal character, and in no case, said the court, could a party on trial for one be convicted of another. The true test, said Chief Justice Shaw, to determine whether a conviction or acquittal upon one indictment is a good bar to another, is well expressed in East's Crown Law, as drawn from the case of Rex v. Vandercomb, 2 Leach, 708. "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second." 12 Pick. 496; 19 Pick. 479. An assault with intent to commit murder, being made a felony by the Penal Code of Alabama, is an offence to which there may be accessories. Hughes v. State, 12 Ala. 458.

In Virginia, on an indictment for unlawful stabbing with intent to maim, disfigure, disable and kill, a verdict that the prisoner is "guilty of unlawful stabbing," will not authorize a judgment; but the court should direct a new trial. Marshall v. Com., 5 Grat. 663.

In an indictment under the statute in Mississippi, for an assault with intent to kill, the accused must be charged with having made an assault on a certain person, with intent to kill that person; and where the indictment alleges an intent merely to kill generally, judgment upon a verdict of guilty will be arrested. Jones v. State, 11 Smedes & M. 315.

In Pennsylvania, where the indictment for assault and battery alleged that the defendant maliciously, &c., did bite or cut off the ear of W. C., and with a certain knife the said W. did stab, &c., with intent him, the said W., wickedly, maliciously, and inhumanely to kill and destroy, it was objected that the charge was stated disjunctively—that he did bite or cut off the ear. But the court stated, that although this would be an objection not to be got over were this the charge alone, it is not material in this case, because the assault and battery is the offence, and the mode, the extent of the injury, and the intention with which it was inflicted, are merely circumstances of aggravation. The offence is the assault and battery with intent to kill, which is sufficiently described, and is punishable by law. Scott v. Com., 6 Serg. & R. 225.

In Missouri, on an indictment for a felonious assault and battery under the thirty-eighth section, second article, of the act concerning crimes and punishments, if the wound inflicted be a dangerous wound likely to produce death, it is sufficient, although the weapon be not a deadly weapon; and if the weapon be a deadly weapon, or likely to produce great bodily harm, it is not necessary that the wound should be a dangerous wound. Carrico v. State, 11 Mo. 579.

In an indictment for an assault with an axe, it will be inferred that it was a deadly weapon without such allegation. Dollarhide v. U. S., 1 Morris (Iowa) 233.

UNITED STATES (GALLEGO v.). See Case No. 5,201.

Case No. 15,186.

UNITED STATES v. GARCIA et al.

[1 Sawy. 383.] [1]

District Court, D. California. Nov. 3, 1870.

PRACTICE—FINAL DECREE—REEXAMINATION.

1. When the minutes of the former United States district court for the Southern district of California, showed that the judge delivered an opinion overruling exceptions and confirming a survey of a Mexican grant, but no decree appeared to have been made or written opinion filed, *Held*, that no final decree had been made and that the cause was still pending.

2. *Held*, further, that it was the duty of this court, which had succeeded to the jurisdiction of the late Southern district court, to enter a decree in the cause; but that on a showing, such as would justify an order for a new trial, or rehearing, or leave to file a bill of review, the cause might be re-examined.

[This was a claim by Maria de Jesus Garcia and others for Los Nogales, one square league in San Bernadino county, granted March 13, 1840, by Juan B. Alvarado to José de la Cruz Linares. Claim filed October 9, 1852; confirmed by the commission January 17, 1854, and by the district court January 16, 1857. Case unreported. It is

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

now heard upon motion to set aside order confirming survey.]

L. D. Latimer, U. S. Atty., and J. W. Harding, for the United States.

Williams & Thornton and Geo. H. Smith, for claimants.

HOFFMAN, District Judge. It appears from the records of the late United States district court, for the Southern district of California, that on the fifteenth November, 1859, the survey of the lands confirmed to the above claimant, was ordered into court for review. Exceptions to the survey were duly filed, and on the twenty-fifth May, 1860, an order was entered, by which the exceptions were in part allowed, the survey set aside, and a new survey ordered in conformity to minute and detailed directions embodied in the order. On the first of June, 1860, this order was opened up on motion of the attorneys for the claimant, and the cause was continued for a further hearing, until the succeeding term. On the nineteenth March, 1861, the cause was again argued and submitted, and on the twentieth March of the same year, an opinion was delivered by the court "overruling the exceptions to the survey, and confirming the said survey of the surveyor-general of the United States, for the state of California, now on file in this court." No formal order or decree in conformity with this opinion seems to have been entered. But on the fifteenth April following, an appeal was granted on motion of the attorney for the claimants "from the decision and decree of the court, confirming the survey of the surveyor-general of the United States and overruling the exceptions to the same." The district court for the Southern district of California having been abolished, and its records and pending suits transferred to this court, a motion is now made to set aside the order last referred to, and to open the case for further proofs, with a view to a rehearing on the merits.

This motion is founded on the record and proofs on file, and on affidavits setting forth facts tending to show the official survey to be grossly erroneous and unjust.

Two questions are thus presented for consideration: (1) Is the decision heretofore rendered, a final judgment or decree, which cannot now, after the lapse of nine years, be considered or disturbed? (2) If not a final decree in form, did the rendering of the decision in open court and its announcement to the parties constitute such a final adjudication of the cause, as to restrict the authority of the court at this time to the performance of the merely ministerial act of making and entering a formal decree in conformity with the decision already rendered? Or is the court at liberty on a showing such as would be regarded as sufficient on a motion for a rehearing, or to sustain a bill of review, to look into the merits, and make such final decree as may be just?

1. The only record of the supposed final judgment of the court is an entry in the minutes, to the effect that the judge delivered an opinion overruling the exceptions to the survey, and confirming the survey of the U. S. surveyor-general, "now on file in this court." No written opinion is found on file, nor any order or decree embodying this decision of the court. The minutes are not signed by the judge. The terms of the entry are not that a judgment was rendered, but only that "an opinion" was delivered to the effect stated. There can be no doubt, however, that the court intended to pronounce its judgment, and virtually to decide the case. The taking of an appeal at a subsequent day, and before any final decree was signed or entered, is explained by the fact that the idea generally prevailed among the gentlemen of the bar, that all appeals should be taken during the term at which the decision appealed from was rendered, and the appeal in this case was taken out of abundant caution, and to save the rights of the claimants. The act of 1860 [12 Stat. 34], under which these proceedings took place, evidently contemplates that the determination of a plat and survey the court, shall be by its "decree" (when the district court shall by its decree have finally approved said survey and location," etc., section 5), and it provides that the said plat and survey so finally determined by publication or decree shall have the effect and validity of a patent. The act of July 1, 1864 [13 Stat. 332], which in effect repealed the act of 1860, reserves from its operation, cases then pending, and provides, that "the court may in those cases proceed and complete its examination and determination, and its decree thereon shall be subject to appeal to the circuit court," etc. These provisions clearly contemplate something more than the oral announcement in court, by the judge, of his opinion or even decision in the case, of which a note or minute is taken by the clerk. The plat and surveys approved by the decree have the effect of a patent. The decree, with the plat annexed, operates, therefore, to convey the title of the United States to the land to the confirmee. But to effect this, it would seem indispensable, not only that a formal decree should be made and entered, but that the plat and survey approved should be attached to and made part of it, so that no doubt can remain as to what plat and survey were approved by the court.

In the former Northern district of this state, it was the invariable practice, after the court had rendered its opinion approving a survey, to make and sign a formal decree, to which the plat was annexed and of which it was made a part, and which was identified and authenticated by the written approval of the judge, signed by himself, and inscribed in the margin. It was never supposed

that, until this was done, a final decree had been made in the cause. Substantially, the same practice is understood to have prevailed in the late court for the Southern district. Independently, therefore, of the general rules of equity practice in analogous cases, there are special reasons in this class of cases for holding the cause not to be finally adjudicated until a decree with the approved plat and survey attached has been signed and entered.

A question somewhat similar was presented to the supreme court in Silsby v. Foote, 20 How. [61 U. S.] 290. In that case, a final decision had been made by the court on the twenty-eighth of August, 1854, and an appeal duly taken on the fourth of September. The decree was special in its terms, and was not settled or signed by the judge until the eleventh of December, 1856, on which day a second appeal was taken. The question before the court was, which appeal was regular? It does not appear from the report in what form the first "final decision" was made—whether by announcement orally by the judge from the bench and noted in the minutes, or by the filing of a written opinion. The court held that an appeal might be taken in open court, during the term and within ten days after the decision is pronounced and entered on the minutes by the clerk, but that an appeal taken within ten days after the decree is settled and signed by the judge and filed by the clerk, would also be in time to stay the proceedings—that when the decree is special there is a propriety in waiting for the settlement before taking the appeal, and that "the time when the judgment or decree may be said to be 'rendered' or 'passed,' admits of some latitude, and may depend somewhat upon the usage and practice of the particular court." The court retained the first appeal and dismissed the second.

In the case of U. S. v. Gomez, 1 Wall. [68 U. S.] 691, it was contended that the appeal had not been taken within the five years allowed by law. An opinion confirming the claim of Gomez had been delivered on the fifth of June, 1857, and entry thereof duly made on the minutes with an order that a decree be entered up in conformity to the opinion. On the seventh of January, 1858, a decree was filed, which recited the previous proceedings and was directed to be entered as of the fifth of June, nunc pro tunc. On the fourth of February, 1858, the claimant obtained leave to amend this decree by substituting another, for a larger tract of land, in its stead. A decree in pursuance of this leave was entered on succeeding day. The appeal was taken on the twenty-fifth day of August, 1862. On this state of facts, the court says: "Argument can add nothing to the force of this statement as drawn from the record. Plainly there was no decree of any kind in the case until the seventh of January, 1858, and as that decree was ordered to be amended by substituting another in its stead, the final decree in the case was that of the fifth of February following. Five years therefore had not elapsed before the appeal was taken." It will be noted that in this case it appeared by the minutes that a decree was ordered to be entered in conformity with the opinion at the time when the latter was announced. In the case at bar, the minutes show that an opinion confirming the survey was delivered, but no order for the entry of a decree in conformity to it, appears to have been made. This decision of the supreme court is therefore conclusive as to the question under consideration. No final decree has ever been entered in the case. It is therefore a pending case within the saving clause of the act of 1854, and must be completed and determined by the entry of a final decree.

2. Is this court, which is now called upon to enter a final decree, bound by the opinion already delivered, or is it at liberty to examine into the merits, and enter such final decree as may be just? In the case of Dogget v. Emerson [Case No. 3,961] a cause had by consent been heard in chambers by the circuit judge, a written opinion delivered, and a decree drawn up and given to the reporter, to be filed in the clerk's office; but it did not reach that office until three days after the term had closed. In the meantime, the circuit judge (Mr. J. Story) had died. At the succeeding term a motion was made to enter and carry into effect the decree. It was held that the intervening death of the judge was no ground for a rehearing if an opinion was actually delivered; but otherwise, if only prepared. But that an opinion once pronounced or a decree once made may be altered if some obvious mistake of law or of fact be shown. That "there must be something tantamount to what would justify a new trial," and the court applies to this case the principles which govern in applications for a rehearing, or for leave to file a bill of review, or a bill in the nature of a bill of review.

In Life & Fire Ins. Co. v. Wilson's Heirs, 8 Pet. [33 U. S.] 291, it was held by the supreme court that the signing of a "judgment rendered in the case by the judge's predecessor in office, was a ministerial and not a judicial act, and that the judge might be compelled by mandamus to do so, unless in the exercise of his discretion he grants a new trial, and that as the successor of his predecessor he can exercise the same powers, and has a right to act on every case that remains undecided on his docket, as fully as his predecessor could have done.

There being no doubt, therefore, as to the power of this court as the successor of the late district court for the Southern district of California, to act on the case as fully as that court could have done, it remains to be considered, whether the claimants have shown such a case as entitles them to a rehearing. In considering this question, I shall

confine myself to the undisputed facts disclosed by the record.

* * * * * * *

The long delay on the part of the claimants to move in the matter is explained, on the ground that they are Mexicans, ignorant of our laws and language; that they have continued to live on the land undisturbed until recently, and relying on the justice of the government to protect them in their undoubted rights; that the judge who rendered the decision, died shortly afterwards, and the sessions of the court held by his successor at Los Angeles, were rare and irregular. It does not appear that any rights of third persons have intervened. Nor is it easy to see how, in any view, such persons would be entitled to protection on the ground of any reliance placed by them on the finality of the supposed decision of the court. If that decision and the entry on the minutes amounted to a final decree, then the appeal taken from it was regular and the cause remained pending and undetermined until the appeal should be dismissed—which has not been done. If, on the other hand, the cause is to be deemed not finally decided until a decree has been signed and entered, then the record disclosed that no such decree had ever been made, and that the case was still pending and undecided. In neither view had third persons the right to treat the supposed decision as final and conclusive.

My opinion is, that it is the duty of the judge of this court to make such a decree as on full examination of the case shall appear just. The motion for a re-hearing is therefore granted, and the cause will be opened for further proofs.

UNITED STATES (GARCIA v.). See Case No. 5,215.

Case No. 15,186a.

UNITED STATES v. GARDINER.

[2 Hayw. & H. 89.] [1]

Circuit Court, District of Columbia. May 18, 1853.

FALSE SWEARING—FRAUDULENT CLAIM—EVIDENCE—FOREIGN LAWS—TRIAL.

1. It is not necessary in a case of perjury or false swearing that there should be positive evidence that the paper was sworn to by the prisoner; it may be proved by circumstantial evidence.

2. Papers filed by the prisoner to sustain the allegations contained in the original paper, if they tend to establish the charge made in the indictment, as to guilty knowledge, will be admitted in evidence.

3. Authenticated public documents, giving account of all the mines and all the abandoned mines in the state of Luis Potosi, are not evidence to prove that a certain mine did not exist.

4. A witness who was sent by the United States to Mexico for the purpose of getting a knowledge of the handwriting and seals of certain official persons, will not be permitted to testify as to his knowledge of the handwriting of the officers he saw make their signatures and the impression of the seals; the danger of concocting evidence is too great.

5. A foreign law, and the practice under the law, may be proved by one acquainted with the law and the practice under it.

6. Certain letters were submitted by the U. S. from C. Gardiner, brother of the defendant, a witness for said defendant, who neither admitted nor denied them to be his handwriting. A witness for the U. S. was called who believed they were in the handwriting of the witness for the defendant. *Held*, that the letters written after the crime was committed cannot be given in evidence as the act of a confederate; and that a witness cannot be called to prove handwriting to contradict another who has neither admitted nor denied that the letters were in his handwriting.

7. Acts or declarations of a witness, who was assumed to be a guilty agent, but made not in furtherance of the purposes of the crime for which the defendant stands accused, cannot affect the defendant directly.

8. Evidence in rebuttal must bear directly or indirectly upon the subject-matter of defence, and ought not to consist of new matter unconnected with the defence.

Philip R. Fendall, U. S. Dist. Atty., and Henry May, for the United States.

Joseph H. Bradley, James M. Carlisle, and B. F. Perry, for defendant.

It appears by the fourteenth and fifteenth articles of the treaty of Guadalupe Hidalgo, the United States discharged Mexico from all claims of whatever amount, which citizens of the United States had against the republic of Mexico, and which arose prior to the date of the treaty; and they undertook to make satisfaction of the same, to any amount not exceeding three and one quarter millions of dollars. The act of March 3rd, 1849, was passed to carry into effect these treaty stipulations. It established a board of three commissioners, with a secretary and clerk, who were, during the two years to which the existence of the commission was limited, to receive and adjudicate upon all claims presented to them arising under the treaty. Before these commissioners in session at Washington, Dr. George A Gardiner appeared, and presented his claim by a memorial and an affidavit, accompanied by other affidavits, substantiating the statements in the memorial. The indictment sets out the memorial and affidavit, with the usual innuendoes, and then alleges. "That the said Gardiner swore falsely, maliciously, wickedly, wilfully, knowingly and corruptly before the said justice, touching the expenditure of public money, and in support of a claim against the United States; and that the said oath was material in order to enable the said Gardiner to obtain from the commissioners an award, touching the expenditure of public money, and in favor of the said claim of the said Gardiner, and from the United States a payment of the said claim." The principal alle-

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

gations in the memorial were then negatived and set out to be false, and were known to be false by Gardiner at the time they were sworn to. The indictment was under the following statute: "Sec. 3. That if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for willful and corrupt perjury." 3 Stat. 771 (March 1st, 1823).

March 14, 1853.

During the trial Mr. May, on the part of the United States, offered to read the memorial to the jury. Mr. Carlisle objected; citing Brady's Case, 1 Leach, 327, 330. Mr. Fendall cited the Case of Beute [Case No. 1,468a], convicted in this court of false swearing.

THE COURT said he would read the decision of the court in the Case of Beute. It was tried in the June term of the court, 1851. The decision of the court was read. No question was raised as to the admissibility of the affidavit, but one was raised as to the guilty knowledge of the accused of the falsity of the statements in the oath.

Mr. Fendall cited 3 Starkie, Ev. 1139; Rex v. Morris, 2 Burrows, 1189; Warden's Case, 11 Metc. (Mass.) 406; Silver v. State, 17 Ohio, 365; Price's Case, 6 East, 323.

Mr. May says no proposition could be more clear that that paper was admissible, citing Cole v. Hebb, 7 Gill & J. 20; 1 Show. 327; Rex v. Spencer Ryan & M. 97; Rex v. Benson, 2 Camp. 508; Bull. N. P. 239; Phil. Ev. 291, 454. Rose. Cr. Ev. 89, 190; Starkie, Ev. 836; Wheeler. Am. Com. Law, 483; Greenl. Ev. 520.

Mr. Bradley replied for the defence, and in support of the objection citing 3 Starkie, Ev. 1130; and Chouteau v. Eckhart, 2 How. [43 U. S.] 373.

THE COURT referred to the testimony of Justice Myer, and to the fact that the paper could not have been withdrawn; and upon the evidence said: I thought it my duty to overrule the evidence (memorial) at that time, because it was a non sequitur, and I said then that some recognition by defendant of the paper was necessary. Afterwards it was testified by Johnston, who was secretary to the board (of commissioners,) that this paper was one of those in relation to the claim of Dr. Gardiner; that it was filed in his office by W. Thompson, who, he said, was one of the defendant's counsel on the 29th of Nov.; that the defendant had a claim before the board, and that it could not have been withdrawn without the authority of the board, and that this paper was unquestionably before the board. Then he testified that the rules shown him were those of the board. Dr. Davis was called, said he had seen the paper before—probably a few days before the final award was made—as to the sum, because he was not appointed secretary until the 1st of April, and the awards were made on the night of the 15th of April. To-day Mr. Evans has been called, and states that he was one of the commissioners, and has no doubt at all that the paper was before the board. There is no mark of his upon it, yet he is perfectly familiar with its appearance. He said further that there was no other claim of Dr. Gardiner before the court, and no separate memorial but that one. He said further that Dr. Gardiner, either at the suggestion of the commissioners, or the counsel of Dr. Gardiner—he did not recollect which—was called before the board, in company with Gen. Waddy Thompson, Edward Curtis, Thomas Corwin and Robert Corwin, and perhaps Col. Allen, though he was not confident about his being present; was examined there at least one hour about his claim; was examined closely by himself and other commissioners, and was particularly questioned about his investments, &c., to which he gave certain answers. He says furthermore that these memorials are presented sometimes without being sworn to, either from negligence or otherwise, and in such cases are returned to the parties to be corrected. It appears furthermore that this memorial was sworn to on the 20th day of Nov., and was filed on the 29th according to the endorsement, but was received also on the 30th, a distinction which is a little awkward to me. Nevertheless he did recognize it, and a witness from the treasury department was about to prove what was admitted afterwards, namely, the receipt of this money by Dr. Gardiner or his attorney. On this point it was said the board did not require a signature, which I think they did, or something equivalent, that is, there must be proof or a signature, or it must be signed, one or the other. There is no other mode of procedure. This has been treated throughout as if it were a case of perjury. It is not a case of perjury. The act of congress creates an entirely distinct offence. It is to be punished as perjury, but the supreme court says distinctly, it is not perjury. The words of the law are: "If any person shall swear falsely, &c., (for the purpose of obtaining money from the United States) he shall suffer as for perjury." The cases cited on both sides appear to have related more to the sufficiency of the evidence than to its competency. The law is not here as it is in England, where the judge states the evidence on each side, and in terms almost directs the verdict or takes the case from the jury. Here it would be denied, and I should hold myself bound, but think myself restricted to answer on certain points of law, founded on facts, which the jury are to believe the law applies. Such was the law in this District and in Maryland, or at least used to be—I don't know how it is now.

In this case the filing of the affidavit in

this suit and the date of the oath differ, but it does not strike me that, even unexplained, that would be very material. But it is not necessary that it oe put upon that footing. The jury may infer upon any facts whatever they think proper. They may infer it was a mistake, or that after the paper was filed this defect was discovered, and it was given back and corrected. That the oath was sworn to before it was "received," I suppose can hardly be doubted, for the rules say that no paper will be received unless sworn to. And the first thing the commissioners had to look to was to see that it was sworn to. It is further in evidence in this case that this paper was the foundation of the only claim which Dr. Gardiner had before the board. Before that could be considered at all it was necessary that the memorial should be "received," as they call it, and not only that, it must be sworn to, otherwise it could not be received. That reduces it to a certainty, whether there was any doubt about it before or not. It is not necessary, even if this was a case of perjury, that there should be precise, positive evidence that this was sworn to by Dr. Gardiner. It may be, however, by circumstantial evidence. If circumstantial evidence is not to be received in cases of this kind it would be a great obstruction thrown in the way of the punishment of crime. This paper I am bound to believe, therefore, was recognized as Dr. Gardiner's up to the very time the claim was allowed, and under all these circumstances I am of opinion that it must go to the jury.

March 29, 1853.

Question was as to the signatures of the governor on papers showing the mining title.

Mr. May called a witness who could not speak English, and did not know what would be done for an interpreter. There were one or two present who were competent, but they were witnesses.

THE JUDGE said an interpreter would undoubtedly be required, and it made no difference whether he was a witness or not.

The interpreter was requested to ask the witness to look at the paper, and examine the signatures of the governor.

Mr Bradley, to the interpreter: Don't repeat his answer yet, we object to the evidence.

Mr. Perry said he understood the object of this testimony was to show these papers to be forged.

Mr. May: That is the object.

Mr. Perry said he regarded this question as to the admissibility of this collateral evidence as one resting altogether within the jurisdiction of the court and cited 2 Russ. Crimes, 772. That no evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal cases this rule is more strict, that the evidence must be confined to the point in issue.

Mr. May, in support of the admissibility of this evidence cited 1 Greenl. Ev. § 52; Rosc. Cr. Ev. 83, 87; and cases therein cited; Wheeler, Am. Com. Law, 138; State v. Houston, 1 Bailey, 300; Martin v. Com., 2 Leigh, 749; Hendrick v. Com., 5 Leigh, 708; 1 Camp. 48, and notes; U. S. v. Doebler [Case No. 14,977]; U. S. v. Wood, 14 Pet. [39 U. S.] 430.

THE COURT: It is proposed to prove that the papers, the mining title, and accompanying depositions are forged. The defendant's counsel objects to this course on various grounds: 1st. The indictment is pending and untried for the forgery of these papers. 2nd. That the alleged forgeries, if committed, were made eight months after the oath charged to be false was taken. 3rd. It was within the discretion of the court, which should be exercised to exclude the proof offered. I do not think the pendency of an indictment, charging the defendant with forging the papers, which it is now proposed to show are false, affects the question. Doubts existed formerly on this subject, but they have been removed, and never had any good foundation. It is said to be within the discretion of the court to admit or reject this evidence. True, but I prefer to be regulated by established rules and principles. The fabrication of the papers, if they have been fabricated, was, as it is said, subsequent to the swearing. The argument of the United States considers it to be immaterial whether the matter offered in evidence or fact proposed to be proved to show guilty knowledge, occurred prior or subsequent to the principal fact charged. This proposition, as asserted, is too general. I have had frequent occasion to consider this question, and have a record of an opinion delivered by me at the June term, 1847, in the case of U. S. v. Lee [Case No. 15,587]. This opinion contains the law of the question before the court. The possession of a counterfeit bank note or notes, at the time of the passing charged, or shortly before the passing for which he is indicted, has always been received. If subsequent counterfeit paper is found on the defendant's person, it must be in some way connected with the principal charge, or be of the same manufacture. This is the rule. Here the memorial, in the making of which the false swearing is charged to have occurred, states that the accused had a mine in the state of San Luis Potosi; that was the foundation of a claim, and filed as such, subsequently the papers which the United States say are false, and offer to prove to be so, were procured to sustain the allegation in the memorial that he had such a mine, and were the means of inducing the commissioners to augment the amount of the award, after the commissioners had decided that the claim was valid. Is it not then connected with the memorial, and the verification of it required by the commission, without which the claim could not even be considered? The memorial and proofs submitted with it were the grounds

of the decree that the claim was valid for something; the mining title and accompanying depositions afterwards filed were, with other proofs, the foundation of the decree, fixing the amount due on the claim, and they were especially the means of increasing the amount previously thought of by the commissioners. The testimony offered, if made out to the satisfaction of the jury, would tend to establish the charge made, of which one of the principal features is guilty knowledge. It is a relation to the issue. The case of U. S. v. Wood, 14 Pet. [39 U. S.] 430, is a cogent authority on this question. The objection is therefore overruled.

March 31, 1853.

Mr. May offered in evidence to the jury an official, authenticated public document (one identified by the witness), dated Jan. 3, 1849, giving an account of all the mines and all the abandoned ones in the state of San Luis Potosi. Mr. Bradley objected to the admissibility of the paper.

After arguments by the counsels, THE COURT delivered the following decision:

Two papers are submitted by the United States as proper to go to the jury. They are offered as printed copies of a report, in relation to mines, in the state of San Luis Potosi, made by the governor of the state, and appended to a message of the governor to the legislature, and was handed in 1852, at the Government Hall, to Mr. Partridge, by the secretary of state. One of them has this certificate:

"I, the citizen Luis Guzman, secretary of the department of government of the state of San Luis Potosi, certify that in this present table are named all mines existing in this state, and that neither before the formation of these statistics, nor since then to the present time has any knowledge been had of any other. Luis Guzman, Secretary. San Luis Potosi, Nov. 20, 1852. [Seal.]"

The other of these certificates is:

"This report is really the one which was published during my administration, and I authenticate it with my original signature in order that it may have due effect, accordingly to the request of Mr. George W. Slocum. Julian de los Reyes. Mexico, March 5, 1852."

"The undersigned minister of foreign affairs, certifies that the foregoing signature of his excellency Don Julian de los Reyes, who was governor of the state of San Luis Potosi, is genuine. Jose F. Ramirez. Mexico, March 6, 1852. [Seal.]"

The certificate of our late minister to Mexico, that the signatures of Governor Reyes and Minister Ramirez are genuine, and were made in his presence March 6, 1852.

The certificate of Luis Guzman is not an authentication of the paper offered as an exemplification of the records in the office of state, but a certificate that in this present table are named all the mines existing in that state, and that neither before the formation of these statistics, nor since then to the present time has any knowledge been had of any others. The certificate is no better than that of any other man, in or out of office, of the facts it sets forth. It is no authentication of the paper, which if it were a report to a department of our own government, could not be received in evidence in the shape in which this paper comes. According to what is said by the supreme court, in Watkins v. Holman, 14 Pet. [39 U. S.] 56. The other paper is certified by Julian de los Reyes after he ceased to be governor of San Luis Potosi. He was then a private gentleman, without the power to certify to the verity or official character of any paper that might remain in the public offices of which he once had control. Is it aided by the certificate of Don Jose F. Ramirez, the minister of relations in the republic of Mexico? I think not. He certifies that the signature of Julian de los Reyes, who was governor of the state of San Luis Potosi is genuine. And our late minister to Mexico does not make the certificate any stronger. He states only that the signatures are of the proper handwriting of Governor Reyes and Minister Ramirez. Both of these papers are, in my judgment, altogether informal. But if they were regular and properly authenticated, I do not think they would be evidence. The mere fact of a paper being a public document does not make it evidence, if intrinsically it is not so. The journals of the two houses of congress, and all matters of state, here and in England, are evidence, and may be so even in criminal cases in the United States, in very few and peculiarly circumstanced cases, chiefly, if not exclusively, where the parties against whom they are sought to be used, or the act charged upon him is in some way connected with the document and not always then; in England, where men are indicted for seditious meetings and seditious libels, there has arisen frequent legal occasion for the admission of such evidence. The journals are evidence of what each house of congress does; that such a petition was withdrawn or presented, such a bill considered and passed or rejected. If a question whether a certain officer of either house was elected, and when, undoubtedly the journal would prove it, if properly authenticated. So, if the inquiry is, whether the president transmitted a message to congress, and in it treated of certain subjects, the record would be evidence; but suppose a man should be charged with a crime in any department of the government, will it be urged that the statement of it in a document would be evidence to go to a jury? Take the ten members of the British parliament who have been lately unseated for bribery; suppose they should be, as they ought to be, indicted for the bribery, it would scarcely, I imagine, be deemed proper in that country to adduce the reports of the committee of the house of commons, on which they were deprived of their seats, as evidence of their guilt. I can see no difference in the principle be-

tween that case and this, except that this is the weaker of the two, for the members, it may be presumed, appeared before the committee. An agent of the government in San Luis Potosi made a report in 1849 to his government, which is offered in evidence to show that the accused swore falsely, not because it states a certain fact, but because it does not contain one that is alleged by the defendant to exist. This report is not unlike the geological reports that are made to most of our state governments, and transmitted with the message of the governor to the legislature. If a man were indicted for obtaining money under false pretenses in saying he had a coal mine in a certain district, or if in the gold bearing states a gold mine, it would scarcely be allowed the prosecution to adduce one of these geological reports to show he had no such mine. They are, no doubt, very convenient to the government; it may be in reference to taxation, certainly as showing the real quality and wealth of the country. They extend knowledge and advance science, but I think those are their proper uses. The evidence is rejected.

April 1, 1853.

The United States offered to prove by Mr. Partridge that the signatures of Governor Reyes, Secretary Guzman and Francisco Fernandez, prefect of Rio Verde, to the mining title, &c., were forgeries on the following grounds, and in the following terms. We now offer the evidence of the witness (Mr. Partridge), as founded. 1st. On his testimony of having seen them several times sign official orders and papers in the usual course of their official duties, and which were not in any way connected with the commission. 2nd. On his knowledge derived from a correspondence between these persons and the commissioners of whom he (the witness) was one, which took place during their visit and during its period of ten days at San Luis, in December, 1852.

After argument by the counsel as to the admissibility or inadmissibility of said evidence, THE COURT says:

The modes of acquiring knowledge of handwritings are these: 1. By seeing a man write. 2. By correspondence with him, or by seeing papers frequently which the party has signed. This general statement embraces substantially the legitimate modes of acquiring knowledge of handwriting. The true manner of gaining this knowledge is in the ordinary course of business, or in the correspondence which passed between them regarding business, or in the indulgence of friendship, or in the use of papers, bank notes for instance, which the pay officer of a bank handles every day. The fact of the knowledge of the witness being obtained lately is not regarded as entitled to influence in this case, as to which decision Johnson v. Daverne, 19 Johns. 134, is very much in point. The person whose handwriting the offer respects are Mexican officers of high rank, whose handwriting must be extensively known. Witnesses certainly could be easily obtained who are and have been long acquainted with them, and in fact one such witness has testified. The question is, whether the United States can send a witness to Mexico, for the purpose of getting a knowledge of the handwriting of certain official persons? Mr. Partridge did go there, and those persons wrote their names more or less frequently to acquaint him with their handwriting, besides which he says he saw them write frequently in the discharge of their official duties, and saw letters or communications sent by them to the commissioners. The knowledge to make the evidence offered admissible must have been acquired, as Lord Brougham said, spontaneously, that is in the course of business or correspondence; and this requisite, it is argued, is to be found in this offer, because the witness saw communications from the officers, and saw them write in the ordinary discharge of business, as well as to sign their names to familiarize him with their signatures. The reason which prevailed with the court, in excluding testimony, founded on knowledge of defendant's handwriting, acquired shortly before the trial, in Stranger v. Searle [1 Esp. 14], was that the signatures might have varied from his general mode of signing, and that decision has been authoritative from that day to this. But it is contended that the exclusion of this testimony has taken place only when the defendant, a party has written to qualify the witness to testify. That would obviously, no doubt, impress the mind more strongly—would most frequently occur—but I do not see that such a distinction is taken. The court is again asked if the party writing or testifying can have any possible interest in the indictment or its result? I can see none; but this is not involved. The inquiry is, whether established principles and the danger of manufacturing testimony and making an opinion for the particular case do not exclude the evidence offered. The rule, whichever way it shall be settled, will govern not this case only, but all cases. The witness went to the official, who was told by him or some other gentleman with him, that he desired to see his signature—that was his errand; and although he saw several communications from the official, addressed to the commission, and saw him write at his desk in a public office at other times during a few days' visit in the city where the officer resided, he must always have seen him do so with the impression made by the signatures, if they preceded his other observations and the receipt of the several communications; or if they followed, would more or less efface that observation, and the effect of the letters in either case would be mixed up with them. If the witness had never seen the communications referred to, or the officer write, except when he desired him to do so, that he might be qualified to speak of it on this trial, there could be no question about it; it would be ex-

actly like Stranger v. Searle, except that the handwriting there was that of the defendant. Can it make any difference that he saw about the same time an officer write at his official desk in the ordinary discharge of business, and saw communications signed by him? I think not; for his mind would still have the image of the signatures made on request before it. The great danger attending the admission of such evidence, the facility of concocting evidence which it would furnish, the danger of corrupt action to which it would open the door in any case in which it would become necessary to establish or to discredit handwriting, obliges me to overrule the offer.

April 2, 1853.

The United States offered to prove by Mr. Partridge, who had seen the original seal in the state department in San Luis Potosi, and impressions made there of it, and impressions of it on papers filed in that office, and dated in 1850, that the seals on the mining titles, &c., were forgeries. The defence objected, after argument by the counsel for the United States and the defendant.

THE COURT: The question is whether or not, by looking at the mining title, and from his (the witness') knowledge of these seals, he can say that the seal on the mining title is a forgery.

Mr. May: Here is the point; a seal cannot be removed, we cannot produce it, and the next best evidence of what it is is the evidence of the man who has seen it.

THE COURT: There is no doubt about all this, but it requires that the papers to which the seal is affixed should per se be in evidence. These documents are not in evidence. They cannot be received except for some legal purpose. The question is whether the document to which the seal is attached is in evidence. They are admitted not to be offered as such in regard to their contents, and are only asked to be admitted with a view of instituting a comparison between the seals. The objections taken by the defence are twofold: First, it is objected that these papers were obtained post litem motam; and secondly, that they are offered for the purpose of comparison. I do not think any further discussion on these objections is necessary. The court decided the other day that such papers could not be admitted as evidence, because of themselves they prove nothing at all, and if admitted could only be used for the purpose of comparison, in the same way as proving handwriting by comparison. I do not think the fact of the genuineness of these papers being proven makes any difference at all. The fact that Mr. Partridge saw them taken out of the office of the secretary of state cannot make a particle of difference. For these reasons the court must reject the papers. The effort of the counsel, if successful in this manner, getting in evidence as to the seal, would be but an entering wedge to admit similar testimony in regard to handwriting, and being secondary evidence, and mere hearsay, he objected to it as incompetent.

The counsel for the prosecution base their argument that there is a difference between the handwriting and the seal. In deciding this question the court must look to general principles and rules It would ill become the court to impute corrupt motives to any man connected in any way with the evidence offered. I have no right to think that any such motives exist The principle on which the decision of yesterday was made embraces this question. There is undoubtedly a difference between the uniformity of signatures, and that of seals, but the danger of concocting evidence, when the witness does so to qualify himself to testify is as great in the one case as in the other. The knowledge is not derived from ordinary business transactions. Many persons must be able to testify to this seal who were on the stand a few days ago, and they are best qualified, if others are at all qualified, to speak of the seal. The offer is overruled.

April 4, 1853.

The witness, through the interpreter, was asked by THE COURT if he was acquainted with the practice in the prefect's office. Does it rest upon any general law or not? If it be regulated by public laws, and they can be got, they are the best evidence. If they cannot be got, we must take the next best evidence, that is the evidence of those who understand them.

Mr. Carlisle: If the law had been there it certainly could have been got.

Mr. Fendall contrasted the rules formerly prevailing with those now existing. He referred to the case of Baron de Bode v. Reg. [8 Adol. & E. (N. S.) 208], in a note to section 487. 1 Greenl. Ev. In that note this case was cited for 10 Jur. 217, to the effect that it is now settled in England, upon great consideration, that a foreign written law may be proved by parol evidence of a witness learned in the law of that country, without first attempting to obtain a copy of the law itself. He cited also the Sussex Peerage Case, 11 Clark & F. 116; U. S. v. Certain Casks of Glassware [Case No. 14,764]; Farmers' & Mechanics' Bank v. Ward, 4 Law Rep. 37; Herbert v. Herbert, 2 Hagg. Consist. 272; Middleton v. Janverin, Id. 441.

Mr. Bradley cited Cowen & Hill's notes to 2 Phil. Ev. 326, and the cases there collected.

Mr. Fendall read from Baron de Bode's Case, 8 Adol & E. (N. S.) 208, 286; after which he stated that the United States proposed to show by a practicing lawyer in Mexico what the practice in regard to mines was in San Luis Potosi, and what the duties of prefects were, which knowledge he had acquired not only from the study of the law, but also his practice as a prefect.

Mr. Redin, one of the counsel in the Kosciusko Case (Ennis v. Smith, 14 How. [55 U. S.] 400), stated at the request of the judge what its decision was.

THE COURT: The law formerly was very rigid in its requirements as to proof of the laws of foreign countries. It has lately been less so. The modern decisions have admitted parol proof of such laws. The Sussex Peerage Case and the Baron de Bode's Case are authorities for its admission. In 11 Clark & F. 118, the witness, Dr. Wiseman, proved the contents of a decree of the Council of Trent, as well as its construction. De Bode's Case is stronger. Here the witness on the stand is heritus virtute officii, and professionally skilled too. In the cases referred to the evidence admitted went to the statute law and the decrees, decisions or adjudications on it; that is, the witness stated what the law altogether was in France. How could he intelligently state what decisions had been made on a particular statute, without stating with more or less precision what the statute itself contained? The impression I had when this discussion was entered upon is not changed. I am of the opinion that the evidence offered is admissible.

On the calling of a witness to identify handwriting

Mr. Chew, consular clerk of the state department, was called to identify the handwriting of a consul.

April 18, 1853.

THE COURT. Mr. Robert S. Chew, a witness called by the defendant, having proved on Saturday that letters were received at the state department from T. W. Mather, acting as vice consul at Monterey, in Mexico, in the year 1850; that these letters were acted on, and were in his charge, as chief clerk of the consular bureau, that he had no exemplar of Mr. Mather's handwriting in his mind, any impression that might have been made respecting it being wholly effaced and gone from his general recollection; and that he had on last Friday evening inspected the letters so received, which did not however revive any former impression or image of the handwriting, his present capacity to speak of it arising entirely out of such inspection; it is proposed to ask him what is his belief as to the signature of Mr. Mather to a certificate produced, being or not genuine? This question is different from that heretofore offered and overruled, in relation to the signatures of certain Mexican officials. There the witness saw the officer sign his name on his (the witness') request, to enable him to testify, having seen him also about the same time write without request at his official desk, while the witness was in his office, and all this in the fall of 1852; neither is it the same with the testimony of another clerk from the state department, respecting the handwriting of the defendant. for there he had an image in his mind that he, too, examined the letters from which the image was derived. The present question presents a case of letters received in 1850, but leaving no trace of the handwriting in them behind their receipt. Nothing can now, by reference and inspection be resuscitated. So that the evidence offered is precisely as if the witness had never seen the handwriting of Mr. Mather until last Friday night, for he can speak, he informs the court, only from what he then saw. The question is one that calls for consideration, and is by no means so plain as the counsel for the United States think it. That very learned lawyer, Roscoe, in his treatise on Criminal Evidence, says: (See Rosc. Cr. Ev. 196, 162.) I have however examined the case of Smith v. Sainsbury, 5 Car. & P. 196, 24 E. C. L. 523, and find that it does not at all bear Mr. Roscoe out in the terms in which he states his position. In the case of Mudd v. Suckermore, 5 Adol. & E. 703, 31 E. C. L. 791, cited on a question similar to this, the court of queen's bench were equally divided. Lord Denman, C. J., and Williams, J., holding the evidence admissible, and Patterson, J., and Collridge, J., that it was not; and Mr. Phillips considers this case with ability, and contends for the admissibility of the evidence. 2 Phil. Ev. 260 et seq. I think however the danger of combination and corruption certainly imputable to no person in this instance, but the hazard of it on general principles must exclude the evidence offered. Good policy, in my judgment, requires its exclusion, and I do not find myself constrained to a contrary course by any reported decision that I have met with.

May 3, 1853.

The district attorney said that the United States offered papers, letters of John C. Gardiner, on two grounds: (1) To contradict the witness, and (2) on the ground of his being an accomplice.

Mr. Carlisle said that their objection went entirely clear of the contents of the letters. In support of his argument he cited Pain v. Beeston, 1 Moody & R. 20; Rosc. Cr. Ev. 183; and Smith v. Price. 8 Watts, 447; and to the decisions of the courts of the District in the cases of Alexander, Calder, Van Ness, and Camper [unreported].

The district attorney explained the grounds of the admissibility of the papers as evidence: 1st. To contradict the witness. Citing Pain v. Beeston, 1 Moody & R. 20; Long v. Hitchcock, 9 Car. & P. 619, were in conflict with the case of Crowley v. Page, 7 Car. & P. 791; 1 Greenl. Ev. 462–464; 2 Phil. Ev. 463; as to the right of the jury in certain cases to construe writing. See 1 Greenl. Ev. 49; 1 Starkie, Ev. (3d Ed.) 25. On the 2nd ground, that the witness is an accomplice. Mr. May says that the precise question to be determined on this application was whether certain letters, proved to be in handwriting of the witness, are competent evidence for the consideration of the jury. Cited Crane v. Morris, 6 Pet. [31 U. S.] 598; Carver v. Jackson [4 Pet. (29 U. S.) 1]; U. S. v. Wiggins [14 Pet. (39 U. S.) 334]; Scott v. Lloyd [9 Pet. (34 U. S.) 418]; Md. Dig. 656–662; Davis v. Barney [2 Gill & J. 382]; Mitchell v. Dall [2 Har.

& G. 159]; Cole v. Hebb, 7 Gill & J. 20; Bank of New England v. United States Bank [unreported]; 2 Phil. Ev. 516, 517.

Mr. Gardiner said he relied on the cases cited by the government to show that there is a distinction between the legal sufficiency of proof and the weight of evidence, and stated the progressive order to be: 1st. The admissibility of the evidence. 2nd. Its legal sufficiency, and these were questions for the court. 3rd. Its weight or credit; and this was exclusively for the jury. He referred particularly to the case of Cole v. Hebb, cited by Mr. May, and Parks v. Ross [11 How. (52 U. S.) 362], in the supreme court.

Mr. Bradley restated his proposition: 1st. The evidence is not rebutting if the witness was a confederate or agent. 2nd. The confederacy or agency must be first proved aliunde, and the proof cannot be eked out of these letters. 3rd. They are not admissible to contradict the witness. 4th. Certain of them are purely collateral.

May 6, 1853.

THE COURT: Several letters, dated 12th December, 1844, and from 8th May, 1851, to 8th September, 1852, having been submitted to John Charles Gardiner, a witness for the defendant in this cause, by whom they purport to have been written, and he having said that he neither admitted or denied them to be his writing, with perhaps the exception of No. 6. Col. Lorenzo Thomas was called by the United States, who testified that each of the said letters and writings marked L. T., and numbered from 1 to 15 inclusive, and the one of 1844, marked A. J. H., No. 31, were, as he believed, in the handwriting of the said J. Charles Gardiner, whereupon the United States offer the said letters and writings in evidence. To this proposition the counsel of the defendant object. The objection, it is contended, is well founded: 1st. For that the evidence offered consists of the mere declarations of a stranger. 2nd. If offered to discredit the witness, that the proper foundation has not been laid by the United States; that there is no denial of any one of these papers being of the handwriting of the witness. 3rd. That if they are considered the acts of an accomplice they cannot be received, because not done in furtherance of the common object, but are all, except the letters of 1844, subsequent to its attainment. 4th. That they are collateral. 5th. That they are not rebutting evidence.

The United States insist upon the competency of the evidence offered: 1st. To contradict the witness. 2nd. As the acts of an accomplice. 3rd. As the acts of the agent of the defendant.

There is an indictment against the witness for the same offence, in relation to the same transaction pending in this court. The question presented has been very much labored, but it lies within a nutshell, and will be considered on the ground that the defendant and the witness acted together in the preparation to support the claim of the former before the commission, and in procuring its allowance. Whether the claim be just or unjust, it belongs to the jury to decide. Assuming that they did act together, how stands the law? It is admitted by the United States that a statement of an alleged partner in crime, being a narration of past transactions, cannot be received against his fellow, but only such declarations as accompany the transaction during the conspiracy; and this could not be denied, for the unbroken current of decisions leave no room for controverting this well established doctrine. But it is argued that the supposed conspiracy between the defendant and the witness had for its object the use of the money obtained for the claim, that the desire is as strong now as it was when the original plan was laid, and kept the conspiracy alive to this moment; and second, that the object of the witness is to get his brother out of the scrape. Suppose this to be so, I do not see how it can be connected with an original conspiracy. The purpose of this was answered; an award was made; the money was paid to the defendant, or to his attorney in fact; the defendant had gone to Europe; and the witness was in Mexico. I presume from the date of one of the letters offered at this stage of the business there was nothing to conspire about. If a subsequent conspiracy took place in relation to the defence of the accused, it must have been concocted in the summer or fall of 1851, for the defendant was in England when the indictment now trying was found on the 17th of July, 1851, according to the evidence heretofore adduced. The indictment is for swearing in November, 1849. It was then complete, or the crime was not committed. How the acts of an accomplice, two years after the offence is charged to have been perpetrated, and months after its success was accomplished, can be lawfully used as substantive evidence against the defendant, I cannot perceive. The same point in a case not very unlike this, including even the brotherhood, U. S. v. White [Case No. 16,675] was decided in 1836 by the circuit court of this district. The indictment was for burning the old Treasury Building. The United States offered in evidence against the defendant, Richard H. White, the admission of Henry H. White, who stands charged with the same offence in a separate indictment, evidence having been offered tending to prove that both were in the city of Washington the day preceding the burning of the Treasury Building that both went away together in the evening, and that the defendant had told Henry to say nothing of burning the Treasury. The court (Thurston contra) refused to permit the declaration of Henry H. White, made after the supposed accomplishment of the common purpose, to be given in evidence against Richard (the defendant) in this trial, they hav-

ing been indicted separately, and not charged with a conspiracy. U. S. v. White [Case No. 16,679]. I am of opinion that the letters cannot be received in evidence as the acts or admission of a confederate, so as to affect the defendant directly.

This would seem to dispose of the next question mentioned by only one of the counsel for the United States, and not pressed by him strenuously, but mentioned, as he said, only in case the court should not consider the witness as an accomplice, looking to the witness as agent of the defendant. Presumptions and implications of authority as agent are in general applicable to civil cases. 2 Starkie, Ev. 34. To be a guilty agent is to be an accessory before or after the fact, or an accomplice. To be an innocent agent, is to be generally a mere conduit pipe to convey intelligence, letters, or papers, to communicate messages, without knowing what they are intended to effect. A man may make himself criminally liable by the employment of such an agency. The law goes beyond what was stated in U. S. v. Gooding [12 Wheat. (25 U. S.) 460], for not only may the agent be innocent, but in some cases it is necessary he should be so, to enable you to indict his employer or principal. In those cases, if the agent have guilty knowledge, the principal is only an accessory. Here the whole argument has gone on the assumption very much urged that the witness was a guilty agent, and as such, the court has already said that his acts or declarations made, not in forbearance of the purpose for which this prosecution has grown, was allowed and paid, cannot affect the defendant directly.

3. They are offered lastly to contradict the witness. The objection to this view of the offer is that the proper ground has not been laid for contradicting the witness. Has it? The rule requires when you intend to contradict a witness by evidence that he has made, declarations or statements inconsistent with his testimony, that you must lay a foundation for it, by asking him as to the time, place, and person involved in the supposed contradiction. If he admit that he has made such statements, the enquiry, so far as the evidence is concerned, is at an end; if he deny the imputed inconsistency, then it may be shown by the party desiring to weaken his testimony. If he neither admit nor denies, or says he does not remember, you cannot contradict him, as has been decided in England and by the circuit court of this District, in the case of Culder's, Alexander's and Travers' wills, and by this court, in compliance with those decisions, but against my individual judgment in Camper's Case. To this extent the law must be regarded as settled in this District. It is contended by the United States that the rule and these decisions do not apply to a contradiction by letters or writings. Phillip, Russell and Greenleaf, in prescribing the rule confine it to verbal statements. The judges of England, on the trial of Queen Caroline before the house of lords, gave it as their opinion, not that the rule applied to letters, but they could not ask the witness if he wrote a letter with such contents, or contents to the like effect, and that the proper course was to put the letter into the hands of the witness, and ask him if he wrote the letter. If he admit it, the letter may be read at the proper time, if competent evidence. If he deny it on principle, though the judges were not asked for their opinion in this particular, the handwriting may undoubtedly be proved aliunde. If he should not admit that he did or did not write the letter, the judges said a cross-examination of the witness would not be allowed as to the contents of the letter, because the paper itself is to be produced. How can it be introduced if the indecisive answer of the witness is conclusive? It can only be made evidence by testimony, tending to prove its genuineness, not absolute or positive proof, but enough to allow it to go to the jury as far as it lawfully may. The acknowledged rule in relation to verbal statements I think an injudicious one. It does not in my judgment belong, certainly not clearly or necessarily, as in case of oral declarations to letters or papers, and the court is unwilling to extend it. I am of the opinion that the course pursued in this case was correct, and that no other preliminary inquiry than those made was necessary to let in such parts of these letters as go to contradict the witness, leaving the proof of the handwriting an open question for the jury; the court merely saying by this opinion that enough has been proved to warrant the introduction, as far as stated, of the evidence. The letter of the 12th December, 1844, is collateral, and cannot be read. All the others are dated on or after 8th of May, 1851, and included, except the date of L. F. No. 6, as evidence that the witness was at San Luis Potosi on the 9th and 10th of November, 1851. The date of L. T. No. 11, dated 12th of November, 1851, and the passage in it, "Tell me the exact position of my brother's mines;" and the passage in the letter of the 8th May, 1851, L. T. No. 4, "My brother and I have bought a claim;" the particulars of the three letters are admitted. It is unnecessary to say how far this evidence ought to be excluded as not rebutting.

May 7th, 1853.

The district attorney, handing the witness (James R. Partridge) a paper, asked him: Is that the copy of the descriptive portion of the mining in the alcade's office at Laguinillas, to which you referred on yesterday?

Yes sir.

Describe the appearance of that original paper.

Mr. Bradley: Mr. Partridge has already been examined on this subject in the enumeration in chief.

THE COURT: A witness can only be recalled for the purpose of explanation. The

question now is, whether this is or is not rebutting proof. The court is of opinion that the witness, having been cross-examined only partially as to seeing the deed, its appearance, etc., he may be examined, as rebutting evidence, and to meet the testimony adduced by the defendant in reference to the mining title, provided he has anything of that description to say which he has not already sworn to; but it must be confined strictly to the matter of defence; for the rule is that the evidence in reply must bear directly or indirectly upon the subject matter of defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. 2 Russ. Crimes, 919, 920. But the witness can say nothing of what the alcade or officer in charge of the paper communicated to him. That is pure hearsay. What has been adduced by the United States, in chief, must not be repeated. Witnesses have testified by the week, and if allowed to reiterate, the same circle may be traversed ad infinitum, which cannot be permitted. The evidence to be adduced must conform strictly to the defence, and meet what it has adduced. Cumulative evidence cannot be heard.

May 20th, 1853.

The jury was called, and after answering to their names was asked by the clerk: "Gentlemen, have you agreed upon a verdict?"

The foreman replied, "We have not."

THE COURT: In reflecting on the case, I have come to the conclusion to discharge you. You are therefore discharged.

Case No. 15,187.

UNITED STATES v. GARDNER.

[18 Int. Rev. Rec. 46; 5 Chi. Leg. News, 301; 5 Leg. Op. 95.]

Circuit Court, N. D. Georgia. March 17, 1873.

JURORS IN FEDERAL COURTS—QUALIFICATIONS—MODE OF SELECTION—STATE LAWS.

[1. The provision in the act of July 20, 1840 (5 Stat. 394), that jurors in the federal courts shall have the same qualifications and exemptions as jurors in the state courts, and shall be designated in the mode practiced in the state courts, does not require that jurors, to serve in the federal courts, shall be designated or selected by the state officers, but they may be selected by the national officers, as nearly as may be, in the same manner as they are selected by the state officers.]

[2. Neither the act of 1789 (1 Stat. 73), nor the act of 1840, in respect to the selection of jurors for federal courts, fix the number of jurors to be selected, but leave the matter in the discretion of the court, to be determined by rule, if the court deems it best to make a rule on the subject.]

[3. The act of June 1, 1872 (17 Stat. 196), which declares that the federal courts shall conform, as near as may be, to the practice, pleadings, and modes and forms of proceeding prevailing in the state courts, has no reference to the designation or selection of jurors.]

[This was an indictment against William Gardner for alleged violation of the revenue laws. Heard on motion to quash the array of jurors.]

L. J. Gartrell, Peeples & Howell, and B. H. Hill, for challenger.

Mr. Farrow, U. S. Atty., Mr. Stone and Mr. Thomas, U. S. Asst. Attys., and Mr. Akerman, for the United States.

ERSKINE, District Judge. Before the perusal of the panel, composed of six white persons and six colored, defendant challenged the array on the ground that the jury was illegally constituted, and moved that it be quashed: "First—Because the United States jurors are required to be selected by the United States statutes, according to the laws of each state where said United States courts are held. Secondly—Because there is no authority of law for the United States court to appoint commissioners to select jurors. Thirdly—Because the rules of court under which said jury was selected and impanelled, limits the number of jurors to five hundred. Fourthly—Because the manner of selecting jurors heretofore practised by the United States courts in this state, has not been repealed by competent authority. Fifthly—Because the rule of court under which the said panel of jurors was drawn, selected, summoned, and impanelled is without sanction of law, and contrary to the statutes of the United States in such case made and provided. Sixthly—Because said panel of jurors was not drawn, selected and summoned according to law. (Signed) Gartrell & Stevens, Peeples & Howell, Defendant's Attorneys." Other objections—corollaries from the foregoing, were advanced during the arguments.

These authorities were cited and relied upon by counsel for challenger: Code, §§ 3842, 3858, and 3859; Const. Ga. art. 5, § 13; Act Feb. 15, 1869; 1 Brightly, 4 Dig. 220; Act Cong. July 20, 1840 [5 Stat. 394]; U. S. v. Woodruff [Case No. 16,758]; U. S. v. Wilson [Id. 16,737]; Clinton v. Englebacht, 13 Wall. [80 U. S.] 434; Act Cong. June 1, 1872 [17 Stat. 196]. The second paragraph of section 13, art. 5, of the state constitution of 1868, says: "The general assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors. There shall be no distinction between the classes of persons who compose grand and petit juries." The third sentence refers to the compensation of jurors. On the 15th of February, 1869, the general assembly passed an act to carry this clause into effect. This act contains eighteen sections—I will give the substance of so much of it as is pertinently applicable to the subject now before the court. It makes it the duty of the ordinary of each county, together with the clerk of the superior court, and three commissioners appointed for each county by the judge of the superior court, to meet at the court-house on the first Monday in June, biennially, to select from the book of the receiver of tax-returns "upright and intelligent

persons" to serve as jurors, and to make out tickets, with the names of the persons so selected, and place them in a box, which shall be locked and sealed by the judge. And no grand or petit jury shall be drawn but in the presence of the judge in open court. But (by section 3) if the judge should fail to draw juries, then the ordinary, together with the commissioners and clerk of said county, shall meet at the court-house, within a certain time, and there draw grand and petit juries, all of which shall be entered by the clerk on the minutes of the court and signed by the ordinary.

On reading the act just referred to, and which is entitled "An act to carry into effect the second clause of the 13th section of the 5th article of the constitution," will disclose the fact that although it provides that the persons selected to serve as jurors shall be "upright and intelligent," (using the words of the constitution;) yet it does not speak of the second sentence, which declares: "there shall be no distinction between classes of persons who compose the grand and petit juries." Was this a casus omissus? Looking to the title of the act, there would appear to be some possible ground for this. But does not this very sentence carry itself into effect without legislative aid? Is it not per se operative and to be obeyed; and was not this probably the opinion of the legislature? My mind has always been impressed, with reasons too cogent to be discarded, that, notwithstanding the omission, it was the purpose of the legislature, by this enactment, to carry the entire clause into effect, and not to give force to a part only.

During the first term of this court, after its organization, in framing the jury rule (to be considered presently) the substance of the second sentence was incorporated into it. If this sentence is dormant, and requires legislation to bring it into action, then I may inquire, was the embodying of the substance of the sentence in the rules of court, going beyond the pale of the act of February 15, 1869—giving to it a too elastic construction? If the practical working of the act, in this judicial district, until the making of the rule just alluded to, is to be the guide, it would be difficult, I apprehend, to answer this question in the negative.

By a rule of the United States district court (having circuit court jurisdiction) for this district, adopted at the March term 1871, the marshal was instructed to procure from the superior court clerk for each county, comprising this district, a certain number of names of the "most upright and intelligent persons," between the ages of twenty-one and sixty years, to be taken from the jury lists of the county, without regard to race or color. Comment was made by counsel on both sides, during argument, on the insertion of the word "most" before and in connection with, "upright and intelligent," in the rule of the district court. Whether the word "most" was in the draft of the rule which I wrote, I do not now remember; if so, it was unadvisedly there. But what impediment could it have been to justice? Can either side complain? Was not the word, by fair intendment, to apply to each class, white and colored? At most the word but expressed moral fitness as necessary to the end proposed. But to return; nearly seventeen hundred names were forwarded to the marshal (before the abrogation of this rule) by these clerks, who responded to his request, and for which the government paid them. While this rule was of force, more than two hundred and fifty names were drawn from the jury box by the court, or its officers, the marshal and clerk; but strange as it may appear, every ballot drawn from the box contained the name of a white person. Now, as the ratio of the classes, in this judicial district, has been for years past, as eight white to five colored, or nearly so, it is obvious to the common mind that this mode of designating, or selecting the jurors, cast the entire burden of jury service in the federal court upon one of the classes only—white citizens; thus releasing colored citizens, who possessed the constitutional qualifications for jurors, from the performance of a duty, which they, equally with the qualified white citizens, owed to their country. Not only the constitution of this state, but the recent amendments to the national constitution, have made the colored man a citizen, habilitating him with all the rights, privileges and immunities enjoyed by the white citizen; therefore, he should perform his part of the public labor. On the 1st of June, 1872 [17 Stat. 196], congress passed an act taking away the circuit court power from the district court for this district, and establishing a separate circuit court. At the first term a rule of court was adopted, and it was under this rule that the persons now in the traverse jury-box were designated, summoned, and impanelled. But before passing to this rule it may not be wholly amiss to mention that it is a copy—mutatis mutandis—of the rule which met the sanction of, and was adopted by the United States circuit court for the Southern district of this state, at the last November term. The court was composed of WOODS, Circuit Judge, and ERSKINE, District Judge.

"Order of Court Amending Jury Rules. The court shall appoint three of the United States commissioners residing in the Northern district of Georgia, and the said commissioners, with the marshal for the district of Georgia and the clerk of the court, shall, within ten days after the adjournment of this court, select from the body of the Northern district of Georgia five hundred upright and intelligent persons, citizens of said district, between the ages of 21 and 60 years, without regard to race, color, or previous condition, to serve as jurors. And the clerk of the district and circuit courts for said district and the marshal shall place the names of the persons so selected in a box,

from which they shall draw, within ten days after said names are so deposited, not less than forty-five nor more than fifty names, unless otherwise ordered by a judge, to serve as jurors in the circuit court, and not less than forty-five nor more than fifty names, unless otherwise ordered by the judge, to serve as jurors in the district court. And the first twenty-three names so drawn for each court shall be the grand jurors for such court unless the court or a judge shall otherwise order. And within thirty days after each succeeding term of said courts respectively, unless previously drawn by the court, it shall be the duty of the marshal and clerk to draw from said box, in the manner before stated, the same number of jurors to serve at the next succeeding term of said courts respectively, unless the number is changed by the judge. And if, from any cause, they are unable to procure from the district, as before required, the requisite number of qualified jurors, then, in that event, the names of those they have been able to obtain shall constitute the list from which said jurors shall be taken, and the names of those so drawn shall be placed in another compartment of said box, there to remain until all the names shall have been drawn from the first compartment. The said box shall be kept locked, except when opened for the purpose of drawing or revising the list, and the clerk shall keep the box and the marshal the key. If from failure to draw, as hereinbefore directed, or from any other cause, there shall be a deficiency in whole or in part, of regular jurors, the court may order that upright and intelligent persons from the body of the district shall be forthwith summoned as jurors or talesmen, as the case may be. If the court should not sit at any term, the jurors drawn for that term shall stand over for the next term that shall be held. The marshal shall summon jurors by delivering to each personally, or by leaving it at his usual residence, a written or printed summons. The marshal, the clerk, and any one of said commissioners shall constitute a quorum for the purpose of carrying into effect this rule. And a deputy marshal may, in any case, whether in selecting or drawing jurors, or otherwise in the premises embraced in this rule, do whatever the marshal may himself do.—December 16, 1872."

Amendment December 23, 1872. "Ordered —That the name of each juror selected in conformity to said rule, be written in full, together with the county of his residence, on a separate piece or slip of paper, and also entered on a book to be kept by the clerk of said court. Each ballot shall be so rolled that neither the name nor the county can be seen. The ballots shall then be placed in the box and thoroughly mixed, and when a ballot is drawn therefrom by the court, or by the officers appointed to draw, it shall be unrolled, read, and entered on the venire, or on a paper to be attached thereto."

Attention will be directed to the act of July 20, 1840 (5 Stat. 394): (1) "Jurors," says the act, "to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled to, (2) and shall be designated by ballot, lot, or otherwise, according to the mode of forming juries now practised and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; (3) and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impanelling of juries in substance, to the laws and usages now in force in such state; (4) and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts."

For convenience in the endeavor to interpret and construe this act, the clauses have been marked 1, 2, 3, 4.

1. The qualifications of jurors, as mental capability, residence, age, etc. The second section of the first article of the constitution says: "All persons born in the United States and residents of this state are hereby declared to be citizens of this state." The requisite qualifications for persons to serve as jurors in the highest courts of law of this state, as declared by its constitution and laws, are, that they be "upright and intelligent persons; that they have resided in the county for six months immediately before they are called upon to serve" as grand and petit jurors; that they are "above the age of twenty-one years and under the age of sixty years." Code, §§ 3841, 3858. No property qualification is required in this state for a juror, and if it is not a mere rule of convenience for ordinaries, clerks, and commissioners, to select jurors from the book of the receiver of tax returns, and it be a necessary qualification that the juror must be a tax-payer, then that qualification is included in the qualification of age. Acts March 18, 1869, and January 19, 1872. To be "white" was another qualification for a juror, but this no longer exists. It is unnecessary to speak here of exemptions, under the state laws, from jury duty in the state courts, for the principle is that those who are exempt from serving on juries are not thereby, unless there be some statutory regulations, or perhaps usage, disqualified from doing so. The language employed by congress in this clause of the act of 1840 is direct and posi-

tive; it is also mandatory to the federal courts—that jurors to serve therein shall have like qualifications and be entitled to like exemptions as those of the highest courts of law in the state where the national court is held. Under this clause no discretion is given to the court.

Clauses 2, 3, and 4 may be considered together. They provide for the designating or selecting of jurors by ballot, lot, or otherwise, according to the mode of forming juries as practised in the state wherein the federal court is being held, so far as such mode may be practicable in said courts, or its officers giving the power to said courts to make all necessary rules and regulations for conforming and adopting the designation and impanelling of jurors, in substance to the laws and usages in force in the state at the time. Now, it was contended by counsel for the challenger that for the designating or selecting of qualified persons to serve as jurors in this court, state authority—for example, a board, comprising the ordinary of the county, the superior court clerk, and also three commissioners appointed by the judge of the superior court—is the proper agency to act in the premises; that it, and not the national court or its officers, is the touchstone to discover, and the agent to designate each particular juror to serve in this court, from the list on the books of the receiver of tax returns. The employment of state agency to designate or select jurors for the United States courts was not, in my opinion, contemplated by congress in making this law. The language of the act is that the jurors "shall be designated by ballot, lot, or otherwise, according to the mode of forming juries now practised or hereafter to be practised therein, in so far as such mode may be practicable, by the courts of the United States or the officers thereof." Is it not the plain meaning of this that the designation or selection is to be made by the national and not the state officers? But the argument of counsel in its tenor indicated that, at least, if the officers of this court are to designate or select its jurors, the names should be taken from the list of taxpayers in each county in the district found on the tax receiver's books. If jurors, as the rule requires, are to be taken from the district at large, this would be virtually impracticable. And even if it were practicable to thus select them, I do not think the statute requires it to be done. The legal object is to select persons who possess the qualifications; it is not the mode in which this is to be accomplished that is imperative upon the court; in this matter a large discretion has been bestowed upon it by the statute itself. The act says that the court shall have the power to make all necessary rules and regulations for conforming the designation and impanelling of jurors, in substance, to the laws and usages in force in the state.

Objection to the rule was urged by counsel for the challenger, "because the rule of court under which the jury was selected and impanelled limits the number of jurors in this district to five hundred." I have looked into this question, and I find nothing in any of the laws of congress as to what number shall be designated or selected. The acts of 1789 [1 Stat. 73] and 1840 apply only to the mode of selecting jurors, and not to the number.

Counsel relied on the fifth section of the act of congress of June 1, 1872 (17 Stat. 196). This section declares (in substance) that the United States courts shall conform, as near as may be, to the practice, pleadings, and modes and forms of proceeding in other than equity and admiralty causes, as they may exist in like causes in the courts of record in the state at the time of holding the United States court therein. The act has no reference to the designating or selecting of jurors; nor in my opinion has it any application to the practice, pleadings, or modes of proceeding in criminal cases, as practised in the state courts.

The case of U. S. v. Wilson [supra] was read and earnestly discussed. Two questions were before the court for decision. The first was the construction of the act of July 20, 1840. Speaking of the first clause of the act, Wilson, Jr., said: "So far as relates to the qualifications and exemptions of federal jurors, the courts have no discretion." And in construing other portions of the act, which he quotes from, "and for this purpose the said courts shall have the power to make all the necessary rules, etc." to the end, the learned judge said, "the courts from necessity were to exercise a discretion as to the practicability of designating and impanelling jurors according to the mode prescribed for selecting juries of the highest court of law in the state. They have the power and the discretion to change the mode from time to time. The court may exercise the power, or refrain to exercise it, as it may now deem practicable." The other question for decision was, whether where a grand jury, consisting of fifteen members, fourteen of them—the fifteenth being absent—return a true bill into court; the indictment was well found. The court held it was. But it further held, that if a grand jury has even one disqualified person on the panel, the whole jury is tainted and an indictment found by such a body would be void. And this has been the doctrine as to grand juries in England for the past four hundred years, and it prevails in this country. 2 Pick. 549; Doyle v. State, 17 Ohio, 222.

Counsel also relied on Clinton v. Englebrecht, 13 Wall. [80 U. S.] 434. This case arose exclusively under a law of the territory of Utah. The court there, proceeding on the theory that it was a court of the United States, issued an open venire to the marshal,

acting apparently on the hypothesis that it was to be governed in the selection of jurors by the acts of congress. Chief Justice Chase, in delivering the opinion of the court, held that the territorial court erred both in its theory and in its action, and that the making up of the lists, and all matters connected with the designation of the juries, were subject to the territorial laws.

Reliance was likewise placed by counsel for the challenger on the case of U. S. v. Woodruff [supra]. The defendant objected to a trial, on the ground that the jurors had not been selected conformably to the act of congress of July 20, 1840. The court (Mr. Justice McLean), in delivering the judgment, said: "By an early rule of this court the clerk is required to issue a venire facias, commanding the marshal to summon twenty-four persons to serve as traverse jurors. * * * By the act of Illinois of the 3d of March, 1845, for the selection of jurors, it is made the duty of the county commissioners to select jurors. Now this court cannot call upon the officers of the state to do this duty, but we are bound to conform, as nearly as may be, to the state practice. The venire under the above rules leaves the selection of the juries to the marshal as his convenience shall permit. This does not, therefore, conform to the state practice. The jurisdiction of this court extends throughout the state; consequently the jurors should be selected from the state at large, and their names should be inserted in the venire. The court will therefore adopt a rule requiring the clerk and marshal to select the jurors from the state at large, previous to each term, and to conform in doing so as near to the state practice as may be practicable."

The case of U. S. v. Wilson, instead of showing that the rule is not in conformity to the laws of congress, is, to my mind, an authority which sustains its legality.

The case of U. S. v. Woodruff is so directly applicable, so fully covers the whole question, and so clearly supports the rule, that no other authority need be adverted to or invoked.

The motion to quash the array is overruled.

Case No. 15,188.

UNITED STATES v. GARDNER et al.

[5 Mason, 402.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1829.

SEAMEN—ENDEAVOUR TO MAKE REVOLT.

If the crew combine together to refuse to do duty, and actually refuse until the master complies with some improper request on their part, it is an endeavour to make a revolt, within the crimes act of 1790, c. 9 (36), § 12 [1 Stat. 115; 1 Story's Laws, 85].

[Cited in U. S. v. Nye, Case No. 15,906.]

[1] [Reported by William P. Mason, Esq.]

Indictment for an endeavour to make a revolt on board the ship Ganges, in Boston harbour, founded on the crimes act of 1790, c. 9 (36), § 12 [1 Stat. 115; 1 Story's Laws, 85]. Plea, not guilty. At the trial it appeared, that the seamen had signed the shipping articles, and the ship was all ready for sea, and that the master directed the pilot to get the vessel under weigh for sea for the voyage. The whole crew (among whom were the defendants [Daniel C. Gardner and others]) utterly refused to obey the orders of the master, or to get the ship under weigh, unless the master would agree, that they should have a day watch below, in the forenoon, during the whole voyage. This the master refused to do, as being an unreasonable request; and it was proved by witnesses, that it was improper and injurious, and unknown as a regulation on board of ships. The defendants and the rest of the crew then separated themselves from the officers, and collected together by the forecastle, and steadily refused all obedience to the orders given, and acted together in concert. Application then was made for a warrant to arrest them, and they were taken on shore under it, and upon a hearing before the district judge, he explained the law to the seamen, and urged them to go on board again, and the owners agreed, if they would go on board and perform duty, this offence should be forgiven and forgotten. The defendants refused, and were then committed for trial.

Mr. Dunlap, for the United States.
S. D. Parker, for defendants.

STORY, Circuit Justice, in summing up the case, said: If the jury believe the facts to be as testified by the witnesses, the court are of opinion, that there was an endeavour to commit a revolt. There was a common combination by the crew, for a common and illegal object, and they refused obedience to the lawful orders of the master, and incited each other to persist in that disobedience, so as to overthrow his authority and command on board of the ship. We have already decided this point in the case of U. S. v. Harris [Case No. 15,313], which has just been tried.

Verdict guilty, and sentence accordingly.

Case No. 15,189.

UNITED STATES v. GARLINGHOUSE et al.

[4 Ben. 194;[1] 11 Int. Rev. Rec. 11; 2 Chi. Leg. News, 131, 139.]

District Court, N. D. New York. May, 1870.

INTERNAL REVENUE—BOND—MARRIED WOMAN—LEX LOCI CONTRACTUS.

1. The defendant Garlinghouse, a warried woman, as principal, and the defendants Munger

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

and Gulick, as sureties, executed, on the 9th of March, 1866, at Canandaigua, in the state of New York, a bond, conditioned according to the requirements of the internal revenue laws of the United States relating to bonded warehouses. To the declaration, which was in debt upon this bond, alleging breaches of the condition, the defendants severally pleaded that at the time of the making of the bond, the defendant was, and still continued to be, the wife of one Leman B. Garlinghouse. To the plea of the sureties the United States replied, that at the time of the delivery of the bond, the defendant G. was engaged in the business of a distiller at Canandaigua, on her separate account, and separate and apart from her said husband, and that she gave the bond in the proper carrying on of said business. To the plea of the defendant G. the United States replied, in addition to the allegations just stated, that for the successful prosecution of her separate business it was necessary for the defendant G. to have a bonded warehouse, under the laws of the United States; that she applied therefor; and that she executed the bond according to the requirements of those laws. The defendants demurred to these pleas, and issue was joined on these demurrers. *Held*, that a bond, voluntarily given to the United States to secure the performance of any corporate act, or the discharge of any public, official, or private duty, is valid and binding, if the United States, in their political and corporate capacity, have a legal pecuniary interest in the performance of the condition of such bond, although the bond is not expressly required or authorized by any act of congress.

2. The capacity of a party to contract depending on the law of the place where the contract is made, the validity of the bond in question, so far as it depended on the capacity of the defendant G. to make it, was to be governed by the law of the state of New York, and, under that law, was valid and binding upon her.

3. Under the laws of this state, G. was authorized to carry on the business of a distiller on her own account, and for her own benefit; and, the acts of congress having required that in order to make the warehouse of the defendant G. a legal bonded warehouse, under the laws of the United States, she should execute such a bond with sureties as was here in question, she acquired, by the very virtue of the acts themselves (even if she did not possess it without reference to them) legal capacity to bind herself by such a bond as she had made here, and the bond was valid under those laws by necessary implication.

The declaration in this case was in debt, upon a bond, in the penalty of $20,000, executed by the defendant Garlinghouse as principal, and by the other defendants as her sureties, on the 9th of March, 1866, at Canandaigua, in the Northern district of New York; and such bond was subject to the conditions, thereunder written, that if the said defendant, Martha A. Garlinghouse, should comply, in all respects, with the provisions and requirements of the warehousing and internal revenue laws of the United States, and the regulations of the treasury department made in pursuance thereof, and should not store, in the premises, described in the application made by her for a bonded warehouse, any goods, wares, or merchandise other than those manufactured or produced by her, and ordered to be placed therein by the collector, or his officer having charge thereof; and should pay to the said collector monthly the salary of the officer having charge of such goods, and should exonerate and hold the United States and its officers harmless therefrom or on account of any risk, loss, or expense of any kind or description connected with or arising from the deposit or keeping of any goods, wares, or merchandise in the said warehouse; and should not remove, or suffer to be removed, from said warehouse any goods, wares, or merchandise stored therein, without lawful permit, and without the presence of the officer having charge thereof; or, in case of such removal, should pay to the collector of internal revenue for the district the value of the merchandise so removed, and five thousand dollars as liquidated damages for such removal: then such obligation was to be void. The declaration assigned breaches of this condition. No question upon the form of the bond, or of the declaration, or the sufficiency of the assignment of such breaches, was made. To this declaration, the defendants [Merrick] Munger and [Egbert] Gulick—after oyer of the bond and condition, and after taking issue by their first plea upon the assignment of breaches—pleaded, secondly, that the said Martha A. Garlinghouse, at the time of the making of the said bond or writing obligatory, was, and still continued to be, the wife of one Leman B. Garlinghouse. The defendant Garlinghouse also pleaded her coverture, in the same form. To the second plea of the defendants Munger and Gulick, the United States replied, that, at the time of the execution and delivery of the said bond by the said defendants, the said defendant Martha A. Garlinghouse was, and for a long time previous thereto had been, engaged in and carried on the business of a distiller, at Canandaigua aforesaid, on her separate account, which said business the said defendant Martha A. Garlinghouse had maintained and carried on as and for her sole and separate use and behoof and profit, and as and for her separate trade, business, and occupation, separate and apart from her said husband; and that she gave, made and executed the said bond, at the time and in the manner aforesaid, in the proper carrying on of her said business, so carried on by her, on her separate account, as aforesaid. There was a similar replication to the plea of the defendant Garlinghouse; but the last-mentioned replication also contained further allegations, in substance, that in order to the successful prosecution of the said separate trade and business of said Martha A. Garlinghouse, it became necessary for her to have a bonded warehouse established, pursuant to the acts of congress in such case made and provided; and that she made application therefor, and was thereupon required to execute such a bond with sureties; and did thereupon execute such bond, with her said sureties, as by law required. To these replications the defendants demurred, and the plaintiffs joined in demurrer. Upon the argument of the demurrer, it was not denied that the

principal in the bond, though a married woman, might, under the statute of the state of New York, lawfully carry on the business of a distiller, for her own separate use and benefit, and might lawfully make all ordinary contracts with private persons in respect to such business; nor was it alleged that such contracts would not be binding upon her, and upon her separate estate and property, or that she could not be prosecuted to judgment thereon, in the proper form of civil action at law, as much as if she had been a feme sole; but it was insisted on behalf of the defendants, that the bond declared on, being executed to the United States, must be governed by the common law, and not by the laws of the state of New York; and was void, as against both the principal and the sureties.

H. G. Cheesebro, counsel for defendants, made and argued the following points in support of this position:

First. The bond, being executed under the United States laws, is to be governed by those laws, and not by the laws of the state in which it chanced to be executed. Cox v. U. S., 6 Pet. [31 U. S.] 172, 203, 204; Ableman v. Booth, 21 How. [62 U. S.] 506.

Second. There being no statute law of the United States, on the subject of the execution of bonds by married women, the courts of the United States must be governed by the rules of the common law, in deciding questions of that kind. 1 Kent, Comm. 341; Ludlam v. Ludlam, 26 N. Y. 361.

Third. By the common law the bond of a married woman is void; and, there being no other law to govern this case, the bond in question is, against Mrs. Garlinghouse, null and void. Fowler v. Shearer, 7 Mass. 14; Daniel v. Rose, 1 Nott & McC. 33; Martin v. Dwelly, 6 Wend. 14; 1 Pars. Cont. 286.

Fourth. The bond, being void as against the principal, is void as against the sureties. 1 Poth. Obl. pt. 2, c. 6, § 1, marg. pp. 366, 370, 377; Id. (2d Am. Ed.) marg. p. 196; Chit. Cont. 199.

W. Dorsheimer, U. S. Dist. Atty.

HALL, District Judge. The only question argued on this demurrer, and the only one it is intended now to decide, is whether, under the facts admitted by the pleadings, the bond declared on is void by reason of the coverture of Mrs. Garlinghouse, the principal obligor.

This question may properly be considered under two aspects: First, as presented under the common law and the laws of the state of New York alone, without regard to the effect of the act of congress under which it was executed; and, secondly, as presented under the provisions of the act of congress, in addition to the common law and the statutes of New York.

In considering this question, independent of the legislation of congress, as affecting the capacity of Mrs. Garlinghouse to bind herself by the bond declared on, it is proper first to dispose of the objection, urged upon the argument, that the United States cannot take a valid bond except under the express authority of an act of congress. I have lately had occasion to examine the question presented by such objection, and regard it as a well and firmly-established doctrine that a bond, voluntarily given to the United States to secure the performance of any lawful act, or the discharge of any public, official, or private duty, is valid and binding, if the United States in their political and corporate capacity have a legal pecuniary interest in the performance of the condition of such bond, although such bond is not required by any act of congress. The United States, the different states of the Union, and all municipal corporations, may legally take a bond, with sureties, for the faithful performance, by an individual, of all lawful contracts made with them, and in the performance of which they have a direct pecuniary corporate interest. In this respect, they may take the same measures for their security as might be taken by an individual for his own security in similar cases; and whenever any tax is legally imposed by the United States, they may take security, by bond, for the payment of such tax, or for the proper accounting therefor, by the officer who collects it, in the absence of any congressional legislation upon the subject of such security. In U. S. v. Maurice [Case No. 15,747], Mr. Chief Justice Marshall declared that the capacity of the United States to contract was co-extensive with the duties and powers of government; that every contract which subserved to the performance of a duty might be rightfully made; that a contract executed by an individual, and received by the government, was prima facie evidence that it was entered into by proper parties; and that the authority of an agent or officer of the government, employed in making the contract, is acknowledged by the individual when he makes the contract, and by the United States when the government asserts any right under it. These doctrines were substantially recognized by Mr. Justice Washington, in U. S. v. Howell [Id. 15,405], by the supreme court of the United States, in U. S. v. Tingay, 5 Pet. [30 U. S.] 115, in U. S. v. Bradley, 10 Pet. [35 U. S.] 343, in U. S. v. Linn, 15 Pet. [40 U. S.] 290, and in Tyler v. Hand, 7 How. [48 U. S.] 573. Indeed, the validity of such bonds would seem to be unquestionable, even if there were no direct authority upon the question. No maxim is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized (The Federalist, No. 44); and the taking of a bond, with sureties, is one of the ordinary means of securing the payment of a debt, or the performance of a duty. And sovereignties and states, as well as mu-

nicipal corporations and individuals, have, unless prohibited by law, the right to take such security within the scope of their general authority, or in the just exercise of their constitutional or corporate powers.

Assuming, then, that the United States may properly take the bond of a feme sole, or other person, having capacity to contract, according to the law which must determine that capacity, it is proper to inquire by what law the question of such capacity is to be determined in the present case.

In the case of Cox v. U. S. [6 Pet. (31 U. S.) 172], cited by the defendants' counsel, as above stated, it was declared to be a well settled general rule, "that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place, where it is to be executed." And it was declared that, admitting the bond in that case to have been signed at New Orleans, it was very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington; that the accountability of the principal as a navy agent, was to be at the seat of government; that the bond was given with reference to the laws of the United States, which required such navy agent to account with the treasury department, at the seat of government; that he was bound to pay over such sum as might be found due to the treasury department, or in such manner as should be directed by the secretary; and that, in every point of view in which it could be considered, the contract of the obligors was to be executed at the city of Washington, and that, therefore, the liability of the parties must be governed by the rules of the common law, which were in force at Washington. The case of Cox v. U. S., and the case of Duncan v. U. S., 7 Pet. [32 U. S.] 435 (which was a suit upon a paymaster's bond, and which, so far as the question under discussion is concerned, was decided upon the same principles as that of Cox v. U. S.), are, therefore, in entire accordance with the almost uniform course of decision upon such questions. Alves v. Hodgson, 7 Term R. 242; Smith v. Smith, 2 Johns. 235, 241; Thompson v. Ketcham, 4 Johns. 285; Lodge v. Phelps, 1 Johns. Cas. 139; Thompson v. Ketchum, 8 Johns. 190; Hicks v. Brown, 12 Johns. 142; Hyde v. Goodnow, 3 Comst. [3 N. Y.] 266.

But in most of these cases the obligation, or legal effect, of the engagement, rather than the capacity of the obligor to enter into the contract, was in controversy; and the question of capacity to contract depends upon the law of the place where the contract is made, rather than upon the law of the place where it is by its terms to be performed.

In this case the bond is alleged, and admitted by the pleadings, to have been made at Canandaigua, in the state of New York; and it bears upon its face an admission that that was the place of residence—the domicile—of the obligors. And the contract was by its terms to be performed in the state of New York. The domicile of the obligors, and the place of the execution of the contract, as well as the place where it was to be performed, being the same, the question whether the lex loci contractus or the lex domicilii is to determine the capacity of the parties to enter into the contract, (upon which the common law and most continental jurists disagree) does not arise; and the capacity of the obligors to enter into the contract, and the validity and extent of its obligations, are to be determined by the laws of New York.

Mr. Justice Story, in his "Conflict of Laws," has discussed this question and reviewed the authorities at great length, and with his usual ability; and in section 241, he says: "The law, which is to govern in relation to the capacity of the parties to enter into a contract, has been already fully considered. It has been shown that, although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet that the common law holds a different doctrine, viz.: that the lex loci contractus is to govern." Again in section 242, he says: "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made." And, again, in section 263, he says, "that the law of the place of the contract is to govern as to the nature of the obligation and the interpretation of the contract."

Mr. Justice Story states some exceptions to these rules, among which is the one referred to in the case of Cox v. U. S., that the law of the place where the contract is to be executed (that is, performed) should govern in determining the nature and extent of its obligation. Sections 233, etc.

It would be idle to attempt to add anything to the discussion of this subject by Mr. Justice Story; but it may properly be said that the positions stated are fully sustained by later authorities. A few of these will be referred to.

"All questions of minority or majority, incapacity consequent on coverture, emancipation, and other personal qualities and disabilities, are governed by the lex loci contractus, or the law of the place where the contract is made or the act done." Levi, Merc. Law, p. 41, cl. 47, citing Walker v. Witter, 1 Doug. 6; Martin v. Nicolls, 3 Sim. 458.

Westlake, in his valuable work on Private International Law, says (pages 386, 387): "The validity of a contract, made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the lex loci contractus;" and Chancellor Kent (2 Comm. 455) says: "A contract valid

by the law of the place where it is made, is, generally speaking, valid everywhere, jure gentium and by tacit consent. The lex loci contractus controls the nature, construction, and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established." At pages 457, 458, he says: "It may be laid down as a settled doctrine of public law, that personal contracts are to have the same validity, interpretation, and obligatory force in every other country, which they have in the country where they are made." And at page 458 he says: "So, also, the personal incompetency of individuals to contract, as in the case of infancy, and the general capacity of parties to contract, depend as a general rule upon the law of the place of contract." And see Thompson v. Ketchum, 8 Johns. 190; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 520; and Townsend v. Jamison, 9 How. [50 U. S.] 407, 414.

Under the authorities, and for the reasons already stated, the demurrers would be overruled, if there were no other ground upon which the validity of the bond declared on could be maintained. It may, nevertheless, be well to consider the case in the other aspect to which reference has been already made, and to determine the effect of the act of congress under which the bond was taken, upon the question of the capacity of Mrs. Garlinghouse to enter into the contract.

The laws of this state clearly authorized her to engage in and carry on the business of a distiller upon her own account, and for her sole benefit, separate from the business of her husband; and under such laws she might make with an individual any contract for the procurement or use of a warehouse to enable her to carry on such business. The act of congress, however, required that, before such warehouse could be legally established as a bonded warehouse, she should execute a bond, with sureties, as prescribed in that act; and the requirement of such a bond necessarily authorizes its execution, and also by implication, as a necessary consequence, renders such bond valid. By requiring such bond of a married woman who might carry on the business of a distiller for her sole and separate benefit, under the laws of any state, congress incidentally and necessarily conferred upon her (if she had not that capacity before) the legal capacity to bind herself by such bond, for otherwise the execution of the bond would be a nugatory act, and the object and purpose of congress in requiring such bond would be defeated.

It is, in principle, like the case of a contract of enlistment made by a minor, under acts of congress providing for enlistments without declaring the capacity of minors to enter into a contract of enlistment, or expressly authorizing their enlistment, but which, nevertheless, recognize the practice of their enlistment, without requiring the consent of their parents or guardians. In such cases, the acts of congress, authorizing or recognizing such enlistments, give to the minor, by necessary implication, legal capacity to enter into such contract, and establish their validity when made. U. S. v. Bainbridge [Case No. 14,497]. Upon the same principle it has been held that when a statute obliged an infant to indemnify a city, town, or county against the expenses of supporting his illegitimate child, and made it necessary for him to enter into a bond with sureties for that purpose, as the only means by which he could be discharged from arrest, such statute gave the infant legal capacity to make a binding obligation for that purpose. People v. Moores, 4 Denio, 518. And see People v. Mullin, 25 Wend. 698.

In Baker v. Lovett, 6 Mass. 80, Parsons, C. J., said, "Infants are bound by all acts which they are obliged by law to do," and I know of no good reason why the same should not be applied to the acts of a married woman.

The right of the United States to sue upon a contract made with it, without any express authority of an act of congress, was established as early as 1818, in the case of Dugan v. U. S., 3 Wheat. [16 U. S.] 172, 181.

In respect to the second point made by the defendants' counsel, it may be proper to remark that the courts of the United States are governed by the rules of the common law, because the common law is in force in the state or territory where the cause of action arose or is to be enforced, and not because the common law has been adopted by the United States, or has under the laws of the United States any binding force except as being the law of some state, territory, or district. In the case of Wheaton v. Peters, which was argued at great length by Mr. Paine and Mr. Webster for Mr. Wheaton, and Mr. J. R. Ingersoll and Mr. Sergeant for Mr. Peters, Mr. Justice McLean, in delivering the opinion of the court, said (8 Pet. [33 U. S.] 638): "It is clear there can be no common law of the United States The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the state in which the controversy originated." And see Kendall v. U. S., 12 Pet. [37 U. S.] 524; Lorman v. Clarke [Case No. 8,516]; and Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 518, 564.

The case of Cox v. U. S., ubi supra, so far as it adopted the common law as the rule of decision, therefore proceeded upon the ground that the common law was in force in Maryland at the time of the cession by that state of the territory in which the treasury depart-

ment was situated, and continued to be in force in that part of the District of Columbia after such cession, and not upon the ground that the common law furnished the rule of decision in every state in all cases where contracts with the United States were in controversy. See Kendall v. U. S., ubi supra.

The conclusions already stated render it unnecessary to consider the other points made by the defendants' counsel. The United States must have judgment upon the demurrer, with leave to the defendants to amend their pleadings within twenty days, on payment of costs

Case No. 15,190.

UNITED STATES v. GASSAWAY.

[1 Hayw. & H. 174.] [1]

Circuit Court, District of Columbia. March 30, 1844.

INDICTMENT—FOLLOWING STATUTE—LARCENY FROM WAREHOUSE.

An indictment is good and sufficient under the act of Maryland of July, 1729, c. 4, § 3, if it alleges that the prisoner with force and arms, into a certain storehouse, feloniously did break and enter, and then and there chattels of a greater value of five shillings of the currency of the state of Maryland, feloniously did steal, take and carry away, &c.

[This was an indictment against Samuel Gassaway for house-breaking.]

This is an indictment, for breaking into a storehouse and stealing goods, under the act of Maryland of July, 1729, c. 4, § 3,[2] and is as follows: "The jurors of the United States, for the county aforesaid, on their oath present that Samuel Gassaway, late of the county aforesaid, a slave, on the 26th day of Nov., 1842, with force and arms, at the county aforesaid, into a certain storehouse of one James Thecker and one Henry Thecker, there situate, feloniously did break and enter, and then and there three pair of boots of the value of $10.50, and of a greater value than five shillings of the currency of the state of Maryland, and then and there one quarter box of segars, of the value of four dollars and fifty cents, and of a greater value than five shillings of the currency of the state of Maryland, of the goods and chattels of the said James Thecker and the said Henry Thecker, feloniously did steal, take and carry away, against the form and statute in such case, made and provided, and against the peace and government of the United States." On which indictment the jury, being empannelled and sworn to say the truth on the premises, said that the prisoner is guilty. Whereupon the said prisoner, by his attorney, moved in arrest of judgment upon the verdict. Because the indictment states a larceny by the prisoner, and not a stealing from the house or warehouse according to the terms of the statute, and for other reasons apparent on the record.

Pursuant to the act of congress of July 7, 1838 [5 Stat. 306], the motion and the questions of law were adjourned to the circuit court for its decision. The cause coming on to be heard on the transcript of the record of the criminal court of the District of Columbia for the county of Washington, on the motion in arrest of judgment and on the questions of law arising on said motion, was argued by counsel.

THE COURT decided that the judgment in this cause ought not to be arrested because the said indictment does not charge a stealing from the house or warehouse, nor for any other reason apparent on the record. That the offence charged in said indictment is sufficiently charged therein, and that the said indictment is good and sufficient in law. Whereupon it is ordered and adjudged by this court, that the motion in arrest of judgment in said cause be, and that the same is hereby, overruled, and that the same be certified to the said criminal court.

Case No. 15,191.

UNITED STATES v. GATES.

[2 N. Y. Leg. Obs. 8; 8 Law Rep. 465.]

District Court, S. D. New York. Dec., 1845.

PENAL ACTION—FORMER CONVICTION.

A person who has been convicted and punished by fine and imprisonment for smuggling goods on shore in violation of the provisions of the act of August 30, 1842, § 19 [5 Stat. 565], is not liable to an action to recover the penalty imposed by the statute of March 2, 1799, § 50 [1 Stat. 665], for landing them without a permit,—the act complained of in the two cases being the same.

[Distinguished in Re Leszynsky, Case No. 8,279.]

This was an action under the 50th section of the act of congress of March 2, 1799, which provides that no goods brought in any vessel from any foreign place may be unladen within the United States but between the rising and the setting of the sun, except by special license of the collector, &c., nor at any time without a permit; and the landing thereof under any other circumstances is prohibited under a penalty of $400 against the person in command of the vessel at the time, and every other person knowingly concerned or aiding therein, and certain disabilities therein mentioned against such persons.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] "That if any person or persons shall, after the end of this session of assembly, break into any shop, storehouse or warehouse, although such shop, storehouse or warehouse, be not contiguous to or with any mansion-house, and steal from thence any goods, to the value of five shillings, and be thereof convict, by confession or verdict of a jury, such offender or offenders, shall suffer death as felons, without benefit of clergy, any law, usage or custom to the contrary notwithstanding." 1 Maxcy, Laws Md. p. 190.

The United States sued for the above penalty, alleging the landing of the goods [from the packet ship Oxford, from Liverpool, defendant being then in command of said ship] [1] in question without a permit. The defendant pleaded specially that since the landing of said goods he had been indicted by the United States in the circuit court of this district, under the act of 1842, for smuggling and clandestinely introducing said goods into the United States without paying or accounting for the duties due thereon according to law, and that he pleaded guilty to such indictment, and was by said court sentenced to pay a fine of two thousand dollars and be imprisoned thirty days; that he paid such fine and bore such imprisonment; and that the acts for which he was so indicted and committed and sentenced are the same acts for which this action is brought to recover the above named penalty. To this plea the United States demurred. The defendant joined in demurrer. The cause came on for argument before the Honorable S. R. BETTS, United States District Judge, on the 28th day of October, 1845.

The Hon. Benjamin F. Butler, attorney for the United States, with whom was F. A. Marbury, relied on the following points:

I. The facts set forth in the second plea, and which are admitted by the demurrer, constitute no valid bar to the action of the plaintiffs. (1) The unlading and delivery of goods without a permit from the collector (section 50, Act March 2, 1799) is an offence entirely distinct from the fraudulent introduction of goods into the United States (section 19, Act Aug. 30, 1842), for which the defendant has been indicted and punished as set forth in his plea. The former offence may be committed in respect to free goods; the latter only concerns such as are dutiable. A party might unlawfully unlade goods, and thus incur the penalties of the law of 1799, without that fraudulent intent which would be necessary to conviction under the law of 1842. The punishment attending the violation of the former differs from that prescribed in the latter. (2) The two statutes are at most only cumulative. The former is not repealed by the latter, neither being incompatible with the existence and operation of the other.

II. There is no merger. The ancient feudal doctrine of the merger of a private wrong in a felony is not applicable to the civil polity of this country, and has never been adopted in our system of jurisprudence. Plummer v. Webb [Case No. 11,234]. But, if this doctrine were recognized by our courts, it could not affect this case, as the law of 1799 was devised for the protection of a public right, and the infringement of its provisions is therefore a public wrong. Nor is the violation of the law of 1842 made felony; it is, on the contrary, expressly declared to be a misdemeanor

Charles A. Peabody, contra.

Though there are no cases in point which I have been able to find, yet, upon general principles, the defendant is not liable to this second action for another offence in the same act for which he has already been punished at the suit of the same party (the United States). The rights of the United States against the defendant have been satisfied, and his liability discharged, by a compliance with the former sentence of the court. In a suit for money, if a judgment were obtained for the same cause, and paid, the fact pleaded would be a good bar to a subsequent action for the same cause, however the action (as in this case) might differ in form. In criminal law the maxim is familiar, that "no man shall be twice put in jeopardy for the same offence." Moreover, it cannot be supposed to have been the intention of congress that the two acts should be enforced in the same case, for one and the same offence. They could hardly have intended to cumulate penal consequences in this manner. On the contrary:

I. The statutes were intended for different cases, and the act of 1799 was intended to apply to those cases in which the landing was only in violation of that statute, but without any fraud or fraudulent intent upon the revenue of the United States. Whenever the fraud or fraudulent intent made a part of the offence, the act of 1842 applied, but the act of 1799 did not; and, on the other hand, when the landing was without such fraudulent intent upon the revenue, this act (of 1799) was violated, and the remedy provided by it was the legitimate remedy.

The counsel for defence admitted the position of the plaintiff, that the latter did not repeal the former statute, and also that the doctrine of the merger of the civil remedy in the felony was not a part of the common law of this country, it having had its origin in England, in the necessity of the case, where the entire property of any one convicted of felony was forfeited and confiscated, and the civil remedy of the individual lost. But the case at bar does not depend upon either of these positions. Neither this nor the former suit was for damages sustained. The case at bar is more nearly analogous to the doctrine of merger as applied to a lesser offence, where the acts constituting it go to make up a greater. He cited the cases of robbery, assault with intent to rob, and assault and battery. In every robbery there is an assault with intent to rob, and usually an assault and battery, and one guilty of the first is literally guilty of the one or both of the others; and yet it will not be contended that, in a case where all these concur, the offender, having been punished for robbery, is liable for an assault with intent to rob, or that, having suffered for the latter, he could properly be

[1] [From 8 Law Rep. 465.]

proceeded against for an assault and battery. The lesser would be merged in the greater offence, and, having suffered for the latter, he would not be liable for the former. On the other hand, if indicted for assault and battery, and on the trial the evidence should show death caused by the assault and battery, so that the accused was guilty of murder, the less would doubtless be merged in the greater offence, and on this appearing on the trial the proceedings under the indictment would be dismissed. The two remedies in the case at bar are in behalf of the same plaintiffs. Both are for the commonwealth. The offences complained of are against the rights of the same parties, and concur in the same act, and neither is for damages. The goods were landed without a permit (the offence forbidden in the act of 1799), and with intent to defraud the revenue of the United States (the offence prohibited in the act of 1842). In one suit he has been punished for the act with the intent. In this it is sought to punish (more mildly) for the act alone, without the wrong intent,—the mere landing, independently of any intent to defraud the revenue.

II. On general principles there can be only one punishment for the same act,—one satisfaction for one debt. The United States having enforced one remedy, their claim against defendant is satisfied,—extinguished. He has fulfilled the law by bearing the sentence thereof. The demand of the United States having been paid, they have no further claim on defendant for the single act which forms the foundation of both their claims. This doctrine is analogous to that of satisfaction of a debt or liability by payment in a civil suit, —a former conviction in criminal law. In this case the first suit was criminal in its form, but this is a civil action. The law in either case, being complied with, is satisfied.

On either of the above grounds the plea is good, and this action cannot be maintained.

BETTS, District Judge. The question raised by the demurrer in this case is substantially whether a person convicted and punished by fine and imprisonment for smuggling goods on shore in this port (thus landing them without a permit) is liable also to an action for $400 penalty for such landing. The act of March 2, 1799, § 50, provides that no goods brought in any vessel from any foreign place may be unladen within the United States, but between the rising and the setting of the sun, except by special license from the collector of the port and naval officer, where there is one, nor at any time without a permit from the collector and naval officer, if any, for such unlading, and, if goods shall be unladen from any such vessel contrary to the directions aforesaid, the master and every other person who shall knowingly be concerned or aiding therein, &c., shall forfeit and pay each and severally the sum of $400 for each offence; and shall be disabled from holding any office of trust or profit under the United States for a term of not exceeding seven years, and the collector shall advertise the names of such persons, &c., &c.; and all goods so unladen or delivered shall become forfeited and may be seized by any of the officers of the customs, and, when of the value of $400, the vessel, tackle, and furniture shall be subject to like forfeiture. The United States sue for the above penalty, alleging the landing of the goods in question without a permit. The defendant, by plea thereto, avers that he has since such landing, &c., been indicted by the United States therefor in the circuit court of this district, under the act of 1842, and has been by said court, on his plea of guilty to such indictment, sentenced to pay a fine of $2,000 and be imprisoned 30 days in punishment of said offence; and that the sentence in both particulars has been satisfied; and the acts for which he was so convicted and indicted are the same acts mentioned in the declaration in this case. To this plea the United States demur, and the broad question is whether an offender so circumstanced is liable to be proceeded against under the provisions of the two statutes.

On the argument the sufficiency of the plea to establish the fact that the transaction for which the two prosecutions were instituted was one and the same was objected to; but I think it sufficiently certain to a common intent, and shall consider the case as if the plea stood clear of all exception in alleging the identity of the acts involved in the two punishments. By the act of August 30, 1842, § 19, it is enacted, "If any person shall knowingly and willingly, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, and merchandize subject to duty by law, and which should have been introduced without paying or accounting for the duty, &c. &c., every such person shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

It is manifest upon the comparison of these two provisions that the latter is not inconsistent in every respect with the former, nor is it so far applicable to a like state of facts as to import an intention in the legislature to repeal or supersede the prior enactment, because the acts which are subject to the operation of the respective statutes are not identical in all particulars, and furthermore because the forfeiture of the goods and vessel may still be inflicted. 1st. The offence under the act of 1799 is committed, though the goods landed be not subject to duty, but not where a permit is granted, although there may be deception or smuggling under it, nor unless the goods are unladen from some vessel. 2d. The offence, under the act of 1842, may be committed notwithstanding a permit for landing,

but not for clandestinely landing goods which are not dutiable. The offence is also complete by bringing in clandestinely by any other means than landing from vessels. These instances, independent of others which may be designated, show that the 50th section of the act of 1799 may still be in force and operation in relation to many particulars without being touched or interfered with by the provision of the 19th section of the act of 1842. But, when both apply to identically the same state of facts, can both be enforced, or does the latter supersede the former and supply the whole law applicable to such particular cases?

In the case of U. S. v. One Case of Hair Pencils [Case No 15,924], Judge Thompson discusses the doctrine of the repeal of one statute by force of the enactment of a subsequent one on the same subject-matter. In most cases, he says, the question resolves itself into the inquiry, what was the intention of the legislature? Did it mean to repeal or take away the former law, or was the new statute intended as merely cumulative? 6 Davies, Abr. 594, § 9. The courts, in examining the questions as they present themselves on this subject have fixed upon various incidents as indicative of the legislative purpose, and rendered them probably legal presumptions, which are to be regarded as fixing the intent. 6 Dana, 591; 6 Bac. Abr. "Statute" D, M; Dwar. St. 674, 675; 21 Pick. 373; 5 Mass. 380. So Judge Thompson adverts to some criteria decisive of the purpose of the legislature to introduce a new law not cumulative to the former, but revoking and supplanting it, as when the latter act on the same subject-matter introduces some new qualifications or modifications, or is affirmative in its character [U. S. v. One Case of Hair Pencils, Case No. 15,924], though it is well settled that subsequent statutes, which add cumulative penalties merely, do not repeal former statutes (1 Com. 298, per Lord Mansfield). The act of 1799, § 50, prohibits the landing of goods, &c., under a penalty, and, moreover, denominates it an offence. Ordinarily mere statutory penalties are to be sued for and recovered by action of debt. 5 Dana, 243, 260; Jacobs v. U. S. [Case No. 7,157]. But information will also lie, when no method is prescribed by the statute for recovery of the penalty. Adams v. Wood, 2 Cranch [6 U. S.] 336. And it would seem that the party may, at the election of the government, in place of a suit, be indicted and fined to the amount of the penalty (1 Chit. Cr. Law, 162), unless the special mode of remedy is pointed out by the statute (Bac. Abr. "Indict," E; Rex v. Sainsbury, 4 Durn. & E. [Term R.] 457; Hollingworth's Case, Cro. Jac. 577. If the defendant in the case had been before indicted on the 50th section and fined the amount of the penalty, and then this action for the penalty was instituted, it can scarcely be questioned that the plea sets up a complete bar to such proceeding; the averment of facts showing that the one case, in all its particulars, is involved in the other. It is laid down by Baron Gilbert that, if the party hath once been fined in an action on the statute, such fine is a good bar to an indictment, because by the fine the end of the statute is satisfied Bac. Abr. "Statute," E. It appears thus to be clearly the law, when the proceedings are founded upon the same statutory penalty, that the government is restricted to a single exaction of the penalty, whether enforced by action or indictment. It is not perceived that any distinction in principle can be drawn between inflicting punishment for the same offence, by different modes of prosecution under an enactment, or by applying to the case enactments in separate statutes, all having relation to precisely the same subject matter.

The principle upon which the plea autrefois acquit, or autrefois convict, is founded, is that no man shall be placed in peril of legal penalties more than once upon the same accusation. 1 Chit. Cr. Law, pp. 452, 462. And this applies to misdemeanors as well as felonies, except that, if the plea is found against the defendant in cases of felony, the judgment is respondeat ouster, but, in case of misdemeanor, is final. Id. pp. 451, 461, 462. The government will be restricted to one satisfaction for an offence, whether the punishment be pecuniary or corporeal, unless the legislature, in explicit and in indubitable language, exact a further one.

It is true the courts do not favor constructive repeals of statutes and look for some marked inconsistency between the two, before one is held revoked by implication by the other. 9 Cow. 437; 5 Hill, 221; Dwar. St. 675. But when one act points out a particular punishment for an offence, and a subsequent act prescribes a different punishment, the latter is held to control the former, and supply the sole rule to be administered. Nichols v. Squire, 5 Pick. 168; Com. v. Kimball, 21 Pick. 373; Rex v. Cator, 4 Burrows, 2026. In the first of these cases the court say when the legislature imposes a second penalty for an offence, either larger or smaller than the former one, the party cannot be allowed to sue for either, at his option. He is confined to the one last enacted. This, it is to be observed, was a civil action for a penalty. 1 Pick. 168. And the same rule obtains in all qui tam actions, or those sounding in tort. 3 Wils. 308, and cases cited. The supreme court of Massachusetts repeat the doctrine with emphasis, in the case of indictment for an offence punishable by fine. There the forbidden act was prohibited by the first statute under penalty of $20, and the second prohibited the same act under the penalty of not more than $20 nor less than $10, and the court held that the prosecution must be under the subsequent act alone. 21 Pick.

373. It is of no moment whether or no, in this case, the provisions in the act of 1842 be held a technical repeal of that part of the 50th section of the act of 1799 applicable to the subject. The latter enactment controls the former, and supplies the only punishment that can be inflicted for the offence pointed out by it. Howe v. Starkweather, 17 Mass. 243.

The facts declared upon as the foundation for the penalty demanded by this action, then, being the same for which the defendant has already been indicted and punished, I hold that the action cannot be maintained, and that the plea is a good bar thereto, both because, the United States having obtained judgment and inflicted punishment upon the defendant for an offence, they are prohibited by general principles of law from prosecuting him again for acts constituting the same offence, or, in other words, which, if proved, would call for his conviction of that offence, and because the punishment provided by the 19th section of the act of 1842 is not cumulative, and to be imposed in addition to that prescribed by the 50th section of the act of 1799, but is quoad hoc a substitution for, or repeal of, the latter.

Judgment is accordingly given for the defendant, and against the demurrant.

Case No. 15,192.

UNITED STATES v. GAUSSEN.

[2 Woods, 92.] [1]

Circuit Court, D Louisiana. April Term, 1875.[2]

COLLECTOR OF CUSTOMS — BOND — ADDITIONAL DUTIES AND LIABILITIES—DELAY.

1. Where the condition of the bond of a collector of customs was that he should faithfully discharge the duties of his office according to law, the law referred to was any law that was on the statute book at the date of the bond, or that might be passed during the collector's term, prescribing the powers and duties of his office.

2. Where the duties and responsibilities of a collector of customs were changed by law subsequent to the execution of his official bond, but the nature and general duties of his office remained the same, the sureties on the bond remained liable.

[Cited in U. S. v. McCartney, 1 Fed. 107.]

3. Where duties not required by law to be performed by him were imposed on a collector by the superior officers of the treasury department, he was still required to discharge his duties according to law, and the sureties on his official bond were liable for his failure to do so.

4. Delay on the part of the government in enforcing its rights cannot be set up as a defense.

This cause was an action at law against [Bessie Elgee Gaussen,] the executor of one of the sureties on the bond of Thomas Barrett, late collector of customs. It was heard upon a motion of plaintiff's counsel to strike out two of the answers of defendant as insufficient in law.

[In this case there had been a judgment in the circuit court in favor of defendant. Case unreported. This judgment was reversed by the supreme court, and a new trial granted. 19 Wall. (86 U. S.) 198. The cause is now upon the second trial.]

J. R. Beckwith, U. S. Atty., for the motion.

W. H. Hunt, John Finney, and H. C. Miller, contra, cited De Colyer, Suretyship, 336; Pybus v. Gibb, 88 E. C. L. 910; Converse v. U. S., 21 How. [62 U. S.] 463; U. S. v. Shoemaker, 7 Wall. [74 U. S.] 338; U. S. v. Tillotson [Case No. 16,524]; U. S. v. Hilligas [Id. 15,366]

WOODS, Circuit Judge. This is an action brought on the official bond of Thomas Barrett, late collector of customs for the district of Louisiana against the defendants as executors of John K. Elgee, deceased, who was one of the sureties on the bond. It appears from the petition that Barrett was appointed collector on the 6th of July, 1844, and made his official bond of that date, in the penalty of one hundred and twenty thousand dollars with John K. Elgee and others, sureties, and conditioned as follows: "Now, therefore, if the said Thomas Barrett has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office according to law, then the above obligation to be void; otherwise, it shall abide and remain in full force and virtue." The breach alleged is that Barrett, the principal, failed to account for and pay over the sum of $41,376.64, which was found to be due from him to the United States on the 12th day of October, 1845, on a statement of his accounts.

To the petition filed in this action, the defendant has answered, among other pleas, the following in substance:

(1) That subsequent to the date of the bond and during Barrett's term of office, the United States exacted from him the performance of duties and the assumption of responsibilities in regard to the receipt, custody and disbursement of moneys received by him as collector, different and varying from the duties and responsibilities in that regard legally incumbent upon him as collector, by the law in force at the date of the bond.

That during his said term, Barrett was relieved by the United States from the duty and obligation of paying out the public moneys in the mode required by law, and in lieu thereof was required by the United States to expend and disburse a large part of the public moneys received by him in payments to collectors and surveyors of other districts, for the construction of the new marine hospital and for the maintenance of existing hospitals, light houses, revenue vessels, etc., and for other purposes entirely beyond the scope of his duties as collector as fixed and defined by

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 97 U. S. 584.]

law; that he was required by the United States to receive and disburse, and during his term did receive and disburse under said requirements, large sums of money which he was not required by law to receive and disburse as collector.

That in this manner the risks and responsibilities of Barrett as collector were, without the consent of the sureties, enlarged and changed by the United States subsequent to the execution of the bond; therefore the sureties are discharged.

(2) That in 1846, Barrett died, leaving a large estate, more than sufficient to pay the plaintiff's demand; that four other persons who were sureties on said bond have died, leaving large estates; that the United States were entitled to priority of payment out of all said estates for any claim they might have against Barrett on his bond, and that having neglected to enforce the demand for payment out of said estates, it has lost its right against them, and in consequence of this laches the liability of the defendant's testator is discharged.

The plaintiff pursuant to the practice which has been recognized as not improper in this state, now moves to strike out these answers as insufficient in law to bar the plaintiff's right of action.

I shall notice these defenses in their order:

1. When the condition of the bond sued on declares that Barrett "shall truly and faithfully discharge the duties of his office, according to law," it is clear that the law referred to is any law that was then on the statute book or that might be passed during the continuance of his term of office, regulating the powers and duties of his office. Otherwise, every increase in the rate of duties, every change in the manner of conducting the office, or rendering accounts or paying out the public money would discharge the bonds of all the collectors of customs holding under the government. The same would hold true of the bonds of the army of internal revenue collectors, postmasters, or other officers who have any duty to discharge in collecting or paying out the public money. The case of Postmaster General v. Munger [Case No. 11,309], was an action on a postmaster's bond. Acts of congress had been passed subsequent to the giving of the bond increasing the rates of postage, and consequently the responsibility of the sureties. But it was held that as the undertaking of the sureties was general, that all postages should be paid over, and referred to no particular act explaining or limiting the rate of postage, and was not taken under any law defining its extent and operation, the sureties were not discharged. So in Boody v. U. S. [Id. 1,636], it was held that the sureties on the bond of a postmaster are liable for his noncompliance with subsequent as well as past laws or orders till his official term expires, if the orders be such as are justified by law. In Pybus v. Gibb, 6 El. & Bl. 903, the plaintiff being high bailiff of the county court of Northumberland, had appointed Gibb, one of the defendants, his bailiff, and the bond was by the bailiff and the other defendants, his sureties, conditioned to indemnify the high bailiff in respect of the conduct of the bailiff in office. Under color of a warrant against the goods of Edgar, Gibb the bailiff seized the goods of Thew, who recovered against the plaintiff, and the breach assigned was for not indemnifying the plaintiff against this. The plea by the sureties showed that the bond was executed when St. 9 & 10 Vict. c. 95, was the act regulating the county court; it alleged that several acts came into operation after the execution of the bond and before the breach complained of. On demurrer to the plea, Campbell, C. J., said: "The question is, whether the nature and functions or the office or employment are changed; for if they are, it is not the same office within the meaning of the bond. The condition of the bond was for the due execution by Gibb of his office as bailiff, according to St. 9 & 10 Vict. c. 95, not, be it observed, according to such acts of parliament as might be made respecting the office." And the acts passed since the execution of the bond having increased the jurisdiction of the court from £20 to £50, and in cases of consent of parties to any amount, and having conferred bankruptcy jurisdiction, and given power to arrest absconding debtors, the court held that the office of bailiff was substantially changed and the sureties no longer liable. It will be observed that this decision rested on the language of the bond, limiting the duties to be performed by the bailiff to those prescribed by a particular act, and that if the bond had been made for the due execution of the office according to law generally, the inference from the language of the court is that the bond would have been held good and binding on the sureties. See, also, People v. Vilas, 36 N. Y. 459.

The answer under consideration sets up three substantial facts as constituting a defense to this action:

(1) That the performance of duties and the assumption of responsibilities were exacted of Barrett different from those incumbent on him by the law in force at the date of the bond.

(2) That Barrett was excused from the obligation of paying out the public money in the mode required by law, and was required by the United States to disburse a large part of the public moneys received by him in payment, to other collectors, and in the construction of the new marine hospital, etc., and for other purposes beyond the scope of his duties as fixed and defined by law.

(3) That he was required to receive and disburse large sums which he was not required by law to receive and disburse as collector.

If the first branch of the answer under consideration means that the duties and responsibilities of Barrett were changed by law, subsequent to the execution of the bond, I am of opinion on the authorities cited, that the

sureties on the bond of Barrett were not discharged by any such change, for the reason that the condition of the bond in effect bound him to perform the duties of his office according to the law as it existed at the date of the bond, or might be changed by subsequent legislation.

Again, if the meaning of this part of the answer is as just stated, the answer is not good for another reason: the court takes judicial notice of the legislation of congress, and the court judicially knows that during Barrett's term of office there was no legislation of congress which in any way materially changed the duties or responsibilities of his office. But suppose the plea to mean that new duties and responsibilities were imposed upon Barrett during his term of office by his superior in the treasury department: These superior officers imposed these new duties upon Barrett as collector, either with or without the authority of law. If by authority, it follows from the terms of the bond that the defendant is bound; if without, these requirements could not affect his duties as collector. He is still bound to discharge his duties according to law, and if he fails in this, he and his sureties are liable upon his bond. If the officers of the treasury have imposed upon him duties not required of him by his office of collector, neither he nor his sureties are bound for any failure to discharge such duties. But his duties as collector still remain, and he is bound to discharge them, and he and his sureties are liable for his failure to do so. These remarks apply to the first and third branches of the plea.

The second part of the answer alleges that Barrett was excused from paying out the public money in the manner required by law, and was required to disburse it to collectors and surveyors of other districts for the marine hospital, light houses, and for other purposes beyond the scope of his duties as collector.

This part of the answer presents the question whether the disbursement, by a collector, on the authority of the United States, of public money for the payment of collectors and surveyors of other districts for the erection of the marine hospital for light houses and revenue vessels, were payments authorized by the law in force during Barrett's term of office.

During Barrett's term, the act of March 2, 1799, "to regulate the collection of duties on imports and tunnage" (1 Stat. 627), was in force. Section 21 of this act declares that "the said collector shall at all times pay to the order of the officer who shall be authorized to direct the payment thereof, the whole of the moneys which they may respectively receive by virtue of this act." Now it does not appear by the answer under consideration that Barrett was required to pay out, or did pay out, any of the public moneys, except in the manner pointed out in this section. For what purpose they were paid out is entirely immaterial, provided they were paid to the order of the officer who should be authorized to direct the payment.

During Barrett's term of office, there was no law in force establishing an independent treasury for the United States. As soon as public dues were paid to a collector of customs they were, to all intents and purposes, in the treasury, and were subject to the order of the proper officer of the treasury. It is a mistaken idea to suppose that, before the enactment of the independent treasury act, a collector of customs could pay over the public money in his hands in only one way, and that by transmission to the treasury. "The duties of collectors of customs," says the supreme court of the United States, in Broome v. U. S., 15 How. [56 U. S.] 157, "have been much multiplied by other acts since the act of 1799 was passed. Scarcely an act, and no general act has been passed since, concerning the collection of duties upon imports and tunnage, without some addition having been made to the collector's duties. They are suggested from experience. The collector too has always been a disbursing officer for the payment of the expenses of his office, and may pay them out of any money in hand, whether received from duties or remittances for that purpose, when the expenses are not unofficial, have been sanctioned by law, and have been incurred by the direction of the secretary of the treasury. For such payments he may credit himself in his general account against the sums which may have been received for duties. He may retain his own salary or fees and commissions; pay the salaries of inspectors and other officers attached to the office; make disbursements for the revenue boats, light houses, buoys, etc., and apply money collected for duties to all expenses lawfully incurred by himself or his predecessors. * * * It has often been the case, and must be so again, as it is now, that the convenience of the government and the interest of its citizens require collection districts to be established which do not and are not expected at first to pay expenses. Remittances then must be made for such purposes. They are made to the collector, because it is under his personal supervision that the work is done or the goods are furnished for the government at the point of his office where the law requires him to reside." See, also, Converse v. U. S., 21 How. [62 U. S.] 463.

I am of opinion therefore that if the averments of the second branch of the answer were true, it would not discharge the bond of Barrett.

My conclusions are as follows:

1. That the collector was bound by the condition of his bond to discharge the duties of his office according to the law as it existed at the date of the bond or might during his term be changed by subsequent legislation.

2. That no change made by law in the rate of duties, the routine of the office, or in the method of conducting it, which did not change materially the character of the office, would

discharge the sureties on the official bond of the collector.

3. That there was no legislation during Barrett's term which either changed the nature of his office or duties, or the method of performing his duties.

4. That everything alleged in the answer, as required by the United States to be done by him, was authorized by law at the date of the bond.

As the result of these conclusions, it follows that the answer under consideration is not well pleaded, sets up no good defense to the action, and must be stricken out.

As to the third answer, setting up laches on the part of the plaintiffs in prosecuting their claim, it is sufficient to say: "Nullum tempus occurrit regi." See Dox v. Post Master Gen., 1 Pet. [26 U. S.] 318.

The motion to strike out both answers, as insufficient in law, must prevail.

[A writ of error was subsequently sued out, by the defendant from the supreme court, where the judgment entered in this case was affirmed. 97 U. S. 584.]

Case No. 15,193.

UNITED STATES v. GAY.

[2 Gall. 359.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

RESISTING CUSTOMS OFFICER — PROBABLE CAUSE OF SEIZURE.

1. To justify a seizure, there must be probable cause of seizure, and if an officer of the customs seize without probable cause, no indictment on the statute of 2d of March 1799, c. 128, § 71 [1 Story's Laws, 633; 1 Stat. 678], lies for resisting him in the seizure. See The Invincible [Case No. 7,054], note.

[Cited in Averill v. Smith, 17 Wall. (84 U. S.) 93.]

2. What constitutes probable cause is, when the facts are given, a question of law.

This was an indictment for resisting one Johnson, an inspector of the customs, in attempting to seize two casks of merchandize and some other articles of trifling value. The casks had been brought from Vermont, and were deposited in the store of Gay, at Cambridgeport, a short distance from Boston, to which place they were destined. There appeared to have been no attempt at concealment, or opposition to search. The casks were accompanied by an invoice, on which was written a certificate or passport from the collector of the district of Vermont. This invoice was produced and shown to Johnson, and the marks and numbers in it corresponded with those on the casks. Gay informed Johnson, that the casks were to be transported to Boston, and there delivered to a person whose name and place of business he declared, and he offered that Johnson should accompany the merchandize, and ascertain at the custom-house the genuineness of the signature of the collector of Vermont. This offer Johnson refused, and insisted upon a removal of the property to the custom-house in Boston. Gay, thereupon, placed the casks in a cart, they having before been rolled out from the store by Johnson, and sent them to Boston.

THE COURT called upon the district attorney to show, that, upon these facts, there was probable cause of seizure.

Dist. Atty. Blake contended, that the mere production of the invoice or passport did not bind the officer, who had no means of knowing whether it was genuine or not. That the merchandize, being on its way from Vermont, and such as must have been imported, might reasonably be presumed to have been imported from the British colonies, and as such to be liable to seizure.

But THE COURT were of opinion, that the facts were not such as to justify the officer in insisting upon a removal of the property to the custom-house in Boston, though it might have been reasonable, that the property should be placed in a neighboring store, until the genuineness of the certificate could be ascertained.

STORY, Circuit Justice, directed the jury as follows:

In order to maintain this indictment, it is necessary that the resistance or impediment to the inspector should be, while he was in the execution of the duties of his office. It is the duty of the inspector to make seizures of goods imported contrary to law, and if resisted in the act of making such seizure, or in securing the property seized, it is a case within the statute. But it is not the duty of the inspector to make any seizures at his arbitrary discretion. He cannot lawfully seize goods, which have been lawfully imported, or which are liable to no reasonable suspicion of illegal importation. To justify him, it is not necessary to show, that the goods were liable to condemnation; but there must, at all events, be a probable cause for the seizure. S. P., Rex v. Akers, 6 Esp. 125, note 126. Otherwise, the power of an inspector would be most arbitrary and mischievous. It is true, that the law vests him with a discretion; but it is a legal discretion; and he cannot protect himself, if he acts wantonly, and without probable cause, for he is then a mere trespasser, and not in the execution of the duties of his office. What constitutes probable cause for seizure is, when the facts are given, a mere question of law, on which the court ought to instruct the jury. It is not a mere question of fact, of which the jury are the sole judges; and, therefore, the court are bound to direct the jury, whether upon the facts, there be probable cause or not. In the present case, I am clearly of opinion, that there is no probable cause shown for the seizure; and that the defendant ought, upon this ground, to be acquitted.

Verdict for the defendant.

[1] [Reported by John Gallison, Esq.]

Case No. 15,194.

UNITED STATES v. GAY'S GOLD.

[1 Woods, 55.] [1]

Circuit Court, D. Louisiana. June, 1870.[2]

FORFEITURE—TRANSPORTING GOLD TO TERRITORY IN INSURRECTION.

An attempt was made to transport without a license, and contrary to the 5th section of the act of congress of July 13, 1861 [12 Stat. 257], and 3d section of the act of May 20, 1862 [Id. 404], property from the United States to the territory declared to be in insurrection. *Held*, that such property becomes subject to forfeiture to the United States, notwithstanding the insurrectionary district to which it was being conveyed was at the time in the possession of the federal forces.

[Appeal from the district court of the United States for the district of Louisiana.] At chambers.

Alanson B. Long, U. S. Atty.
Geo. L. Bright, for claimant.

WOODS, Circuit Judge. This is a libel filed against $5,000 in gold seized on board the steamer Empire Parish, on the Mississippi river, in the port of New Orleans. The libel charges that the gold was being transported to Bayou Sara, in the state of Louisiana, a place declared to be in insurrection, contrary to the 5th section of the act of congress of July 13, 1861 (12 Stat. 257), and the 3d section of the act of May 20, 1862 (12 Stat. 404). The facts are, that the gold was taken on board the Empire Parish, by one Smith Freeman, for the purpose of carrying the same up the river, either to Bayou Sara, or to the residence of the owner of the gold, E. J. Gay, near the village of Placquemine, both Bayou Sara and Placquemine being in a section declared to be in insurrection. The defense seems to be, that the purpose of Freeman was to carry the gold to its owner [Edward J.] Gay, who resided a mile and a half below Placquemine, on the right bank of the Mississippi river, and that at the time Placquemine and its neighborhood were held by the Union forces.

Admitting all that the testimony for the claimant tends to establish, yet it is clear that this gold should be forfeited. There is no pretense that its transportation was authorized by any permit or license whatever. It is admitted that the purpose was to transport the same to a place declared to be in insurrection, and whether such place was held by troops of the United States or not can make no difference. The act of congress forbids the transportation of gold to any place declared to be in insurrection, whether held by Union troops or not, and the proclamation of the president, April 2, 1863 [13 Stat. 730] declares the whole state of Louisiana to be in insurrection, except the port of New Orleans. So it is clear that here was a transportation commenced of property from a section not in insurrection to a section declared to be in insurrection, contrary to the plain provisions of the act of July 13, 1861, and by that act declared to be forfeited to the United States.

I am satisfied from the testimony that it was the purpose of Gay, the claimant, to use this gold in the purchase of cotton in the insurrectionary districts. The pretense that he ordered his gold from its safe depository in New Orleans to his plantation, merely to hoard it, is too transparent to deceive any one. Let a decree be entered against the gold and the principal and sureties on the release bond.

[The case was taken, on an appeal to the supreme court, where the decree of this court was affirmed. 13 Wall. (80 U. S.) 358.]

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 13 Wall. (80 U. S.) 358.]

Case No. 15,195.

UNITED STATES v. GEAR.

[3 McLean, 571.] [1]

Circuit Court, D. Illinois. June Term, 1847.

TRESPASS—ORE LANDS—PERMIT—RENT RECEIPT.

1. A permit to enter on lands containing lead ore, may be shown in an action of trespass by the United States, not as a justification, but to show the nature and object of the entry.

2. A final receipt by an officer of the government, authorised to act in the premises, for rent, is a full discharge, being subsequent to the trespass alleged, although the officer may never have accounted for the money received.

At law.

Mr. Gregg, U. S. Dist. Atty.
Hardin & Campbell, for defendant.

OPINION OF THE COURT. This action was brought by the United States, for a trespass upon certain lands containing lead ore. The defendant [Hezekiah H. Gear] pleaded the general issue and notice, &c. [See 3 How. (44 U. S.) 120.] It was proved that defendant being in possession of certain mineral lands, had dug of lead ore about one hundred thousand pounds, which contained from sixty to seventy per cent. of pure lead. The mineral was worth from fifteen to eighteen dollars per thousand pounds. The defendant offered in evidence a permit from an authorised officer of the government to enter upon the land, which was objected to, but the court admitted it as evidence, as it explained the nature and object of his entry, and showed that it was not tortious. He also offered in evidence a receipt of John Flannigan, agent for the lead mines, for four hundred dollars, in full for rent of lead mines, dated in 1841, subsequent to the trespass laid in the declaration. This receipt was objected to on the ground, that the

[1] [Reported by Hon. John McLean, Circuit Justice.]

agent had never accounted for the money, but the court admitted it as evidence, and instructed the jury that unless there was fraud in obtaining the receipt, or a mistake, of which there was no evidence, that it was a full discharge. That the money having been paid by the defendant to the authorised agent of the government, the payment was good, though the agent may never have accounted for it. Verdict, not guilty.

Case No. 15,195a.

UNITED STATES v. GEARY.

[4 N. B. R. 534 (Quarto, 175).] [1]

District Court, S. D. New York. 1870.

BANKRUPTCY—OBTAINING GOODS ON CREDIT—FRAUD.

An insolvent obtained goods on credit from various parties, with the intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, and on a hearing before a commissioner he was held to bail in the sum of five thousand dollars.

[Cited in note to U. S. v. Frank, Case No. 15,159.]

[Before United States commissioner.]

Previous to July 21, 1869, the defendant and Wm W. Borden were engaged in the boot and shoe retail trade at No. 270 Greenwich street, in this city, under the name of Borden & Geary. On that day they filed a petition in bankruptcy in the office of the clerk of the Southern district of New York. They were subsequently adjudged bankrupts, and at a meeting of their creditors George G. Nason, of the firm of Cammeyer & Nason, wholesale boot and shoe dealers, of this city, was chosen assignee, and his appointment confirmed by the court. The assignee then proceeded to examine the defendant Horace P. Geary before Register Fitch, to whom the case had been referred, as to property of the bankrupts alleged to have been concealed or disposed of contrary to the provisions of the bankrupt law. On this examination the defendant, Horace P. Geary, testified, in effect, that on the 16th day of July, 1869, the bankrupts consulted their counsel, Messrs. Cheney & Dixon, and then decided to go into bankruptcy, and instructed their counsel to prepare their petition and the other papers necessary for that purpose. The defendant transferred to Cheney & Dixon a promissory note of A. McLean for two hundred and fifteen dollars, payable two months after its date, July 15, 1869, and two promissory notes of the same date, made by Henry V. Geary, the brother of the defendant,—the one for fifty dollars and nine cents, payable one month after date, the other for fifty dollars, payable two months after date,—and paid these notes and one hundred and seventy-five dollars in cash on the 20th of July, 1869 (the day before they filed their petition in bankruptcy), to their counsel for law expenses. The defendant also testified that Cheney & Dixon had been their counsel only for about a week previous, and that they owed their counsel nothing, except for services in the bankruptcy proceedings. It also appeared, from the testimony of the defendant, that previous to May 5, 1868, they had a retail boot and shoe store in Bleecker street, in this city, which on that day they sold out to Henry V. Geary, the brother of the defendant, and sold him goods on open account, but on no fixed time of credit; that on the 15th day of July there was a balance of about six hundred dollars due by Henry V. Geary to the bankrupts, and the defendant told his brother, Henry, that Borden & Geary were about to become bankrupt, and then took his twelve notes for the amount, payable monthly, and gave him a receipt in full. The affidavits also alleged that the books of the bankrupts showed that Henry V. Geary had a credit with them, not exceeding sixty days, and that the defendant, in extending the time for the payment of his debt, by taking from him those twelve notes running from one to twelve months, prevented the debt from coming into the possession of the assignee. The complainants further charge that, by the foregoing acts, the defendant, being a debtor or bankrupt, disposed of part of the estate of the bankrupts with intent to prevent it from coming into the possession of the assignee in bankruptcy, and to hinder, impede, or delay him in recovering or receiving the same, and made a payment, gift, sale, assignment, transfer, or conveyance of property belonging to their estate with the like intent, and did, with intent to defraud, willfully and fraudulently conceal from his assignee, or omit from their schedule, property or effects belonging to their estate. The affidavits further alleged that it appears from the books of the bankrupts that they were insolvent on the 21st day of April, 1869; that the books were kept by the defendant, Horace P. Geary, who is a practical bookkeeper, and himself kept the books in his own handwriting, and therefore knew the fact of their insolvency on that date. After which, and within three months before the filing by them of their petition in bankruptcy (on July 21, 1869), the bankrupts obtained on credit from various parties in this city goods or chattels with intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, which, the complainants allege, was a further violation of the bankrupt law.

The defendant was held to bail by the commissioner in five thousand dollars.

[1] [Reprinted by permission.]

Case No. 15,196.

UNITED STATES v. GEE.

[2 Cranch, C. C. 163.] [1]

Circuit Court, District of Columbia. April Term, 1819.

JURY—PEREMPTORY CHALLENGE.

Upon an indictment for larceny, in Alexandria, D. C., the prisoner is entitled to a peremptory challenge

Indictment [against Thomas Gee] for stealing the money of James H. Caldwell.

THE COURT decided that the prisoner was entitled to a peremptory challenge. Laws Va. Nov. 13, 1792, p. 103, § 8.

Case No. 15,197.

UNITED STATES v. GEORGE et al.

[6 Blatchf. 37; [2] 7 Int. Rev. Rec. 51; 1 Am. Law T. Rep. (U. S. Cts.) 53.]

Circuit Court, S. D. New York. Feb. 8, 1868.

CUSTOMS DUTIES—FORFEITURES—DISTRIBUTION—INFORMER'S SHARE.

1. The provisions of the act of March 2, 1867 (14 Stat. 546), in regard to the distribution of the proceeds of fines, penalties, and forfeitures incurred under the provisions of the laws relating to the customs, commented on.

[Cited in The Monte Christo, Case No. 9,720.]

2. Those provisions apply to the proceeds of a forfeiture incurred under the 3d section of the act of August 6, 1846 (9 Stat. 54, 55).

3. The provisions of the act of 1867, compared with those of the 89th, 90th, and 91st sections of the act of March 2, 1799 (1 Stat. 695–697), in regard to the distribution of the proceeds of forfeitures for a breach of its provisions.

4. The proper practice, under the act of 1867, is for the court to pay to the collector the amount recovered, less the charges allowed, and for the collector to deduct duties and charges, where proper, and to pay the residue into the treasury of the United States, to be distributed, under the direction of the secretary of the treasury, to the persons, and in the proportions, prescribed by the decree of the court.

5. Preparatory to such decree, the court, while in possession of the fund, will determine disputes between persons claiming to share in the fund, as informers.

In this case, which was an action of debt, commenced by capias, on the 21st of December, 1867, to recover the sum of $59,722 in gold coin, and $32,000 in United States currency, "as and for forfeitures, penalties, &c., incurred for violations of the revenue laws of the United States," the defendants [John W. George and others] submitted to a final judgment for the above amounts, and paid the same into court as the proceeds of such judgment. Those proceeds were in court, awaiting such disposition of them as might be required by law. They were the proceeds of penalties and forfeitures incurred under the provisions of the laws relating to the customs. The record of judgment showed, that the declaration in the suit charged the defendants with having unlawfully and fraudulently withdrawn and removed from a bonded warehouse, certain merchandise which was subject to duty by law, without the payment of the legal duties thereon, in violation of the 3d section of the act of August 6, 1846 (9 Stat. 54, 55), and claimed that the value of the merchandise, being the sums before mentioned, became thereby forfeited to the United States. Such 3d section provided, that, if any warehoused goods should be fraudulently removed from any warehouse, the same should be forfeited to the United States. A person who claimed to be entitled to an informer's share in such proceeds, now petitioned the court to ascertain and determine who was entitled to the informer's share

Christopher Fine, for petitioner.

Benjamin K. Phelps, Asst. Dist. Atty., for the United States.

BLATCHFORD, District Judge. The 1st section of the act of March 2, 1867 (14 Stat. 546), provides, that, "from the proceeds of fines, penalties, and forfeitures, incurred under the provisions of the laws relating to the customs, there shall be deducted such charges and expenses as are by law, in each case, authorized to be deducted, and, in addition, in case of the forfeiture of imported merchandise of a greater value than five hundred dollars, on which duties have not been paid, or, in case of a release thereof, upon payment of its appraised value, or of any fine or composition in money, there shall also be deducted an amount equivalent to the duties in coin upon such merchandise, (including the additional duties, if any,) which shall be credited in the accounts of the collector, as duties received, and the residue of the proceeds aforesaid shall be paid into the treasury of the United States, and distributed under the direction of the secretary of the treasury, in the manner following, to wit: one-half to the United States; one-fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty, and, if there be no informer other than the collector, naval officer, or surveyor, then to the officer making the seizure; and the remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred, or, if there be only a collector, then to such collector." The section then provides for a different distribution where the information is given by the officer of a revenue cutter. The 4th section of the act repeals specially two sections of two former acts, relating to matters not involving any question arising in this case, and also repeals "all other laws, or parts of

[1] [Reported by Hon William Cranch, Chief Judge.]

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

laws, inconsistent with, or supplied by, the provisions of this act," and then provides, that "the secretary of the treasury shall prescribe all needful regulations to carry out and enforce the provisions of this act."

These provisions of the act of 1867 are, to some extent, a substitute for provisions contained in the 89th, 90th, and 91st sections of the act of March 2, 1799 (1 Stat. 695–697). The 89th section authorizes the collector, within whose district a seizure is made, or a forfeiture is incurred, for any breach of that act, to receive from the court in which a trial is had of any issue of fact, in any suit founded on any such breach, the sum recovered, after deducting all proper charges, to be allowed by the court, and requires him, on receipt thereof, to pay and distribute the same, without delay, according to law. The 90th section requires, that the proceeds of sales of property condemned by virtue of the act, and not previously bonded, shall, after deducting all proper charges allowed by the court, be paid by it to the collector of the district in which the seizure or forfeiture took place, as directed in the 89th section. The 91st section provides, that all fines, penalties, and forfeitures recovered by virtue of the act (and not otherwise appropriated) "shall, after deducting all proper costs and charges, be disposed of as follows: one moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to, the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and, in districts where only one of the said officers shall have been established, the said moiety shall be given to such officer; provided, nevertheless, that, in all cases where such penalties, fines, and forfeitures shall be recovered in pursuance of information given to such collector by any person other than the naval officer or surveyor of the district, the one-half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor, or surveyors, in manner aforesaid." The section then provides for a different distribution where any fines, forfeitures, or penalties incurred by virtue of the act are recovered in consequence of any information given by any officer of a revenue cutter. By the 7th section of the act of May 28, 1830 (4 Stat. 411), it is provided, that all forfeitures incurred under that act shall be distributed according to the provisions of the act of March 2, 1799. The 1st section of the act of March 3, 1863 (12 Stat. 738), provides that property forfeited under that section, or its value, shall be disposed of as other forfeitures for violations of the revenue laws. The act of 1846, which is the only act claimed to have been violated in the present case, contains no provision giving any share to any person of any forfeiture for a violation of that act, and no provision respecting the disposition of the proceeds of such forfeiture. I have been unable to find any provision by statute respecting the disposition of the proceeds of a forfeiture under the act of 1846, or respecting shares in the same except the provision in the act of 1867. The provisions of the act of 1799 refer solely to forfeitures for a breach of that act itself. The act of 1867, however, applies to the proceeds of all forfeitures incurred under the provisions of any laws relating to the customs. The act of 1846 is a law relating to the customs.

On comparing the provisions of the act of 1799 with those of the act of 1867, in the particulars above recited, the following results appear: In respect to the channel of distribution, by the former act, the court is to pay the net amount remaining, after the deduction of proper charges, to the collector of the district, and he is to "pay and distribute the same without delay, according to law;" by the latter act, it is not provided to whom the court shall pay the net amount, but it is provided that the net amount shall "be paid into the treasury of the United States, and distributed under the direction of the secretary of the treasury," in the proportions, and to the persons, designated by the act, the act not stating by whom it shall be paid into the treasury. The secretary of the treasury is required, by the latter act, to distribute the amount according to law, quite as much as the collector is required, by the former act, to distribute the amount according to law. The amount is required, by the former act, to be distributed under the direction of the collector, quite as much as it is required by the latter act to be distributed under the direction of the secretary of the treasury. The provision, in the latter act, that the secretary of the treasury shall prescribe all needful regulations to carry out and enforce the provisions of the act (the 2d and 3d sections of which relate to the seizure of books and papers in cases of fraud on the revenue, and to the enforcement of liens for freight on imported merchandise in the custody of officers of the customs), gives to the secretary no greater power, in respect to prescribing regulations in reference to the distribution of the proceeds of forfeitures, than the collector had in the same respect, under the former act, in subordination to his superior officers, or than the secretary himself had, under that act. The 4th section of the act of 1867 only repeals laws and parts of laws that are inconsistent with, or supplied by, the provisions of the act of 1867. In respect to forfeitures for breaches of the act of 1799, the provision of that act, which requires the payment by the court to the collector, of the net proceeds of such forfeitures, is not inconsistent with, or supplied by, any provision of the act of 1867.

In respect to such net proceeds, the proper construction of the act of 1867 is, that the court is still to pay to the collector, under the 89th and 90th sections of the act of 1799, the amount recovered, after deducting all proper charges allowed by the court. The collector is then to deduct, in proper cases, the amount representing duties, named in the act of 1867, and any other lawful charges, and is to pay the residue into the treasury of the United States. There is nothing, in the act of 1867, which takes away the right given to the collector, by the act of 1799, to receive from the court the proceeds of forfeitures for breaches of that act. So, also, with regard to forfeitures under the acts of 1830 and 1863, and under any other acts which adopt the mode of disposition of forfeitures prescribed by the act of 1799. In regard to the duties mentioned in the act of 1867, the collector is the proper person, and the only proper person, to ascertain the proper amount representing the duties, and it is impossible that that amount can be, as the act of 1867 requires, "credited in the accounts of the collector, as duties received," unless the collector receives the amount, so as to credit the United States with it in his accounts, as duties received. I think that the act of 1867 intends, that the collector shall receive from the court the whole amount, and not merely an amount equal to the duties. The act evidently recognizes the then existing practice, and assumes that the collector will receive from the court the proceeds, less the lawful charges and expenses which the court may allow to be deducted from the proceeds while in court, and in substance provides, that he shall ascertain the duties, if any, and retain them, and then, instead of distributing the balance himself, shall pay it into the treasury of the United States. And there is no reason for any different mode of procedure in the case of a forfeiture for a violation of the warehousing act of 1846, nor is there any thing in the act of 1867 to indicate that the collector is not to receive the proceeds of such a forfeiture. There may be duties to be ascertained and retained by the collector, in cases under the act of 1846, quite as much as in cases under the act of 1799, or under any other customs act. The effect of the change made by the act of 1867, in regard to the channel of distribution, is merely to substitute the treasury of the United States for the coffers of the collector, as a place of deposit for the money, when nothing is left to be done in regard to it but to distribute it, and to substitute the secretary of the treasury for the collector, as the ministerial agent of distribution. In regard to the distributees, both acts give the same quantum, one-half, to the United States; the act of 1799 divides the other half equally among the collector, the naval officer, and the surveyor, except that, where some person other than the naval officer or the surveyor is informer to the collector, such informer receives a moiety of such other half, and the other moiety thereof is divided equally among the collector, the naval officer and the surveyor; the act of 1867 gives one-fourth of the whole to the informer, and, if there be no informer other than the collector, the naval officer, or the surveyor, then to the officer making the seizure, and directs that the remaining one-fourth shall be equally divided among the collector, the naval officer, and the surveyor. Where an officer of a revenue cutter is the informer, the distributees and their shares are the same, under the two acts.

Such being the state of the law on this subject, and the money before named being in court, in this case, D. Henry Burtnett presents a petition to this court, setting forth that he is the person who gave the information which led to the recovery in this case; that he claims an interest, as informer, in said money; that five other persons, named Davis, Webster, Wiggin, Giles, and Hefflin, also claim to have given information of the character aforesaid, and claim to be informers herein; and that the petitioner has served notice of his claim, as such informer, on the collector and on the United States attorney. The prayer of the petition is, that the court will refer it to a commissioner of the court, to take proof of the facts, and of the respective claims and rights of the several persons claiming to be the informers herein, as such claimants, and report the same to this court, with his opinion thereon, as to who is or are the informer or informers herein. Notice of the presentation of the petition has been served on the United States attorney, and on the collector, and on the other persons named as claiming to be informers.

It is contended on the part of the petitioner, that the court has jurisdiction to determine the question, as to who is or are the person or persons entitled, as informer or informers, to share in the money. The attorney for the United States denies the jurisdiction of the court, and contends, that, under the act of 1867, the secretary of the treasury has the exclusive power to determine who is the informer.

On the part of the petitioner, it is urged that, independently of the act of 1867, the court has inherent jurisdiction to determine all claims to moneys which are in court, and that such jurisdiction is not taken away by the act of 1867; that, under the act of 1799, and kindred acts, it has always been held, by the courts of the United States, that they have jurisdiction to examine and decide contested claims to the proceeds of forfeitures under the act, while such proceeds are still in court, and to direct in what manner they shall be distributed; that, it having been so held in respect to the act of 1799, there is nothing in the act of 1867 taking away or affecting such jurisdiction; that the act of 1867 confers no authority on the secretary of the treasury to determine or adjudicate who the informer is, in case of a dispute; that, in such a case, a resort must be had to a proper judicial tri-

bunal; that the secretary of the treasury has no judicial functions; and that the act of 1867 merely makes him, instead of the collector, the ministerial officer for paying over the money to such persons as the proper judicial tribunal declares are entitled to it under that act.

A similar question came before the circuit court of the United States for the district of New Jersey, in 1824, in the case of Westcot v. Bradford [Case No. 17,429]. In that case, there was a forfeiture decreed by the district court for New Jersey, of certain property, for violations of the act of 1799. While the proceeds of the forfeiture were in that court, Bradford presented to it a petition, setting forth, that the condemnation took place in pursuance of information given by him to the collector, and praying for the payment to him of the informer's share, one-quarter, given by the 91st section of the act. The district court made a decree, establishing the claim of Bradford, as informer, and directing that the money in court be paid to the then collector, to be disposed of by him as directed by the decree. The decree disposed, finally, of the whole fund remaining in court, as concerned all the parties interested in it—the United States, the collector who made the seizure, and the informer—leaving nothing to be done but to execute the decree. The collector appealed to the circuit court from the decree. The circuit court held, that the petition of Bradford was an original suit, from the decree in which an appeal would lie. An objection was taken, in the circuit court, to the power of the district court to direct a distribution of the proceeds of the forfeiture remaining in court. This objection was put on the ground, that the 89th section of the act of 1799, which authorized the collector to receive from the court, or its officer, the sums recovered, after deducting costs and charges, and enjoined upon him the duty of making the distribution, was imperative on the court, and ousted its general jurisdiction to make the distribution. But the court (Mr. Justice Washington delivering the opinion) held, that the 89th section merely pointed out the officer who was to receive the money from the court, and who was to distribute it, where no dispute existed respecting the distribution; that the jurisdiction of the court, to examine into contested claims to the money, while under its control, and to direct the collector in what manner it was to be distributed, was not taken away, or even impliedly affected; and that if, upon general principles, this could be questioned, the point was directly settled in the case of Jones v. Shore's Ex'rs, 1 Wheat. [14 U. S.] 462. The decree of the district court was affirmed, so far as it directed how the funds in court should be distributed.

In the case of Jones v. Shore's Ex'rs the fund was in the circuit court, as the proceeds of a penalty or forfeiture, under the embargo act of December 22, 1807 (2 Stat. 451), and was required by the 6th section of the act of January 9, 1808 (Id. 454), to be distributed and accounted for in the manner prescribed by the act of 1799. A contest, as to shares in the fund, was brought before the circuit court. The case went to the supreme court, on a division of opinion. That court directed that the money in the circuit court be paid to the collector, with directions to him as to how he should distribute it. This was in 1816.

In the case of McLane v. U. S., 5 Pet. [30 U. S.] 404, the supreme court say: "Where a sentence of condemnation has been finally pronounced, in a case of seizure, the court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds, according to the terms prescribed by law; and it is a familiar practice to institute proceedings of this nature, wherever a doubt occurs as to the rights of the parties who are entitled to share in the distribution." The same doctrine was held in The Josefa Segunda, 10 Wheat. [23 U. S.] 312, 323, 324.

In Hooper v. Fifty-One Casks of Brandy [Case No. 6,674], the district court for Maine (Ware, J.) entertained the petition of an informer, for a share of the proceeds of a forfeiture, incurred under the act of 1799, the collector and surveyor being the adverse parties, and sustained the claim of the informer. The court, in its opinion, expressly upholds its jurisdiction, on the authority of the cases of Westcot v. Bradford and McLane v. U. S. [supra].

In the case of U. S. v. Fifty Thousand Cigars [Case No. 4,782], the district court for Massachusetts (Lowell, J.) entertained petitions filed by several persons claiming shares, as informers, in the proceeds, in court, of forfeitures incurred under the act of 1799, and made a decree that one of them was entitled, as informer, to one-fourth of the fund.

This jurisdiction being well established, there is nothing in the act of 1867 which takes it away, or which confers on the secretary of the treasury any more power to decide disputed claims to the fund than the collector had under the act of 1799. The judicial tribunal which has the custody of the fund, is the proper forum to entertain and decide disputes as to shares in the fund, and to direct how it shall be distributed, and to what persons, under the act of 1867, under the direction of the secretary of the treasury, as a ministerial officer. To this end, it is proper to refer the matter to a commissioner of the court, for the taking of testimony on the part of all parties concerned, and for a report. On the coming in of the report, the court will make such decree as is warranted by the facts, in regard to the subject matter of the petition, and will direct the money to be paid over to the collector, and to be by him, subject to the provisions of the act of 1867, paid into the treasury of the United States, and to be then distributed, under the direction of the secretary of the treasury, to the persons, and

in the proportions, prescribed by the decree of this court. The hearing before the commissioner will be on notice to all parties having any claim to the fund.

[Subsequently the controversy between the parties in regard to their respective rights to the fund in court was determined. Case No. 15,198.]

Case No. 15,198.

UNITED STATES v. GEORGE et al.

[6 Blatchf. 406.] [1]

Circuit Court, S. D. New York. April 16, 1869.

CUSTOMS DUTIES—FORFEITURES—DISTRIBUTION—AUTHORITY TO COMPROMISE—INFORMERS.

1. The proper course of practice, where claims are made by the United States, by customs' officers, and by informers, to a fund in court, paid in under the laws relating to the customs.

2. There is no statute of the United States which forfeits the value of dutiable goods which have been unlawfully removed from a bonded warehouse, without payment of the customs duties.

3. Customs' officers and informers are entitled to share only in fines, penalties, and forfeitures which are created by some law of the United States.

4. The authority to compromise, conferred on the secretary of the treasury by the tenth section of the act of March 3, 1863 (12 Stat. 740), is not an authority to compromise criminal prosecutions.

5. The authority so conferred, defined and explained.

6. The secretary of the treasury has no power, under any act of congress, to compromise criminal proceedings pending in court.

7. Duties are not simply a charge upon merchandise, to be collected only by means of the custody of the property, but are a personal debt against the importer, which may be collected by a civil action.

[Cited in U. S v. Boyd, 24 Fed. 691.]

8. Money in the registry of the court, which is shown to have been demanded by the United States as duties, to have been due as such, and to have been paid as such, must be distributed by the court as such.

9. The rights of customs' officers and informers are rights which should be carefully protected.

10. In a contest between informers, he is the informer, who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered.

[Cited in U. S v. Simons, 7 Fed. 712.]

This was a controversy between the customs' officers and certain informers on the one hand, and the United States on the other, and also between the informers, among themselves, in regard to the distribution of a certain fund, which originally consisted of $59,722 in gold, and $32,000 in currency, and which was paid into the registry of this court under the following circumstances: In the summer of 1867, the officers of the customs, having discovered that great frauds upon the government had been perpetrated by persons doing business in the city of New York, under the name of J. W. George & Co., by means of the withdrawal, without payment of duties, of dutiable merchandise, from their bonded warehouse, Nos. 290 and 291 West street, criminal proceedings were instituted against the offenders, in which several of them were arrested and held to bail for trial, and a civil action for duties, amounting to $400,000, was commenced in the district court, against one of them named Henry Hart, in which suit a large amount of real estate and personal property was attached. A quantity of segars, appraised at some $25,000, was also seized by the collector, as forfeited by reason of these frauds. Pressed by these proceedings, the offenders commenced negotiations with the officers of the government, which terminated in an agreement, made at Washington, with the secretary of the treasury, by which it was arranged that the offenders should pay to the United States the sum of $59,722 in gold, for the duties on the segars, brandy, rum, gin and wine withdrawn by them without payment of the duty, and also $32,000 in currency, as penalties for the illegal abstraction of such bonded merchandise; and that, upon such payment, the government should discharge all the property which had been attached or seized, and release the offenders from all civil and criminal liabilities relating to the illegal transactions. Accordingly, instructions were issued to the district attorney to carry into effect this arrangement, and the offenders proceeded to make the payment agreed on. This payment, however, by arrangement with the district attorney, was not made in the action for duties which was pending in the district court; but a new, and, in some sense, a friendly action of debt was commenced in this court, not for duties, but for penalties and forfeitures, amounting to the sum agreed on, namely, $59,722 in gold, and $32,000 in currency, in which action judgment was confessed on the same day, and the same was satisfied, on the payment into the registry of this court of the sums demanded. At the same time, the property attached in the action pending in the district court was released from custody, and all the criminal proceedings were stopped. The segars held under seizure by the collector were also directed to be released, on due entry and payment of the duties to the collector. There being thus $59,722 in gold, and $32,000 in currency, in the registry of this court, a controversy arose respecting the rights of the customs' officers and the informers in this fund, it being claimed, by the officers and the informers, that no part of it was duties, but that it was all penalties and forfeitures, and, as such, distributable, one-half to the government, one-fourth to the customs' officers, and one-fourth to the informers. [See Case No. 15,197.] A controversy also arose between the parties claiming to be the in-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

formers, in regard to their respective rights. One-half of the gold and one-half of the currency being clearly payable to the United States, was so paid, by consent, and one-half of the residue of the currency, admitted to be payable to the collector, was paid, by consent, thus leaving in the registry $29,861 in gold, and $8,000 in currency. To one-half of this $29,861 in gold the customs' officers laid claim, and the informers claimed the other half, as well as the balance of the currency. These several claims were set forth by petitions, under which, by order of the court, testimony in behalf of all the parties was taken by the clerk. Upon these petitions, and some 363 pages of testimony, with a mass of exhibits, the case now came before the court for its determination.

Simon Towle, for the United States.

Clarence A. Seward, Christopher Fine, and Asa W. Tenney, for the several informers.

BENEDICT, District Judge. The course of procedure adopted in this matter appears to have been somewhat irregular. A more proper practice would have been, for the customs' officers and the informers to have set forth their claims to this fund by petitions, to which answers should have been interposed by the government, and, upon the issues thus framed, and the testimony adduced by the respective parties, in support of their allegations, a decree could have been rendered, with less danger of confusion and mistake. The respective parties petitioning here seem to have treated each petition as an answer to the others; and the customs' officers appear to have considered themselves entitled to prove their case under the petition presented by the United States. But, as all parties have spread out their case very fully in the evidence, and as all the points in controversy have been considered and argued by the counsel, without objection, as if duly pleaded, it appears unnecessary to direct the proceedings to be reformed.

In considering the questions thus presented, it will be convenient to examine, first, the claim made by the customs' officers and the informers to the portion of the fund consisting of $29,861 in gold. The claim in regard to this is, that the $59,722 in gold, of which the $29,861 remaining in the registry is a moiety, consisted of fines and penalties, and that a moiety of it is given by law to the customs' officers and informers; while, on the part of the United States, it is contended that the $59,722 was not fines and penalties, but duties, in which no person is entitled to share with the government.

The determination of this issue renders it necessary to consider, at the outset, the effect of the record of the judgment in favor of the United States, and against the offenders, which was entered on the 27th of December, 1867, and was satisfied upon the payment of this fund into the registry. This record, which it has been suggested, on this argument, must be conclusive in favor of the customs' officers and informers, would, as I view it, if held conclusive, deprive those persons of any right to any portion of this fund. This will appear from an examination of the record itself. The cause of action which the record sets forth, and which was admitted by the confession, is, that certain parties defendant unlawfully removed from the bonded warehouse dutiable goods, without payment of the duties, whereby, as it is averred, the value of the goods became forfeited to the United States, and the United States became entitled to have of the defendants $59,722 in gold, and $32,000 in currency. The record nowhere refers to any statute by virtue of which the alleged forfeiture arose, and no statute has been found which forfeits the value of goods for any such act as is set forth in the declaration, or which, upon the facts stated in the declaration, created a legal liability on the part of the defendants to pay to the United States this $59,722 in gold, and $32,000 in currency. Customs' officers and informers can claim to share only in fines, penalties, and forfeitures which are created by some law of the United States. If no statute exists, by virtue of which any particular sum of money, whether called a fine, a penalty, or a forfeiture, has been demanded and paid, no customs' officer or informer can share in the money. Here was no forfeiture of goods, for, no goods subject to forfeiture were proceeded against. The segars which were seized by the collector were released, without any other condition than that they should be duly entered, and the duties be paid; and the illegal acts charged in the declaration did not render the parties liable in a civil action, under any law of the United States, to such fines and penalties as were demanded. It may be that the $32,000 in currency, which formed part of the demand, can be held to be thirty-two fines of $1,000 each, incurred by virtue of the act of August 6, 1846 (9 Stat. 53), and that portion of the fund has been so treated by the government. But this would not affect the $59,722 in gold, which is now under consideration. If, then, the record alone were to be looked to as fixing the rights of the parties, it would seem to confer no right upon the customs' officers and informers to a distributive share of the gold in the registry. This difficulty has been realized on this proceeding, and, accordingly, the customs' officers and informers have not rested their claims upon the record of the judgment alone, but have, without objection on the part of the government, introduced much testimony to show the real nature of the claims made by the government against the offenders. The case being thus opened, evidence has been also introduced by the United States, tending to show the circumstances under which this money was demanded and paid. This evidence, therefore, thus introduced by the respective petitioners, and which discloses the actual liabilities which the parties who paid

this money were under to the United States, and from which they sought to be discharged by the payment which they made, must be considered in connection with the record, in determining the character of the fund in question, and the rights of the parties to share therein. It is proper to say here, that, if the course of this proceeding had been otherwise, and the judgment entered on the 27th of December, 1867, had been relied upon as decisive of the character of this fund, it would, doubtless, have been incumbent upon the court—called on, as this court is by this proceeding, to distribute a fund in its registry—to require a fuller explanation than has yet been given of the circumstances under which that judgment was taken. On this argument, it has been treated by the counsel for the government as an inadvertence, and, perhaps, properly so treated; but, it is such an inadvertence as to require full explanation before I should feel justified in disposing of this large amount of money in accordance with its terms.

Looking, then, into the evidence as it has been given, it appears, that certain parties, doing business under the name of J. W. George & Co., perpetrated frauds upon the government, by removing for consumption, dutiable goods from a bonded warehouse, without payment of the duties; that criminal proceedings were commenced against them, and also a civil suit to recover some $400,000 of duties, in which suit a large amount of property was attached; that, thereupon, the offenders applied to the secretary of the treasury for relief, and then, plainly and deliberately, admitted themselves to be liable to the government for duties amounting to $59,722 in gold, which they promised to pay, together with the sum of $32,000, as thirty-two penalties for as many unlawful withdrawals, which they also admitted to have been made by them; and that, thereupon, the secretary agreed that all the parties implicated should be released from all civil and criminal liability relating to the transactions in which they had been engaged, upon the payment of such duties and penalties. In pursuance of this agreement, the parties did pay into the registry of this court the $59,722 in gold, and the $32,000 in currency, in question; and all the pending civil and criminal proceedings, were thereupon stopped by the district attorney. But the payment, instead of being made in the proceedings, pending at the time of the agreement with the secretary, was made in satisfaction of a judgment confessed by them in a friendly action, which they suggested should be commenced, as affording them a more satisfactory evidence of the payment of the money which they had agreed with the secretary to pay.

Upon the evidence, it is claimed, on the part of the government, that the agreement made by the secretary was a compromise made by virtue of the 10th section of the act of March 3, 1863 (12 Stat. 740), and, therefore, decisive of the character of the fund realized in pursuance of it. To this view I do not assent. The authority, conferred by the act referred to, is an extraordinary power, which the interests of the secretary of the treasury, as well as those of the government, require to be carefully guarded against abuse. The statute, therefore, confines the power to the compromise of claims in favor of the United States, and confers no power at all in regard to criminal prosecutions. It looks, also, to the attorney of the government, in charge of the claim, as the proper place of origin for arrangements looking to a compromise, and might well be held to confer no power in regard to claims not in suit; and it requires, as the basis, and the only legal basis, of action on the part of the secretary, a report of the attorney of the government, showing in detail the condition of the claim, and the terms of compromise proposed, and also showing the approval of the terms by the attorney. It also requires, in addition, that the solicitor of the treasury shall recommend the acceptance of the terms. The act thus provides for the creation and preservation of a complete record of all cases of compromise, showing the transaction in detail; and the voluntary assent of three different officials to the terms of any compromise which it is proposed to accept, is required to make it effective. Under the statute, the action of the secretary is confined to the acceptance or rejection of the terms recommended by the attorney. Here, the terms agreed to by the secretary were never reported or recommended by the district attorney, and the action of the secretary must, therefore, be held to be without sanction of law, and of no effect as a legal compromise. The present case, in which it is claimed by the government, that the recommendation, by the district attorney, of terms requiring a less sum than that finally agreed on with the secretary, warranted the secretary, under the statute, in accepting terms deemed more favorable, affords a good illustration of the result of any other than a strict adherence to the provisions of the act. For, it seems, as I understand the figures, that the terms agreed upon by the secretary, although apparently less favorable to the offenders than those recommended by the district attorney, were, in fact, more favorable, and the sum realized was several thousands of dollars less than the parties themselves had offered to the district attorney.

While considering the action of the secretary in making this compromise, I feel bound to notice another prominent feature in it, which is, that the secretary undertook to compromise the criminal proceedings which were pending in court. Neither the act of March 3, 1863, nor any other act that I know of, confers that power on the secretary of the treasury. The solicitor of the treasury may, perhaps, have power, in a proper case, and upon his own official responsibility, to in-

struct a district attorney to effect a discontinuance of a criminal prosecution, for offences arising under the revenue laws; but I know of no statute which permits either the secretary or the solicitor to demand money of a person accused of crime, in consideration of causing a criminal prosecution to cease, although the money may be demanded for the United States, as was the case here. Civil suits for penalties and forfeitures may be compromised or remitted by the secretary, in the manner prescribed by law; but I apprehend, that neither the power to determine the extent of punishment to be inflicted in a criminal proceeding, nor the pardoning power, has been entrusted to the secretary or the solicitor, or the collector. The action of the secretary, in regard to the criminal proceedings pending against John W. George, Henry Hart, and others, was, therefore, of no legal or binding effect whatever; and his action in regard to the civil suits against the same parties was unauthorized, for want of compliance with the conditions which the statute imposes upon his power of remission and of compromise. But, while the agreement made by the secretary has no effect, as a legal compromise, to determine the character of the fund in question, the admissions of the parties, made to the secretary, during the negotiation which ended in the agreement, are competent and very controlling evidence to show the liabilities of the parties to the government, and the real character of the fund which they subsequently paid in discharge of their liabilities. These admissions, with other uncontradicted evidence in the case, show, that the parties who paid this $59,722 in gold, were legally liable to the government, for duties upon segars and liquors, amounting to that sum. This cannot be disputed as to $34,834.50 of the amount; for, Henry Hart was the importer of segars on which the duties had been duly ascertained and assessed at that sum, and which he withdrew without payment of any duty. As to the remainder, being duties charged on rum, gin, brandy and wine, although the custom-house officials seem to have had difficulty in tracing the articles, the secretary had thirty-two orders on the bonded warehouse for certain specified withdrawals of such liquors, which were signed by these same parties, which quantities, it is proved, they withdrew without payment of the duties. The appraisers and other officers of the custom-house declare, that neither the records of the custom-house, nor the orders, nor both together, enable any one to say what amount of duties has been lost; but there is evidence tending to show withdrawals of liquors by these parties from this warehouse, without payment of the duties. This evidence, with the admissions of the parties as to the amount, is sufficient to show that this is not a case of simply calling a sum duties, which was, in reality, penalties, as has been contended, but that an actual legal liability to the government for duties existed, the exact amount of which the parties admitted and promised to pay.

It is said, that there could be no legal liability for duties, because no duties can be "collected, levied, and paid," as duties, unless the merchandise is in the possession and control of the government; that, as soon as property is fraudulently withdrawn, the power to collect duties ceases, and fines, penalties, and forfeitures are imposed. But the law is otherwise. Duties are not simply a charge upon the merchandise, to be collected only by means of the custody of the property. They are also a personal charge against the importer—a debt created by law, which may be collected by a civil action, wholly irrespective of the possession and custody of the goods. United States v. Lyman [Case No. 15,647]. Here, segars, on which the duty was $34,834.50, were actually imported by these parties, who were liable, as importers, for such duties, and who discharged that liability by the payment of the fund in question, while the liquors were bought by them in bond, subject to duties, sufficient in amount, as they themselves admitted, to make up the balance of the $59,722, and which they became liable to pay when they withdrew the merchandise for consumption, as they subsequently did.

Again, it is said that there was no liability for duties, so far as the liquors were concerned, because these goods had been taken out of the bonded warehouse on bonds to deliver them to a manufacturing warehouse, whereby the right to duties was lost; and that the only subsisting liability was for damages upon the bonds. But the evidence shows, quite plainly, that the ostensible transfer to the manufacturing warehouse, which was owned by these same parties, was simply a cover for the fraud. The real intention of the parties, when the goods were bought, was to withdraw them and put them upon the market, without payment of duties; and that intention was successfully carried out, by means of an ostensible transfer to the manufacturing warehouse. The whole was one single connected enterprise, namely, the withdrawal of these dutiable goods for consumption, without payment of the duties. Furthermore, if this $59,722 in gold be not duties, what is it? It is said to be penalties prescribed by the act of August 6, 1846. But, the penalties prescribed by that act are a fine of $5,000, or imprisonment, in the discretion of the court, and a penalty of $1,000 for opening the warehouse, and getting access to the goods, in the absence of the custom-house officer. If the latter penalty was ever incurred by these parties, which is by no means clearly shown, it forms the portion of the fund consisting of the $32,000 in currency, and is not the gold. Besides, what act prescribes a penalty in gold?

But, the fund in court is said to be a single amount, paid by virtue of the duress of

the civil and criminal proceedings, and, therefore, no part of it duties. An exaction, not based on a legal liability, paid to avoid the exposure and punishment likely to follow a criminal prosecution, is what is characteristically termed, in common parlance, "hush-money." If such were the character of this fund, it would not avail the customs' officers and informers, for, they are, by law, entitled to a certain share of lawful fines, penalties, and forfeitures, imposed and collected by virtue of provisions of law. No statute gives them any right to any portion of irregular exactions. But, to suppose the secretary of the treasury, or the solicitor, or the district attorney, to have consented to such an exaction from offenders like these, is to impute a gross dereliction. No such supposition is necessary to determine the character of this gold, for the evidence sufficiently shows that it was demanded as duties, was due as such, and was so paid. It must, accordingly, be distributed as such.

In dismissing this branch of the case, I may properly add, that the action of the secretary of the treasury, in making the agreement which he did with these offenders, and which was severely criticised, on the argument, as an attempt to deprive the customs' officers and the informers of their legal rights, does not appear to me to be capable of such a construction. If such an intention were disclosed by the proofs, it would receive no support at the hands of this court; for, the rights which the law gives to informers and to customs' officers, in order to insure a better enforcement of the revenue laws, are rights which are entitled to be carefully protected, both by officials and courts. I discover no such intention, in the action of the secretary, but only an effort to obtain for the government as great a portion of the duties legally due to it as was possible by the method adopted. Whether a vigorous prosecution of the civil action for the $400,000 of duties supposed to have been lost, and a proper criminal punishment of the offenders for their crimes, together with an enforcement of the forfeitures incurred, would not have been a method more likely to secure obedience to the law in future, is, perhaps, open to question. It may be that such a course would have realized, in addition to these duties, a larger amount of penalties and forfeitures than the $32,000 which was paid. But the abandonment by the officers of the government of the prosecutions for penalties and forfeitures, although it may have been irregular or injudicious, can have no effect to change the character of a payment of duties, which is shown to have been made in discharge of a subsisting liability for such duties. My conclusion, upon this branch of the case, is, therefore, that the customs' officers and the informers have failed to show themselves entitled to a distributive share of the $29,861 in gold, now in the registry.

It remains only to determine who are the informers entitled to the $8,000 in currency, which has been substantially conceded to be penalties distributable to the informers, the other one-quarter of the $32,000 in currency having been paid over to the collector, as penalties in which he was entitled to share. The persons claiming to be the informers are J. W. Wiggin, D. H. Burtnett, and J. W. Hefflin, on the one hand, who claim one-quarter of the whole amount of penalties; and E. D. Webster, Rodman G. Moulton, and John S. Beecher, on the other. The latter persons do not present, for the decision of the court, any issue between themselves, but have consented that whatever may be found payable to any of them shall be paid to the attorney who represents them all. They do, however, dispute the right of Wiggin, Burtnett, and Hefflin, to any share as informers. I have examined with care the voluminous evidence bearing upon this question, and, while I am satisfied that Wiggin procured valuable evidence, and Burtnett and Hefflin evidence still more important, tending to make out a strong case against the offenders, without which, indeed, it is doubtful whether any considerable sum would have been recovered from them, and, although it seems to me not consistent with justice that Burtnett, who spent much time, and expended some money, in ferreting out the details of the fraud, and in finding the property, which was attached as the property of Henry Hart, should receive no reward, still I am unable to adjudge either Wiggin or Burtnett or Hefflin to be legally entitled to share in this fund, as informer. Their action cannot be said to have induced the prosecutions which were instituted. The fraud was discovered by others, proceedings were commenced in pursuance of that information, and the clue to the parties was obtained before either Wiggin or Burtnett or Hefflin gave any information. What they did was to furnish evidence tending strongly to confirm the truth of the statements of the informers. The informer is he who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture, which is eventually recovered. Sawyer v. Steele [Case No. 12,406]; City Bank v. Bangs, 2 Edw. Ch. 95, 105; Lancaster v. Walsh, 4 Mees. & W., 16. In the present case, information had been given of the frauds, upon which positive and effective action was taken, and which contributed to the recovery of the $32,000, a considerable period before either Wiggin or Burtnett or Hefflin gave any information at all; and such first informers, who were Webster, Moulton, and Beecher, are the legal informers, entitled to the informer's share of this fund.

In accordance with these views, a decree must be entered adjudging that E. D. Webster, Rodman G. Moulton, and John S. Beecher, are entitled, as informers, to the $8,000

in currency, in the registry, and that the United States are entitled to the $29,861 in gold.

Case No. 15,199.

UNITED STATES v. GEORGE et al.

[3 Dill. 431;[1] 2 Cent. Law J. 77; 22 Pittsb. Leg. J. 103.]

Circuit Court, D. Minnesota. 1874.

ACTION ON RECOGNIZANCE—AUTHORITY TO TAKE—REQUISITES OF DECLARATION.

1. Leave by the trial court to the plaintiff to amend his declaration upon a forfeited recognizance given in a criminal proceeding, held not to be erroneous.

2. Where a recognizance contains the usual provision that the party shall appear to answer to a particular charge "and not depart said court without leave thereof," it seems not to be essential to its validity that it shall on its face describe the particular offense with which the party is accused.

[Cited in State v. Edgerton, 12 R. I. 106.]

3. The recognizance in suit held to describe the particular offense with sufficient certainty.

4. In a proceeding upon a recognizance by declaration instead of scire facias, it is not necessary where the officer taking it has jurisdiction over cases of the general description named in the recognizance to aver the existence of the particular facts, which establish that the officer had authority to take it; following People v. Kane, 4 Denio, 530, and State v. Grant, 10 Minn. 39 [Gil. 22].

Error to the district court [of the United States for the district of Minnesota].

The action in the district court was upon a recognizance entered into by the plaintiffs in error as the sureties of one Hiram George, in the sum of $5,000, before by I. N. Cardozo, Esq. a commissioner for the circuit court for the district of Minnesota.

The condition of the recognizance appears in the following opinion of NELSON, District Judge, in the district court, on demurrer to the petition:

This action is brought on a recognizance entered into before a commissioner of the United States circuit court, by which Hiram George, as principal, Wm. H. Grant and Francis X. Brosseau, acknowledged that they owe the United States five thousand dollars upon the condition "that the said Hiram George shall be and appear at the district court of the United States, to be holden at Winona, in said district, on the first Monday of June, A. D. 1869, to answer to such matters and things as shall be objected to him on behalf of the United States for unlawfully, falsely and deceitfully uttering and publishing as true, certain false, forged and counterfeited writings for the purpose of defrauding the United States, then and there knowing the same to be false, forged and counterfeited, and not depart said court without leave thereof," &c. It is alleged in the declaration that the recognizance was filed for record, and that at the June term of the court, 1869, on the first day thereof, the defendant was called to appear, but that he failed to do so, and a default was entered against all the parties. A demurrer was filed by the defendants. The point presented by the demurrer and relied upon by the counsel for the defendants is, that no offense is charged in the recognizance over which this court can take jurisdiction.

The statute (14 Stat. 12) enacts "that if any person or persons shall utter and publish as true, any false, forged, altered or counterfeited bond, bill * * * or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited, every such person shall be deemed guilty of a felony, and shall be punished," &c. The commissioner, in the recognizance, has followed the language of the statute without particularly setting forth the kind of writing with which the accused intended to defraud the government. The intent being the gravamen of the charge, and a necessary ingredient of the crime, the authority of the commissioner to act is apparent from the instrument; the offense is set forth with sufficient clearness to enable the accused to ascertain the principal charge he was expected to meet, and greater nicety in setting out the offense was, to say the least, discretionary; it was not required in the warrant of arrest, would have been unnecessary in the mittimus, and no good reason can be urged why it should be any more minutely described in the recognizance. In warrants of arrest some eminent criminal writers have claimed that it was unnecessary to set out the charge or offense at all, and none have deemed it necessary to set forth the offense alleged against the party with more than convenient certainty. The same rule would apply to the recognizance, and enough should be set out to show jurisdiction; no greater certainty is required. The case of U. S. v. Hand [Case No. 15,296], cited by the counsel for the defendants, is not inconsistent with the views laid down by us in regard to statutory offenses. In that case the defendants entered into a recognizance upon the condition "to answer a charge of wilful and corrupt conspiracy for burning the steamboat Martha Washington on the Mississippi river." It is an offense against the laws of the United States to enter into a conspiracy to burn a steamboat with intent to injure certain underwriters. The court sustained the demurrer on the ground that no offense could be committed over which the federal courts had jurisdiction, unless the conspiracy to burn had been entered into with intent to injure the persons named in the act of congress creating and defining the crime. The intent in the case before us is a necessary element of the offense, and is fully set forth in the recognizance. Without the allegation that the uttering and publishing as true, was with the

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

fraudulent intent specified in the statute, no crime would have been set out. Any writing, without reference to its character, when uttered and published with the intent specified in the act of congress, will subject the party to a criminal prosecution under this statute (14 Stat. 12). So under the act of congress considered by the court in U. S. v. Hand [supra], it was not the name of the steamboat that entered into the offense created by the statute, but the intent with which the conspiracy was entered into.

Upon this view of the case I think the demurrer should be overruled, with leave to plead in twenty days.

On the overruling of this demurrer the defendants pleaded that at the time of making the recognizance the said Hiram George was unlawfully imprisoned by the said Cardozo and others in collusion with him, in the common jail, and was there unlawfully kept and detained until the said recognizance was executed to procure the release of the principal from such wrongful imprisonment. Issue was taken on this plea, and the case was by stipulation tried to the court, who found that the bond was not procured in the manner pleaded, and gave judgment against the defendants for the amount of the recognizance. To reverse this judgment, the sureties in the recognizance prosecute this writ of error.

Masterson & Simons, for plaintiffs in error.

Wm. W. Billson, Dist. Atty., for the United States.

DILLON, Circuit Judge. 1. The recognizance in this case was sought to be enforced by a complaint or declaration, and thereto the defendants first pleaded, in effect, nul tiel record, and on this plea the cause was tried before the court, and after its submission the court "ordered that the plaintiff have until the first day of the next term to amend its complaint, and upon failure to do so that judgment be entered in favor of the defendants."

The action of the court permitting the plaintiff to amend the declaration is assigned as error. The record does not state that any exception to this ruling of the court was taken, and there is nothing to show that the court improperly allowed the declaration to be amended.

2. An amended declaration having been filed, the defendants demurred thereto, substantially on the ground that no offense is stated in the recognizance over which the court can take jurisdiction. The demurrer was overruled, and this ruling is now assigned as error. This objection assumes that it is essential to the validity of a recognizance that it shall specify or describe the particular offense with which the principal cognizor is charged—a proposition which I do not decide, though I do not wish to be understood as conceding it to be sound. It is perhaps sufficient that the papers filed in the principal case or proceeding, and the entries of record therein, show that the recognizance is one taken by a competent court or officer in a proceeding properly commenced, and within the jurisdiction of the tribunal or magistrate taking the obligation. State v. Randolph, 22 Mo. 474, and authorities cited. The recognizance in suit contains, inter alia, a provision that the principal should "not depart from said court without leave thereof," the effect of which, according to Hawkins (Hawk. Pl. C. bk. 2, c. 15, § 84), whose language is approved in the last case cited, is that the party shall not only appear and answer the particular charge, but also "be forthcoming and ready to answer to any other information exhibited against him while he continued not discharged." See, also, People v. Stager, 10 Wend. 431; Champlain v. People, 2 Comst. [2 N. Y.] 81.

I believe there are cases in this country holding that such a provision does not dispense with the necessity of the recognizance describing the particular charge for which the party is to answer, but I do not care to enter upon this inquiry, because, conceding for the purposes of this case, that the special offense must be described in the recognizance, my judgment is that in the case before me it is described with sufficient certainty. The reasons for this view are very satisfactorily stated in the opinion of the district judge in whose conclusion I fully concur, and whose judgment will be found supported by the following cases: State v. Randolph, supra; State v. Rogers (horse stealing), 36 Mo. 138; State v. Marshall (seduction), 21 Iowa, 144; Besimer v. People, 15 Ill. 439; Browder v. State, 9 Ala. 58; Hall v. State, Id. 827; Com. v. Nye, 7 Gray, 316; People v. Blankman, 17 Wend. 252; State Treasurer v. Bishop, 39 Vt. 353.

3. The next assignment of error is that the recognizance on its face, or in connection with facts stated in the declaration, does not show that the commissioner had any jurisdiction or authority to take it. And in argument it is insisted that it does not appear by the recognizance or such parts of the record as are before the court that the offense was committed by George within the district, or when committed, etc. It is not necessary that these circumstances should be shown on the face of the recognizance. In New York, where the proceeding is by declaration instead of scire facias, it has been expressly decided that in such a declaration it is not necessary to aver the special facts showing the officer had authority to take the recognizance in the particular case. People v. Kane, 4 Denio, 530; Champlain v. People, 2 Comst. [2 N. Y.] 81; and these cases have been expressly approved by the supreme court of Minnesota, as applicable to the proceedings in this state as to admitting offenders to bail. State v. Grant, 10 Minn. 39, 48 [Gil. 22]; U. S. v. Rundlett [Case No. 16,208]; U. S. v.

Horton [Id. 15,393]; Furgison v. State, 4 G. Greene, 302.

As none of the assignments of error are well taken, the judgment of the district court must be affirmed. Affirmed.

Case No. 15,200.

UNITED STATES v. The GEORGE DARBY.

[26 Law Rep. 566.]

District Court, S. D. New York. June, 1864.

SHIPPING — REGULATIONS — PROCEEDING ON VOYAGE.

A vessel has not proceeded or departed on her voyage, within the provisions of acts of congress of July 13, 1861 [12 Stat. 255], and May 20, 1862 [Id. 404], and the rules and regulations of the secretary of the treasury supplementary thereto, until she is outside the limits of the harbor of her port of departure.

In admiralty.

Mr. Smith, Dist. Atty., and Mr. Lowrey, for the United States.

Webster & Craig, for the vessel.

BETTS, District Judge. The collector of the port, on Sept. 26, 1863, seized the above vessel and cargo, anchored in the harbor, having commenced to depart from this port, destined on a voyage to Beaufort, N. C. The next day a libel of information was filed against the vessel and cargo in the cause, demanding the forfeiture of the vessel and cargo, and their condemnation to the use of the United States, because of the violation of the acts of congress of July 13, 1861, and May 20, 1862 (12 Stat. 257 and 404), and the proclamations of the president of Aug. 16, 1861 [Id. 1262], and May 12, 1862 [Id. 1263], and the rules and regulations of the secretary of the treasury of May 12, 16, and 23, and of Aug. 28, 1862. The Atlantic Navigation Company, a corporation established by the laws of the state of New York, intervened by their secretary and filed their answer and claim to the suit against the vessel, Oct. 1, 1862, claiming to be her true and bona fide owners, and taking an issue of general denial to all the charges inculpating the vessel in the matters alleged against her, the owners of the vessel not being owners of or claiming any interest in the cargo. Various parties, asserting interests in the property and merchandise laden on board, also intervened and filed claims and answers in full defence of the action implicating the cargo seized with the vessel.

The various issues were brought before the court for hearing in the December term of 1863, and were proceeded with for the prosecution and defence during five successive days, fully occupied in giving parol and documentary evidence, and in submitting oral arguments thereon, the counsel for the respective parties reserving the privilege also of supplying further explanations and discussions upon the entire controversy by written briefs and arguments. The last of these papers were delivered to the court during the March and April terms of the present year. On the final submission of the case, however, it was agreed between the parties that the decision of the court should be limited to the issue with the vessel alone, without affecting the claimants of the cargo or of the government in that branch of the suit affecting the cargo, the counsel for those claimants withdrawing themselves, with the consent of the United States attorney, from taking part in the issue in respect to the culpability of the vessel.

There seems to be no ground of controversy upon the proofs that the claimants of the vessel were, at the time the voyage was undertaken, bona fide owners of the vessel; that the port of Beaufort, in the state of North Carolina, though territorially within the enemy's country, was, under the statutes and regulations, in force in this respect, open and free to the lawful commerce of the United States in vessels duly cleared and licensed in the United States; that this vessel had been in proper form cleared and licensed at the custom-house at this port for the voyage intended to be made at the time hence to that port, and that the cargo discovered upon the vessel, and alleged to be contraband of war and unlawfully placed there, was laden on board without the actual knowledge of or notice to the claimants or their agents of any illegal or irregular act on the part of the vessel in respect thereto, other than what the clearance and permit granted the vessel at the custom-house at this port, previous to her effort to leave the port on her intended voyage, may have imported in contemplation of law. The gravamen of the charges against the vessel was, first, that she was carrying as part of her lading articles contraband of war; and secondly, that she was proceeding from this port to Beaufort, in violation of the provisions of the statute before referred to, as supplemented by the regulations of the treasury department, which are co-operating with the said statutes as an entire enactment.

The gist of the defence, except in the particular of fact, that the voyage complained of had not actually been entered upon and commenced when the vessel and cargo were seized, rests upon the proposition of law set up by the claimants, that the acts alleged to have been committed by the vessel were not unlawful, within any provision of the existing law. A succinct and connected statement of the terms of the acts of July 13, 1861, and May 12, 1862, together with the regulations appointed by the secretary of the treasury, will exhibit a satisfactory exposition of the purport of the enactments governing the subject in question. The act of July 13, 1861 (section 5), enacts that all commercial intercourse by and between the

inhabitants of any state in a state of insurrection and those of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue, and all goods and merchandise coming from said states into the others by land or water, and all proceeding to the same, together with the vessel or vehicle conveying the same, shall be forfeited to the United States. The act of May 20, 1862, authorizes regulations to be adopted by the secretary of the treasury with respect to the transportation of goods from any foreign or domestic port for the use of the insurgents, those regulations having the same sanction and force as statutory enactments. The rules and regulations prescribed by the secretary of the treasury, admitted by the counsel for the claimants on the trial to be legally authenticated, were issued by the department in May and August, 1862, and are made in the libel of information substantive grounds of charge against the vessel in this suit. The true import of the act of May 20, 1862, is to empower the secretary of the treasury to apply by his regulations conditions to the trade to be after permitted with insurrectionary ports, of the same efficiency as if imposed by direct legislation of congress. And accordingly, violations of the rules restrictive of such trade are subject to like penalties as if the regulation was one of direct and positive legislation. But the overt acts, made criminal by the acts of congress referred to in the libel of information in the cause, are those of actual trading or intercourse with the ports or citizens and inhabitants of insurrectionary places, or the proceeding or departure of vessels to carry into effect such intercourse or trading. The libel nowhere alleges that the purpose and intention to carry on commercial intercourse at Beaufort, or with the rebels, or to supply them with articles contraband of war, in the contemplated voyage, subject the vessel to condemnation and forfeiture. The libel does not aver the purpose and intention per se of the owners of the vessel to prosecute an unlawful commercial intercourse with the enemy, or supply them with articles contraband of war, were a criminal offence, subjecting the vessel to forfeiture. The allegations are, that the ship is now at the port of New York, and was there seized as forfeited to the United States, "for proceeding to a state declared to be in insurrection against the United States, in violation of the acts of congress and regulations of the secretary of the treasury," &c. If the preparation of the vessel for the voyage she purposed performing was in violation of the regulations of the secretary of the treasury, or the provisions of the act of congress, it is not made by the libel the gravamen of the offence alleged to have been committed by her. The libel charges that "the said George Darby and cargo are forfeited to the United States for proceeding to a state," &c. The vessel was seized and detained in the harbor immediately after leaving her dock, and in the open body of the harbor. The blow was struck when the criminal act was under premeditation and fully resolved upon, perhaps, mentally by the accused party, so that the guilty deed was morally accomplished; but it yet lacked that physical perpetration necessary to constitute the derelictum which only is cognizable by civil law. The government detectives, who sedulously supervised in secret the outfitting of the vessel in this port, and watched every step in her preparation, were obviously cautioned that she could not be interfered with whilst moored in the harbor, and waited until she cast off from her dock to arrest her in the act of violating the law "in proceeding" from this port to Beaufort. The arrest of the vessel was virtually concomitant with her casting off from her moorings, as the seizing officers went immediately on board her, and she was brought to anchor immediately by their orders, and prevented from departing from this port or "proceeding" upon such undertaking.

The propositions of fact insisted on by the libellants are, in substance, that the liquors taken on board the vessel were contraband of war, and that permits and licenses therefor were fraudulently and evasively obtained at the custom-house, so as to make the clearances and permits therefor legally void; and that the vessel was seized proceeding on a voyage from this port to Beaufort, with a view to commercial intercourse there, in violation of the act of congress referred to, she not having obtained a lawful permit therefor.

The claimants contest these positions of fact and law, denying that the vessel, when arrested, was proceeding on the voyage alleged, or that she was lawfully seizable in this port on the allegations contained in the libel; that the cordial laden on board her was contraband of war, or that the ship was responsible for the liquor admitted on board under the permit of the custom-house, and insisting that neither the law nor the regulations of the treasury department make the vessel responsible for the liquors found on board of her.

I think the decision of the supreme court in the case of The Active, 7 Cranch [11 U. S.] 100, establishes the principle that the action of the schooner in this case, at anchor or in motion within the harbor, under way, with a view of pursuing a voyage to Beaufort, was not a proceeding or departure within the interdiction of the law, and does not authorize her arrest in this case. The vessel was not, in judgment of law, proceeding to the port of Beaufort in violation of law, until she had gone out of the port of New York. There had accordingly no right of action accrued in the case when the vessel was attached by warrant, and the libel must be dismissed.

Case No. 15,201.

UNITED STATES v. The GEORGE M. BAIN.

[See Case No. 14,496.]

Case No. 15,202.

UNITED STATES v. GEORGETOWN BRIDGE CO.

[3 Cranch, C. C. 369.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

HIGHWAYS—REPAIRS.

The Georgetown Bridge Company is bound to keep in repair the road leading from Georgetown to the little falls bridge, notwithstanding the act of congress of the 13th of July, 1813 [3 Stat. 12], "to incorporate a company for making a certain turnpike-road in the county of Washington, in the District of Columbia."

Presentment against "the Georgetown Bridge Company for not keeping in repair the road leading from Georgetown to the little falls bridge." By the act of Maryland of 1791 (chapter 81), a company was incorporated, by the name of "The Georgetown Bridge Company," "to erect a bridge over the river Patowmack at or near Georgetown." This act says nothing of a road. By the act of Maryland of 1795 (chapter 44), the Georgetown Bridge Company is authorized "to open a road not exceeding sixty feet in width, from Georgetown to a bridge to be erected over the river Patowmack at or near the little falls;" and by the 2d section it is declared, "that the said road shall be a public highway forever, and kept in repair by said company." The road was opened accordingly, and the bridge erected. By the act of congress of July 13, 1813 (3 Stat. 12), "to incorporate a company for making a certain turnpike-road in the county of Washington, in the District of Columbia," a company was incorporated by the name of "The Georgetown and Leesburgh Turnpike Company," "for the purpose of opening, gravelling, and improving a road in the counties of Washington and Alexandria, in the District of Columbia, from the intersection of Falls street and Water street, in the town of Georgetown, to the boundary line of the District of Columbia, in the most direct and practicable route towards Leesburgh, conforming as nearly as shall be found advantageous and convenient, to the present main road leading from the said intersection towards Leesburgh, and through the counties of Washington and Alexandria as aforesaid." By the 5th section, commissioners were to be appointed, who were required, upon the request of the president and directors of the company, to "cause to be surveyed, laid out and ascertained, described and marked, by certain metes and bounds, the aforesaid turnpike-road, described in the first section of this act, not less than sixty feet in breadth, in such routes, tracts, or courses for the same respectively, as, in the best of their judgment, will combine shortness of distance with the most convenient ground, and the smallest expense of money." "And the said commissioners, upon completing the said survey of the said road, shall return a plat and certificate of such survey to the said clerk" (of the circuit court for the county of Washington), "and the same, being accepted by the said court, shall be recorded by the said clerk; and thereupon the said road, so laid out, shall be taken, used, and occupied as a turnpike-road and public highway forever." By the 11th section it is enacted, "That it shall be the duty of the said corporation to keep the said road in good repair; and if, in neglect of their said duty, the said corporation shall, at any time, suffer the said road to be out of repair so as to be unsafe or inconvenient for passengers, the said corporation shall be liable to be prosecuted," &c. The commissioners under this act surveyed and laid out a road from the bridge to the boundary line of the District, towards Leesburgh, but not from Georgetown to the bridge; and this company never made that part of the road, nor expended any money upon it.

Mr. Coxe, for defendants, moved the court to quash the presentment, and contended that as, by the act of congress incorporating the Georgetown and Leesburgh Turnpike Company, that company had a right to make the old road a turnpike, the defendants were relieved from the duty of keeping it in repair.

Mr. Swann, for the United States. There is no inconsistency in the two acts. The new company was not bound to occupy the old road as a turnpike, and could not so occupy it unless surveyed, and the survey returned to and accepted by the court. They could demand toll only upon that part of the road which was so surveyed. The old road was a privilege granted for the benefit of the bridge, and without which the bridge would be of no use to the public, or benefit to the proprietors.

THE COURT (nem. con.) refused to quash the presentment.

An indictment was afterwards sent up to the grand jury, who returned it ignoramus.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,203.

UNITED STATES v. The GERTRUDE.

[See Case No. 5,369.]

Case No. 15,204.

UNITED STATES v. GIBERT et al.

[2 Sumn. 19.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1834.

ROBBERY ON HIGH SEAS—PIRACY—CONTINUANCE—SEPARATE TRIALS—INDICTMENT—CONCLUSION—NEW TRIAL—EVIDENCE.

1. It is not a sufficient ground for a delay of the trial of a capital case, that the party wishes it, in order to procure papers from a foreign country, since this court cannot issue process, which will be effectual in procuring such papers.

2. Convictions for murder may take place, where the murdered body is not found.

[Cited in U. S. v. Matthews, Case No. 15,741a; U. S. v. Williams, Id. 16,707; St. Clair v. U. S., 154 U. S. 152, 14 Sup. Ct. 1009.]

[Cited in brief in State v. Lamb, 28 Mo. 227.]

3. The weight and character of circumstantial evidence.

[Cited in U. S. v. Macomb, Case No. 15,702.]

4. In order to affect all the officers and crew of a piratical vessel with guilt, the original voyage must have been undertaken with a piratical design, and the officers and crew have known and acted upon such design; otherwise those only are guilty, who actively co-operated in the piracy.

[Cited in brief in Com. v. Nickerson, 5 Allen, 525. Cited in State v. Furney, 41 Kan. 115, 21 Pac. 216; State v. Soper, 16 Me. 297.]

5. It would not be sufficient to affect them with guilt, if they had known, that the voyage was intended to be an illegal one, as in the slave trade, contrary to the laws of Spain.

6. The simple fact of presence on board the piratical vessel, where there was no original piratical design, is not sufficient per se to affect a party with the crime.

[Cited in State v. Furney, 41 Kan. 115, 21 Pac. 216.]

7. All, who are present, acting and assisting in the piracy, are to be deemed principals.

8. The prohibition in the constitution of the United States, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," means, that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction. Therefore, the circuit court of the United States cannot grant a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment. Davis, J., dissenting, *held* that the privilege, intended to be secured by the prohibition, might be waived by the prisoner.

[Cited in U. S. v. Keen, Case No. 15,516; U. S. v. Shoemaker, Id. 16,279; U. S. v. Harding, Id. 15,301; Macy v. De Wolf, Id. 8,933; U. S. v. Holmes, Id. 15,382; U. S. v. Williams, Id. 16,707; Holmes v. Oregon & C. R. Co., 9 Fed. 239; U. S. v. Watkinds, 6 Fed. 159; Sparf v. U. S., 156 U. S. 175, 15 Sup. Ct. 321.]

[Cited in Ex parte Brown, 68 Cal. 180, 8 Pac. 831; Brown v. Swineford, 44 Wis. 287; Harp v. State, 59 Ark. 113, 26 S. W. 715. Disapproved in Re Keenan, 7 Wis. 697. Cited in Kohlheimer v. State, 39 Miss. 548; Re McClaskey (Okl.) 37 Pac. 858; McDonald v. State, 79 Wis. 653, 48 N. W. 864; Mount v. State, 14 Ohio, 295; State v. Davis, 31 W. Va. 393, 7 S. E. 26; State v. Hornsby, 8 Rob. (La.) 583. Disapproved in State v. McCord, 8 Kan. 241; U. S. v. Salter, 1 Pinney, 282; Weinzorpflin v. State, 7 Blatchf. 196. Cited in brief in Williams v. State, 10 Ind. 517.]

9. Quære—If this prohibition extends to the state courts?

10. A new trial may be granted in a capital case, where the jury has been discharged from giving a verdict; for then the party has not been put in jeopardy of his life.

[Distinguished in U. S. v. Keen, Case No. 15,510. Cited in Holmes v. Oregon & C. R. Co., 9 Fed. 239.]

[Cited in Kohlheimer v. State, 39 Miss. 548; State v. Davis, 31 W. Va. 393, 7 S. E. 26; State v. Walker, 26 Ind. 353.]

11. The prohibition in the constitution is a recognition of an old maxim of the common law, and, therefore, we are to resort to the common law to ascertain its true meaning.

[Cited in Kohlheimer v. State, 39 Miss. 548.]

12. There is no instance of a new trial granted by the English courts in capital cases, where the indictment was sufficient, and there has not been a mistrial.

[Cited in State v. Howard, 17 N. H. 197.]

13. Quære—If the courts of the United States may grant new trials in cases of misdemeanors.

[Cited in U. S. v. Morris, Case No. 15,815; Ex parte Lange, 18 Wall. (85 U. S.) 204.]

[Cited in Henning v. State, 106 Ind. 394, 6 N. E. 803, 7 N. E. 4.]

14. Quære—If congress may invest the courts of the United States with the power to grant new trials in all criminal cases, capital or otherwise.

[Cited in U. S. v. Plumer, Case No. 16,056.]

15. A writ of error does not lie at the common law for the refusal of a court to grant a new trial.

[Cited in U. S. v. Jarvis, Case No. 15,469; U. S. v. Plumer, Id. 16,056; Ex parte Lange, 18 Wall. (85 U. S.) 185.]

[Cited in Fay v. Parker, 53 N. H. 387; Welch v. County Court, 29 W. Va. 68, 1 S. E. 340.]

16. According to the constitution of the United States, "no fact, once tried by a jury, shall be otherwise re-examined than according to the rules of the common law;" therefore, independent of the express prohibition of the constitution, there can be no new trial, in a capital case, after a regular trial once had upon a good indictment.

[Cited in Fay v. Parker, 53 N. H. 387; State v. Elden, 41 Me. 169; State v. Lee, 10 R. I. 495. Cited contra in State v. McCord, 8 Kan. 232.]

17. Whether prisoners shall be tried separately or together, rests in the discretion of the court.

[Cited in Ballard v. State (Fla.) 12 South. 868. Cited in brief in Com. v. James, 99 Mass. 439; Doyle v. People, 147 Ill. 395, 35 N. E. 372. Cited in Maton v. People, 15 Ill. 539.]

18. Where the reason assigned for separate trials was, that the prisoners might use the testimony of each other in their defence; *held*, that this would not justify the court in the exercise of its discretion.

19. Quære—If the court, for the reason assigned, would have a right to grant separate trials, and thus deprive the government of the right to exclude all the confederates from being witnesses, and render them competent, when they would otherwise be incompetent.

20. The clerk of the court, upon the arraignment of the prisoners, did not further proceed, upon their pleading not guilty, to ask them, how they would be tried, so that they did not make the usual reply, "By God and their

[1] [Reported by Charles Sumner, Esq.]

country." *Held* that, under the laws of the United States, the plea of not guilty put the prisoners upon the country by a sufficient issue, without any further express words.

[Cited in Com. v. McCormack, 126 Mass. 258; State v. Soper, 16 Me. 300; Territory v. Kee (N. M.) 25 Pac. 926.]

21. A question cannot be put to a witness, the relevancy of which does not appear.

[Cited in brief in Real v. People, 42 N. Y. 275.]

22. Where the court instructed the jury, that certain confessions of the prisoners, reduced to writing, and not produced on the trial, ought to be disregarded by the jury, although they came out upon direct interrogatories of the cross-examining counsel for the defence, *held*, if there was any error in this instruction, it was favorable to the prisoners, and that the suppression of the writings afforded no presumption of law, but of fact only in the case.

23. If the persons, who made the confessions were not identified, but the testimony was only, that some did confess, not being named or identified, such confessions could not be applied to any particular prisoner as proof of his guilt, but might be considered by the jury, so far as they applied to the identification of the piratical vessel.

24. The log-book is not proof per se of the facts therein stated, except in certain cases provided for by statute.

[Cited in Paine v. Maine Mut. Marine Ins. Co., 69 Me. 571.]

25. It was proper to admit parol evidence to establish the time of the sailing of the Panda on her voyage, and to prove the course and termination of the voyage, without proving, that the log-book was missing or lost.

26. The rule, requiring the production of the best evidence, is applied to reject secondary evidence, which leaves that of a higher nature behind in the power of the party: but not to reject one of several eye-witnesses to the same facts, for the testimony of all is in the same degree.

[Cited in U. S. v. Scott, 25 Fed. 471.]

[Cited in Putnam v. Goodall, 31 N. H. 424; State v. Kilgore, 70 Mo. 547.]

27. Where the officers, attending upon the jury, under a mistake of duty, permitted them to read the newspapers,—the officers first inspecting them, and cutting out everything, that in any manner related to the trial,—and it appeared, that in point of fact the jury never saw anything in any newspaper relative to the trial, and, after the charge from the court, were not allowed to see any until they had delivered their verdict, *held*, that it was an irregularity in the officer, but not sufficient to justify the court in setting aside a verdict, and granting a new trial, or treating the matter as a mis-trial.

[Cited in Henning v. State, 106 Ind. 394, 6 N. E. 808, 7 N. E. 4; Jones v. People, 6 Cal. 452; State v. Robinson, 20 W. Va. 757.]

28. Nor would it be sufficient for this purpose, to show, that some of the jurors drank ardent spirits during the trial, when the prisoners' counsel consented in open court to this indulgence to those whose health might require it, unless it was also shown, that the indulgence was grossly abused, and operated injuriously to the prisoners.

[Cited in Creek v. State, 24 Ind. 155; Jones v. People, 6 Cal. 452; Perry v. Bailey, 12 Kan. 546; State v. Greer, 22 W. Va. 827.]

29. The indictment charged the piracy to have been committed "on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state." *Held*, that this was a sufficient statement of the venue, without any further specification of place.

[Cited in St Clair v. U. S., 154 U. S. 145, 14 Sup. Ct. 1006; Kelly v. U. S., 27 Fed. 620.]

30. The crimes act of 1790, c. 9, § 8 [1 Stat. 113], as well as the act of 1820, c. 113 [3 Stat. 600], applies to all murders and robberies committed on board of or upon American ships on the high seas.

31. A conclusion of an indictment against the form of the statute (in the singular) is sufficient in all cases, where the offence is distinctly within more than one independent statute.

32. Also a conclusion against the form of the statutes (in the plural) would be good, even if the offence were punishable by a single statute only.

33. A sworn interpreter may take advantage of the suggestions of others, who are not sworn, with regard to the proper interpretation of testimony, stating the result to the court as his own interpretation.

[Cited in Skaggs v. State, 108 Ind. 56, 8 N. E. 697.]

34. Where the prisoners were placed within the bar, and within a reasonable distance from their counsel, who could constantly have free access to them, and to whom the court stated, that every delay of time for that purpose would be cheerfully given, and it was given, *held*, that to place the prisoners in the very front benches of the bar, by the side of their counsel, would have been an indulgence inconvenient and unnecessary, and that the court did not err, under the circumstances of the case, in refusing it.

35. The court did not err in refusing to have the order of the prisoners (twelve in number) changed, before the introduction of each of the witnesses for the government, who were excluded from the court room, and after the first of these witnesses had been examined and had retired.

36. The witnesses for the government were allowed, with the chart of the Mexican's course before them, to be asked the question, whether, under the circumstances stated of the supposed time of starting of both vessels, the Mexican and Panda would or would not be likely to meet at the point marked on the chart. *Held*, that this was a direct and proper question, and not leading.

37. The practice in this court in capital cases is for counsel to state the points of law, on which they wish instructions to the jury, at some time before the charge is given, that the court may have time to examine and consider them.

38. It would be improper to grant a new trial, on the ground of newly-discovered evidence, proceeding from persons, who were charged as joint offenders with the prisoners, and were incompetent at the time of the trial, but have been acquitted.

[Cited in State v. Bean, 36 N. H. 128.]

39. No bill of exceptions lies in any capital case, in the courts of the United States.

[Cited in State v. Croteau, 23 Vt. 42; State v. Ryan, 120 Mo. 88, 22 S. W. 486, 25 S. W. 354.]

40. The only mode contemplated by the laws of the United States to revise the opinions of the judges of the circuit court in criminal cases is, when the judges are divided in opinion at the trial, and then the point of division may be certified to the supreme court for a final decision under the judicial act of 1802, c. 31, § 6 [2 Stat. 159].

41. No bill of exceptions lies at common law in cases of treason and felony.

42. Quære—If one lies in cases of misdemeanors.

43. If the court has the power in a capital case to allow a bill of exceptions, it is too late to present it, when no tender has been made at the trial, and after the motions for a new trial and in arrest of judgment have been argued and overruled.

Indictment against Pedro Gibert, Bernardo de Soto, Francisco Ruiz, Nicola Costa, Antonio Ferrer, Manuel Boyga, Domingo de Guzman, Juan Antonio Portana, Manuel Castillo, Angel Garcia, Jose Velasquez, Juan Montenegro, otherwise called "Jose Basilio de Castro," part of the officers and crew of the Spanish schooner Panda, for robbery on the high seas, committed on board the American brig Mexican. The brig Mexican belonged to Salem, and was owned by Joseph Peabody. It sailed from Salem for Rio Janeiro on the 29th August, 1832, under the command of Captain Butman; having on board a valuable cargo, and twenty thousand dollars in specie. On the 20th September, in 33° N. lat. and 34° 30' W. lon., she fell in with a suspicious-looking vessel, from which she made many efforts, but unsuccessfully, to escape. This vessel, a schooner, having come up with the Mexican, fired a gun, and the captain of the latter, seeing that the schooner was armed with one long and two small guns, and that her decks were crowded with men, felt himself obliged to submit, and accordingly hove to. He was then hailed, and ordered to come on board the strange vessel, which mandate he obeyed in his own boat, but on reaching the schooner, five men jumped into the boat, and ordered it to be rowed back to the brig. On arriving on board the brig, they directed the captain to accompany them into the cabin, where, brandishing their knives, threatening and beating him, they compelled him to give up the money which was in his possession. A communication was then made with their companions on board the schooner, who sent a launch and carried away the treasure. The party on board the Mexican then left, after confining the crew below, breaking the compasses, and destroying the rigging and tackle. They also set fire to the caboose, in which they placed a tub of combustibles, and lowered the mainsail in such a way that it would speedily ignite. A short time afterwards, however, the captain contrived to get upon deck, and extinguished the fire before it had caught the mainsail. They then repaired their damages as well as they were able, and returned to Salem, where they arrived on the 2d of October. Information of what had taken place was immediately disseminated throughout this and other countries, and reached the coast of Africa, where Captain Trotter, commanding the British brig of war Curlew, was then cruising. Circumstances led that gentleman to believe that the schooner Panda, then lying in the river Nazareth, was the vessel which had captured the Mexican. He immediately, therefore, proceeded to take measures against her. These measures resulted in the capture of the Panda, but the escape, for the time, of her crew. No ship's papers or logbook were found on board of her, although diligently sought for; and, owing to some accident, she shortly afterwards blew up, thereby killing several of the Curlew's men. Captain Trotter then sailed to other ports, still making efforts to discover the crew of the Panda, and at last succeeded in arresting the prisoners, and carried them into Portsmouth, England. By the British government, they were sent to this country for trial, the offence of which they were charged having been committed on board a vessel of the United States.[2]

[2] Upon the conduct of the British government, and Captain Trotter, the court, in summing up to the jury, remarked as follows:

STORY, Circuit Justice. There was another topic, on which he must say a few words, and that was the remarks, which had been made in relation to the manner, in which the prisoners had been brought here, and upon the circumstances of their capture. He should feel himself unworthy of the station he occupied, if he did not advert to this topic, because, if he rightly understood the prisoners' counsel, an attempt had been made to throw a great deal of doubt over the motives and actions of Captain Trotter, and even of the British government itself, for having sent the case for trial to this country. The British government, on this occasion, finding persons in England in custody of one of its own officers, accused of piracy on an American vessel, chose to send those persons here, where the best evidence could be obtained, and where the greatest facilities and advantages for their trial were to be found. Over piracy, all nations exercise equal jurisdiction, and the British government might justly have exercised it in this case. But they preferred, that the offenders should be tried by the citizens of that country against whom the offence had been committed. And I may say, that this conduct of the British government can scarcely receive too much praise from an American citizen. How could this case have been decided in England? None of the crew of the Mexican, or her owner, were there. How could the evidence heard before this court, and which occupied its attention during the three first days of the trial, have been heard in England? Let us look, too, at the conduct of Captain Trotter. He was an officer of the British navy, stationed on the coast of Africa, with directions to use his exertions in suppressing the slave trade. He was there discharging the particular duty, which had been assigned to him, and was under no obligation to trouble himself about pirates. But he receives information of the robbery of the American brig and that the pirate is supposed to be on the African coast, and immediately goes in quest of her. What motive could this gallant officer have had to interfere in this matter, but a sense of justice, and a desire to protect the rights of the whole world? He had nothing to gain, and he might encounter a great deal of peril, obloquy, and responsibility. Under these circumstances Captain Trotter does interfere. He goes in search of the pirate. And you know, gentlemen, it was no ordinary peril he encountered. Mr. Quentin has stated facts sufficient to prove to you the danger of the undertaking, even when the crew of the Panda were not on board to make resistance. Had the crew remained on board, and used the means in their possession, the loss of lives among the British, they being in open boats, must necessarily have been great. Now what inducement had Captain Trotter to encounter all this, but a

It appeared by the evidence of Jose Perez, one of the crew of the Panda, who had become a witness for the government, that the schooner Panda sailed from Havana on or about the 20th of August, 1832, with Pedro Gibert, master, and Bernardo de Soto, mate, bound for St. Thomas on the coast of Africa, with a cargo of new rum, about thirty bales of cloth, muskets, powder, &c.; that she fell in with the Mexican on the 25th of September, and robbed her of twenty thousand dollars. Of the prisoners, Ruiz, Boyga, Castillo, Garcia and Montenegro were identified as among those who went on board the Mexican, and actively co-operated in the robbery. The trial lasted fifteen days.

The prisoners were defended by George S. Hillard and David L. Child.

A. Dunlap, Dist. Atty., for the United States.

In the course of the trial, many points arose, and were considerably discussed. These appear in the motion for a new trial, which will be found in a subsequent page, and all received the consideration of the court in the full and learned opinion, which was given on that motion.

On the first day of the trial, Child addressed the court, in relation to a motion for the production of the log-book of the Panda, and read an affidavit from the mate of the Panda and others, stating that the log-book was in the possession of certain parties in Portsmouth, England; that the manifestos of the cargo, &c. of the Panda, were also at the Havana, and might be had by sending for them. Time was requested, in order that these necessary documents might be procured.

THE COURT overruled this motion, on the ground that it could not issue process, which would be effective in procuring the papers alluded to; it had no authority in Great Britain, or Havana. It was also stated, by an English officer, who was one of those, who boarded the Panda, that the log-book of that vessel had never been discovered.

The arguments to the jury, were confined very much to a review of the evidence. Hillard, for the prisoners, contended that the Panda had been fitted out for a slaving voyage, for which alone, doubtless many of the crew had shipped; and that if she had robbed the Mexican, only those who had been engaged in the robbery could be punished for it. He cited U. S. v. Jones [Case No. 15,494]; Kidd's Case, 14 How. State Tr. 123.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice, in summing up the case at the trial, stated as follows. Before I proceed to the facts of the case, it seems proper to take notice of several cases, which have been cited at the bar, to show the danger in capital cases, of relying on presumptive evidence as sufficient proof of guilt. Those cases may be said to constitute the commonplaces of the law, in trials of this sort, always resorted to, to create doubts in the minds of the jury, and to shake our confidence in human testimony. If these cases (some of which, there may be reason to doubt, whether they are founded in truth or in fiction,) are brought to establish any thing, they are brought to establish these propositions on trials on indictments for murder (for they are all of this sort.) (1) That there ought to be no conviction for murder, unless the murdered body is actually found. (2) That men have been convicted of murder upon false testimony. The first proposition certainly cannot be admitted as correct in point of common reason, or of law, unless courts of justice are to establish a positive rule to screen persons from punishment, who may be guilty of the most flagitious crimes. In the cases of murders committed on the high seas, the body is rarely if ever found; and a more complete encouragement and protection for the worst offences of this sort could not be invented, than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas. In regard to the second proposition, it is probable, that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence, of offences, which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses, who have deliberately sworn falsely to the facts, constituting the guilt of the party accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare, that no human testimony to circumstances or to facts, is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the

high sense of public duty, not merely to his own country, but to the commercial world. It is said, that there was something mysterious about the conduct of this brave officer. I have never observed any thing of the kind, gentlemen, during this trial; it remains for you to say, whether any thing of the kind exists. His station was on the African coast, and he could not leave it without orders from home. He made the capture, and communicated it, where he was in duty bound to do, to the heads of the admiralty. We know that he did this, because we find the British government taking cognizance of his act, and sending the prisoners to be tried here with reference to it. Suggestions had been thrown out, and questions asked, as to whether money had not been divided among the crew of the Curlew. This question no person could misunderstand for a moment. Now, I must say, as an individual, that, on the most careful examination, I have found nothing, done by Captain Trotter, that a man in his situation might not fairly do. The learned judge farther stated, in reference to this matter, that if, in this first instance of national reciprocity, British officers found themselves accused without sufficient reason, it would be, as it was the first, most assuredly the last time they would expose themselves to such consequences.

administration of public justice. If, on the other hand, such cases are addressed as a mere admonition to the judgment of the jury, requiring caution on their part in weighing evidence, in order to guard them against the impulses of sudden conclusions and slight suspicions, there is certainly nothing objectionable in the course, although under the solemn circumstances of the present case, it seems hardly necessary to enforce an appeal, the importance of which is so deeply felt by all, who sit on this trial.

I may, indeed, add another remark, which, strange as it may seem, has nevertheless been justified, as there is every reason to believe, by actual facts. It is not even certain, that criminals, who in capital cases plead guilty, and by confession of their guilt in open court, submit to the sentence of the law, are always guilty of the offence. Cases have occurred, in which men have been accused and tried and convicted of murder upon their own solemn confession in a court of justice, where it has been afterwards ascertained, that the party could not have been guilty, for the person supposed to be murdered was found to be still living, or lost his life in another place, and at a different period. And yet it never has been supposed, that a solemn confession in open court, was not a just ground to believe the guilt of the party accused. The truth is, that notwithstanding the admitted infirmity of human testimony, and the inherent defects of circumstantial evidence, they still are, and for ever must be, the only solid foundations, on which reliance can be placed, for the due administration of all civil as well as of all criminal justice. It is scarcely possible to take a step in the trial of any matter of fact, without directly or indirectly appealing to them, as unquestionable and satisfactory sources of human belief.

There are three questions in this case. The first is, whether a robbery was actually committed on the Mexican, on the high seas, as charged in the indictment. The second is, whether it was committed by the officers or crew of the Panda. The third is, whether, if committed by the officers or crew of the Panda, all of them are guilty, or a part only; and if a part, who in particular are guilty. Upon the first question, there is no controversy at the bar. The robbery was committed; and, indeed, is established, if any fact in the case is so, by entirely satisfactory evidence. Upon the second question, it is indispensable to go into a minute and accurate survey of the whole evidence, circumstantial and positive. (Here the judge went into a full examination of all the evidence, leaving all the facts to the jury.) If the jury shall be satisfied that the Mexican was robbed by the Panda, then, upon the third question, there are some principles of law, which require to be accurately considered, in order to arrive at a just conclusion, as to the guilt or innocence of any or all of the parties accused. And, here it is most important to ascertain, whether the original voyage of the Panda from Cuba was intended to be a piratical expedition or not. If it was originally intended to be a piratical expedition, then all of the officers and crew, who knew of such intended expedition, and acted upon it, are to be considered as equally guilty of the robbery of the Mexican, (if the offence was committed,) whether at the moment, they are proved to have been active in the acts then done, or not; for, under such circumstances, they must, in the absence of all counteracting evidence, be presumed to co-operate in furtherance of the original design, each doing the duty assigned to him. If, on the other hand, the original expedition was not intended to be piratical, then those only are to be deemed guilty, who knowingly co-operated in the act of robbery of the Mexican. Co-operation or combination may be express, or it may be implied from circumstances. All, who were present and acting in the robbery, are to be deemed principals. All who were present, advising, directing, encouraging or assisting in the accomplishment of the robbery, thus performing the part assigned to them in the common piratical enterprise, are to be deemed equally principals. But the other persons, whether they were of the officers or of the crew of the Panda, who did not know of the piratical design, and did not co-operate or aid or take any part in it, though they were present on board of the Panda, are not to be deemed guilty. In this view of the matter, the nature of the original enterprise, and of the outfit and voyage of the Panda from Cuba become most material for the consideration of the jury. It is not sufficient to affect all the officers and crew of the Panda with guilt, that they should have known, that the voyage was intended to be an illegal voyage,—as a voyage in the slave trade, contrary to the laws of Spain. The evidence must go farther, and satisfy the jury, that the voyage in contemplation by all of them, was to be piratical, as well as illegal. If the voyage was simply illegal, then those only are to be deemed guilty, who co-operated in the piratical act upon the principles above stated.

Let us now examine the evidence in the case, as applicable to all the persons accused severally, upon the supposition, that the original enterprise, is not shown to be piratical. (Here the judge went into a very minute examination of the evidence, remarking, that if any were guilty of the crime, Gibert, the captain, and De Soto, the owner and mate, must be; for they had the unquestioned command, and control of the ship and crew. He then summed up the evidence, as to the identity of those of the crew of the Panda, who went on board of the Mexican, and as to the acts done by them while on board; and their subsequent conduct and confessions. He added, that against Portana and Guzman, no direct co-operation was proved,

unless the original enterprise was piratical, and so known to be by them; and that the sole evidence against Velasquez, was his assisting in burying the money, as testified to by Perez. In regard to Ferrer, the cook, he remarked, that he was a black man, and possibly might be a slave, and no act was proved against him. If he was a slave, he was entitled to a very indulgent consideration, for he could hardly, under the circumstances, be deemed master of his own will. As to Costa, the cabin boy, he suggested, that there was no evidence against him, and his youth and station ought to induce the jury to give his case a very indulgent consideration. Neither he, nor the cook, were likely to have been entrusted with the secret, that the voyage was originally intended to be piratical, if that was the fact, and no cooperation at the time of the robbery, was shown on their part.)

The jury returned a verdict of not guilty in favor of Ferrer, Costa, Portana, Velasquez, and Guzman, and as to the rest of guilty. After verdict and before judgment, the following motion for a new trial, and in arrest of judgment, was filed by the counsel for the prisoners:

And the said Pedro Gibert, Bernardo de Soto, Francisco Ruiz, Manuel Boyga, Manuel Castillo, Angel Garcia, and Juan Montenegro, prisoners here in the custody of the marshal, after verdict and before judgment, move the court that the said verdict be set aside, and that a new trial be granted, for the causes following, viz.:

I. Because said prisoners, since the rendering of the said verdict, have come to the knowledge, and are enabled to avail themselves, of new evidence, which they believe to be very material for their defence, and that the same, if submitted to a jury, would lead to a result different from the said verdict.

II. Because the said prisoners were not permitted by the honorable court to be tried separately on the indictment in said case.

III. Because the said prisoners were never arraigned upon the said indictment.

IV. Because no issue was joined between the said United States and the said prisoners, according to the course of the common law.

V. Because the said prisoners have never put themselves upon the country of and concerning the matters charged in said indictment, and were never inquired of how they would be tried.

VI. Because the said court overruled a question proposed on the part of the prisoners, to a witness produced by the government, on the ground that the said court could not perceive the object or bearing of the said question, and when the counsel for the said prisoners had stated to the said court that to explain would defeat the object of the said question.

VII. Because the said prisoners believe and respectfully suggest, that in the trial of said cause, the jury were misdirected in matters of law, by the said court, in the following particulars, viz. (1) Because the said court instructed the jury that one Jose Perez, a witness produced on the part of the government, was not an accomplice in the commission of the crime alleged in the said indictment. (2) Because the said court instructed the jury that they might, if they pleased, or they might not, if they pleased, entertain a presumption against the credibility of said Perez, by reason of the refusal of the counsel for the government to produce the written examination of said Perez, taken at Fernando Po; and, because the said court declined giving an instruction that the said refusal of the said counsel, after due notice on the part of the prisoners, to produce the said written examination, afforded a legal presumption, that if the said written examination were brought forward, the effect thereof would be unfavorable to the credit of said Perez. (3) Because the said court instructed the jury that the question of the liability of Henry D. Trotter for the loss and damages occasioned by the capture of the schooner Panda, and by the detention of her officers and crew, was immaterial on the trial of the issue upon the said indictment. (4) Because the said court instructed the jury that certain confessions of the prisoners, testified to have been made at Fernando Po, Sierra Leone, and on the passage of the said prisoners to England, and at other places, were proper to be considered by the jury. (5) Because the said court instructed the jury that the withholding by the counsel for the government from the prisoners on the trial, of certain writings containing the said confessions or a part of them, was a fact from which the jury might presume what they pleased, provided that they presumed nothing therefrom against the prisoners; and because the said court declined to give it in charge to the jury, that the suppression of said writings by the counsel for the government, afforded a legal presumption that if the same were brought forward, the effect thereof would be in favor of the said prisoners. (6) Because the said court declined to instruct the jury that by the waiver on the part of said prisoners of any legal exceptions, to which said writings might be liable, the counsel for the government ought to have put the said writings into the case, or the parole testimony of the same confessions which had been proved to have been reduced to writing, ought to have been wholly rejected and considered out of the case. (7) Because the said court instructed the jury that confessions, testified to have been made by some of the prisoners, without the same having been brought home to any of them individually and by name, might be considered by the jury in reference to the case generally, and to the identification of the said Panda as the pirat-

ical vessel mentioned in said indictment, and of her crew as the piratical crew; and that the jury must not consider such confessions as evidence upon which to convict any one of the prisoners in particular. (8) Because the said court declined to instruct the jury that the counsel for the government having produced a part of the papers and documents appertaining to the said Panda, and not having shown that any of the customary papers and documents, which should regularly belong to the said Panda, were detained or destroyed by the officers and crew of the said Panda; or were from any cause missing at the time and place of the seizure of those produced—a legal presumption arises that the log-book of the said Panda was taken at the same time and place, and by the same captors, and that they have it or have destroyed it. (9) Because the said court declined to instruct the jury that the non-production of said log-book on the part of the prosecution, gives rise under the circumstances aforesaid, to a legal presumption in favor of the prisoners. (10) Because parol evidence was admitted to prove the time of the sailing of the said Panda on her voyage from Havana to Cape Mount, and to prove the course and termination of said voyage, without evidence having been previously adduced, that the said log-book was missing from said papers and documents at the time and place of said seizure, or had since been casually lost. (11) Because the said court declined to instruct the jury that under the circumstances proved, resistance, flight, or the destroying of the said Panda by her officers and crew, would be exercising the right of self-defence on the part of the said officers and crew. (12) Because the said court declined to instruct the jury that the failure of the government to produce, in evidence of the attempt by said Ruiz to blow up the said Panda, the only witness who saw the match, as applied for that purpose, and who is testified to have removed it, affords a legal presumption against the truth of the alleged attempt by said Ruiz, to destroy the said Panda.

VIII. Because the jury were furnished with newspapers, and did read the said newspapers during the pendency of the trial.

IX. Because the said jury, while they had the said cause in charge, drank ardent spirits.

X. And the said prisoners move for a new trial, because the said verdict is manifestly against evidence and the weight of evidence.

And in case that the honorable court should not set aside the said verdict and grant a new trial, then said Gibert, De Soto, Ruiz, Boyga, Castillo, Garcia and Montenegro, move the court to arrest the judgment on said verdict, for the causes following, viz. (1) Because no legal offence is set forth in said indictment, and because the said indictment is uncertain, insufficient and not judicially intelligible (2) Because the said prisoners were never arraigned, and have never put themselves upon the country for trial. (3) Because no issue has been joined on said indictment according to the course of the common law.

The foregoing is a copy of the original motion. Subsequent to the filing of that, and before argument, the following additional causes were assigned for a new trial:

Because interpreters were admitted to interpret a part of the testimony of said Jose Perez, without being previously sworn to interpret truly and faithfully. Because the said prisoners were not allowed to be placed near their counsel on the trial, for the purpose of instructing said counsel in the conducting of the defence of said prisoners, when the said counsel had made an application to the said court for said purpose, and stated that in their opinion, such change of position was necessary for said purpose. Because the said court overruled a motion by said counsel, that the order in which said prisoners were placed at the bar on their trial should be changed, before the introduction of each of the witnesses for the government, who were excluded from the court room, after the first of said witnesses had been examined and had retired. Because the counsel for the government was permitted, upon objection made by the counsel for the prisoners, to lead the witnesses for the government, by means of a certain chart, upon which the voyage of the said brig Mexican was delineated, and upon which the point at which the piracy alleged in said indictment had been testified to have been committed, was distinctly marked; and upon a view of said chart by said witnesses, the following question was proposed to them by the said counsel for the government: viz. whether, if the said schooner Panda left the port of Havana on the 20th or 26th of August, bound to Cape Monte, on the coast of Africa, and the said brig Mexican left Salem on the 29th of said August, bound to Rio Janeiro, the said vessels would or would not be likely to meet? Because the said court declared to the jury, and delivered it as the opinion of said court, that the prisoners, by their counsel, had no right to pray instructions to the jury on particular points, after the delivery of the principal charge. Because the said court declined to instruct the jury that if they believed, upon the evidence, that the said schooner Panda, while lying in a certain river called "Nazareth," was suddenly assailed by a superior force, which advanced upon them in hostile array, without hailing or declaring their intention, the officers and crew on board the said Panda, had a right to resist, to flee, or to destroy the said Panda, or to resort to any other means of self-defence, which they might deem expedient.

These motions were argued at great length by George S. Hillard and David L. Child, for the prisoners, and by A. Dunlap, Dist. Atty., for the United States.

THE COURT, in pronouncing its opinion, went so fully into all the considerations urged as to supersede the necessity of stating the arguments, which occupied three days, and were concluded December 10th.

STORY, Circuit Justice. This is an indictment for a robbery on the high sea, which is declared to be a capital offence and piracy by the statute of 1790, c. 9 [1 Stat. 113]. The prisoners having been found guilty, a motion has now been made for a new trial, upon grounds stated in a written motion submitted to the court. Upon the grounds thus stated, it is unnecessary for me to say any more at present, than that so far as they purport to be founded upon what took place at the trial in the presence of the court and jury, they are not admitted by the court, to present a full, accurate, or just representation of all the facts and circumstances. This remark is made simply to prevent any misapprehension from any silence or acquiescence of the court upon this subject.

The question now to be considered is, whether this court has, by the constitution and laws of the United States, authority to grant a new trial in a case circumstanced as the present is. And, in order to free the case as much as possible from any collateral and unimportant considerations, it is proper to state, that in examining this question, we shall, for the present, assume that the court had jurisdiction of the case; that there has been no mis-trial, in a legal sense, that is, no such irregularity, or error in impannelling the jury to try the cause, or in the other proceedings in the course of the trial, as would upon the face of the process and proceedings be fatal as matter of substance, and that the indictment is sufficient in point of law to found a just judgment against the prisoners in conformity to the verdict. In other words, for the purpose of the argument, we shall for the present assume that the jurisdiction is clear, that the indictment is good, and that the trial has been regularly had, and the verdict has been regularly rendered by a competent jury.

Under such circumstances, has this court authority, by the constitution and laws of the United States, to grant a new trial after a verdict regularly rendered of guilty against the prisoners?

The constitution of the United States has exhibited great solicitude on the subject of the trial of crimes, and has declared, that the trial of all crimes, except in cases of impeachment, shall be by jury; and has in some cases prescribed, and in others required congress to prescribe, the place of trial. And certain amendments of the constitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury. One of these amendments provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," (with certain exceptions not necessary to be mentioned); and it then proceeds—"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Now the question is, what is the true interpretation and meaning of this latter clause? When, in a constitutional sense, can a person be said to be twice put in jeopardy of life or limb? If resort should be had to the grammatical structure and meaning of the words, the natural interpretation would certainly seem to be, that no person should be twice put upon trial for any offence, for which he would be liable, upon conviction, to be punished with the loss of life or limb;—for jeopardy means hazard, danger, or peril; and when a party is put upon trial for an offense punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, danger or peril of his life or limb. But, fortunately, in the present case, there is no necessity of resorting to mere general principles of interpretation; for the privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law: and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitation. The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice, may be constantly found recognised by elementary writers and courts of justice from a very early period down to the present times. Thus Staundford, in his Pleas of the Crown (lib. 2 c. 36, pp. 105, 106), says—"Home, per common leye, ne mittera sa vie deux foits in jeopardie de trial per un mesme felonie, sinon que sort en ascun especial cas de quel jeo dirra apres." A man shall not by the common law put his life twice in jeopardy of trial for the same felony, except it shall be in some special case, of which I shall hereafter speak. And the excepted case, to which he here alludes, he states in the same chapter to be where there is not in the indictment sufficient matter to constitute felony in point of law. And he applies his doctrine directly to the case of a plea of a former acquittal, grounding the sufficiency of it as a bar upon the above maxim. And he then states, that if the acquittal was upon an insufficient indictment, it is no bar to a second indictment for the same offense (eo que in tiel cas il ne unque mittoit sa vie in jeopardie sur le matter), because his life has never been in jeopardy upon the matter. And the like doctrine may be traced up as early as the age of Bracton. 1 Staund. P. C. lib. 2, c. 36, p. 106. See, also, Fitzh. Abr. Corone, pl. 444. Hawkins, whose work on Crown Law is deservedly held in very high estimation, states the doctrine in the most unqualified manner: "The plea (says he) of autre fois acquit is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once.

From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court, which hath jurisdiction of the cause, he may by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime." Hawk. P. C. bk. 2, c. 35, §§ 1, 8–10. And Lord Hale recognizes the same doctrine. See 2 Hale, P. C. 181, 220, 249, 250. See, also, Com. Dig. "Appeal," G. 9, G. 11. And not to multiply authorities on so plain a point, Mr. Justice Blackstone, in his Commentaries (4 Bl. Comm. 335; Reg. v. Carter, 6 Mod. 168), says: "The plea of autre fois acquit. or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

Hitherto we have been examining the doctrine with reference to cases of acquittal only. But the like doctrine, founded on the like maxim, will be found to apply to cases of conviction of a capital offence. And, here, in order to avoid any ambiguity, it may be proper to state, that conviction does not mean the judgment passed upon a verdict; "but if the jury find him, (the party), guilty, he is then said to be convicted of the crime, whereof he stands indicted. 4 Bl. Comm. 362; 3 Inst. 131. For there is, in point of law, a difference between the plea of autre fois convict, and autre fois attaint of the same offence; the former may be where there has been no judgment; the latter is founded upon a judgment." See 2 Hawk. P. C. c. 36, §§ 1, 10; Staunf. P. C. lib. 2, c. 37, p. 108; 4 Bl. Comm. 336.

Hawkins, after remarking upon the plea of autre fois attaint, and saying that one reason why it is a good bar for a second prosecution for the same felony is, "because the life of the defendant was in danger by the first; and it is against a maxim of law to bring a man into such danger more than once for the same offence," proceeds to say, "the plea of autre fois convict seems chiefly to depend on this reason, that the party ought not to be twice brought into danger of his life for the same crime." 2 Hawk. P. C. bk. 2, c. 36, §§ 1, 10, 15. He afterwards makes the known exception, where the verdict is erroneous either in respect of insufficiency of the indictment, or for a mis-trial, &c., so that the life of the prisoners was not in danger at the trial. 2 Hawk. P. C. bk. 2, c. 36, § 15. See, also, 2 Hale, P. C. cc. 31, 32, pp. 243, 251; Reg. v. Goddard, 2 Ld. Raym. 922; Armstrong v. Lisle, 1 Salk. 63; People v. Barrett, 1 Johns. 66; People v. Casborus, 13 Johns. 351. See the distinction between a mis-trial, and a new trial in Rex v. Fowler, 4 Barn. & Ald. 273. The same doctrine is abundantly established in the cases of appeals and indictments, reported in 4 Coke, 40–47; and especially in the cases of Richard Vaux and William Vaux, there stated (pages 40, 44, 45). In the latter case, the court held, "that the reason of autre fois acquit was because, where the maxim of the common law is, that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause why autre fois acquitted or convicted of the same offence is a good plea; yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason, he was not legitimo modo acquietatus," &c. "So, if a man be convicted, either by verdict or confession, upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end." And the same was ruled in Wigg's Case, 4 Coke, 45, 47. So in Armstrong v. Lisle, 1 Salk. 63, where there was a plea of autre fois convict to an appeal of murder, the court said: "At common law autre fois convict or acquit was a good bar to an appeal, for no man's life ought to be twice endangered for the same offence." See Smith v. Taylor, 5 Burrows, 2798; Com. Dig. "Appeal," G. 9. And, lastly, Mr. Justice Blackstone, in his Commentaries (4 Bl. Comm. 336), says: "The plea of autre fois convict, or a former conviction of the same identical crime, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle of the former (autre fois acquit) that no man ought to be twice brought in danger of his life for one and the same crime."

Thus we see that the maxim is imbedded in the very elements of the common law; and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment. Indeed, so strong has been the influence of this maxim, that it was for ages construed not only to apply to cases, where there had been a verdict given by a jury; but even where the party had been once put upon his trial before a jury for deliverance. And Lord Coke laid it down, that after a jury were once charged with a prisoner upon an indictment for treason or a felony, the jury could not be discharged, but were bound to give a verdict. 3 Inst. 110; 1 Inst. 227, 6. See, also, Kinloch's Case, Foster, Cr. Law, 28–37; 2 Hawk. P. C. bk. 2, c. 47, § 1. And though that rule has been broken in upon in modern times, and juries have been discharged from giving a verdict in capital cases in cases of pressing necessity; yet it has been done with extreme caution, and confined to cases of pressing necessity; and as we shall presently see, the exercise of it has been greatly doubted, and even denied

in cases where the jury were unable to agree on a verdict.

This matter was very gravely discussed in the Case of the Kinlochs in 1746; and though the court upon that occasion did discharge the jury in favor of life, and so let the prisoners at their request into a new defence; yet the judges did it upon great deliberation and debate. And Sir Michael Foster on this occasion observed (and it illustrates the force of the maxim) that "it was not to bring the prisoners' lives twice in jeopardy, which is one inconvenience of discharging juries in capital cases, but merely in order to give them one chance for their lives, which, it was apprehended, they had lost by pleading to issue." So that even this humane judge felt that it was trenching upon the maxim, and that when once the party was put on his trial before the jury, if the jury were discharged he was subjected to be put twice in jeopardy for the same offence.

Hitherto we have been chiefly considering the case of a new indictment, to which the party pleads the former indictment and a verdict of acquittal or conviction. And it was fit so to do, in order to understand the full import and bearing of the language of the maxim. But the question now more directly presented is, whether the same maxim equally applies to the case of a new trial moved for in a capital case upon the same indictment. It is impossible, I think, to doubt that, in England, the maxim according to the doctrine of the English courts of justice does apply to and govern the case of a new trial. As soon as a capital case is fully committed to a jury, the life of the prisoner is in their hands, and he stands in jeopardy of his life upon the verdict of the jury. He is in the truest sense put upon his deliverance from the peril. When once the verdict is pronounced the case is fixed. If there is a verdict of acquittal, it is generally agreed that he cannot be put upon his trial again for the same offence. And why? Because it contradicts the direct language of this maxim of the common law. He would again be put in jeopardy of his life. And how does the case at all differ in principle in the case of a conviction? The fact is the same. He is again put in jeopardy of his life. He is again to be tried, and acquitted or condemned. If it be said, that it is for his benefit and in favor of his life to have a new trial, that may be true; but there is in the body of the maxim no such qualification or limitation of its meaning. It is nowhere laid down as a part of the maxim that if he is acquitted he shall not be tried again; but if he is convicted he may be allowed a new trial. And if the court are to assume the power in favor of the prisoner; why may it not equally assume it when it will prevent a manifest fraud upon the administration of justice to suffer his acquittal to remain? Cases may easily be put where an acquittal may have been produced by gross bribery of the witnesses, by false testimony fraudulently procured by the prisoner, by spiriting witnesses away, and even by means still more offensive and revolting to public justice. And yet no case has as yet been produced of a new trial granted against a prisoner upon such grounds. In Reg. v. Carter, 6 Mod. 168, Lord Chief Justice Holt stated a case where a rank perjury had gone unpunished from some defect in entering of the record of the former case, in which the perjury was alleged, for that (the first trial for perjury) was final, so as the party could never be tried thereon again. It is true, that in order to avoid difficulties of this sort, the courts in the reign of Charles II. (that reign of bad precedents) did sometimes go so far as to discharge juries before a verdict was given, where there was reason to believe that evidence was suppressed, or that there was not enough to convict the prisoner, or that there was reason to suspect malpractice. And even Lord Hale fell into this erroneous practice, and endeavored to justify it. 2 Hale, P. C. c. 41, pp. 294–296. But it has since been wholly repudiated, and it met the decided disapprobation of Sir Michael Foster. Kinloch's Case, Fost. Cr. Law, 16, 17. But in point of fact, there is no instance of any new trial having been granted by the English courts in capital cases, where the indictment is sufficient, and there has not been a mistrial, upon the plain ground that it would violate the integrity of this fundamental maxim of the common law. Indeed, for a great length of time the opinion prevailed, that there could be no new trial granted in any criminal cases, even where the indictment was for a mere misdemeanor, although it is manifest that the maxim does not apply except to capital felonies. Mr. Justice Blackstone has indeed in his Commentaries said: "In many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for in such a case, as hath been said, it cannot be set right by attaint. But there hath as yet been no instance of granting a new trial, where the prisoner was acquitted upon the first." Now, from the other citations already made, it must be manifest that the learned commentator was referring to cases of mere misdemeanors. And he cites in support of this doctrine the case of Rex v. Read, 1 Lev. 9; Rex v. Smith, T. Jones, 163; Rex v. Simons, 10 St. Tr. 416, 19 How. St. Tr. 680; 2 Hawk. P. C. bk. 2, c. 47, § 12; and see Mr. Curwood's note, Id.,—which were all cases of mere misdemeanors. Even as late as this very case of Rex v. Simons, it seems to have been deemed a very unusual course to grant a new trial in any criminal case, where the party was convicted. And in this very case the distinction, as to granting new trials between capital cases and other criminal cases was already recognized; and well it might be, as the maxim applies only to offences

where the party is put in jeopardy of life or limb, which the defendant clearly is not upon an indictment for mere misdemeanors. In Rex v. Mawbey, 6 Term R. 638, Lord Kenyon lays it down expressly that "in one class of offences, indeed, those greater than misdemeanors, no new trial can be granted at all." In a note to the case of Rex v. Inhabitants of Oxford Co., 13 East, 416, note (see 2 Hawk. P. C. bk. 2, c. 47, § 12; and see Mr. Curwood's note, Id.), Mr. East, himself a most able and exact crown lawyer, says: "In capital cases at the assizes, if a conviction take place upon insufficient evidence, the common course is to apply to the crown for a pardon, upon a full report of the evidence sent in by the learned judge to the secretary of state for the home department. But I am not aware of any instance of a new trial, granted in a capital case; and upon the debate of all the judges in Tinckler's Case in 1781 [1 East, P. C. 354], it seemed to be considered that it could not be." And this is admitted to be the received and settled doctrine in England, by every elementary writer upon the criminal law, who treats of the subject. Thus Mr. Chitty says in his work on Criminal Law, that in case of felony or treason, it seems completely settled that no new trial can in any case be granted. But if the conviction appear to the judge to be improper, he may respite the execution, to enable the defendant to apply for a pardon. 1 Chit. Cr. Law (Eng. Ed.) p. 654; S. P. Christian's note to 3 Bl. Comm. 388. The like doctrine is stated by Mr. Russell, in his work on Crimes. 2 Russ. Cr. bk. 6, c. 1, § 1 (2 Lond. Ed.) p. 589. See, also, 2 Tidd. Prac. p. 820; Rex v. Fowler, 4 Barn. & Ald. 273; Rex v. Edwards, 4 Taunt. 309. And to show how inflexibly the doctrine stands in the jurisprudence of the common law, it may be added that in the report made to parliament by the commissioners on the criminal law, at the very last session, it is stated as a known fact, that parties charged with felonies "cannot have a new trial." Indeed, the total silence of the English books upon this subject during the last three hundred years, is as significant as any positive expression could be. Considering the vast number of capital trials, amounting to hundreds every year, during this long period, the total absence of any trace of a motion for a new trial, in any capital case for misdirection of the court, or upon the discovery of new evidence, or because the verdict was against the weight of evidence, or for any other causes not amounting to a mistrial, where the indictment was good, is perhaps the strongest possible proof, that the power was not supposed to exist in any of the courts.

This then was the actual posture of the common law on this subject, and this the received interpretation of the maxim, at the time when it was solemnly incorporated into the constitution of the United States, as an article of a bill of rights. If this clause does not in legal contemplation, prohibit the granting a new trial after verdict in a capital case, then there is nothing in the constitution which does prohibit it, even in cases of acquittal. It may be said, that in practice a new trial is never granted in any criminal case after an acquittal. And as a matter of practice, we know that such is the common course. 2 Hawk. P. C. c. 47, § 12; and Curwood's note, 4 Bl. Comm. 361; Rex v. Mann, 4 Maule & S. 337. But in misdemeanors, it is perhaps still open to inquiry, whether the court do not possess the power, if it should choose to exercise it. See 1 Chit. Cr. Law (Lond. Ed.) 657, and cases there cited; Rex v. Reynell, 6 East, 315; Coventry & H. Dig. "Trial," IX., pl. 5, 6; People v. Olcott, 2 Johns. Cas. 301; Fost. Cr. Law, 22–40. At all events, if any clause of the constitution does not prohibit the grant of a new trial after verdict in capital cases, there is nothing to prevent congress from investing the courts of the United States, with the power of granting new trials in all criminal cases (capital or otherwise), as well in cases of acquittal as of conviction, a power which, I imagine, has never hitherto been generally supposed to belong to that body, and which is truly alarming, both in its nature and its exercise.

Let us now see, how the American authorities stand upon the same subject. And here, it is proper to state, that my researches have not enabled me to ascertain a single case, solemnly adjudged in the United States before the adoption of the constitution, in which after a verdict, regularly obtained, a new trial has been granted in a capital case.

In State v. Hopkins (1794), 1 Bay 373 (see also, State v. Duestoe, Id. 377), the prisoner was convicted of passing a ten pound bill, knowing it to have been forged; and he moved for a new trial; and it was granted by the court. There was another count in the indictment for forgery, upon which he was acquitted. It does not distinctly appear upon the face of the report, that the offence was capital, though the argument of counsel would lead us to that conclusion. But no point was made at the argument as to the power of the court to grant a new trial. It was silently taken for granted on all sides. Now, whether the laws of South Carolina, gave such a power to their court in such cases, is what I have no means of knowing. But it is material to state, that the constitution of South Carolina, contains no prohibition on the subject. There is no clause in it, like the prohibitory clause in the constitution of the United States. The point not having been made, the court did not even advert to it.

In U. S. v. Fries [Case No. 5,126], in 1799, which was a trial for treason in the circuit court of the United States for Pennsylvania district, before Judges Iredell and Peters, a new trial was actually granted. This is an authority directly in point, and its bearing cannot be overlooked. But there are circum-

stances in the case, which greatly weaken if they do not impugn its authority. The counsel for the prisoner contended, that though it was not usual, to grant a new trial in a capital case, it was unquestionably in the power of the court so to do; and for this they cited 4 Bl. Comm. 391 (probably intending page 361); 1 Burrows, 394; 2 Strange, 968; and 6 Coke, 14. Now, it will be found upon examination, that not a single one of these citations justifies the doctrine contended for. The citation from Blackstone (page 391, if the page be not miscited) contains not one word on the subject. If page 361 was intended, the doctrine (as we have already seen) applies only to misdemeanors. The case in 1 Burrows, 394, was a civil suit, and in which, Lord Mansfield discussed the right to grant new trials, with reference to such suits only. The case in 6 Coke, 14 (Arundel's Case), was upon a motion in arrest of judgment, because there was a mis-trial, the jury having in that case (murder) been drawn, not out of the parish, but from the vicinage of the city, or as it is phrased, that the venue ought to have been out of the parish, and not out of the city. And the court adjudged that "the trial was insufficient, and a new venire facias was awarded to try the issue again, for his (the prisoner's) life was never in jeopardy." This therefore was not a motion for a new trial, grounded upon matters, dehors the record, but for matters of error on the face of the proceedings, showing that there had been a mis-trial, or no lawful trial at all; in other words, not by lawful jurors. In Rex v. Gibson, 2 Strange, 968, the defendant was indicted for forgery (of what sort is not stated), and would have moved for a new trial (for what cause is not stated) without appearing in court; and the court refused to hear the motion, on account of his not being present. The same case is reported in 7 Mod. 205, where it is stated to be the forgery of a note, and it must have been a forgery at the common law, which was only a misdemeanor; for it appears that the offence, was charged in the indictment to have been committed in 1713; and it was not until the statute of 2 Geo. II. c. 25 (1729), that forgery of a note was made a capital offence. 4 Bl. Comm. 249. In Fries's Case, the counsel for the government, admitted the power of the court, to grant a new trial in capital cases, and argued solely against the validity of the grounds assigned for granting it in that case. The point was therefore not argued; the clause in the constitution of the United States was not even alluded to, much less reasoned out. The court did not, in giving their judgment, in any manner speak to the point, and the judges were divided in opinion, as to the propriety of granting a new trial, for the cause shown; but Judge Peters yielded his opinion, and acquiesced in granting the new trial. Now, under such circumstances, it is not too much to say, that the court might have been surprised into the decision; and certainly in a case of constitutional law, it ought to have no decisive influence, especially (as we shall presently see) that in the very state of Pennsylvania, in whose constitution a like clause exists, and where this cause was tried, the power has been solemnly denied to exist under stronger circumstances.

In Com. v. Hardy (1807) 2 Mass. 303, the supreme court of Massachusetts granted a new trial, in a capital case, because there had been a mis-trial, the prisoner having been arraigned before an incompetent tribunal, and therefore in legal interpretation, the trial was utterly void, as coram non judice. No one can doubt the propriety of this decision. But it stands wide of the present question.

In Com. v. Green, 17 Mass. 515, the very point of the right of the supreme court of Massachusetts, to grant a new trial in capital cases, after verdict, was brought before the court, and argued at large; and the decision was in favor of the power; but the new trial was denied upon the merits. In delivering the opinion of the court, Mr. Chief Justice Parker said: "It appears by the English text books, and by several decisions cited in support of the position, that in cases of felony a new trial is not usually allowed by the courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here." Now, with the greatest deference for that learned judge, I cannot admit, that this language truly represents the state of the English common law doctrine on this subject. On the contrary, as I understand that doctrine, it is no matter of practice at all (usual or unusual), in respect to which the English courts are at liberty to exercise any discretion; but it is a matter of power, which a fundamental maxim of the common law prohibits the court from exercising, in all cases (subject to the exceptions already adverted to); and which disability, nothing but an act of parliament can remove. It is a matter of right of every British subject, which constitutes a part of his freedom, like other great rights secured by Magna Charta. If it were a matter of mere practice, there might be some ground for an American court to adopt or reject it. But if it is a great common law right, then it stands upon a very different foundation. The learned judge goes into a train of reasoning to show, why in cases of acquittal, no new trial should be granted, in relation to those, whose lives have been once put in jeopardy; and also, to show that in cases of conviction, the same reasons for denying a new trial, do not apply. But I cannot find that he anywhere denies, that if a new trial is granted in a case of conviction, the party is put a second time, in jeopardy of his life. But it is no part of my right or duty, to enter upon the examination of the reasoning of the learned judge in that case,

First, because, in the constitution of Massachusetts, there is no clause similar to that contained in the constitution of the United States; and it is for the supreme court of the state, and not for me to decide what portion of the common law is in force therein. And secondly, because the supreme court of the state, is the appropriate and exclusive judge of its own powers under the constitution and laws of the state; and it may well be, that it has complete power to grant new trials in capital cases, when no such power exists in the courts of the United States. If this were not (as I think it is) a question of constitutional law, under the constitution of the United States, but under the laws of the United States, I can read in the judiciary act of 1789, c. 20, § 17 [1 Stat. 83], that the courts of the United States have not a universal power to grant new trials, but only "power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have been usually granted in courts of law." As far as the reasoning of the learned judge goes, it may show that it may be of great public utility, to have the power to grant new trials, in cases of capital convictions, and not in cases of capital acquittals. But this reasoning must address itself to the framers of the constitution, and not to those who are called upon to administer its actual provisions.

A case has also been cited from Virginia (Com. v. Jones, 1 Leigh, 598), where a motion for a new trial was entertained by the appellate court in a capital case after a conviction; and upon the merits was denied. But to this case as an authority bearing on the present question, two objections may be properly made; first, that the point was not made at the argument, nor considered by the court; and secondly, that the constitution of Virginia contains no prohibitory clause bearing upon the point; and consequently the right to entertain such a motion was dependent wholly upon the local jurisprudence; and whether it was conferred upon the court was matter of local law, turning upon no general principles.

Another case has been cited from the Indiana Reports (Jerry v. State, 1 Blackf. 395), in which a writ of error was brought in a capital case from a judgment of an inferior court, refusing to grant a new trial to the prisoner after a conviction, which was moved for upon the ground that the verdict was contrary to evidence. The supreme court of the state ordered the judgment of the court below to be reversed, and the verdict set aside, and a new trial granted upon the ground that strong doubts remained, whether the testimony supported the verdict. Upon this case it may in the first place be remarked, that a writ of error for the refusal of a court to grant a new trial does not lie at the common law; and so it has been repeatedly held in the supreme court of the United States, the granting of such new trial in any case being a matter of discretion. So that the case must stand upon some peculiarity of the local jurisprudence. And in the next place, though the constitution of Indiana does contain a prohibitory clause, like that in the constitution of the United States, it is not even alluded to in the opinion of the court, short and unsatisfactory as it is; and therefore we cannot know whether the point has ever been argued in that state, or not. Under such circumstances the case can have no intrinsic authority here.

In no one of the cases heretofore cited has the clause of the constitution of the United States been brought under the review of the court, or its interpretation ascertained. But there are cases in other courts of great respectability in which the question has come solemnly in judgment; and the true intent and meaning of the clause has been severely sifted. If I do not greatly mistake, some of these cases will be found to carry an opposite doctrine far beyond the limits necessary for the decision of the present case. One of these cases is People v. Goodwin (1820) 18 Johns. 187, where the whole subject was most elaborately examined by the counsel and the court. It was an indictment for manslaughter, and the jury, after the whole cause was heard, being unable to agree, were discharged by the court without the consent of the defendant. The question was, whether under these circumstances the defendant could be again put upon his trial. On the part of the defendant it was contended that he could not, among other reasons, because the constitution of the United States had declared, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" and that putting the party upon trial was putting him in jeopardy of life and limb. The argument on the other side was, that this clause did not apply to state courts; and if it did, it was inapplicable to the cause, for if the cause was sent to another jury, the defendant would not be twice in jeopardy, nor twice tried, for there never had been a trial, in which the merits had been decided on. The court inclined to the opinion that the clause was operative upon the state courts; but at all events that it was a sound and fundamental principle of the common law, that the true meaning of the clause was that no man shall be twice tried for the same offence; that the true test by which to decide the point, whether tried or not, is by the plea of autre fois acquit, or autre fois convict; and, finally, (what is more direct to the present purpose), that in a legal sense "a defendant is not once put in jeopardy until the verdict is rendered for or against him, and if for or against him he can never be drawn in question again for the same offence." And the court accordingly held that the discharge of the jury before giving a verdict was no bar to another trial of the defendant. Soon afterwards (in 1822) the same question occurred in Pennsylvania, before the supreme court of

that state, in the case of Com. v. Cook, 6 Serg. & R. 577; and what makes it still more direct, as an authority, there is a provision in the state constitution of Pennsylvania exactly like that in the constitution of the United States. The court held that the discharge of the jury, because they could not agree, was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Mr. Chief Justice Tilghman on that occasion said, where a party "is tried and acquitted on a bad indictment, he may be tried again, because his life was not in jeopardy. The court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation." "I grant that in case of necessity they (the jury) may be discharged; but if there be any thing short of absolute necessity, how can the court, without violating the constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?" So that the opinion of the learned chief justice, á fortiori, manifestly is, that if a verdict has been once regularly given upon a good indictment, the prisoner could not be tried again. Mr. Justice Duncan was still more full upon the point. After adverting to the case of People v. Goodwin, and the construction there given to the clause now under consideration, he said, "I feel a strong conviction that the construction here (there) given to this provision of the constitution of the United States, engrafted into the constitutions of Delaware, Kentucky, and Tennessee, and made an article in the bill of rights of this state, is not the true one, and that the provision that no person can be put twice in jeopardy of life and limb, means something more than that he shall not be twice tried for the same offence. It is borrowed from the common law; and a solemn construction it had received in the courts of common law ought to be given to it," &c. "This is not the signification of the words used in their common use nor in their grammatical or legal sense. 'Twice put in jeopardy,' and 'twice put on trial,' convey to the plainest understanding different ideas," &c. "There is a wide difference between a verdict given and jeopardy of a verdict. Hazard, peril, danger of a verdict, cannot mean a verdict given. Whenever the jury are charged with a prisoner, where the offence is punishable by death, and the indictment is not defective, he is in jeopardy of life." And he accordingly held, that in that case the jury, having been discharged, without giving any verdict, for an unjustifiable cause and without necessity, the prisoner was not liable to be tried again. And here I might repeat, á fortiori, if the jury had given a verdict he could not be tried again.

The same question came before the supreme court of North Carolina in State v. Garrigues, 1 Hayw. (N. C.) 241, and very recently again (in 1828, in Re Spier, 1 Dev. 491) before the same court, where the jury in a capital case had been discharged without legal necessity and had given no verdict. The court held that the prisoner could not be again tried. Upon this occasion the cases in the supreme courts of Massachusetts, New York, and Pennsylvania were cited, and the court adopted that of the supreme court of Pennsylvania, and affirmed the exposition of the clause given by that court, that no man shall be twice put in jeopardy, &c. for the same offence. Mr. Justice Hall said: "When the jury were thus charged with the prisoner he certainly stood upon his trial; his life was jeopardized;" and he afterwards proceeded to the exceptions of a discharge from necessity, and when the indictment is bad. Mr. Chief Justice Taylor delivered a more elaborate opinion, insisting that "twice put in jeopardy," and "twice put on trial," convey to the mind several and distinct meanings; for we can readily understand how a person has been in jeopardy, upon whose case the jury have not passed. The danger and peril of a verdict do not relate to a verdict given. When the jury are impannelled upon the trial of a person for a capital offence, and the indictment is not defective, his life is in peril or jeopardy, and continues so throughout the trial.

Now, whatever diversity of opinion there may be among these learned judges as to the right and power of the court to discharge the jury in a capital case from giving any verdict, except in cases of extreme necessity, all of them agree in this, that after a verdict once given by the jury in a capital case, upon a good indictment, the party cannot be again tried for the same offence; and that such an attempt would be a violation of the constitution of the United States. The judges in Pennsylvania and North Carolina go farther, and deem the case within the prohibition of the constitution, if the party is once put upon trial before a jury, and the jury is discharged without giving a verdict, except in cases of extreme necessity.

Upon the question of discharging a jury in capital cases, the supreme court of the United States have in the case of U. S. v. Perez, 9 Wheat. [22 U. S.] 579, adopted the doctrine of the supreme court of New York. Upon that occasion the court did not go into any exposition of the clause in the constitution now under consideration; but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted, and therefore might again be put upon his defence. But I think I may say, that it was never for a moment at that time understood by the court, that if there had been a verdict of conviction or acquittal, the prisoner could be again tried for the same offence. The point was not before the court, and was not at all examined.

In the very recent case of People v. Comstock, 8 Wend. 549, the supreme court of New York treated it as perfectly certain and settled "that in offences greater than misde-

meanors, a new trial cannot be granted on the merits, even where the prisoner has been convicted;" and the court placed the doctrine upon the same basis on which the English cases already cited have put it. I am not unaware that there is some general language attributed to the court in People v. Stone, 5 Wend. 39, which may bear a different interpretation. But it was a mere obiter dictum, and stands overruled by the later and more exactly considered cases.

Now, in the face of these authorities bearing directly on the point, and in which the interpretation of the clause of the constitution was before the court, I confess myself greatly distressed in attempting to give a different interpretation, without reducing the words to an unmeaning formulary, vox et præterea nihil. I find that my brother, the late Mr. Justice WASHINGTON, in the case of U. S. v. Haskell [Case No. 15,321], where a jury had been discharged in a capital case, before verdict, on account of the insanity of one of the jurymen, held that there might be a new trial; and that the discharge was no bar to a further prosecution—upon that occasion, he said that the jeopardy spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereon. And he asserted this to be the meaning affixed to the expression of the common law. Upon this I should greatly doubt as a doctrine universally true, especially when I find that it differs from the doctrine maintained by Mr. Justice Blackstone in his Commentaries (4 Comm. 336), as well as in some other authorities (see, on this subject, Vaux's Case, 4 Coke, 44, 45; Wigg's Case, Id. 45, 46; 2 Hawk. P. C. c. 36, §§ 13. 14, 19. But see 2 Hale, P. C. c. 32, p. 251; Id. c. 55, p. 391; Id., c. 31, p. 243); for, then, there would be no distinction between the plea of autre fois convict and the plea of autre fois attaint, of the same offence; and yet a distinction is manifestly maintained between them. And if it were even true that the plea of autre fois acquit or autre fois convict without a judgment, could not be pleaded technically as a bar to another prosecution or another indictment, it would not follow that it might not be a good bar to a new trial upon the same indictment, when there had already been one trial regularly had upon the ground of the maxim already adverted to; for upon the first trial the life of the prisoner was certainly in jeopardy. Mr. Justice Washington afterwards says, that the article does not apply to a jeopardy short of a conviction; which may be true, if we are to understand by conviction (as is certainly the legal sense), a verdict against or confession by the party of record. See 4 Bl. Comm. 362; 4 Coke, 46; 2 Hawk. P. C. c. 36, § 9; 1 Chit. Cr. Law (2 Lond. Ed.) 462. But what with me is decisive against the construction of the clause of the constitution given by Mr. Justice Washington is, that he puts it as clear upon his interpretation, that after a verdict of acquittal in a capital case (upon a good indictment) the court might still award a new trial against the prisoner. And he puts the case (to illustrate this doctrine) of an acquittal of the prisoner procured by his own fraud. Now, I am not aware that the maxim has ever received such an interpretation from any other judge; and all the authorities which I have seen are against it. I confess my extreme repugnance to adopt any interpretation of the maxim, which shall lead to such consequences. It would remove the whole force of the prohibition, and submit the whole subject in criminal trials to the discretion of the court. I have always understood that the great object of this clause was, on the contrary, to take away all discretion, and to forbid all courts of the United States from trying a man twice upon a good indictment for the same offence. It has been supposed that in all cases of conviction there may be ground to grant a new trial, because it will always be in favor of the prisoner. If this were true, the difficulty would still remain, that the constitution does not provide for a new trial only where it is favorable to the prisoner. If the twice being put in jeopardy is referrible only to cases after judgment, and not after verdict; and before judgment, even a new trial may be granted, though it may be unfavorable to him. Cases of conviction may readily be conceived, in which a new trial may be injurious to the prisoner. If, after conviction, it may be granted at his request, it may also be granted without his consent. Suppose a man indicted for murder and convicted of manslaughter; can a new trial be granted at all, unless by putting him twice in jeopardy of his life? Suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offence), and there is a conviction of the robbery without such aggravated circumstances, can a new trial be granted, upon the application of the government or of the prisoner? Many other cases of a like nature may be easily put, where the offence in an aggravated form is a capital felony, and without such aggravations not. Yet the power to grant a new trial in cases of conviction, if it exists at all, is general, and may be required by the government as well as by the prisoner.

Upon the whole, having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction. My judgment is, that the words in the constitution, "Nor shall

any person be subject, for the same offence, to be twice put in jeopardy of life or limb," mean that no person shall be tried a second time for the same offence, where a verdict has been already given by a jury. The party tried is in a legal sense, as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offence as a capital offence upon a good indictment, and have delivered themselves of the charge by a verdict. In this respect I follow the doctrine of the supreme court of New York; and the doctrine of the supreme court of Pennsylvania and North Carolina goes not only to the same extent, but includes cases where the party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity. This too is the clear, determinate and well settled doctrine of the common law, acting upon the same principle, as a fundamental rule of criminal jurisprudence. I deem it a privilege of inestimable value to the citizen; and that it was introduced into the constitution upon the soundest principles of prudence and justice. But if it were otherwise, it is my duty to administer the constitution as it stands and not to incorporate new provisions into it. If this clause does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial whether the verdict is of acquittal or of conviction of the offence; and the same party may, in the discretion of the court, be put upon his trial ten, nay, twenty times, if the court should deem it fit. It was (as I think) among other things, to get rid of the terrible precedents on this subject alluded to by Lord Hale, and even acted upon by him, in the reign of Charles II., in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was engrafted into the constitution. The constitution has also in another clause declared, that "no fact once tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The only modes of making this re-examination known to the common law, are by a writ of error and a new trial, and if by the common law there cannot be a new trial in a capital case, after a regular trial once had upon a good indictment, as seems to me to be conclusively established by the English authorities already cited, then this clause also carries in its bosom another virtual prohibition.

Lest I should be thought to have overlooked the case of U. S. v. Daniel, 6 Wheat. [19 U. S.] 542, where the circuit court divided upon the motion for a new trial, I beg only to say that the point whether the circuit court had jurisdiction to grant a new trial in a capital case, was not before the court. It was a mere certificate of division of opinion of the circuit court; and the supreme court held that it had no jurisdiction to entertain the point certified, so far as it regarded a new trial.

If the language used by me in the Commentaries on the Constitution (3 Story, Const. c. 38, § 1788) should be thought to inculcate a different doctrine, I can only say that I do not so understand it. I have no doubt that there are cases where there may be a new trial; as in cases of a mis-trial by an improper jury. See People v. M'Kay, 18 Johns. 212; 2 Hawk. bk. 2, c. 36, § 15; Rex v. Keite, 1 Ld. Raym. 139; 2 Hawk. P. C. c. 27, § 104; Id. c. 47, § 42; Arundel's Case, 6 Coke, 14. But in the language there used, it should be considered that the author was not summing up his own private or judicial opinions, but only gathering together the opinions of others, which had come to his knowledge, to illustrate the text. But if there be any erroneous opinions inculcated in those Commentaries, which upon more deliberate examination I should deem unfounded, I trust that I shall be the last person to insist upon them as obligatory or correct. My duty, as a judge, is to pronounce such a judgment as my conscience dictates, without reference to any preconceived opinions. But I freely admit that I see nothing in that passage of the Commentaries, so far as relates to the granting of new trials, which I deem incorrect, or which I wish to retract.

It may be thought by some, that there may be great inconvenience in the establishment of this doctrine. But if there be, it is for those who possess the power to amend the constitution to apply the proper remedy. For myself, I entertain great doubts whether, in the actual administration of public justice, the present doctrine would not be far more safe and useful than an unlimited power to grant new trials in all capital cases, at the mere discretion of the court. It may be, that a court may sometimes err in the proper administration of the law; and it may also err in granting or refusing a new trial. But the consciousness that the trial is final, will always impress every court, mindful of its duty, with the utmost caution in all its opinions and judgments in capital cases, where the result may be unfavorable to the prisoner. It will naturally induce it to lean to the side of mercy; and it will look anxiously to the dictates of the law. But still if, after all, errors should intervene, it will be but the common infirmity of the administration of all human justice. And the prisoner, even in such a case, will not be wholly without redress. He may apply for a pardon or mitigation of the sentence, to the executive; and it cannot be doubted that the court itself, if conscious of any serious error, would cheerfully aid in his application. Hitherto this ultimate appeal to the pardoning power has been deemed satisfactory and safe in the land of our

ancestors down to our own age; and it has been deemed equally satisfactory and safe in all those states whose jurisprudence does not permit a new trial in capital cases under like circumstances. But whatever might be my opinion as to the authority of this court to grant a new trial in capital cases generally, I shall, under the present circumstances go over all the grounds insisted upon by the prisoner's counsel (some of which being in arrest of judgment, are indispensable to be disposed of before judgment), because if any error in point of law has been committed by the court, injurious to the prisoners, or upon established principles of law, they ought (if the court could grant it) to have a new trial, I should feel it my duty to make a direct application in their behalf to the executive for a pardon, to redress the error. God forbid that any man in this country should suffer death against the law, from the mere infirmity of judgment of those who are appointed to preside at his trial.

The first cause assigned for a new trial is the discovery of new evidence. For the present I shall pass over this point, intending to examine it when all the other grounds shall have been passed under review.

The second cause is, that the prisoners were not permitted to be tried separately, although they made a motion for this purpose. Now, this has been long since settled by the supreme court of the United States to be a matter, not of right, but of sound discretion to be exercised by the court. So it was held in the case of U. S. v. Marchant, 12 Wheat. [25 U. S.] 480, upon the fullest consideration. The sole ground upon which the present motion was made, was that by means of separate trials, the prisoners wished and intended to make use of the testimony of each other in their defence. Now I was of opinion, and still am, that the reason assigned was wholly, in a legal point of view, inadequate to justify the court in the exercise of such a discretion. The charge was a charge of a joint piracy on the high seas, committed by all the prisoners, found by the grand jury upon their oaths, and therefore to be taken primâ facie to be well supported by competent evidence before them. There is no pretence now to say, when the trial has been had, that there was not a solid ground of probable cause to put all the prisoners in the indictment as confederates in the act, or that any of the prisoners were included upon mere false suggestions, to evade their testimony. It is clear by law that confederates in the same piracy, put upon trial at the same time, are not competent witnesses for each other. And I do exceedingly doubt whether in point of law the court possess the right to make witnesses competent in a trial by any act of their own, who would otherwise be incompetent. The government has rights as well as the prisoners. The government is not to be deprived of its rights merely because the prisoners request a separate trial. In a joint trial the government has a right to exclude all the prisoners from being witnesses. If the court deprive the government of this right, it is an exercise of power which may sometimes subvert the purposes of justice. It certainly does not necessarily promote it. It is no just cause of complaint on the part of prisoners, that they stand jointly indicted; for they can rarely be so, except where they have mixed themselves up with the criminal transaction in a manner which in the sober judgment of the grand jury implicates them in the common guilt. I have never before known a case, in which the sole ground for a separate trial has been to make the witnesses competent for each other. In the only cases in the circuit court in which a separate trial has been granted, there has been an express disclaimer of using the confederates as witnesses; and the defence has been exclusively placed upon several and distinct grounds. In the present case the main argument was at the trial, and now is rested upon a defence common to all the prisoners, viz. that the robbery was not by the Panda or her crew; but by some other vessel. If, therefore, the question were now to be decided over again, I should, under the circumstances, refuse to concur in a separate trial of the prisoners. I should doubt the legal right so to do, for the cause assigned. And I cannot but think that the granting it in a case of this sort (in which, if in any case, there ought to be a joint trial), would be an abuse, and not a just use of a sound discretion.

The third, fourth and fifth causes embrace in different forms the same subject matter. The prisoners, who are all foreigners and strangers to our institutions, and do not, as far as we know, speak or understand the English language, and with whom the court could communicate only by an interpreter, were, after the indictment was found against them, brought into court and were informed that they were entitled to copies of the indictment, and should be furnished with them two full days before they were required to plead; and that they were entitled to counsel to assist them in the defence, and that the court would assign such counsel as they desired,—and accordingly the learned gentlemen, who have since conducted the defence, were so assigned; and that at a subsequent time, after two full days, they would be arraigned and required to plead to the indictment. Accordingly, after this period had elapsed and the copies were duly furnished, the prisoners were brought to the bar, and in the presence of their counsel were arraigned, and upon their arraignment they severally pleaded not guilty. But, as is said, the clerk of the court upon this arraignment did not further proceed, upon their pleading not guilty, to

ask the prisoners how they would be tried, so that they did not make the usual and common reply, "By God and the country." The district attorney then moved the court to assign a time for the trial of the prisoners, and accordingly, at the request of the prisoners' counsel, a particular day, named by themselves, was assigned for the trial. It was then stated to the prisoners, that they were to be tried by a jury, that the list of the jurors would be furnished to each of them (and they were accordingly furnished) two full days before the trial, that they might exercise their full right of challenge. Accordingly at the time assigned the prisoners were brought to bar for trial; they were then distinctly and in the usual manner informed by the clerk, that they were then set at the bar to be tried, and that the good men and true, whom he was then to call, were to pass between them and the United States at the trial; and that if they would object to any of them, they must do it as they were called, and before they were sworn. The jury were accordingly called, and not the slightest objection to the trial by the jury was intimated, either by the prisoners or their counsel; but the prisoners proceeded, with the assistance of counsel, to make their challenges, (amounting, I believe, in all, to thirty-six), and all the jurors sworn and impannelled were those to whom they declared that they had no objection. The whole cause was then most elaborately examined and heard; the fullest defence made; and the jury returned their verdict, as it appears upon the record. Now, the objection is, not that no similiter is joined (for it is admitted that this is not necessary) but that there is no issue to the country, until the prisoners have expressly put themselves, by the words already quoted, "upon God and the country;" and that until such an issue there can be no trial. In order fully to understand the nature of the objection it may be well to state the course of the proceedings at the common law in England; and this may be taken from the very ample account given by Mr. Justice Blackstone in his Commentaries (4 Comm. c. 25, pp. 322–331; Id. c. 26, pp. 332–341). See, also, 2 Hale, P. C. c. 43, pp. 314–322; Id. c. 28, pp. 216–225. When the prisoner is brought into court to answer the indictment, he is said to be brought in to be arraigned thereon; for "to arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him by the indictment." The indictment is then read to him, and when called upon to answer, he either stands mute or confesses the fact (which we may call incidents to the arraignment), or else he pleads to the indictment. Regularly a prisoner is said to stand mute upon being arraigned upon a capital felony, when he either (1) makes no answer at all; or (2) answers foreign to the purpose or with such matter as is not allowable, and will not answer otherwise, or (3) what is most material to the present purpose, upon having pleaded not guilty, refuses to put himself upon the country. If he says nothing, the court ought ex officio to impannel a jury to inquire, whether ne stands obstinately mute, or whether he be dumb ex visitatione Dei. If the latter is the case the court proceed to the trial, and examine all the points, as if he had pleaded not guilty. If he be found obstinately mute, in cases of treason and petit larceny and misdemeanors, his standing mute was deemed equivalent to a conviction, and he received the same judgment and execution. In other capital felonies the prisoner was not anciently deemed convicted, but for his obstinacy he received the terrible sentence of penance, or peine forte et dure (as it was called) which in substance was, that he was put into a low, dark chamber, laid on his back naked, and a weight of iron, as great as he could bear, placed on his body; he was to have no sustenance save only on one day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door; and in this situation this should alternately be his diet till he died. And this remained the law in England, though rarely put in force, until 12 Geo. III. c. 20, when it was enacted that all persons who should stand mute on being arraigned for felony or piracy, should be deemed convicted of the offence and punished accordingly.

We next come to consider the general issue, as it is called, which is the plea of not guilty. When upon his arraignment the prisoner pleaded not guilty, the clerk immediately enters upon the record "Not guilty," or as it stood anciently abbreviated, "Non cul" for "non culpabilis"; and immediately the reply of the government, supposed to be [3] given viva voce, that the prisoner is guilty (and by Blackstone supposed to be indicated by the abbreviation "cul. prit."), though in point of fact such reply is never formally made. When this is done issue is then said to be joined; for Mr. Justice Blackstone informs us that, "immediately upon issue joined, it is inquired of the prisoner, by what trial he will make his innocence appear," which the clerk does by the words, "How wilt thou be tried." And indeed this must necessarily be so, for until an issue is virtually joined between the parties, there is nothing to be tried, and of course there can be no trial, until something is to be tried. And the question propounded becomes thus intelligible. So that the remark of the district attorney is critically correct, that there is a joinder of the issue, before we arrive at this stage of the arraignment. See 1 Chit. Cr. Law, 416. In order to as-

[3] Mr. Christian's account in his note to 4 Bl. Comm. 340, note 1, appears to me far more probable than that of Mr. Justice Blackstone.

certain why this inquiry is made, it is necessary to state that anciently in England the party accused had his choice of being tried in one of two manners, by battel, or by a jury. And in those times of course it was indispensable that he should be put to his election. If he chose the trial by battel, he was accustomed to say that he would be tried by God; if by a jury, that he would be tried by the country. But since the trial by battel was abolished (as it has been for ages upon indictments), there can be no trial but by a jury; and hence in England, where the old form was still retained, the refusal to answer that he would be tried by God and the country was treated as a refusal to put himself upon the inquest in the usual manner, and therefore as legally standing mute. Now in America, the trial by battel was never introduced at all; and the only trial since the first settlement of the country has always, in criminal cases, been by a jury; and could not be in any other manner. But in England the right of trial by battel in certain cases continued down to our own day, viz. in cases of appeals and approvements; and as late as the case of Ashford v. Thornton, 1 Barn. & Ald. 405, in 1818, was acted upon, though it has been since abolished by a recent statute. The continuation of the form in England may thus be easily accounted for; and though in America it has very probably been acted upon in many states, it would be proper only, where the common law rule that the party might otherwise be deemed to stand mute, was in force; for I believe that the punishment of peine forte et dure, never was adopted in any part of America. And it seems to me, that in all those states, where the constitution provides that the trial of all crimes shall be by a jury, and the prisoner pleads not guilty, it is a mere mockery to ask him how he will be tried, for the constitution has already declared how it shall be.

But be this as it may under the state governments, I am clearly of opinion, that the form is wholly unnecessary under the constitution and laws of the United States in the federal courts. The constitution has expressly declared, "that the trial of all crimes except in cases of impeachment shall be by jury." It is imperative upon the courts, and prisoners can be lawfully tried in no other manner. As soon, therefore, as it judicially appears of record that a party has pleaded not guilty, there is an issue in a criminal case, which the court are bound to direct to be tried by a jury. The plea of not guilty does import of itself a tender of a proper issue, and the attorney for the government, in demanding a trial of that issue, necessarily requires it to be by a jury. And so in point of fact, the plea of not guilty is always understood by the court. When the clerk enters it upon record, in making up the record he usually adds to it "and of this he (the prisoner) puts himself upon the country." And in misdemeanors this is the common course in England. And why? Plainly because in the case of a misdemeanor there never could be any other trial than by jury; and therefore, in cases of misdemeanor, the prisoner never is asked how he will be tried; but his plea of not guilty is of itself an issue to the country. The laws of the United States establish this to be the true view of the matter, at least in the courts of the United States.

The crimes act of 1790 (chapter 9, § 30) provides that if any person shall be indicted for treason, and shall stand mute or refuse to plead, or shall challenge peremptorily above thirty-five of the jury; or if any person be indicted of any other capital offence, &c., if he shall stand mute or will not answer to the indictment, or challenge peremptorily above twenty of the jury, the court in any of these cases, shall, notwithstanding, proceed to the trial of such person, as if he had pleaded not guilty, and render judgment thereon accordingly. And the act of 1825, c. 276, § 14 [3 Story's Laws, 2002; 4 Stat. 118], provides the like rule in regard to offences not capital, declaring that in such cases the court shall proceed to the trial of such person as if he had pleaded not guilty, and upon the verdict render judgment accordingly. Both of these statutes clearly establish that the party is not to be understood to stand mute, when he has pleaded not guilty; and that as soon as the plea of not guilty is put in, the cause must be tried by the jury. It is impossible, consistently with the language of these acts, for the court to adjudge that the party stands mute, when he pleads not guilty; and if he does not, in contemplation of law, stand mute after such plea, then the plea of not guilty includes every thing essential to put him on trial by the jury.

It ought to be added, that the present, being a charge of piracy on the high seas, was not originally or practically within the ancient rules of proceedings at the common law on land. On the contrary until the statute of 28 Henry VIII. (chapter 13), piracies on the high seas were exclusively triable in the admiralty according to the course of the civil law; and that statute first made them triable by a jury in the common form of jury trials. 4 Bl. Comm. 71, 269; 1 Hawk. P. C. bk. 1, c. 20, §§ 17, 18. So that the trial by battel was never applied to them; nor until the statute of Henry VIII. were the forms of arraignment consequent thereon at the common law. Besides, what is the reason, even at the common law, of asking the prisoner how he will be tried? It is to ascertain whether he consents to a trial by jury. If he does consent in any clear and determinate manner, it is manifest that he cannot object that the form has not been gone through, if the substance has been preserved. Now, in the present case there is the most ample proof of a consent, if consent were necessary, by the acts of the prisoners, and of their counsel before and at the trial. And if the prisoners had refused to consent, the trial must have

been in the same manner precisely as it has been had. But I confess for one, that I deem it a little short of an absurdity in the courts of the United States to call upon the prisoners, after they have pleaded not guilty, to say how they will be tried, when the constitution and laws have peremptorily required the trial to be by jury. Suppose the prisoners had been asked, how they would be tried, and they had answered that they wished for no trial at all; must not the court have proceeded to try them upon the plea of not guilty? Suppose they had answered that they wished to be tried by the court, could the court have tried the cause otherwise than by jury? Suppose they had been silent as to how, and when, and whether, they should be tried, could the court have done otherwise than order a trial by jury? We have no authority to inflict the punishment of the peine forte et dure (and I trust our courts never will have it), and our laws manifestly contemplate no such thing as either legal or necessary. It appears that by a recent statute in England (St. 8 Geo IV. c. 28) it is provided that, if a person being arraigned upon an indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without further form, be deemed to have put himself upon the country for trial. And this is precisely what our laws, in my judgment, do in effect prescribe. The provision was indispensable in England, since the refusal of the prisoner to state, after he had pleaded not guilty, how he would be tried, was deemed in law as standing mute. In our law he cannot be deemed to stand mute, when he has pleaded not guilty. The constitution decides how he shall be tried, independent of any election on his part. The plea of not guilty puts the party for all purposes upon his trial by jury. My judgment, therefore, is that there is nothing in this objection.

The sixth cause respects the overruling by the court of a question asked by the prisoners' counsel, the relevancy of which was not perceived by the court, and the counsel refused to state it. The fact afterwards came out (I believe) incidentally upon the answer to other questions. But at all events, the relevancy of the question not having been shown at the time (and indeed not even now at the argument), it is clear that there is no ground to say that it ought to have been put. It would otherwise happen, that the right of cross-examination might extend to everything, whether it were material or immaterial, which had occurred in the whole course of the witness's life.

The seventh objection relates to certain supposed errors in the instruction of the court. The first specification respects the supposed remark of the court that Perez was not an accomplice. What the court actually said was this—After stating to the jury that a conviction ought not to be upon the naked testimony of an accomplice, unless strongly corroborated by other evidence or circumstances, the court said, that it was not to be taken as a matter of course that Perez was an accomplice. That was for the jury to consider. Perez, in his testimony, utterly denied that he was an accomplice; the defence was, that the crime was never committed by any of the crew of the Panda; and if the crime never was committed at all, Perez could not be an accomplice. The government alone insisted that Perez was an accomplice. And under these circumstances, the jury were to say, whether he was an accomplice or not, upon the evidence. It is now argued (as I understand it) that Perez might have been an accomplice, although the crime was never committed. This appears to me, in point of law, wholly unmaintainable—and at all events, the court left the matter to the jury upon the whole facts, exactly as the evidence and circumstances placed it before them.

The next specification is to the supposed instruction of the court as to the effect of the non-production of the written examinations, under the circumstances. These circumstances took place in the presence of the court and jury. The counsel for the prisoners made a written demand of the district attorney to produce the examinations of Perez and several of the prisoners taken at Fernando Po; the district attorney offered to produce them, if the prisoners would read them, or suffer them to be read, to the jury. The counsel for the prisoners declined to receive them upon that condition. But they afterwards stated that the district attorney might, if he chose, read them to the jury, as papers produced by him; and they would waive any objection to the examination of Perez being under oath. The district attorney declined so doing, saying he was not in the habit of using the confessions of prisoners against them. Such was the substance of the proceedings—and the court were asked, under these circumstances, to instruct the jury that the suppression of the examination of Perez by the district attorney, afforded a legal presumption, that if produced, that examination would be unfavorable to the credit of Perez. Whether the district attorney was right or not in insisting upon the withholding of the examinations, unless upon the terms proposed by himself; and whether the counsel for the prisoners were discreet or not in their offer, which was not accepted, are matters with which the court had nothing to do, and upon which they were not bound to express any opinion; and with which I do not now intermeddle, for they are matters properly resting in the discretion of the counsel on each side. But the court left the whole matter to the jury, instructing them that they might draw such inferences from the circumstances in evidence as they pleased, and which were warranted by them, provided they were not unfavorable to any of the prisoners; and that they ought not to presume any thing from these circumstances

against the prisoners. In this instruction I cannot now perceive any thing objectionable. And I know not how, consistently with the rules of law, the court could have told the jury that the circumstances afforded a legal presumption against the credit of Perez.

Another specification is the supposed instruction of the court as to Captain Trotter's liability for loss and damages occasioned by the capture of the Panda. At the trial a vast deal of argument was urged to the jury by the closing counsel for the prisoners, to establish gross misconduct on the part of Captain Trotter, and his liability to losses and damages for his acts; and thus to found imputations that he had a vital interest in this prosecution, and to influence the testimony of the witnesses. And upon the present motion, the same line of argument has been with even more zeal and earnestness pressed upon the court. At the trial the court said, that they did not perceive that these charges were made out by the evidence, but of that the jury would judge for themselves. But that the guilt or innocence of the prisoners at the bar did not depend upon the good conduct or malconduct of Captain Trotter. That Captain Trotter may have conducted himself incorrectly, and yet the prisoners may be guilty. And on the other hand, he may have had probable cause for the capture, and have acted bona fide, and with the most correct intentions, and yet the prisoners may be innocent. This instruction I then thought, and still think, entirely correct; and I cannot think that it was at all injurious to the prisoners.

Another specification is the supposed instruction of the court that certain confessions of the prisoners were proper for the consideration of the jury. It is to be observed, that none of these confessions were brought out by the district attorney against the prisoners upon the direct examination of the witnesses—but they were all brought out upon the cross-examination of the prisoners' own counsel. The court stated to the jury that these confessions were not to be viewed in any different light from their coming out upon the cross-examination, from what they would be, if they had come out upon the direct examination. But that these confessions, so far as they were not reduced to writing, were in the case, and were to be considered by the jury. And afterwards, upon the suggestion of the prisoners' counsel (whether rightly or not I do not now say in point of law) that the confessions, reduced to writing, and not now produced, ought to be disregarded by them, although they came out upon direct interrogatories of the cross-examining counsel. In this instruction I can as yet perceive no error; though I confess that upon farther reflection, I do doubt, whether, under all the circumstances of the case, the court were right in directing the jury to disregard the confessions of the prisoners which were reduced to writing and not produced. But if there was any error in this direction, it was manifestly favorable to the prisoners.

The next specification referred to the same matter of the suppression of the said written examinations and confessions of the prisoners by the district attorney, under the circumstances above-mentioned, and called upon the court to instruct the jury, that, under the present circumstances, the suppression of these writings afforded a legal presumption that, if the same were brought forward, the effect thereof would be in favor of the prisoners. The court left the matter at large to the jury, in the manner above-mentioned, as matter of fact, and presumption of fact, to be weighed by the jury, but with the express direction that they ought not to presume any thing unfavorable to the prisoners. There was no matter of presumption of law in the case, but of presumption of fact only; and I am entirely satisfied that the court did all that it ought in law to have done in this direction.

The next specification is upon the same subject, and required the court to decide, that the district attorney ought to have put these writings into the case, or the parol testimony of the same confessions, which had been proved to be reduced to writing, ought to have been wholly rejected, and considered out of the case. The court did, under the circumstances (as above stated), direct the jury to disregard the parol testimony of any of the confessions which were reduced to writing. The district attorney did offer to put these writings into the case, if the prisoners' counsel required him to do it. So that there is no legal ground of complaint on this head.

Another specification respects the confessions, stated to have been made by the witnesses, or one of them, of some of the prisoners at the bar, without naming them, being allowed to go as evidence to the jury. Now, the confessions thus referred to, were brought out upon pointed interrogatories in the cross-examination: and the counsel for the prisoners did not follow up the cross-examination, and ask who the particular prisoners were. Upon examining my minutes of the testimony, I find that Domingo said, that he heard some of the crew confess to the captain of an English brig, that they had robbed an American brig. They had a Portuguese interpreter, who spoke English and Portuguese. The first five that were captured, confessed. Some of them are here. He afterwards stated, that some of them were examined on board, and some on shore, at Fernando Po: and he proceeded to give the names of those who confessed at Fernando Po, viz. Montenegro, Garcia, Castillo, Perez, Delgado, and Guzman. Now there was evidence, in other parts of the testimony, to show that the five who were first captured were Montenegro, Garcia, Castillo, Perez, and Delgado. Silveira (another wit-

ness), according to my minutes, testified to various confessions. Among others, he stated that he went in an English transport, with five others, viz. Delgado, Perez, Garcia, Montenegro, and Castillo, to Ascension; that some of the prisoners at the bar told him at Ascension, that they had robbed the Mexican. He stated, also, that they had confessed it to him, not once or twice, but several times; that the three of the prisoners, who were present at the governor's house at Fernando Po, said they had robbed the Mexican; that the day before they denied it, but this last day they all confessed it, and laid the blame to the captain and officers; that the declarations at the governor's house were not taken down in writing. Now these are but part of the confessions stated in the case, for Perez stated others; and the whole matter, as matter of evidence, was left to the jury under all the instructions in the case; and the court instructed the jury on this point, that if the persons who made the confessions at any time were not identified, but the statement was only that some did, or three did confess, not being named, and not being identified, such confessions could not be applied to any of the prisoners in particular as proofs of his guilt; but the evidence under such circumstances being in the case, might be weighed by them, so far as it applied to the identification of the Panda as the vessel which committed the robbery of the Mexican. Upon the most mature reflection, I am not persuaded that there was any error in this instruction.

The next specification is, that the court declined to instruct the jury, under the circumstances stated in the instruction prayed, that a legal presumption arose that the log-book of the Panda was taken at the same time and place, and by the same captors, and that they have it, or have destroyed it. Now, without dwelling upon the manifest impropriety of giving this instruction as asked, as it assumes certain facts, not admitted to be proved, the court, in my judgment, would not have been justified in giving any such instruction as a matter of law. But the testimony, so far as there was any evidence on the point before the jury, positively denied any possession of the log-book by the captors; and Mr. Quentin directly stated, that it was not on board at the time when he boarded and captured the Panda; and that he never heard of its having been obtained afterwards. And there was not a tittle of proof upon the other side that it had come to the possession of the captors. The court did, however, instruct the jury, that if they did believe that the log-book of the Panda had come to the possession or power of the captors, or of the government officers, their omission now to produce it was a circumstance unfavorable to the captors, and favorable to the prisoners. It appears to me that this was going to the extreme limits of the law in favor of the prisoners.

The next specification being to the same point requires no further notice. The court gave an instruction in favor of the prisoners, if the log-book was proved to be in the possession or power of the government prosecutors.

The next specification is, that the court admitted parol evidence to establish the time of the sailing of the Panda on her voyage from Havana to Cape Mount, and to prove the course and termination of the voyage, without proving that the log-book was missing or lost. This objection is, as I understand it, founded upon the notion that the log-book is not only evidence of these facts, but the only proper evidence, and the best evidence, if it can be produced. I do not so understand the law. The log-book is in no just sense proof per se of the facts therein stated, except in certain cases provided for by statute. It is not evidence under oath. It does not import legal verity. It could not, if it had been produced by the prisoners, have been per se admitted (if objected to) as evidence of the facts stated therein. It would be mere hearsay not under oath. It might be introduced against those of the prisoners, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defence. But I am yet to learn that parties can thus create evidence for themselves by inserting facts in a log-book. I know of no such rule of law; and no authorities are introduced to establish its existence. In the most common class of cases in which the log-book is used, those of insurance, the log-book has never, to my knowledge, been allowed (if objected to) as proof of the loss for the assured. The officers or others of the crew, constantly prove all the facts by parol. The log-book is often called for by the underwriters to contradict their statements on the stand; or to control or weaken the influence of these statements.

The next specification is, that the court declined to instruct the jury that under the circumstances proved, resistance, flight, or the destroying of the Panda by her officers and crew would be exercising the right of self-defence on the part of the said officers and crew. For myself, I confess that it is utterly inconceivable to me, how the court could give any instruction in the manner required by this prayer. What were the circumstances? They were matters of fact to be ascertained and fixed by the jury. The court could not affirm what they were, or, before they were ascertained, declare to what extent the right of resistance might go. The court cannot judicially know why and wherefore the flight of the Panda's crew took place. It may conjecture that the jury have thought that it was occasioned by a fear of being captured, as pirates. But we cannot say so. Neither can we, nor could we at the trial say why it was done, or whether it was done for other justifiable reasons. It did not in-

deed appear from any evidence in the case, that there was any resistance to capture by the Panda's crew. And the defence expressly denied that there was any intention to blow up the vessel. On the contrary, an elaborate argument was introduced to establish the contrary. It is a little difficult, therefore, to see why these ingredients should have been thought so essential to the merits of the case presented in behalf of the prisoners. But the court left the whole matter to the jury, and stated that if the Panda's crew did believe and act upon the ground, that there was an intended hostile attack by public enemies or by pirates, their right of resistance and self-defence in any manner which they might deem most beneficial, was not to be doubted. As I understood the application of the prisoners' counsel, the court enlarged the prayer from a mere hostile attack (which was supposed to mean an attack of public enemies) to an attack also by pirates. But in every view my opinion is that the court stated the law correctly, and could not properly have gone farther.

The next and last specification under this head is that the court declined to instruct the jury that the failure of the government to produce the witness, who (it was testified) saw the match applied for the purpose of blowing up the Panda, and removed it, afforded a legal presumption against the truth of the alleged attempt by the prisoner Ruiz to destroy the Panda. Now it appears to me, that if there was any presumption at all to be drawn from this failure to produce the witness, it was a presumption of fact, and not a presumption of law; and as a presumption of fact, it was most strenuously urged to the jury by the prisoners' counsel. The argument now is, that although Mr. Quentin, who was upon the stand, stated that he was on board at the same time with the witness, that he saw the smoke coming from the cabin, and the absent witness go down, and bring up the match, and many other circumstances to establish an intention to set the Panda on fire and blow her up; yet that his testimony was not the best evidence on this point, and ought to be rejected; and not only so, but the failure to produce the witness afforded a legal presumption against the truth of the alleged attempt to destroy the Panda. It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence in proof of a fact, which leaves evidence of a higher and superior nature behind, in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. So, oral testimony is inadmissible to prove the contents of a written instrument, when the paper is in the possession or power of the party; for it is not of so high a nature as the paper itself. But the rule does not apply to several eye witnesses testifying to the same facts, or parts of the same facts, for the testimony is all in the same degree; and where there are several eye witnesses to the same facts, they may be proved by the testimony of one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent. And to apply the principle to the present objection, Mr. Quentin was a competent witness to prove all the facts, which he knew, which went to establish an intention to blow up the Panda. That another witness might have proved more and other facts to the same purpose, which might have been more full and satisfactory and conclusive to the jury, does not render Mr. Quentin's testimony incompetent. The defects in the evidence, whatever they might be, are very proper matters of observation to the jury, to create doubts or justify disbelief of any intention to blow up the Panda. But the jury were to judge of all these matters in weighing the whole evidence on this particular point. A witness who has seen a party write several times is a good witness to prove his handwriting. But a clerk in the counting-room of the party, who has seen him write innumerable times, would be in many cases a more satisfactory witness to prove the handwriting. But nobody can doubt that each would be a competent witness of the facts within his knowledge to prove the handwriting.

Another cause assigned for a new trial is that the jury were furnished with newspapers in their room, and did read them during the pendency of the trial; and subsequently another ground was added in a supplementary paper, that the jury drank ardent spirits while they had the cause in charge. It is important to a right understanding of these objections, to state the real facts and circumstances attendant upon the trial. The trial lasted, I believe, about fifteen days, during which time the jury were kept together night and day in the custody of officers. Some of them were engaged in very pressing business, which required them to communicate with friends respecting that business; and one or more of them was in ill health during the trial, and was obliged to have the aid of a physician. These circumstances were stated in open court, and it was agreed between the counsel in open court, that the jury might have all reasonable refreshments during the trial, that they might communicate on business with their friends, and write and receive papers from their friends on business, the papers being previously examined, and the conversation witnessed and heard by one or more of the officers of the court. And the court requested the jury during the trial, and until the arguments were heard and the charge given, not

to converse with each other on the subject of the trial, in order to keep their minds open to the last moment to all the merits of the cause. While the jury were thus kept together, they were allowed by the officers of the court attending them, to read the public newspapers, the officers first inspecting them and cutting out every thing that in any manner related to the trial. And it now appears, as well from the affidavits of the officers, as from the affidavits of the jurymen, that in point of fact they never saw any thing in any newspaper relative to the trial. The officers granted the indulgence to read the newspapers, under a mere mistake of their duty, and as soon as the charge was given by the court, the jury were not allowed to see any newspaper, until after they had delivered their verdict in open court. So far, then, as reading the newspapers went, there is not the slightest reason to believe that it could or did in fact in any manner whatsoever affect the verdict or influence the jury. The evidence, as far as it bears on the point, negatives any supposition of this sort. And, speaking for myself, I must say that considering the protracted nature of the trial, and the necessary privations of the jury, and the importance of keeping them when out of court from too constant meditation upon the subject of the trial while it was yet imperfectly before them, I do not doubt that the indulgence had a tendency to tranquillize their minds, and to keep them in a state of calmness and freedom from anxiety highly favorable and useful to the prisoners themselves. Without doubt it was a great irregularity in the officers of the court, for which they may be punishable, to have granted this indulgence without the express sanction of the counsel or of the court. I am not aware that any such sanction was given. But it is not every irregularity of officers, which would justify a court in setting aside a verdict and granting a new trial, or treating the matter as a mis-trial. The court must clearly see that it is an irregularity, which goes to the merits of the trial, or justly leads to the suspicion of improper influence, or effect, on the conduct or acts of the jurors. We must take things as they are in our days. Juries cannot now, as in former ages, be kept in capital cases upon bread and water, and shut up in a sort of gloomy imprisonment, with nothing to occupy their thoughts. It would probably be most disastrous to the administration of justice, and especially to prisoners, to attempt, in these days, the enforcement of such rigid severities, so repugnant to all the usual habits of life. And for one, I am not satisfied that the irregularity in the present case has been in the slightest manner prejudicial to the prisoners; but on the contrary, as far as the evidence leads me to any conclusion, I should deem it favorable to the prisoners. The indulgence ceased the moment when the charge was given, and the jury were then put upon their own solemn and exclusive deliberations on the case.

The other ground is, that the jury, while they had the cause in charge, drank ardent spirits. Now it is most material to state certain facts which took place at the trial, and which though wholly passed over in this motion, yet essentially affect its validity and force. After the charge was given by the court to the jury, one of the jurors in open court stated that he had been unwell for several days, and still was so, and that it was impossible for him under the circumstances to confine himself to water, without danger to his health; and he wished permission to use such spirit as might be required for his health. The counsel for the prisoners then assented in open court to this indulgence, and it was also assented to by the district attorney, who at the same time suggested that the like indulgence ought to be extended to any others of the jurors, whose state of health, from the great length of the trial, and their unusual confinement, might also require it. The counsel for the prisoners then gave their consent to this extension of the indulgence. It was accordingly stated to the jury in open court that it was so granted; but they were at the same time advised to use the indulgence as little as possible, and in as moderate a manner as practicable. Now upon this statement, where there was an express consent given by the prisoners' counsel in open court to this indulgence to the jurors, it seems to me impossible that the present objection can be sustained, unless it is shown, that the indulgence was grossly abused, and operated injuriously to the prisoners. Of this there is not the slightest proof, nor indeed was it even pretended at the argument. On the contrary, the only evidence in the case to establish the fact of drinking ardent spirits, comes from one of the jurors, who is said to have stated, after the trial was over, that he was sick and went down to the bar, and got a glass of brandy and water. The juror himself has not been examined. And this renders it wholly unnecessary to consider the authority and bearing of the cases cited at the bar on this subject; and especially the cases of People v. Douglass, 4 Cow. 26, Brant v. Fowler, 7 Cow. 562, and People v. Ransom, 7 Wend. 417, for they all turn upon very different circumstances.

The other parts of the original motion are in arrest of judgment, if the motion for a new trial should be denied. Some of the causes assigned for this purpose, viz. those respecting the arraignment, and that there was no joinder of issue, and no putting themselves upon the country for trial by the prisoners, have been already considered.

It only remains to take notice of the objections taken to the sufficiency of the indictment.

The first objection is, that no venue is laid

in the indictment; that is, that no particular place is stated on the high seas at which the robbery was committed, but it is only alleged that it was committed on the high seas. And reference has been made to some indictments in cases of piracy, where the offence is stated with more particularity of place, for example, "on the high seas in a certain place distant about ten leagues from Cursheen, &c." and "on the high seas about a half league distant from Leghorn, &c." See 3 Chit. Cr. Law, 1130 et seq.; Id. (English Ed.) 1135. See, also, Kidd's Case, 14 How. St. Tr. 130, 147, 187–190. But there certainly are precedents which contain no such specification of place (see 3 Chit. Cr. Law, English Ed., 1135); and in all the indictments for piracy in this district (which have been numerous, and upon which convictions and executions have taken place) our researches have not detected a single one in which such locality of place is to be found. The indictment has usually charged the piracy to be committed upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, as it is charged in the present indictment, and without any further specification of place. And I am not aware that any different course of practice has been adopted in any other district. Now, it is certainly not sufficient proof that an indictment is bad substantially, to show that forms can be found which are more special and particular in their allegations of place; for such particularity may be adopted only ex majori cautela by the pleader. It will be necessary to sustain the objection to show some authorities, which establish the necessity of averring such special locality of the offence, or some principle of law, which leads to the same conclusion. No such authority or principle has been shown upon the present occasion. My opinion is that the objection is unfounded in point of law; and that the averment in the indictment, that the offence was committed on the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, is sufficient certainty for all the purposes of the indictment and trial, without any other particular designation or averment of the locality of the offence. If such particular designation or averment of locality had been put into the indictment, it could not have tied up the proofs to that particular spot; but proofs of the commission of the offence in any other place on the high seas, would have sustained the indictment. The doctrine of venue in indictments at the common law is inapplicable to cases of this sort. At the common law all offences were required to be tried in the county where the offences were committed; and as the jury were to come from the neighborhood of the place where the offence was committed (technically called the "visne" or "visinage"), it was farther necessary to state in the indictment the particular parish, vill, or other place within the county from which the jury might come. And, in criminal cases it seems true even at this day in England, that the right to challenge the panel for want of hundreders exists, though it has fallen into disuse. See 1 Chit. Cr. Law (English Ed.) 177, 189, 190, 194, 196, 197; 4 Bl. Comm. 303, 305, 306. But even at the common law, although this certainty of averment of place was required, yet it did not tie up the party in his proofs; for the offence, if proved to have been committed any where within the county, was sufficient to maintain the indictment. See 1 Chit. Cr. Law, 200. But the reason of the common law for laying the venue so particularly in offences on land, does not in any manner apply to offences on the high seas; for no jury ever did or could come from the visne or visinage on the high seas to try the cause; and no summons could issue for such a purpose. And even now in England, when offences on the high seas are cognizable and punishable under the statute of 28 Hen. VIII. c. 15, by the special commission court, and by a jury of the county for which the commission is issued (see 4 Bl. Comm. 269; 2 Hawk. P. C. bk. 2, c. 25, §§ 43–47), no venue of any parish, vill or other place within the county is included in the indictment. The allegation that the offence was committed on the high seas is sufficient of itself to found the jurisdiction, and all the incidents of the trial and judgment. But if it were otherwise at the common law, we are to consider that, in the jurisprudence of the United States, the present is a statute offence, and that the jurisdiction is given also by statute; and if the offence is so laid in the indictment as to bring the case within the language of the statute in point of jurisdiction and certainty of description, that is all which can properly be required in our country. The crimes act of 1790 (chapter 9, § 8) provides that if any person shall commit upon the high seas, &c. murder, or robbery, &c., he shall on conviction suffer death. And it farther provides that the trial of all crimes committed on the high seas or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. And there are direct and positive allegations in the present indictment to all these facts. So that the jurisdiction is upon the face of the indictment made out in the most positive manner. And the judiciary act of 1789 (chapter 20, § 29), has provided for the manner of summoning juries for all cases of trials in the courts of the United States. So that there is in reality nothing upon which to suspend a legal doubt as to the sufficiency of the indictment in this respect. No further venue is necessary than what the indictment contains. It in no manner affects the summoning of the jury.

The other objection to the sufficiency of the indictment is, that it concludes in the plural, "against the form of the statutes of the United States in such cases made and provided." whereas it ought to conclude "against the

form of the statute," &c. in the singular. It is admitted that the offence, as charged in the indictment, is within the act of the 15th of May, 1820 (chapter 113), and that if it is also within the crimes act of the 30th of April, 1790 (chapter 9, § 8), the objection is unmaintainable. Upon this point I profess not to feel the slightest doubt. There never was, as far as my knowledge extends, any judicial doubt breathed on any occasion that the act of 1790 (chapter 9) did apply to all murders and robberies committed on board of or upon American ships on the high seas. If the act did not apply to such cases, it is difficult to conceive to what cases it could legally apply. The general terms not only cover such cases, but many others. The only doubts that ever did occur, and were thought worthy of being considered by the supreme court, were, in the first place, whether murders and robberies, committed on the high seas on ships belonging exclusively to subjects of a foreign state and then under the acknowledged jurisdiction of a foreign sovereign, came within the meaning of the act. The supreme court, in U. S. v. Palmer, 3 Wheat. [16 U. S.] 610, thought they were not. Neither question was whether such offences committed on board of a piratical vessel, then in possession of pirates, and acknowledging the jurisdiction of no foreign sovereign, were within the meaning of the act. The supreme court, in U. S. v. Klintock, 5 Wheat. [18 U. S.] 144, decided that they were. On this occasion the court said that the opinion in Palmer's Case might well be understood to indicate an opinion "that the whole act of 1790 (chapter 9) must be limited in its operation to offences committed by or upon citizens of the United States," which is the very case before the court. And indeed Palmer's Case necessarily leads to this result. And the case of U. S. v. Furlong, 5 Wheat. [18 U. S.] 184, is direct to the same purpose, and covers the very case now before us. And, indeed, the language of the court upon this last occasion is express, that it is sufficient for the indictment in such a case to conclude against the form of the statute in such case made and provided (in the singular), although it might be equally within the act of 1790 (chapter 9) and the act of 1819 (chapter 77, § 5 [3 Stat. 513]), thereby laying down the broad principle that a conclusion against the form of the statute (in the singular) is sufficient in all cases where the offence is distinctly within more than one independent statute. But I am of opinion that the present case is equally within the act of 1790 (chapter 9) and the act of 1820 (chapter 113); and if so, then it is admitted that the conclusion is in the strictest sense right. And I am also of opinion, that if the offence was punishable by a single statute only, and the conclusion was against the form of the statutes (in the plural) that it would, in point of law, be a good conclusion. I am aware that there is some diversity of opinion in the books on this point; but having had occasion many years ago, in Kenrick v. U. S. [Case No. 7,713], to consider the question with great care, that was the conclusion to which my judgment deliberately led me; and I have since seen no occasion to change it upon principle or authority. Either way, then, the objection is unmaintainable.

These were all the causes or grounds contained in the original motion. At a subsequent day, however, other causes were assigned, which will now be considered.

The first is, that interpreters were admitted to interpret a part of the testimony of Perez without being previously sworn to interpret truly and faithfully. The facts were that Mr. Badlam was sworn as a general interpreter of Spanish at the trial, and in an early stage of his interpretation of some of the testimony, Mr. Child (one of the counsel for the prisoners, and who himself understood Spanish) objected to some of the interpretations as incorrect, and requested that two other gentlemen, whom he had selected, might be sworn as interpreters. This was objected to by the district attorney, who thought that it was his right to use such an interpreter as he had confidence in, leaving to the counsel for the prisoners to swear other interpreters in their own employ in the cause. The court then, upon the suggestion of the prisoners' counsel, allowed these two interpreters to sit near Mr. Badlam and the witness, and to suggest to Mr. Badlam any doubt or mistake in his interpretation, for him to consider and rectify. This was accordingly done; and whenever any such suggestion was made by these interpreters to Mr. Badlam (who did not profess to be well acquainted with Spanish nautical terms), he considered it, and I believe invariably adopted their interpretation, and then stated it to the court as his own interpretation. In a short time, however, it being perceived that the interpretation of nautical terms became very important in the cause, upon the suggestion of the court both of these interpreters were sworn, and one of them (Mr. Peyton) was afterwards, during almost the whole of the trial, used by the government as the exclusive interpreter. Now it is not, and it was not at the trial pretended, that ultimately any interpretation of the language of the witnesses by Mr. Badlam went to the jury, which was incorrectly given, without due correction. There was no dispute upon this head; and it could have been corrected in a moment, if it had been suggested, for Mr. Peyton was present throughout the whole trial. Under these circumstances the objection seems to me wholly groundless. Mr. Badlam gave every interpretation to the court under oath; and he had certainly a right to use the knowledge of others to assist his own judgment in any case of doubt, giving his own interpretation finally to the court. If there has been no mistake in the interpretation, what ground can there now be for any just complaint?

The next objection is, that upon the appli-

cation of the counsel for the prisoners, the latter were not allowed to be placed near to the counsel, for the purpose of instructing the counsel in their defence, as they deemed necessary. Now the facts were, that though the usual place for prisoners, in all capital cases, is in the dock, or prisoner's bar, the prisoners in this case were all, for their own accommodation, and that they might hear the testimony, witness the proceedings, and have free intercourse with their counsel, placed within that portion of the bar, which is assigned for the use of counsellors at law, and within a reasonable distance from their counsel, who could constantly have the freest access to them; and to whom the court stated, that every delay of time for this purpose, would be cheerfully given; and it was accordingly given. But the counsel wished to have the prisoners placed in the very front benches of the bar, in places constantly assigned for gentlemen of the bar. The court thought such an indulgence inconvenient and unnecessary; and if it was yielded to in that case, it must form a precedent in all other cases, and that such a departure from the whole course of practice, usually adopted upon such occasions, would, from its nature, become liable to great objection. But the court added, that an interpreter should sit by the prisoners, and punctually state to them the proceedings, and questions and answers; and that they might communicate with their counsel freely, and as often as they wished. And this was accordingly done. Even this objection, such as it is, applied only to a short period of the trial; for when the court removed to another place (the temple), the prisoners were placed as near to their counsel as they well could be. Nor should it be put out of sight, that during this long and protracted trial, every indulgence, as to time and examination, was granted to the prisoners' counsel; that they had the fullest opportunity to communicate in court, and out of court, with the prisoners, upon all the matters in evidence, and to obtain their instructions. And we have not the slightest reason to doubt that such communications, as far as they were deemed useful by the counsel, were most freely and fully used by them. Nay, to this very hour, no suggestion has been made, that any material fact or disclosure was omitted, which could have aided in the defence. Under such circumstances, I can perceive no ground to sustain this objection.

The next cause is, that the court refused to have the order, in which the prisoners were placed at the bar, changed before the introduction of each of the witnesses for the government, who were excluded from the court room, after the first of these witnesses had been examined, and had retired. The court did so refuse; and I am yet to learn, that there is any principle of law or duty, which required them to act otherwise. The reason why the court did not yield to the request was, that it might otherwise seem, as if the court intended to cast some imputation upon these witnesses, as confederating out of court together to tell the same story, and charge the same persons, sitting in the same order with the crime. But the court said that it was open for the counsel of the prisoners, to make inquiries from each of the witnesses when upon the stand, whether they had had any such communication with the others out of court; or whether they had had any knowledge of the order, in which the prisoners were arranged. To some of the witnesses (if I rightly remember) such questions were put, and they negatived any such communications. Nor is there now any proofs, that any such communications were had, which could have influenced the testimony of these witnesses. The motion itself was new. It was a matter for the exercise of the sound discretion of the court; and there is no proof, that it operated injuriously to any of the prisoners. Without imputing fraud and wilful perjury to these witnesses, I cannot perceive how the objection can be sustained.

The next objection is, that the witnesses for the government, were allowed, with the chart of the Mexican's route on her voyage before them, to be asked the question, whether under the circumstances stated, of the supposed time of starting of both vessels, the Mexican and Panda would or would not be likely to meet at the point marked on the chart. The objection proceeds upon the ground that, under such circumstances, the question became a leading question; and ought not to have been put. My opinion is, that the objection is unfounded in law. The chart of the Mexican was already in the case, and it was proved by the mate that it contained her route on the voyage, and that he had marked that route from day to day, during the voyage on the chart, up to the point where the robbery was committed, and back again to Salem. For the purpose of asking the question, then, it might properly be taken as a supposed fact, that the Mexican was at a particular spot on the day of the robbery, having sailed from Salem on the 29th of August, and the question then to be asked of nautical witnesses, was whether a vessel sailing from Havana, bound to Cape Mount on the coast of Africa, on the 20th or 26th of August, would or would not be likely to meet her at that point. It seems to me, that this was not only a proper question to be asked of the witnesses, but in no just sense a leading question. It was a matter of nautical skill, experience, and opinion, and the examination of the chart was fit to enable the witnesses as well as the jury, with more accuracy and clearness, to examine all the elements which ought to enter into their opinion. The question was but coming directly to that very point, which, however circuitously, must have been aim-

ed at, in the course of the inquiries, before the testimony could have any strong bearing on the case. Wherever the vessels might have met, if they could not have met at this very spot, where the proof stated that the Mexican was at the time of the robbery, the fact could have had no material influence on the case. If the vessels could not have met there, then the cause was clearly for the prisoners. If they could have met there, it would still remain to be shown that they did meet there. The real point, therefore, of the whole inquiry was to ascertain, whether these vessels might or might not under the circumstances, have met at the very point where the Mexican was. It was the true and appropriate question, which the witnesses were called upon to solve in the negative or affirmative, according to their own skill, judgment, and experience in nautical affairs. The form of the question could not lead them, and it could not mislead them. And the question, in this very form, was afterwards repeatedly asked on behalf of the prisoners' counsel of their own witnesses.

The next objection is that the court declared to the jury and delivered it as their opinion, that the prisoners had no right to pray instructions to the jury on particular points, after the delivering of the principal charge. The court did not give any such direction to the jury upon the subject. The court stated to the leading counsel for the prisoners, who was praying instructions at that stage of the cause and proceeding to reason them out at large, that he must be aware that it was wholly irregular, at that stage of the cause, to proceed in this manner. The regular course of practice in this court in all cases of this sort, is to state the points of law on which the counsel rely, and wish the instructions of the court in their argument to the jury, or at least at some time before the charge is given, that the court may have time to examine and consider them. It would otherwise happen, that the court might be surprised into the necessity of expressing opinions, before due time was allowed to deliberate on them. It is understood, that this objection, after the explanations which have passed at the argument, is not now insisted on.

The next objection is founded upon the supposed refusal of the court, to give an instruction to the jury, that under certain circumstances, at Nazareth, stated in the instructions, the crew of the Panda had a right to resist, to flee, or destroy the Panda, or to resort to any other means of self-defence, which they might deem expedient. In the actual form and qualified manner, in which this objection is now couched, that "if the jury believed upon the evidence that," &c., (stating certain facts,) I have not the slightest recollection, that the instruction was ever asked of the court. On the contrary, I then understood it to be asked in the manner and form in which it is expressed in the original motion, and not otherwise. And the circumstance that it was so asked, is strongly corroborated by the fact, that it is so stated in the original motion. But if it were otherwise, still I am of opinion that the court have given the instruction, as fully as the prisoners' counsel were entitled to require it, and in a manner quite as favorable to the prisoners. And indeed, the whole merits of this objection have been already considered in the preceding part of this opinion.

These are all the objections which are in the written motions, and which have been so elaborately argued at the bar, excepting those which respect the weight of evidence upon the trial, and the new evidence now offered. I shall now proceed with the consideration of these objections. And, first, it is said that the verdict is manifestly against evidence and the weight of evidence. My opinion is the other way. If the jury believed the evidence (and its credibility was a matter exclusively for their consideration), it appears to me, that their verdict was not contrary to evidence or against the weight of evidence, but coincident with both. And I apply this remark equally to the case of Boyga, Montenegro, Castillo, and Garcia; although certainly, the evidence was not equally strong against each of them.

The other point respects the new evidence now before the court. I lay no particular stress upon the affidavit of Dalrymple (which has been objected to) for two reasons—first, because he might have been produced as a witness on the stand at the trial, by the counsel for the prisoners, as Battis expressly pointed him out at the trial as having been spoken to by him; and, secondly, because I do not think, correctly considered, that any thing contained in Dalrymple's affidavit does impugn what Battis stated at the trial. The affidavit of Alexander Thomas is principally to collateral matters only. The other affidavits are of the prisoners who have been acquitted. They positively swear to certain facts, which, if true, are utterly inconsistent with the testimony and statements of the witnesses for the government. First, they utterly deny that they ever met or robbed the Mexican during the voyage. Secondly, they utterly deny any intention or attempt to blow up the Panda at Nazareth. Upon this last point they are opposed by the direct and strong testimony of Quentin, Domingo, and Silveira, all three of them disinterested witnesses. Upon the first point their testimony is irreconcilable with the strong and direct and disinterested testimony of the officers and crew of the Mexican (seven in number), and especially of those who speak positively to the identity of Ruiz, Boyga, and Delgado, if that testimony is not utterly unworthy of belief, and is not founded in the grossest and most extraordinary mistakes. It is also irreconcilable with the positive testimony of

Domingo and Silveira, as to the confessions of several of the prisoners. And, if Perez is to have any credit, where he is confirmed by other testimony, it is utterly irreconcilable with the whole substance of his testimony. Besides these considerations, it cannot escape observation that these acquitted witnesses stand in a very delicate and peculiar predicament in relation to the case. They were embarked, if the evidence upon the trial is to be credited, and upon which their own acquittal mainly proceeded, on a voyage in the slave trade, a voyage prohibited by the Spanish laws and treaties, and of such a character, that under such circumstances, it cannot but detract somewhat from the confidence which we should otherwise repose in their perfect integrity and credit. To this it should be added, that they were incompetent witnesses at the trial. And I cannot but think it would be most injurious to the general administration of public justice to allow a new trial upon the merits, upon the evidence of persons charged as joint offenders after their acquittal, when they were incompetent witnesses at the time of the trial. The observations of the supreme court of Massachusetts upon this point, in the recent case of Sawyer v. Merrill, 10 Pick. 16, strike me as entitled to very great weight, and I entirely concur in them. Indeed, an acquittal is not always proof of actual innocence; and it is frequently little more than a declaration, that the guilt of the party is not established by the proofs beyond a reasonable doubt. But in a capital case, like the present, it appears to me, that the court ought not, upon general principles, to grant a new trial, unless the fullest credit is given to the new evidence, and the court is of opinion, that it outweighs in strength and clearness and force, the evidence on the other side. In short, my opinion is, that in a capital case a new trial ought not to be granted, if the court possess the power, unless, taking into consideration the new evidence, the verdict in the opinion of the court, ought to be the other way; and that, therefore, injustice has been done to the prisoners. There is much good sense in the remarks of the court upon this subject, in State v. Duestoe, 1 Bay, 377. And looking at the evidence produced at the trial by the government in this case, I cannot escape from the conclusion, that if the court were to grant a new trial upon the affidavits of the acquitted prisoners, it could scarcely be justifiable, except upon the belief that five at least of the government's witnesses were either perjured, or their testimony was grossly and culpably incorrect,—Butman, Reed, Quentin, Domingo, and Silveira; and that the others had rendered themselves incredible in their statements. To such a conclusion I should be slow to arrive under any circumstances, when the witnesses were disinterested and unimpeached in point of general character, and their credit had been fully sustained by the verdict of an impartial jury. But if I could arrive at such a conclusion in any other case, I could not arrive at it in this case, where the whole stream of evidence comes from persons, who were indicted as confederates in the offence, and who were then incompetent to testify. I cannot feel such confidence in such testimony as to lead me to the conclusion, that all is rank perjury or reckless delusion on the side of the government's witnesses. This ground, therefore, for a new trial, is in my opinion insufficient also to sustain the motion.

I have now gone over all the grounds offered for a new trial, whether they are matters of law or matters of fact, as briefly as I could, though many of them would have furnished topics for a much longer discussion, if the occasion had required it. My decided judgment, upon a deliberate survey of all these matters, is that the court ought not to grant a new trial, if we possessed the power to grant one. But being of opinion, that we do not possess the power under the circumstances, I am for overruling the motion altogether. I trust that I have a due and a deep sense of the responsibility thrown upon the court upon the present occasion. No person could have desired more anxiously than myself, that I might have been spared from this painful duty. With the private opinions of other men, not sitting in judgment under the solemnity of an oath, or called upon to express opinions upon a judicial survey of the whole evidence (which the learned counsel for the prisoners has thought fit to bring into the case), we have nothing to do. As little have we to do with the appeals made through the press during the pendency of this cause, or with the supposed popular excitements, which have been alluded to at the argument. I trust that this court is incapable of being influenced by any such considerations, or of being betrayed by them into an abandonment of its own proper duty. I trust, that while I shall never be insensible to human life or human sufferings, I shall always possess the firmness to follow out with an unshrinking fidelity the dictates of my own conscience, and the high commands of the law. I may err in my judgment, for I have not the slightest pretension to infallibility; but if I do err it shall not be an error forced upon me by private opinions, promulgated through the press or otherwise. My present judgment I cheerfully submit to the sober consideration of my country. It is my conscientious judgment, for which I am ready to assume the full responsibility belonging to my station, it having been the result of the best exercise of the powers of my understanding.

DAVIS, District Judge I concur with the presiding judge in the disposal of the motions before us, in this very serious case, which has so long engaged the devoted and solicitous attention of the court, counsel, and jury. With the grounds and reasons

of that opinion my own views coincide, excepting in one point, and on that, from its important bearing, as a constitutional question, I consider it a duty to express my opinion. I refer to that part of the argument, which rests the denial of a power, in the courts of the United States, to grant a new trial, on the merits, in a capital case, though at the request of a person convicted, on the 5th article of amendments to the constitution, declaring, that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb." The case of a person convicted of a capital offence, put on trial again, would certainly be embraced by the terms of the article; and yet, in my view of the question, it would not present a case within its true intent and meaning. The article, in the amendments to the constitution, corresponding to a rule of the common law, according to the prevailing spirit and character of those amendments generally, was doubtless intended for the security and benefit of the individual. As such it may be waived and relinquished. That the request of a prisoner for a new trial, affording a chance of escape from death to which a previous conviction would assign him, should be rejected, from adherence to the letter of the rule, that his life would be again in jeopardy, would present an incongruity not readily to be admitted. It is true, that according to approved authorities, the plea of autre fois convict depends on the same principle as the plea of autre fois acquit, that no man ought to be twice brought in danger of his life, for one and the same cause. Bl. Comm. bk. 4, c. 26; 2 Hawk. P. C. 377. The doctrine establishes a right in the prisoner to resort to that defence, if it be attempted or moved, against his will, to subject him to a second trial. The case of a verdict of conviction set aside, at the request of the prisoner, is not suggested in those authorities, and would stand, in my opinion, on very different ground. The previous conviction would not, I apprehend, under such circumstances, be considered as a sufficient bar to a second trial. The concise manner in which many general maxims of the law are expressed, like general rules on other topics, admits or requires, in their application, distinctions, exceptions, and qualifications, all just, reasonable, and, in some instances, indispensable, not expressed in their terms. We have an instructive exemplification of this in an early case, in the supreme court of the United States, in which the meaning of the prohibition, in the constitution, of ex post facto laws, came in question. "I do not consider," said Mr. Justice Chase, "any law as ex post facto, that nullifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." 3 Dall. 391. The benign spirit, ever pervading our law, which dictated that distinction, may, as appears to me, have a proper influence and application, in reference to the rule of law under consideration, and in other instances of analogous character. By the old common law, observes Sir W. Blackstone, the accessory could not be arraigned till the principal was attainted, "unless he choose it, for he might waive the benefit of the law." Comm. bk. 4, c. 25 And in People v. McKay, 18 Johns. 212, a case of murder, Chief Justice Spencer remarks: "We know of no case which contains the doctrine, that where a new trial is awarded, at the prayer and in favor of a person that has been found guilty, he shall not be subject to another trial." [4] On the whole, I am not convinced that the article of the constitution under consideration, would, in just and reasonable construction, be a bar to a new trial granted at the request of a person capitally convicted. I am not aware that there is any direct decision on this point. It is an open question. If a second trial in capital cases, be inadmissible, under the article, though at the request of the prisoner, then no legislative enactment can vary the law on the subject, without an amendment of the constitution. The question may thus become highly important, though the article should be binding only in the courts of the United States; still more so if, conformably to Chief Justice Spencer's opinion, it extend to decisions in the state courts. A decision on this point, however, is not essential, as this case stands, to a determination on the motion for a new trial, in which, notwithstanding a difference in opinion in reference to the constitutional question, we come to the same result. The discretion of the court on the subject of new trials is not unlimited. They are allowable "for reasons for which new trials have usually been granted in the courts of law," and with this statute direction, we are to bear in mind the 7th article of amendments to the constitution—"No fact tried by a jury, shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law." Having reference to such directories, should the motion for a new trial in this case be allowed, there would, in my opinion, be a departure from the usages of courts

[4] McKay was convicted on an indictment for murder. Judgment was arrested, on motion in his behalf, for defect in the issuing and return of the venire. Agreeably to repeated decisions, there may be a new trial, in all cases, where there has been a mis-trial or mere irregularity in the former trial, vitiating or vacating the proceedings. But the question made by the counsel in that case, whether the arrest of judgment did not entitle the prisoner to be discharged, does not appear to have been met by the court on that ground. "It will be observed," says the chief justice, "that the judgment is arrested on the motion of the prisoner, an act done at the request, and for the benefit of the prisoner, we are clearly of opinion cannot exonerate him from another trial."

of law, and from the principles manifested by the great current of decisions in cases of this description.

I agree with the presiding judge, in the views which he has expressed on the motion in arrest of judgment, as well as with those on the motion for a new trial, excepting in the instance which I have specified, and in the result, that the motions be overruled.

The decision of the court was then interpreted to the prisoners.

Mr. Child then begged leave to file a bill of exceptions, with a view of carrying the case before the supreme court, and urged that the case involved several important points of law.

THE COURT replied, that they must proceed to pass the sentence; but the motion of Mr. Child could be taken into consideration, and would be acted upon hereafter.

Mr. Child then earnestly pressed upon the court to respite the execution, to give time to send to Havana and England, to clear up this dark and mysterious affair.

THE COURT said it should be allowed, and if the time proved not long enough, the executive clemency would no doubt extend it, by a reprieve.

STORY, Circuit Justice, after hearing the several protests of innocence from the prisoners, on motion of Dunlap, Dist. Atty., proceeded to pronounce the sentence of the court, as follows:

Prisoners at the Bar: The motions made by your counsel for a new trial and in arrest of judgment having been overruled by the court, and all other matters disposed of, it is now my painful duty to pronounce the sentence of the law upon each of you, for the crime whereof you severally stand convicted. I shall do this in as brief terms as possible, being conscious of the difficulty of addressing you through the medium of an interpreter only. The sentence is, that you, and each of you, for the crime whereof you severally stand convicted, be deemed, taken, and adjudged to be pirates and felons, and that you, and each of you, be therefore severally hanged by the neck until you are severally dead. That the marshal of this district, or his deputy, do, on peril of what may fall thereon, cause execution to be done in the premises upon each of you on the 11th day of March next ensuing, between the hours of 9 o'clock in the forenoon and 12 o'clock at noon, of the same day, and that you now be taken from hence to the jail in Boston, in this district, from whence you came, there, or in some other safe and convenient jail within the same district, to be closely kept until the day of execution; and from thence, on the day of execution appointed, as aforesaid, you are severally to be taken to the place of execution, there to be hanged, as aforesaid, until you are severally dead. I earnestly recommend to each of you to employ the intermediate period in sober reflections upon your past life and conduct, and by prayer and penitence, and religious exercise, to seek the favor and forgiveness of Almighty God for any sins and crimes which you may have committed; and for this purpose I earnestly recommend to you, and to each of you, to seek the aid and assistance of the ministers of our holy religion of the denomination of Christians to which you severally belong. And in bidding you, so far as I can presume to know, an eternal farewell, I offer up my earnest prayers that Almighty God may in his infinite goodness have mercy on your souls.

The above sentence was then interpreted to the prisoners by a sworn interpreter.

David L. Child, of counsel for the prisoners, now (on the 23d day of December), in pursuance of a suggestion made by him a week before, and immediately after the opinion of the court overruling the motion for a new trial and in arrest of judgment, moved to file a bill of exceptions, and requested the court to sign the same, if found true. THE COURT said that the bill might be filed, if the counsel wished it, on the record; but it could not be allowed by the court. And it was accordingly filed, but without having been read, the counsel not wishing to read it, after the opinion of the court was stated.

STORY, Circuit Justice. This being the case of a capital conviction, when the counsel for the prisoners, a week ago, suggested an intention to offer a bill of exceptions, the court then stated, that it would be expected that he should show some authority to justify the court in allowing a bill of exceptions in a capital case. It is now admitted, that the counsel have no authority to cite, which affirms the power in this court. And it is believed by the court, that none exists. We have, however, in the interval between the suggestion and the present time, deliberately examined the point, and are fully satisfied, that no such power exists in this court; and therefore it has not been deemed necessary to examine the correctness of the exceptions stated in the bill, which has been proffered.

In the first place, no power is given by statute to this court, to allow any bill of exceptions in any criminal case whatsoever; and it seems impossible to infer it by implication from any provisions in the laws of the United States. The circuit courts have final jurisdiction of all cases of crimes; and no writ of error or appeal lies to the supreme court in any such cases. Now, the sole object of a bill of exceptions is to present the matter for the revision of some superior court; and if no revision can be had, then the authority to allow a bill of exceptions would be utterly nugatory. The only mode contemplated by the laws of the United States to revise the opinions of the judges of the circuit courts in criminal cases is, when the

judges are divided in opinion at the trial; and then the point of division may be certified to the supreme court for a final decision under the judicial act of 1802 (chapter 31, § 6) There was no such division upon the present trial. If resort be had to the common law to aid us in examining this point, it will be found, that no bill of exceptions lies, in capital cases, even since the statute of Westminster II. (13 Edw. I. St. 1) c. 31, which first gave a bill of exceptions. And the better opinion certainly now is, that that statute is confined to civil proceedings, and does not extend to any criminal proceedings whatsoever. As the authorities are not all agreed on this point in cases of mere misdemeanors. it is not necessary here to decide it in regard to the latter. But in capital cases. in cases of treason and felony, it is universally agreed in England, that no bill of exceptions lies. This was solemnly settled in the case of Rex v. Vane, which was a case of high treason. It is reported in 1 Lev. 68, and in various other Reports. See Buller, N. P. 316; 1 Chit. Cr. Law (English Ed.) 622; Willes, 535, and note (b), which cites 2 Inst. 424, and Saville, 2. The very point was made, and according to Leving's Reports, it was held by the court, "that a bill of exceptions does not lie in criminal cases, but only in actions between party and party." The application was accordingly overruled, and Sir H. Vane was executed on Tower Hill. The same doctrine is laid down in Hawkins (2 Hawk. P. C. c. 46, § 198), who says: "It hath been adjudged, that no bill of exceptions is grantable on an indictment of treason or felony, the statute of Westminster, etc., having never been thought to extend to any such case." Lord Hardwicke, in Rex v. Inhabitants of Preston, Cas. t. Hardw. 251, 2 Strange, 1040, said: "Nor was it ever pretended, that in capital cases a bill of exceptions lay. In Vane's Case, it is not said to lie in any criminal case. But that point is not settled, and therefore I will give no opinion as to that." In Bacon's Abridgment (1 Bac. Abr. "Bill of Exceptions") it is said: "It is agreed that no bill of exceptions is to be allowed in treason or felony." And the same doctrine will be found in other elementary writers (see Buller, N. P. 316; 1 Chit. Cr. Law, English Ed., 622; Willes, 535, and note b, which cites 2 Inst. 424, and Saville, 2), and no authority to the contrary can be found. In People v. Holbrook, 13 Johns. 90, S. P. 6 Cow. 565, it was held by the supreme court of New York that no bill of exceptions lies in any criminal case; and this doctrine is not only supported by Vane's Case, but by Rex v. Barkstead, 1 Kreb. 244; T. Raym. 468; 1 Sid. 85.

There is then no pretence to say, that in capital cases this court can draw in aid the doctrines of the common law, as administered in England, to confer such a power. It is not implied from any statute authority. It is not implied in any reasoning at the common law, or under the statute of Westminster. We are therefore of opinion, that this court possesses no such authority; and we dare not assume what has never been confided to the court.

If this objection were not, as we think it is, conclusive, we think, that the bill of exceptions ought not now to be allowed, upon another and a distinct ground. It was not made or tendered at the trial, nor until a long time afterwards, and after a motion made and argued for a new trial and in arrest of judgment, and the opinion of the court deliberately had thereon. Under such circumstances, where the verdict was satisfactory, and the court feel no doubt about the law, it is our opinion, that the bill of exceptions ought not to be allowed. It is not within the general principles, which regulate rights of this sort. See 1 Salk. 288; 8 Mod. 222; 2 Tidd, Prac. 788. The government has its rights, as well as the prisoners.

Bill of exceptions not allowed.

Case No. 15,205.

UNITED STATES v. GILBERT.

[17 Int. Rev. Rec. 54.]

Circuit Court, N. D. Ohio. Jan. Term, 1873.

EMBEZZLEMENT BY POSTMASTER.

A postmaster who uses in his private business, and for paying his private debts, money received through the money order department, so that he is found upon examination to be without the amount of money required to balance his accounts, is guilty of embezzlement, under the statute (Act June 8, 1872, § 122), although he always intended to replace the same, and did, in fact, replace it shortly after his arrest, and before his preliminary examination before a commissioner.

[This was an indictment against Everett H. Gilbert upon the charge of embezzlement.]

Geo. Willey, U. S. Atty., for the Government.

G. S. Kain, for defendant.

SHERMAN, District Judge. The defendant in this case was indicted by the grand jury of the present term, under the 122d section of the act of congress approved June 8, 1872 [17 Stat. 283], entitled "An act to revise, consolidate, and amend the statutes relating to the post office department." Upon the trial of the cause, the jury returned a verdict of guilty. The counsel for the defence now move for a new trial, alleging as a cause therefor the general reason, that the verdict is not sustained by the evidence and law in the case.

The facts as agreed upon by the counsel for the defence and district attorney are as follows: The defendant was postmaster at Smithville, Wayne county, Ohio, which post-office had been duly designated and was a money order office, duly authorized by law, and governed by the regulations prescribed by the postmaster-general. On the 29th day of November, 1872, a special agent of the

post-office department, under instructions from that department, visited the post-office at Smithville for the purpose of examining into the accounts of the defendant, it being suspected that there was a deficit in his money order business. A full examination of his affairs showed a deficiency of five hundred dollars, which deficiency had run through several months, and which the defendant failed to pay over, even when demand was made by the special agent upon the spot. In fact it was not paid over for a week or more after the demand. The defendant stated that he did not have the money, that he had used it in his business in paying debts of a private nature, and in making some additions to his property in the town of Smithville, but that he expected to replace it in a few days from money due him. Upon the 5th day of December following, the special agent procured a warrant for the arrest of the defendant, under the 122d section above alluded to. Thereupon examination was had before the commissioner on the 20th day of December, 1872. It further appears, that between the time that the warrant was issued and the examination before the commissioner, the defendant deposited with the postmaster at Cleveland, Ohio, a sum of money equal to the amount which he is charged with having embezzled, the Cleveland post-office being the designated depository for the money order funds of the Smithville post-office.

On this agreed statement of facts it cannot be successfully claimed that the verdict is unsupported by the evidence. Section 122 of the act of congress provides as follows: "That any postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money order office, who shall convert to his own use in any way whatever, or loan, or deposit in any bank, or exchange for other funds, any portion of the money order funds, shall be deemed guilty of embezzlement. * * * And any failure to pay over or produce any money or funds intrusted to such person, shall be taken to be prima facie evidence of embezzlement." From these citations it is evident that an embezzlement, such as is contemplated by this section, may be proved in either one of two ways: First, by showing that in point of fact the postmaster has converted to his own use money order funds. Second, by his failure to pay over such funds when required, either by the law or regulations, or when demand is made by an officer authorized for that purpose. It would seem that the agreed statement of facts substantiates the embezzlement by both these methods, and although it is true that the funds were subsequently paid in to the Cleveland post-office, and although it may also be and probably was true that these funds when thus converted were intended and expected to be replaced, so that the government should sustain no loss, which go very far toward mitigating the offence, yet it is obvious that the enforcement of this section, in all its strictness, is essential to this class of government funds, and to the discouragement of postmasters from even temporarily using them for private purposes. The intention of replacing them, however honestly entertained, cannot be accepted as an excuse or apology for violating the law, as one may be disappointed by unexpected circumstances, and thus not only endanger the moneys of the government, but involve himself in difficulty and criminal prosecution. The law intends that funds of this character should be kept absolutely separate and sacred, as the best method not only of keeping the funds themselves secure, but of guarding the officers themselves from temptation and delinquency. The diversion of money order funds in any way whatever, prohibited by this section, or for any time however short, constitutes embezzlement under this act, and is punishable as such.

The motion for a new trial is therefore overruled, and the defendant sentenced to pay a fine of five hundred dollars, and the costs of this prosecution, and to be imprisoned for six months; but under the advice and concurrence of the post-office department, and under all the circumstances of this case, the execution of the sentence as to imprisonment is indefinitely suspended.

Case No. 15,205a.

UNITED STATES v. GILLIAM.

[1 Hayw. & H. 109.] [1]

Criminal Court, District of Columbia. Sept. 14, 1882.

HOMICIDE — KILLING BY SET SPRING-GUN — BAD CHARACTER OF DECEASED.

1. The court will allow evidence to be given of the previous bad character of the deceased, when the said deceased had been killed in the act of committing a felony. It is proper in determining the intent of the deceased and the offence of the prisoner, who is accused of killing the deceased.

2. The setting of spring-guns in open fields or outhouses, not within the privilege of the domicil, without notice, will not excuse or justify the homicide which might ensue.

The indictment contained two counts. One charging the murder to have been committed by means of a spring-gun set by the traverser for that purpose in a goose-house; the other that the murder was done by shooting. The prisoner [William Gilliam] plead not guilty.

P. R. Fendall, Dist. Atty., for the United States.

W. L. Brent, for defendant.

The counsel for the prisoner, insisted that the prisoner had a right to defend his property by such means. One of the witnesses examined on the part of the United States was questioned by the prisoner's counsel as to the general reputation of the deceased as

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

a thief and a felon. The question was objected to by the counsel for the United States.

BY THE COURT. The prisoner, by his counsel, has asked the court to allow him to give evidence of the general character of the deceased as a common thief and felon, for the purpose of showing the felonious intent with which the deceased entered upon the premises of the prisoner on the night he was shot by the spring-gun, and insists that in all cases of meditated felony it is lawful to take the life of the felon. It has been ruled at the present term of this court that, to show a guilty knowledge in the receiver of stolen goods it is proper to allow proof that other stolen goods had been before received by the party charged, and in the case at bar the court will allow proof that the deceased had, on previous occasions, stolen the goods, either of the prisoner or other persons, as proper for the consideration of the jury in determining the intent of Payne (the deceased) and the offence of the prisoner. The setting of a spring-gun as a protection for property, though not in itself unlawful and indictable, is certainly undeserving of encouragement, and where no notice is given and injury or loss of life ensues, the party setting it is responsible as if he were present himself and fired the weapon. No man can do indirectly what he cannot do directly. He must also use his right as not to injure another. Where notice is given the sufferer is held to have brought the calamity on himself—to be his own executioner if life is lost, and to have himself pulled the trigger. Such was the reasoning of the court of king's bench in the case of Ilott v. Wilkes, 3 Barn. & Ald. 304.[2] All the judges in that case rest their judgment on the ground of notice.

It has been contended by the prisoner's counsel in this case, that if Payne, the deceased, entered upon the premises of Gilliam on the night he came by his death, with the felonious intent to steal Gilliam's property, the prisoner is entitled to acquittal in the absence of notice that the gun was set, and though the felony was unaccompanied by force and did not amount to burglary. The broad ground is assumed that in all cases of felony, the felon may be lawfully put to death in the execution of his meditated crime, and that this position is maintained by the reasoning of one of the judges in the case of Ilott v. Wilkes; I cannot sanction the doctrine thus asserted in the prisoner's defense. It arrogates for property higher immunities and privileges than are conceded to our dearest personal rights. The humane principles of the law do not thus lightly estimate human life. No language or manner, however reproachful or insulting, not even violence to the person of the most ignominious character, will justify the aggrieved in slaying the aggressor; he can only be justified or excused by showing his own life to have been in jeopardy. The law is that a man may oppose force with force in defense of his person, his family or property against one who manifestly endeavors by violence to commit a felony, as murder, robbery, rape, arson or burglary. In all these felonies, from their atrocity and violence, human life either is, or is presumed to be in peril. The principle does not apply to the thief who secretly steals your purse or other personal property in your fields or in buildings not within the privilege of the domicil. It does not apply to the felon who, by forgery, defrauds you of your money or goods. This distinction commends itself to your reason and common sense, and it is sustained by numerous authorities which have been cited in the argument by the counsel for the United States. When we find the books and the judges in some places in general terms speaking of the right to take the life of the felon in the execution of his meditated felony, we are to understand them as referring to felonies with force, of the character described. In no other way can we reconcile what would otherwise appear conflicting authorities and decisions. The setting of spring-guns, therefore, in open fields or outhouses, not within the privilege of the domicil, without notice, would not justify or excuse the homicide which might ensue, but the party setting them would be criminally responsible for the consequences of his act.

The counsel for the prisoner further contended that by the law as it stood prior to the statute of 7 & 8 Geo. IV. c. 29, § 13,[3] and as it now stands here, any outhouse within the curtilage, or same common fence as the dwelling house itself, was considered to be parcel of the dwelling house, on the ground that the capital house protected and privileged all its branches and appurtenances, if within the curtilage or homestall.

The counsel for the United States contended that on a fair view of the authorities on the subject of curtilages prior to the statute of Geo. IV., an outhouse, to be within the protection of the dwelling house, must be "occupied with and immediately communicating with it"; must be adjoining to it or at a reasonable distance from it, and that the communication must be regular and permanent, not merely casual or temporary, that the meaning of the word "outhouse" was

[2] "A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidental treading on the latent wire connecting with the gun, and thereby letting it off."

[3] What buildings only are a part of a house for capital purposes: "That no building, although within the same curtilage with the dwelling house, and occupied therewith, shall be deemed to be part of such dwelling house for the purpose of burglary * * * unless there shall be a communication between such building and dwelling house, either immediate or by means of a covered and enclosed passage leading from one to the other."

the same before as after the enactment of the statute. In Rex v. Scully, 1 Car. & P. 319,[4] 11 E. C. L. 407, decided in 1824, several years before the statute, it was held that the henroost was not part of the curtilage.

In the further progress of this cause evidence was offered to prove that the goose house, in which the spring-gun was set by Gilliam, and in attempting to enter which Payne was killed by the discharge of the gun, was situated within from thirty-five to sixty feet of the dwelling house of Gilliam, in which himself and his family resided and slept; that the said goose house, and out-houses appurtenant to and used with the dwelling, together with said dwelling house, were enclosed by a common fence surrounding them, the whole premises not exceeding in extent one acre of ground; that there was an interior partition fence of stone, not laid in mortar, about three feet high, but with an opening in it about two feet wide, to let Gilliam's family pass through to the goose house, and that the said stone fence, with a rail upon the opening, was used to keep the cows from coming to the dwelling house.

Upon which said evidence, and the other evidence in the cause, the prisoner's counsel prayed the court to instruct the jury: That if they believe, from the evidence aforesaid, that the said goose house was appurtenant to, and used with Gilliam's dwelling house as one of the out-houses thereof, and that the whole were under one common enclosure, and that the said goose house was not more than sixty feet distant from said dwelling, then the said goose house was within the curtilage, and privileged as part of said dwelling, and the breaking and entering the same in the night time by the deceased with the intent to steal Gilliam's geese in said goose house, if believed to be true by the jury, was burglary, and if the deceased came to his death in the attempt to commit said burglary, by the spring-gun set there by Gilliam to protect his goose house, the prisoner is entitled to a verdict of acquittal.

Which instruction the court gave.

The jury returned a verdict of not guilty.

Case No. 15,206.

UNITED STATES v. GILLIES.

[Pet. C. C. 159;[1] 3 Wheeler, Crim. Cas. 308.]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.

CITIZENSHIP—RESIDENCE IN FOREIGN COUNTRY—SHIPPING—MASTER—OWNER—CORRECTION OF ERRORS.

1. Whether a native citizen of the United States, who resides in a foreign country, does not by such residence forfeit his citizenship? Such a person may, under the act passed 31st December, 1792 [1 Stat. 287], command a registered vessel of the United States, without her right to the payment of domestic duties being affected thereby; but under the same act, he cannot be the owner of a vessel of the United States.

[Cited in Scanlan v. Wright, 13 Pick. 526.]

2. A citizen of the United States cannot throw off his allegiance, without a law authorising the same

3. Any irregularities committed by the jury relative to their verdict, ought to have been corrected in the court below, and they cannot be examined by writ of error.

This was writ of error to the district court [of the United States for the district of Pennsylvania]. The only question in the court below [case unreported] was, whether upon the facts stated in the special verdict, the defendant's vessel was liable to pay duties as a foreign bottom. Another error assigned, was, that the jury, after they were sent out, separated without leave of the court, in consequence of a deception they practised upon the officer, by saying they had agreed on a verdict; when in truth they had not done so. They afterwards assembled and found the verdict, upon which the judgment was rendered.

WASHINGTON, Circuit Justice, stopped the counsel, as to this point, by observing, that if there was any such irregularity in the conduct of the jury, as ought to have set aside their verdict, it was in the discretion of the court below, to act as was proper on the occasion; and that the decision of that court, upon this point, is not examinable by this court upon a writ of error or otherwise. The question upon the merits was, whether the master of this vessel had forfeited his character of a citizen of the United States, and the privileges attached to it, under the act of congress of the 31st December, 1792 (2 Bior. & D. Laws, 313 [1 Stat. 287]).

The district attorney maintained the affirmative.

WASHINGTON, Circuit Justice. The court having disposed of the first error assigned in this record, I shall proceed to consider the only remaining question which has been discussed; this is, whether from the facts stated in the special verdict, John Shaw, master of the ship William P. Johnson, has forfeited his citizenship? If he has, then the judgment below must be reversed, and entered in favour of the United States; otherwise it is to be affirmed.

It appears by the finding of the jury, that Shaw is a citizen of the United States, by birth, and resided therein up to the year 1804, with the exception of two years; that he was abroad from the year 1804, to the present year; whether in England or on the Continent, or whether he was navigating the ocean, is not stated. It is found that he is married, and now has a family in London; but whether he married in England,

[4] "A person set to watch a yard or garden, is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen roost. But if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him."

[1] [Reported by Richard Peters, Jr., Esq.]

or in the United States, or whether his family is residing in England, or is there merely on a visit, is not stated. Upon such a case as this, it requires more ingenuity than I possess, to frame an argument to prove, that Shaw has not forfeited his privileges of a citizen of the United States. It would be like attempting to prove a self-evident proposition. But taking for granted, that the case appeared to be such as the district attorney supposed it to be, and argued upon; that is, that Shaw resided in England from the year 1804, to the year 1815, with his family, having married in that country; I am yet to learn, that an American citizen forfeits that character, or the privileges attached to it, by residing and marrying in a foreign country; though, during a part of the time, war should intervene, between that and his native country, he taking no part therein; unless such character or privileges should be impaired, by some law of his own country. I do not mean to moot the question of expatriation, founded on the self will of a citizen, because it is entirely beside the case before the court. It may suffice for the present to say, that I must be more enlightened upon this subject than I have yet been, before I can admit, that a citizen of the United States can throw off his allegiance to his country, without some law authorising him to do so. It is true, that a man may obtain a foreign domicil, which will impress upon him a national character for commercial purposes, and may expose his property, found upon the ocean, to all the consequences of his new character; in like manner, as if he were, in fact, a subject of the government under which he resides. But he does not, on this account, lose his original character, or cease to be a subject or citizen of the country where he was born, and to which his perpetual allegiance is due. The present case presents no question connected with the subject of domicil, but turns, altogether, upon the construction of a law relative to the navigation system of the United States.

The question, which the case I am supposing suggests is, does an American bottom, lose her privileges as such, on account of the master residing with his family in a foreign country, he being by birth a citizen of the United States? Let the act of congress made upon this subject, answer the question. It declares, that registered vessels of the United States, shall not continue to enjoy the benefits and privileges bestowed upon such vessels, longer than they shall continue to be wholly owned and to be commanded, by a citizen of the United States. The second section of the law, however, declares, that such registered vessel shall cease to enjoy the benefits thereof, if owned in whole or in part, by a citizen of the United States, who usually resides in a foreign country, during the continuance of such residence; unless under certain exceptions. But in respect to the master, no such qualification is to be found in this law, or in any part of our navigation system. Had this latter provision not have been made, in relation to the owner, I cannot perceive upon what principle, the court could have supplied it by construction; but being made by the legislature, it marks the intention of that body, to distinguish between the foreign residence of the owner, and that of the master; and it further proves the sense of congress, as to residence abroad, that it does not, without legislative provision, affect the character or privileges of a citizen.

There is a sound reason for the distinction which the legislature seems to have had in view. The profits of trade, necessarily incorporate themselves with the wealth of the nation where the trade is carried on; and these profits are increased, as the duties upon the trade are diminished. The policy therefore, which dictates discriminating duties, to favour our own merchants, would point out the necessity of applying the system, as well to citizens of the United States, settled abroad, as to other merchants; but the same policy is not applicable to the master of the vessel. If the owner of the vessel which he employs, resides within the United States, it is immaterial where the master resides. It is only necessary, that he should be a citizen of the United States. Judgment affirmed.

Case No. 15,207.

UNITED STATES v. GILLIS et al.

[2 Cranch, C. C. 44.] [1]

Circuit Court, District of Columbia. June Term, 1812.

CRIMINAL LAW—CORRUPT MOTIVE.

Judges of elections are not liable to criminal prosecution, unless they have acted from a corrupt motive.

Mr. Jones, for the United States, observed that it had been intimated by the court that these prosecutions could not be supported unless a corrupt motive were charged and proved; and that if such was the opinion of the court, as he could not prove such a motive, he would enter a nolle prosequi.

THE COURT (nem. con.) said that such was their opinion. Nolle prosequi entered.

Case No. 15,208.

UNITED STATES v. GILMOUR.

[Cited in U. S. v. Pomeroy, Case No. 16,065. Nowhere reported; opinion not now accessible.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,209.

UNITED STATES v. GITMA.

[3 Hughes, 549; 7 Reporter, 361.] [1]

Circuit Court, E. D. Virginia. Feb. 11, 1879.

HINDERING AND ASSAULTING MARSHAL — PLACES OF ELECTION.

Rights of United States deputy marshals at the places of election. Limits of their power.

[Cited in Attorney General v. May, 99 Mich. 550, 58 N. W. 483.]

Indictment [against Adolphus Gitma] for hindering and assaulting a deputy marshal in the discharge of his duty at an election for a member of the house of representatives of the United States. During the progress of the argument before the jury in this case, the judge, in order to shorten the discussion, interrupted counsel with the following explanation of the law governing the case:

HUGHES, District Judge. There has been so much controversy and so much feeling on this subject that I think I ought to make use of this first occasion on which the court has been called upon to rule upon it, to set out its view of the law on the subject, so that officers of the United States will better know their duties and powers, from the only source competent to explain them in a binding and authoritative manner. It is useless to consider the constitutionality of the law of congress embodied in the Revised Statutes in regard to the duties of supervisors and deputy marshals of the United States during their attendance upon elections. Section 4 of the first article of the constitution of the United States provides that: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations, except as to the place of choosing senators."

There can be no doubt, therefore, of the constitutionality of the sections of the Revised Statutes about to be reviewed, so far as they apply to elections for members of congress. Their constitutionality is only brought in question when they are sought to be applied to elections for state officers. The election, for conduct at which Gitma, now under trial, was indicted, was held for the election of a member of congress. Deputy Marshal Archer was in the room of the judges of election at Petersburg, and was ordered out, and in that way, but not by violence, was put out by Policeman Gitma. Gitma stands indicted for the act. The question is, whether a deputy marshal had a right to be in the room of the judges by the law of the United States? The law makes a clear distinction between the powers of supervisors and the powers of deputy marshals during their attendance at elections. As to supervisors the language of section 2019 is that "they are authorized and directed, in their respective election districts or voting precincts on the day of election, to take, occupy, and remain in such position, from time to time, whether before or behind the ballot-boxes, as will, in their judgment, best enable them to see each person offering to vote, and as will best conduce to their scrutinizing the maner in which the voting is being conducted," etc. Section 2017 gives the same authority in general terms. Thus, not only does the law in terms empower a supervisor to be in the room with the judges of election, but empowers him to be in any place or position in which, in his own judgment, he can best perform his duties. The act of congress which is thus specific in defining and complete in conferring these powers on supervisors, is the same one which prescribes the duties of deputy marshals. While it is thus express and full in regard to supervisors it is the reverse in defining the authority of deputy marshals. Section 2021 simply provides that "when required" to do so by the supervisors it shall be the duty of deputy marshals to "attend the polls" in their districts or precincts. The section gives the deputy marshals no authority except to be present at the polls. The same act of congress which expressly "directs" supervisors to place themselves before or behind the ballot-boxes as they may think proper, is silent in regard to deputy marshals, and gives them no such authority. Section 2022 defines the object of the appointment of deputy marshals, and defines their powers and duties. It makes it their duty to "keep the peace, and support and protect the supervisors in the discharge of their duty; to preserve order at the voting-places; to prevent fraudulent voting, or fraudulent conduct on the part of any officer of election, and to arrest without process any person who commits illegal acts in their presence." It omits to give them authority to go behind the ballot-boxes and to place themselves in any position they please. This omission has much meaning, as showing that the powers and duties of marshals are different from those of supervisors. This same section 2022, while providing that the supervisors, in addition to their own powers, shall, in the absence of deputy marshals, have the same duties and powers as deputy marshals, omits to give the reverse authority; and neither this section nor any other section of the law gives to marshals, in the absence of supervisors, the powers and duties of supervisors proper. Their duties, therefore, are not those of supervisors of elections, but merely those of conservators of the peace at the polls.

My conclusion, therefore, is, that unless for

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 7 Reporter, 361, contains only a partial report.]

the purpose of suppressing actual violence or of preserving the peace when actually disturbed, or protecting the supervisor when actually needing protection, or preventing fraud actually attempted, in the room, the deputy marshals have no right to be in the room in which the judges and supervisors of election are performing their duties, or to go behind "the ballot-boxes" unless requested to do so by both judges and supervisors. If congress had designed that they should have that power (as it did design that supervisors should have it) it would have given it expressly (as it did give the power to the supervisors expressly). Unless it can be shown that their presence is required by the exigencies which have been mentioned, the judges of election have the same right to order deputy marshals out of their room as they have to order out any unofficial person. The object of sections 2021 and 2022 is to define the powers and duties of deputy marshals, while the object of section 5522 is to define the offence and fix the punishment of persons who hinder and obstruct these officers in the performance of duties required of or authorized in them; and when this latter section goes on to say that when a person obstructs them in doing what they are authorized by law to do, by specifying modes by which this obstruction may be committed, these latter clauses of the penal section of the law are not intended to give immunity and protection to deputy marshals in acts not authorized by sections 2021 and 2022. Though section 5522 therefore forbids any person from obstructing the deputy marshals or supervisors in doing acts which it names, and amongst others "from going to and from any room" where an election may be held; yet these words are to be construed in connection with all the rest of this law on the subject, and must therefore be treated as applying only to supervisors of election, as they only, and not deputy marshals, are allowed by those provisions of the law designed to define the powers and duties of such officers to "go to and from the room" in which the ballot-boxes are.

The following is, therefore, the ruling of the court: Unless it is shown that a disturbance of the peace has actually occurred, or violence is committed, or that one or the other is threatened, or that actual fraud is attempted, or that the supervisor is in actual need of protection, in the room of the judges of election, the deputy marshals of election have no right to be in the said room against the orders of the judges of election during the progress of the voting. But if there be actual disturbance of the peace, or other actual violence committed or threatened, or if the supervisor be in actual need of protection, or fraud be attempted in the said room, then the deputy marshal may enter the room for the purpose of discharging the duties imposed on him by section 2022.

Nolle prosequi was entered.

Case No. 15,210.

UNITED STATES v. GIVEN.

[17 Int. Rev. Rec. 189.]

Circuit Court, D. Delaware. 1873.

CIVIL RIGHTS — CONSTITUTIONAL AMENDMENTS — VIOLATION BY STATE OFFICER.

1. The rights secured by the thirteenth, fourteenth, and fifteenth amendments to the constitution are objects of legitimate protection by the law-making power of the federal government, and the power is expressly conferred upon congress to enforce the articles conferring these rights. Earlier prohibitions to the states were left without any express power of interference by congress; but in this case such intervention was contemplated and expressly authorized.

2. When state laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the federal government, congress may make the non-performance of those duties an offence against the United States, and may punish it accordingly.

[This was an indictment against Archibald Given for violation of Act May 31, 1870 (16 Stat. 140). There was a verdict of guilty, and the case is now heard upon motion in arrest of judgment.]

STRONG, Circuit Justice. The defendant was indicted for a violation of the second section of the act of congress of May 31, 1870, entitled "An act to enforce the right of citizens of the United States to vote in the several states of the Union, and for other purposes" (16 Stat. 140). That section enacts "that if by or under the authority of the constitution or laws of any state, or the laws of any territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and, by such constitution or laws, persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote; it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote, without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall for every such offence * * * be deemed guilty of a misdemeanor, and shall on conviction thereof be fined not less than five hundred dollars, or be imprisoned not less than one month, and not more than one year, or both, at the discretion of the court."

At the trial a verdict of guilty was returned upon five counts of the indictment, and it is now moved in arrest of judgment that "the statute under which the indictment was framed is unauthorized by the constitution of the United States, and is in conflict therewith."

The question thus presented is an impor-

tant one, and I have given to it a careful consideration. I agree that the legislative power of the federal government is not unlimited, and I accept the doctrine that congress can enact no law which is not authorized by the constitution, either expressly or by necessary implication. But within its sphere the power of congress is as ample and complete as the necessities for its exercise require. A power is shorn of none of its extent by the fact that it is held by a branch of the federal government. The powers of that government are limited in number, but not in their nature. If, therefore, the grant of power can be found in the constitution, the validity of a law enacted under it is not dependent upon the extent to which the exercise of the power has been carried. The thirteenth, fourteenth, and fifteenth amendments of the constitution have confessedly extended civil and political rights, and, I think, they have enlarged the powers of congress. The primary object of the thirteenth, and of the first sections of the fourteenth and fifteenth was to secure to persons certain rights which they had not previously possessed. Thus the thirteenth amendment made the right of personal liberty a constitutional right. The fourteenth assured the right of citizenship to all persons born or naturalized in the United States, and subject to the jurisdiction thereof. And the fifteenth defined partially that which constitutes citizenship and which belongs to citizenship as such. It recognizes, as a right of citizenship, exemption from disability on account of race, color, or previous condition of servitude, in the determination of a right to vote. It practically declares that citizenship, irrespective of color or race, confers a right to vote on equal terms or conditions with those that are required for voters of another race or color. It places white and colored persons on equal footing as respects the elective franchise, and it protects race against discrimination as fully as it protects color or previous condition. In all the states the right to vote at elections is held under certain restrictions. Among these it was not an uncommon one that the voter should be a free white citizen, or that he should not be of the African race. And until the amendment was adopted, it was in the power of any state to deny to any person who happened to be colored, or who happened to be of German or Irish descent, any participation in the elective franchise. Mere citizenship did not of course secure a right to vote. It was to remove the possibility of such discriminations that the fifteenth amendment was adopted. It leaves to the states, as before, the regulation of suffrage and of the qualification of electors within their limits, with the single restriction that they shall not make color, or race, or previous condition of servitude, a reason for discrimination. It is true the amendment is in form a prohibition upon the United States, and upon the states, but it is not the less on that account an assertion of a constitutional right belonging to citizens as such. Surely it cannot be maintained that it conferred no rights upon persons. There are very many instances to be found in the constitution as it was before the recent amendments, in which rights of persons have been recognized and secured without any express grant. It is not uncommon to speak of them as existing, and to prohibit their infringement. The prohibition is itself an acknowledgment of the right. Thus, the provision that the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it, is a constitutional recognition that such a privilege does exist. Indeed very many of the prohibitions mentioned in the 9th section, and those upon the states mentioned in the 10th section, imply corresponding rights and exemptions belonging to persons. It is not necessary to maintain that because there are constitutional rights, recognized as such by the organic laws, congress has power to protect them, in all cases, by affirmative legislation. Where rights result from prohibitions upon the states, there seems to have been no provision made for their enforcement by congress.

There is, however, one clause in the constitution that deserves particular mention, when speaking of indirect recognition of rights, and of the power of congress to protect them. I refer to the 2d section of article fourth, which ordained as follows: "No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This has always been understood as securing the right of a master to the return of his fugitive servant. It gives no express power to congress to legislate upon the subject. And such power is not found in the 8th section of the first article, unless it is in the last clause, and there only by a very liberal construction. Yet by the act of February 12, 1793 [1 Stat. 302], congress enacted not only that the person to whom such rights were secured, the person to whom such labor or service might be due his agent or attorney, might seize such fugitive from labor, but that any person who should knowingly and willingly obstruct or hinder the seizure, or rescue the fugitive, or harbor him after notice that he was a fugitive from labor, should be subject to a penalty, as well as to damages. This act was held to be a constitutional exercise of congressional power by the supreme court, as well as by state courts, in repeated adjudications. Prigg v. Com. [16 Pet. (41 U. S.) 539]. So on the 18th of September, 1850 (9 Stat. 462), another act was passed, with much more stringent provisions intended to secure this right of the master, imposing severe penalties for obstructing or hindering the exercise of the,

right, and fixing a minimum of damages to be recovered in a civil action. This second enactment has also been held constitutional by the supreme court of the United States. Ableman v. Booth, 21 How. [62 U. S.] 506. The discussion of this subject in Prigg v. Com. is worthy of careful attention, for it bears directly upon the question how far congress could, under the constitution, as it was before its recent amendments, interfere to protect rights recognized by it. I can only quote briefly from the opinion of the court as delivered by Judge Story, but the whole is important. The argument commences with some general observations upon the principles to be applied in expounding the constitution. "It will," said the court, "probably be found, when we look to the character of the constitution itself, the objects which it seeks to obtain, the powers which it confers, the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications of its actual application to particular cases. And perhaps the safest rule of interpretation after all will be found to be, to look to the nature and effects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the end proposed." The court then proceeded to say: "Historically, it is well known that the object of this clause" (that respecting persons held to service or labor) was to secure the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state of the Union into which they might escape from the state where they were held in servitude. "How, then," said the court, "are we to interpret the language of this clause? The true answer is, in such a manner, as consistently with the words, shall fully and completely effectuate the whole object of it. If, by one mode of interpretation, the right must become shadowy and unsubstantial and without any remedial power adequate to the end, and, by another mode, it will attain its just end, and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them." The court then proceeded to show that if congressional legislation was not contemplated, if it was not legitimate, the right secured by the provision would, in a great variety of cases, be delusive and empty. Hence it was argued, that, if the constitution guaranteed the right, and required the delivery (as could not well be doubted), the natural inference was that the national government was clothed with the appropriate authority and functions to enforce it.

These principles reach much farther than is necessary to sustain the constitutionality of the 2d section of act of 1870. From the recognized existence of a constitutional right, and a duty not imposed in terms upon congress, power was deduced to protect the right by penal legislation. Said Chief Justice Taney: "I concur in all that is contained in the opinion concerning the power of congress to protect the citizens of the slave-holding states in the enjoyment of this right, and to provide by laws an effectual remedy to enforce it, and to inflict penalties upon those who shall violate its provisions." Thus it will be seen that the end to be secured was regarded as measuring the extent of the power existing to secure it. I am not, however, to be understood as holding that under the constitution, as it was prior to the recent amendments, all the rights therein recognized, or all of the duties enjoined, might have been protected and enforced by congressional legislation. Some, at least, if not all of the prohibitions upon the states, which imply personal rights, were left for enforcement to the federal judiciary, or to the comity and sense of right of the states themselves.

But the recent amendments have introduced great changes. If prior to 1870, when the fifteenth amendment became a part of our organic law, the right of a slave holder to the ownership of his fugitive slave in any state of the Union, and his right to delivery of such slave, was a right which congress was authorized to enforce and protect by penal legislation against individuals obstructing it, much more are the rights secured, recognized, and guaranteed by the thirteenth, fourteenth, and fifteenth amendments objects of legitimate protection by the law-making power of the federal government. Those amendments have left nothing to the comity of the states affecting the subjects of their provisions. They manifestly intended to secure the right guaranteed by them against any infringement from any quarter. Not only were the rights given—the right of liberty, the right of citizenship, and the right to participate with others in voting, on equal terms, without any discrimination on account of race, color, or previous condition of servitude—but power was expressly conferred upon congress to enforce the articles conferring the right. The second section of the fifteenth article ordained that "the congress shall have power to enforce this article by appropriate legislation." Manifestly this section was adopted for a purpose. It must be so construed as to confer some effective power. But what meaning can it have if the first section, as contended by the defendant, is no more than an inhibition upon the United States, and upon the

states as sovereignties, against discriminations? If the first section assures no rights to persons, how can congress enforce the article? Proprio vigore, the first section renders inoperative all adverse national or state legislation. To hold, therefore, that the second section was adopted merely to guard against national or state enactments, or to afford protection against ministerial or judicial acts of state governments, or of state officers acting in the line of their duty prescribed by a state, is to make superfluous and unmeaning all that was accomplished by the first section. And thus holding is to lose sight of the end sought to be attained by both sections, namely, the right to exemption from certain unfriendly discriminations. It is to subordinate that which is substance to mere form. I cannot think that such is a reasonable construction of this amendment. It was well known when it was adopted that in many quarters it was regarded with great disfavor. It might well have been anticipated that it would meet with evasion and hindrances, not from state legislatures, for their affirmative action was rendered powerless by it, or not from a state's judiciary, for their judgments denying the right were reviewable by federal courts, but by private persons and ministerial officers, by assessors, collectors, boards of registration, or election officers. And it might have been foreseen that by these agencies a right intended to be substantial could become incapable of enjoyment. Suppose, as is largely the case in Delaware, the state passes no unfriendly act, but neglects to impose penalties upon its election officers for making discriminations on account of race or color, and provides no remedy for such wrongs, of what value is the constitutional provision unless it means that congress may interfere? I think such intervention was contemplated and expressly authorized. It was not intended to leave the right without full and adequate protection. Earlier prohibitions to the states were left without any express power of interference by congress; but these later, encountering as they did so much popular prejudice and working changes so radical, were fortified by grants to congress of power to carry them into full effect —that is, to enact any laws appropriate to give reality to the rights declared. That the second section of the act of May 31, 1870, is appropriate legislation to secure those rights and to give effect to the thirteenth amendment is perfectly plain. I am therefore of opinion that its enactment was within the power of congress. The first reason urged in arrest of the judgment cannot be sustained.

The second reason assigned in support of the motion is "that the provisions of the act of congress are not applicable to the duties imposed by the laws of Delaware upon the defendant, as charged in the indictment." I understand this to mean that the defendant is not a person or officer charged by the law of the state with the performance of duties in furnishing to citizens an opportunity to qualify themselves for voting, or to perform some prerequisite thereto. To determine how this is requires an examination of the state constitution and laws. By the constitution several things are required as prerequisites to the enjoyment of a right to vote. Among these is the payment of a county tax within two years next prior to the election day, which tax had been assessed at least six months before the election. To enable the performance of this prerequisite the law of the state makes provision for an annual assessment of a tax, and for the appointment of a collector to receive it. The defendant is such a tax collector, and his duties as such are clearly defined by law. He is required to collect all the rates and taxes mentioned in his duplicate, and pay over the same, except so far as allowances may be made to him by the levy court for delinquencies, commissions, or otherwise. He is required to return to the levy court, on the first Tuesday of March next after the date of his warrant, a true account of all delinquents. If then an allowance be made to him for the tax of any one returned delinquent, the tax is extinguished, and he is not permitted to receive it. With the levy court is the power of making the assessment lists, but no assessment can be made after the last day of March; nor can any alterations be made in the assessment list after that time. From the assessment list the collector's duplicate is made. The levy court is required at its March meeting to examine and settle the delinquent list of each collector, and strike the name of each delinquent from the assessment list, and the collector's duplicate, if the delinquent be dead, or has removed from the state; otherwise it is to remain upon the assessment, and be entered on the collector's duplicate for the ensuing year. These are all duties imposed by the statutes. In view of them, it is very plain that a tax collector is a person charged by the laws of the state with the performance of duties in furnishing to citizens an opportunity to qualify themselves for voting. He, and he alone, can receive the tax which must be paid before a vote can be given. He makes the return of delinquents, and if that return be false, or if he return the delinquent dead, or removed from the state, thereby causing his name to be stricken from the assessment list, there can be no assessed tax the payment of which is by the constitution a prerequisite for voting. A false return is a breach of the duty with which he is charged, leading directly to the disqualification of the voter. If such a return be made, or if the collector refuse or omit to collect the tax, and if this is done because of the race, color, or previous condition of servitude of any citizens, and with a purpose to make a discrimination against him, I have no doubt that the

collector is within the purview of the act of congress. I think, therefore, the indictment is not faulty in this particular.

The remaining reason advanced in support of the motion in arrest of judgment is "that the defendant, being an officer of the state of Delaware, with no powers or duties but such as were prescribed by the constitution and laws of said state, is amenable only to said constitution and laws for any non-performance thereunder." If, by this is meant that a state officer, or a person deputed to perform duties on behalf of a state, is not amenable to the laws of the United States, that he owes no duties to such laws, and that he is not punishable for violation of them, I cannot assent to it. I agree that congress cannot impose upon state officers, as such, federal duties, but I fail to perceive that the act of 1870 has imposed any new duties upon any state officer. It is, I think, an exploded heresy that the national government cannot reach all individuals in the states. It cannot invade the state domain. It cannot take cognizance of offences against state sovereignty. But when state laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the federal government (as, for example, to vote, the right of citizenship, or the right to vote, so far as it is secured). I have no doubt that congress may make the non-performance of those duties an offence against the United States, and may punish it accordingly. This is not invading the state domain. It has no reference to violations of state laws. They remain punishable in the state courts. Undoubtedly, an act, or an omission to act, may be an offence both against the state law and the laws of the United States. Any other doctrine would place the national government entirely within the power of the states, and would leave constitutional rights guarded only by the protection which each state might choose to extend to them. The fault of this objection to the indictment is, it fails to apprehend that the fifteenth amendment secured rights to every citizen, and that it gave congress power to protect them. It may be that congress cannot provide for the appointment of assessors, registers, or collectors, or for the existence of any officers who under state constitutions are necessary to enable persons to qualify for voting; but if they cannot, when such officers are appointed, provide that no constitutional discriminations shall be made, the thirteenth amendment is not worth the paper upon which it was written. I cannot construe the constitution in such a manner as to give it no effect. I am therefore constrained to hold that there is no sufficient reason for arresting the judgment in this case.

The motion in arrest of judgment is overruled.

An opinion was also delivered in this case by Bradford, District Judge, for which see [Case No. 15,211.]

Case No. 15,211.

UNITED STATES v. GIVEN.

[17 Int. Rev. Rec. 195.]

Circuit Court, D. Delaware. 1873.

CIVIL RIGHTS — VIOLATION BY STATE OFFICER — POWERS OF CONGRESS.

[1. The fact that the 15th amendment of the United States constitution merely prohibits the denial or abridgment of a citizen's right to vote on account of his race, color, or previous condition of servitude, does not limit congress, in adopting legislation for the purpose of enforcing the amendment, to cases in which there has been actual legislation by the general government or by a state denying or abridging such right.]

[2. In adopting legislation for carrying into effect the 15th amendment to the constitution, congress has power to provide for the punishment of a state official who refuses to perform the duties necessary to qualify colored citizens to vote.]

[This was an indictment against Archibald Given for violating the second section of the act of May 31, 1870. There was a verdict of guilty against the defendant, and the case is now heard upon motion in arrest of judgment. For the opinion of Judge Strong, delivered in the same case, see Case No. 15,210.]

BRADFORD, District Judge. Taking up the first objection to the indictment, viz.: "For that the statute under which said indictment was framed, was not in pursuance of the constitution of the United States, and is in conflict therewith." We think the 2d section of the act of congress [May 31, 1870 (16 Stat. 140)], on which this indictment is framed, is in pursuance of, and is authorized by the constitution of the United States, and not in conflict with the same. It is the result of the exercise of legislative authority, specially granted for the purpose of accomplishing the object contemplated by the fifteenth amendment, viz., the purpose of securing the right to vote of all citizens without regard to race, color, or previous condition of servitude. Without now considering the legality of the means to accomplish this result, we cannot appreciate the force of the argument, that there cannot be any legislation by congress under the authority of the fifteenth amendment, except that which shall be enacted against some "denial" or "abridgment" by the United States, or by the several states, of the right of citizens of the United States to vote on account of race, color, or previous condition of servitude. The power specifically granted by the fifteenth amendment is to enforce by appropriate legislation the article in question. In my judgment the amendment carries with it the grant of a constitutional right. Indeed it is difficult to conceive of the constitutional prohibition, on the states and general government, from denying or abridging a constitutional right, without at the same time conceding the grant of the

right; for such prohibition or denial appears to be an absurdity if the grant be not admitted, for otherwise there would be no subject matter for the denial or prohibition to work upon. Congress then (the grant of right being admitted) can select any means it deems appropriate to render available and secure this constitutional right to vote, and is not limited to such measures as may be directed to a denial or abridgment of the right by the general government or the states. If the enjoyment of the right is endangered from any other cause than a denial or abridgment by the general government or the several states, that danger is a proper subject matter of legislation; just as much in my judgment, as hostile legislation by the general government or states would be.

The right to vote, before this amendment to the constitution, was wholly granted or denied and regulated by the several states of the Union; and now the citizens of these United States have granted and guaranteed by national authority that which before they enjoyed—if enjoyed at all—at the will of the local or state governments. To make available the right to vote to all citizens of the United States without regard to race, color, or previous condition of servitude was the direct purpose of the fifteenth amendment. We cannot see therefore, how legislation which has this purpose directly in view cannot be appropriate because it was not directed against some denial or infringement by general or state legislation. The mode of the assertion of the constitutional right to vote in the fifteenth amendment is not altogether a novel feature in our constitution—as has been remarked on a former occasion during the trial of this cause. "The privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." Section 9, art. 1, par. 2. This clause comprehends the constitutional grant of the writ of habeas corpus, under the form of an expression of denial of its suspension except in certain cases. Article 1st of the amendment to the constitution, is in these words: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." In this article it will be observed that the right to full liberty of religious faith, as regards any attempt to control it by the general government, secured to the citizen by the constitution of the United States, is granted under a form of expression, forbidding congress to make any law "prohibiting the free exercise thereof;" and that the right to a free press and free speech are granted under a form of expression denying their abridgment. So also with the right of the people to assemble and petition the government for a redress of grievances. Article 2d of the amendment is in these words: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This constitutional right, to keep and bear arms, is thus conferred by the declaration that it shall not be "infringed." In article 4th of the amended constitution, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, is granted by the declaration that this right shall not be violated." It will thus be seen that the form of expression which contains the grant of the right to vote to the citizens is not at all unusual in the constitution.

The argument for the defence is that, as there is no express grant of right, but a prohibition of a denial or abridgment of the right by the general or state government, congress is limited in its exercise of legislative powers to those cases where there has been such denial or abridgment, and as there has been in the state of Delaware none such, the act of congress as regards this case is "ultra vires," is without constitutional authority. Now admitting, for the sake of argument (which otherwise I deny in toto), that the legislation of congress to carry into effect the fifteenth article must be confined to cases of abridgment or denial of the right to vote by the United States, or the several states, it must be conceded that any practical denial or abridgment existing at the present or apprehended in the future, can be made the subject matter of legislation, so as to guard against and defeat obstacles and hindrances in this form. If by indifference, refusal to pass such laws as harmonize with and aid in making available and secure to all citizens the right to vote, and by neglecting to punish the officers of its own state for a violation of their duty in affording to the citizens the prerequisites to voting, a practical denial and abridgment of that right are effected, congress, in my judgment, has full power under the fifteenth amendment to remove this evil, and to select such means as it may deem appropriate legislation. Nor is it necessary that there should be direct and hostile legislation by the general government or the several states. Suppose the qualifying process can be performed by none but officers acting under state authority, and there is no law, or disposition in state officials to punish the individual who by his own wilful act disfranchises citizens of the United States, is not the practical denial and abridgment as complete and as destructive of the purpose the fifteenth article was intended to accomplish, as if there was active hostile legislation? Whether, therefore, the scope of legislative action is extended, under the fifteenth article, to all appropriate legislation,

for the purpose of making available and secure the right to vote granted by the article, or is confined to such legislation as will prevent a practical denial or abridgment thereof by the United States, or the several states, we think this 2d section of the act in question, on which the indictment is framed, is based on ample constitutional authority, and that therefore the first reason filed for arrest of judgment must be overruled.

2. "For that the provisions of the said statute are not applicable to the duties imposed by the laws of Delaware upon the said defendant, as charged in the said indictment." We suppose it is meant to be asserted by this second reason filed, that the collector of taxes was not intended to be embraced in the class or description of persons named in the act as "charged with the performance" of certain duties, etc. We fail to see any ground for such a conclusion. When we examine the provisions of the constitution of Delaware and of its statutes, imposing duties on the collector, the performance of which are pre-requisites to the citizen becoming qualified to vote, we cannot see how any person or officer could be more clearly and certainly embraced within the class or description of persons named in the act of congress, than the collector of taxes, the defendant in this indictment. I do not consider that this will bear an argument; the second reason is therefore overruled.

The third and last reason filed is in these words, viz.. "For that the said defendant being an officer of the state of Delaware, with no power or duties but such as were prescribed by the constitution and laws of the said state, is answerable only to said constitution and laws for any non-performance thereunder." This objection, stated in a different manner, is in substance this: "That the national government has no power to require or command a state officer to perform an act, which act is also required of him by state authority, and consequently has no power to punish for the non-performance of the act" The non-performance, it is said, is a breach of a duty to the authority under which the officer was appointed, and for that breach of duty he can be punished by no power save that under which he was appointed. If the duty of the collector as a qualifying officer was a duty which he owed to the state alone, and his act violated no law but that of the state under whose authority he acted, it may be conceded that there would be no warrant for the United States punishing, by fine and imprisonment, such a person under such circumstances. Congress, in legislating on this subject, found that the ability of the citizen of the United States to vote, depended on certain acts which could only be performed by certain persons holding office or authority under state governments, and unless there was a concurrence of the will of these officers with the action of the citizen, in qualifying himself to vote, the right of voting would be utterly destroyed. And supposing such a non-concurrence—and that it met no punishment in the several states—unless congress exercised a direct authority over, and punished the men who refused to perform their part in, qualifying citizens to vote, the fifteenth amendment would amount to nothing as a guarantee or security of right

The statute of the United States, then, under which this indictment was drawn, not only made a rule of action, superadded to that which was created by the state, but created a penalty, not for violating a state law, for that it could not punish, but for violating a United States law, or law protecting the constitutional rights of citizens of the United States. The fact of duty to state authority did not absolve the state official from duty to United States authority. The law-making power took these individuals just as it found them; invested with ability to carry into effect the fifteenth article, or to render it nugatory, and imposed a duty, by way of punishment, for the non-performance, impartially and fairly, of what was already required of them by state authority; they created no new duty, added no new act to be performed, made no new scheme, plan, or policy, different or other from that already required of the state officer, but only commanded him, as his action was vital to the exercise of right by the American citizen, to do impartially and fairly his duty.

But it is alleged, congress cannot impose a duty on a state officer to execute a United States law, and as it cannot impose such a duty, it cannot punish for violation thereof. The fallacy of this argument lies in not drawing the distinction between punishing a state officer for violating the laws of his state and violating the laws of the United States. Has congress the power to make it criminal for a state official to hinder and obstruct the exercise of this constitutional right to vote? This is the real question. I can have no doubt on that point. This power then granted—having committed the act of hindrance and obstruction—this defendant has made himself amenable to the laws of the United States, and incurred the penalty for their infraction. Now, how does his official character, or his duty to the state government, free him from this predicament. There are many cases where a man owes a double duty—to the state, and to the United States. For instance, among many others that might be named, the state, in the exercise of its undoubted rights of police arrangement and discipline, requires that its citizens shall keep the peace toward each other—shall not defraud each other by the circulation of spurious money; and yet when these crimes impinge on some duties due from the general government to citizens of the United States, they do not rely on the states for punishment, but legislate directly against the of-

fenders, and punish by United States laws. Thus they will not leave the punishment of one who assaults a United States mail carrier with intent to rob, or who circulates spurious United States money, to the states, but punish these criminals by United States laws, leaving it optional with the states how far they will also vindicate their own broken laws. Justice Daniel, in U. S. v. Marigold, 9 How. [50 U. S.] 569, says: "With the view of avoiding conflict between the state and federal jurisdiction, this court, in the case of Fox v. Ohio [5 How. (46 U. S.) 410], have taken care to point out that the same act, might, as to its character and tendencies, and the consequences it involves, constitute an offence both against the state and the federal governments, and might draw to its commission the penalties denounced by either as appropriate to its character in reference to each." In [Moore v. People] 14 How. [55 U. S.] 15 Justice Grier rules that states might punish for harboring slaves in violation of their own laws, and that the same act might be a breach of the peace, and a transgression of the laws of both the United States and the individual states. Judge Nelson, in a case reported in American Law Review for January, 1873 [U. S. v. Wells, Case No. 16,665], where a person was indicted for passing forged U. S. treasury notes, and also indicted in the state court of Minnesota for the same offence, said: "The concurrent jurisdiction must be regarded as settled." Mr. Justice Johnson, in [Houston v. Moore] 5 Wheat. [18 U. S.] 1, asks: "Why may not the same offence be made punishable both under the laws of the state and of the United States? Every citizen owed a double allegiance; he enjoys the protection, and participates in government, of both the state and the United States." Now, as there can be no valid reason why a man who violates a United States law in passing forged money should not be punished because he was forbidden by the laws of his state not to do that act, so there can be no valid reason why this defendant should not be punished for a violation of a United States law, because at the same time he violates the law of his state. A conviction for passing counterfeit money, and a sentence for the same, would undoubtedly interfere somewhat with the financial duties of a collector; yet no one supposes, for a moment, that his official position would constitute for him any protection, or that by his punishment the reserved rights of the state would in any constitutional sense be trenched upon; and yet they would be just as much in the one case as the other.

This claim made by the defence of immunity from punishment because it would interfere with the performance of official duty, would prevent the general government from punishing any state official who violates a United States law. I cannot, therefore, see that the record presents a case of an officer who had no duties but state duties, and therefore answerable only to state authority, but that a case is shown of a state official violating a United States law, which he was equally bound to obey and respect, with the law of his state.

I must therefore overrule the third reason filed for arrest of judgment, and the motion in arrest is denied.

Case No. 15,212.

UNITED STATES v. GIVINGS et al.

[1 Spr. 75.] [1]

District Court, D. Massachusetts. April, 1844.

SEAMEN—REFUSAL TO GO TO SEA—SEAWORTHINESS OF VESSEL—RESISTING ATTEMPT TO COMPEL GOING TO SEA—REVOLT.

1. If seamen really believe, upon reasonable grounds, that a vessel is unseaworthy, and ask for a survey, they are not bound to go to sea in her, till such request is granted. And this is so, although the jury in a very doubtful case, should incline to think that the vessel was, in fact, seaworthy.

2. If the masts are rotten and unfit for the voyage, the crew are not bound to go to sea, although the master makes a verbal promise that he will keep in certain latitudes, and carry certain sail, for which the masts are sufficient.

3. In such case, seaman may resist an attempt of the master to compel them to go to sea.

4. If, in making such resistance, an individual commits an unlawful act, he alone is liable therefor.

The prisoners [Henry Givings and others], fourteen in number, were indicted for a revolt on board the whale ship Hibernia, of New Bedford, while lying at Port Louis, in the Isle of France. From the evidence it appeared, that when the ship had been about twelve months out, and was nearly full of oil, the masts were discovered to be rotten, and were fished by pieces of a spare topmast, cut up for that purpose. Port Louis was the first port the ship made, after this discovery. On arriving there, a petition was presented to the American consul, signed by the three boat-steerers the carpenter, the cooper, and the blacksmith, and all the foremast hands, requesting that a survey might be had on the masts, before proceeding to sea. No notice being taken of this petition, several of the crew went to the office of the consul, who, however, refused to do anything in the matter, and treated the defendants very roughly. The men afterwards made another appeal to the master alone, who refused to call a survey, and asked the men why they did not run away. They continued to perform all their duty, until the master ordered them to heave up the anchor. They then refused, saying they would not go to sea, unless the masts were surveyed, and pronounced seaworthy. The master then ordered his officers to seize one of the men, named Dawson,

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

who was the spokesman, and bring him aft. From this point, there was much conflicting evidence; but the facts appeared to be, that the officers attempted to seize Dawson, but were forcibly prevented from so doing by the men. The master then procured a sword, and repeated the attempt, but was again prevented, and the sword taken from him. After this, there appears to have been no further difficulty. The master called the men aft, and asked them, if they would go on the voyage, which they still refused to do, except upon the condition of a survey. The master, upon this, sent for a force of police, and had them all put in prison; and in a few days sailed for home without them. The men remained in prison forty-seven days, and were brought home for trial in another vessel. As to the condition of the masts, there was evidence that the vessel came home with her masts standing; and the master and officers testified that they bore a very heavy press of sail, in bad weather, without injury. But there was other evidence, showing that they were condemned and sold, on the arrival of the Hibernia, and that they were then very rotten, and unsafe for the purposes of a whaling voyage. It also appeared that the master made no offer to the men, to return home immediately in the ship, but insisted on their going on a cruising ground, which had the reputation of being stormy, making, however, certain promises, as to the latitudes within which he would keep, and the sail he would carry.

R. H. Dana, Jr., with whom was J. H. Prince, for the prisoners, rested the defence upon the right of the seamen to a survey, upon reasonable grounds of apprehension of unseaworthiness, and their right to refuse to go to sea without such survey.

Franklin Dexter, Dist. Atty. for the United States, argued, that, on the facts, the defendants were guilty of a revolt.

SPRAGUE, District Judge (charging jury.) If the crew of a vessel, acting in good faith, and upon reasonable grounds of belief, refuse to go to sea, because of the unseaworthiness of the vessel, they cannot be found guilty of revolt, even though the jury should, upon all the evidence, be in doubt as to the actual seaworthiness of the vessel; or even, if they should, upon a measuring cast (Stat. July 20, 1840, c. 48, §§ 12–14; 5 Stat. 396; The Hibernia [Case No. 6,455], and cases there cited), be inclined to think she might have been seaworthy; for a reasonable apprehension, fairly entertained, takes away the element of "unlawful and wilful" resistance, necessary to constitute the offence. Full force should be given to the necessity of upholding the power of the master, and to the policy of requiring seamen to submit, in some instances, even to evident injustice, waiting for redress from the home tribunals; but a distinction should be drawn between cases of ordinary injuries, which can be compensated by pecuniary damages, and those where the wrong about to be done is of so serious a nature, as not to be measured by subsequent compensation in money; as when life or limbs are put in danger. The law regards life, and the safety of limbs, as of a higher value than the cost of surveys or repairs. Also, that if the masts were unseaworthy for the purposes of the voyage, the seamen were not obliged to go to sea, upon any merely verbal promise of the master, that he would keep in certain latitudes, and carry certain sail, even if the masts might be safe, in case these promises were complied with.

As to the charge of revolt, in resisting the attempt to seize Dawson; if the men were justifiable in refusing to go to sea without a survey, the master had no right to attempt to compel them; and if he used, or threatened, violence, upon the men, or any of them, apparently for the purpose of forcing them to go to sea, they had a right, in self-defence, to use such force as was necessary to resist his attempt. If the general object of resisting such attempt was legal, the particular acts of any one person, who might, in the course of the resistance, go farther than was necessary, being no part of the general object, others would not be responsible therefor. For such individual trespasses, the party committing them would alone be liable.

Verdict "Not guilty."

See U. S. v. Borden [Case No. 14,625]; Shorey v. Rennell [Id. 12,806]; Knowlton v. Boss [Id. 7,901].

[NOTE. Immediately after their acquittal, the defendants filed a libel for subtraction of wages against the Hibernia. The court decided that the refusal of the men to obey the master's orders was justifiable, and that the men were entitled to their full lays. Case No. 6,455.]

Case No. 15,213.

UNITED STATES v. GLAB.

[1 McCrary, 166.] [1]

Circuit Court, D. Iowa. Oct., 1876.[2]

INTERNAL REVENUE—LICENSE TO FIRM.

Where a license for carrying on business as brewers was issued to the firm of A. & G. for one year, and before the year expired G. purchased A.'s interest in the business, and continued the business at the same place till the end of the year, and not elsewhere by either partner,—*held*, no violation of the law.

Error to district court [of the United States for the district of Iowa].

This is a civil action to recover the penalty imposed for carrying on the business of a brewer, without having paid the special tax therefor required by law. The answer sets up former acquittal and general denial. By stipulation, the cause was tried alone upon

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 99 U. S. 225.]

the general issue on the following agreed statement of facts: "That on the first day of May, 1874, Glab & Sness, a co-partnership, paid their special tax for carrying on the business of brewers of first class by the said firm, and took proper receipt therefor. That said firm carried on said business thereafter, until the first of August, 1874, when the said firm was dissolved, and the said [Adam] Glab purchased the interest of said Sness in said firm and business of brewing, and thereafter carried on the said business of a brewer of the first class, at the same place, during the remainder of the year covered by said license, viz.: To the first of May, 1875, without having paid a special tax therefor, other than that paid by said firm, and took out no license in his own name." The question raised, therefore, is this: Whether, under the circumstances, said Glab could carry on said business of a brewer at the same place, in his own name, for the remainder of the license year, without the payment of a special tax, in addition to that paid by the firm. The district court gave judgment for the defendant [case unreported], and to reverse this judgment the case is brought by writ of error to this court by the government.

James T. Lane, Dist. Atty., for the United States.

T. S. Wilson, for defendant.

DILLON, Circuit Judge. As the same business was carried on in the same place by Glab, and not elsewhere by either partner; as no new member was introduced into the firm on the dissolution; as there is no express requirement in such a case that a new license shall be taken out by the successor, guided by the provision that "any number of persons doing business as a firm at any one place, shall be required to pay but one special tax" (Rev. St. § 3234); and by the spirit of the analogous cases as to succession in business provided for by section 3241, and influenced by the consideration that the government received its revenue on this business in this place for a year, and is not therefore deprived of any revenue in fact, and that within the limitations of this case no door is open for fraud, I am of opinion that, upon the special facts, the judgment of the district court was right. Affirmed.

[A writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 99 U. S. 225.]

Case No. 15,214.

UNITED STATES v. The GLAMORGAN.

[2 Curt. 236.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

APPEAL—WHEN TO BE TAKEN.

1. After a final decree has been made by a district court, sitting in admiralty, and the court has adjourned without day, the decree cannot be set aside, or opened so as to allow an appeal to the circuit court, a term whereof has intervened since the decree was made.

[Cited in The Major Barbour, Case No. 8,984; The Lizzie Weston, Id. 8,425; Snow v. Edwards, Id. 13,145; French v. Stewart, 22 Wall. (89 U. S.) 245; Bronson v. Schulten, 104 U. S. 416; Allen v. Wilson, 21 Fed. 884; The Brantford City, 32 Fed. 325.]

2. If an appeal from such a decree be not taken to the term of the circuit court, held next after the making of the decree, the right is lost.

[Cited in The Oriental, Case No. 10,570.]

In admiralty.

Mr. Hallett, Dist. Atty., for the United States.

CURTIS, Circuit Justice. This was a libel of information for a forfeiture of the brig, by reason of her employment in the slave-trade. The district court decreed a forfeiture and sale of the vessel and cargo [Case No. 5,472], and on a return of the warrant of sale, and payment of the proceeds into the registry, at the September term, 1854, made a final decree, distributing the net proceeds equally between the United States, and the commander, officers, and crew of the brig Perry, a public armed vessel of the United States, who made the seizure of the Glamorgan, and ordering each moiety to be paid out of the registry accordingly; and it was paid, one moiety to the United States, and the other to the proctor of the private persons interested. Subsequently, the secretary of the navy not being satisfied of the correctness of this distribution, the district-attorney, at the following December term of the district court, applied to the judge to re-examine so much of the decree as made distribution. The judge heard the attorney, and upon that, made an entry on the record, that, having examined the order, and considered the same, he was of opinion it was correct, and therefore does not revoke or alter the same. An appeal was then claimed by the United States, and disallowed; and the question now is, whether the appeal should have been allowed? The 21st section of the judiciary act of 1789 (1 Stat. 83) allows an appeal from final decrees of the district court to the next circuit court to be held for such district. The final decree in this case was made on the 8th of September, 1854. The next term of the circuit court, held in this district, was on the 15th of October, 1854. This appeal was not claimed until the December term of the district court, and could not then be allowed, because it was too late to take an appeal to the term of the circuit court held next after the entry of the final decree. See Montgomery v. The Betsy [Case No. 9,734]; Norton v. Rich [Id. 10,352]; U. S. v. Certain Hogsheads of Molasses [Id. 14,766].

But it is argued, that the final decree was opened, at the December term, on motion of the district-attorney; and that the right of appeal is to be considered as thereby re-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

vived, or a new right created. Without intending to give any opinion as to what it was fit for that court to do, in respect to hearing an argument on that motion, and without knowing what it would have done, if it had come to the conclusion that the order of distribution was erroneous, I am of opinion that it is not in the power of the district court to open, or set aside a final decree, regularly entered at a former term of the court, and thereby confer a new right of appeal upon a party, or revive a right lost by lapse of time. The power of a court of admiralty over its final decrees, except in the cases provided for in the fortieth rule, made by the supreme court to regulate the practice in admiralty, is somewhat unsettled. It has been very little discussed in England, and until the decision of Doctor Lushington in The Monarch, 1 W. Rob. Adm. 21, it cannot be said that any thing respecting it, was determined, though the subject had been before the court of admiralty in the Vrouw Hermina, 1 C. Rob. Adm. 163, and before the court of appeals in The Elizabeth, 2 Act. 57. See, also, The Herstelder, 1 C. Rob. Adm. 119, note; The Fortuna, 4 C. Rob. Adm. 278; The Flora, 1 Hagg. Adm. 298, 304. It was discussed by Mr. Justice Story in The New England [Case No. 10,151]. In the case of The Monarch, Dr. Lushington held, that the high court of admiralty had the same power to vary its decrees, before they were enrolled, that were possessed by other courts of equity. So far as I am aware, no court, either of law or equity, has exercised a summary control over its judgments, or decrees, after their enrolment, and after the expiration of the term at which they were entered. In our practice, decrees in the admiralty, as well as in equity, being matters of record, are deemed to be enrolled, as of the term of the court at which they are finally passed. The New England [supra]; Dexter v. Arnold [Case No. 3,856]; Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 6, 13. And after a final decree has been drawn up and entered, and the court has adjourned without day, no further control can be exercised by the district court over it, save by force of the fortieth rule, already mentioned, or by a libel of review, respecting which I give no opinion.

In the case of The New England, Mr. Justice Story speaking of such a case, says: "There could be no appeal; and the mode of redress must have been, if any, by a libel of review," which he proceeds to consider. In Washington Bridge Co. v. Stewart, 3 How. [44 U. S.] 424, the supreme court disclaimed all power to change its decrees after the expiration of the term at which they are entered. And in Bank of U. S. v. Moss, 6 How. [47 U. S.] 31, it was held, that the circuit courts could not set aside a judgment of a former term on motion, even for want of jurisdiction. A district court, sitting in admiralty, is within the same rule.

My judgment is, that the claim of an appeal was rightly disallowed by the district court; that this court has no jurisdiction over the case, and can pronounce no opinion on the merits.

Case No. 15,215.

UNITED STATES v. GLEASON.

[1 Woolw. 75.] [1]

Circuit Court, D. Iowa. May Term, 1864.

FEDERAL JURISDICTION — KILLING OF ENROLLING OFFICER—DISCHARGE OF DUTIES—CONSTITUTIONAL LAW—INDICTMENT—ANIMUS.

1. If an officer, while engaged in the proper discharge of his official duties, have occasion to deal with a man who, under the influence either of a general feeling of hostility to the law, or of a violent temper, which is roused by no fault of the officer, or of a spirit of revenge, makes an assault which results in the death of the officer, a purpose in his mind to obstruct the execution of the law, is not necessary to constitute the offence a crime under the act.

[Cited in Tennessee v. Davis, 100 U. S. 279.]

2. But, on the other hand, if the officer should be employed in the discharge of such of his duties as did not bring him in collision with others, as when going through the country serving notices of a draft, and should become involved in a quarrel upon some matter having no connection with his official duties, but growing out of some personal difficulty of his own, and should be assaulted and killed, the author of the homicide would not be amenable to this act.

3. The object of this law was to prevent obstruction to its execution.

4. If it seek to draw to the federal jurisdiction offences against the person of a federal officer, simply on the ground that he is such officer, the act may be unconstitutional.

5. As it must be shown in proof that the animus of the assault was roused by the officer's discharge of his duties, the indictment must contain an averment to that effect.

This was a demurrer to an indictment.

Mr. Severe, in support of demurrer.

Mr. Baldwin, Dist. Atty., contra.

MILLER, Circuit Justice. This is an indictment for murder under the 12th section of the act of February 24, 1864 (13 Stat. 8), which provides: "That any person who shall forcibly resist or oppose any enrolment, or who shall incite, counsel, encourage, or who shall conspire or confederate with any other person or persons forcibly to resist or oppose any such enrolment, or who shall aid or assist, or take any part in any forcible resistance or opposition thereto, or who shall assault, obstruct, hinder, impede, or threaten any officer or other person employed in making, or in aiding to make such enrolment, or employed in the performance, or in aiding in the performance, of any service in any way relating thereto, or in arresting, or aiding to arrest, any spy or deserter from the military service of the United States, shall, upon conviction thereof, in any court competent to try

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

the offence, be punished by a fine not exceeding $5,000, or by imprisonment not exceeding five years, or by both of said punishments, in the discretion of the court. And in cases where such assaulting, obstructing, hindering, or impeding shall produce the death of such officer or other person, the offender shall be deemed guilty of murder, and upon conviction thereof, upon indictment in the circuit court of the United States for the district within which the offence was committed, shall be punished with death. And nothing in this section contained shall be construed to relieve the party offending from liability, under proper indictment or process, for any crime against the laws of a state, committed by him while violating the provisions of this section." The indictment alleges, that the persons killed were enrolling officers, and were, at the time of the commission of the offence, employed or engaged in and about the duties of said enrolment; that while so engaged they were assaulted by the defendant, and wounded; and that the wounds so received resulted in death. To this indictment there is a demurrer. Among many other grounds alleged therefor, it is insisted that it is a fatal objection to the indictment, that it contains no allegation that the assault was made with the intent to hinder, delay, obstruct, or oppose in any manner, the execution of the duties in which the officers were engaged.

We are not prepared to hold that such intent is in all cases essential to an offence under this statute. If an officer, while engaged in the proper discharge of his official duties, have occasion to deal with a man who, under the influence of a general feeling of hostility to the law, or of a violent temper, which is roused by no fault of the officer, or of a spirit of revenge, makes an assault which results in the death of the officer, a purpose in his mind to obstruct the execution of the law, is not necessary, to constitute the offence a crime under the act. But, on the other hand, if the officer should be employed in the discharge of such of his duties as did not bring him in collision with others, as when going through the country serving notices of a draft, and should become involved in a quarrel upon some matter having no connection with his official duties, but growing out of some personal difficulty of his own, and should be assaulted and killed, the author of the homicide would not be amenable to this act. Offences against persons exercising these offices, and discharging the duties thereby imposed, must be punished; but if the offences are committed against them, not as officers, but in personal difficulties totally disconnected with their official duties, in which they may be right or wrong, and in which they may give or receive injuries, the guilt or innocence of the parties with whom they come in conflict must be otherwise determined than by the act before us. The object of that act was to prevent obstructions to the enforcement of the enrolment law, and to protect officers engaged in that enforcement from violence growing out of and connected with the performance of their duty. It was not intended to draw to the jurisdiction of the federal courts all offences of which such officers might be the objects. Indeed, it may be doubted whether congress has the constitutional power thus to withdraw from the jurisdiction of the state tribunals the cognizance of such offences, solely upon the ground that the party injured is an officer of the federal government, and at the time was employed in a general way in discharging the functions of his office. The true principle seems to be, that it must appear that the animus of the assault grew out of, or had some relation to, the discharge by the officer of his official duties. And if this is necessary to appear in proof, it is equally necessary that some averment of it should be made in the indictment. Nothing of the kind is found here. It is perfectly consistent with all that is alleged in the indictment, and perhaps a fair inference from it, that while the deceased was an enrolling officer, and engaged as such in the discharge of the regular duties of his office, the assault which resulted in his death had no connection whatever with those duties.

The demurrer is therefore sustained.

At the request of the district attorney, the prisoner was retained in custody, to await the action of the grand jury, then in session, which found a new bill. [See Case No. 15,216.]

Case No. 15,216

UNITED STATES v. GLEASON.

[1 Woolw. 128.] [1]

Circuit Court, D. Iowa. Oct. Term, 1867.

FEDERAL OFFICERS—DISCHARGE OF DUTY—ARREST OF DESERTERS—INDICTMENT FOR MURDER—CASUAL RENCOUNTER—DYING STATEMENTS—REASONABLE DOUBT.

1. Parties employed by proper officers to arrest deserters, when, having come into a vicinage on such service, they are returning therefrom to another place, to obtain assistance to effectually discharge their duty, are employed in arresting deserters within the meaning of the act of 24th February, 1864.

[Cited in Re Neagle, 135 U. S. 57, 10 Sup. Ct. 665.]

2. It is not necessary that such parties be, at the time, in the immediate act of making an arrest.

[Cited in Re Neagle, 135 U. S. 57, 10 Sup. Ct. 665.]

3. The purpose of the act is to protect the life of the person so engaged, and this protection continues so long as he is employed in a service necessary and proper to the discharge of his duty in that behalf.

[Cited in Re Neagle, 135 U. S. 57, 10 Sup. Ct. 665.]

4. Parties charged by proper officers with the duty of arresting persons especially named, as deserters, cannot make their obedience to their

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

orders dependent upon any inquiry on their part, whether the persons to be arrested be, in fact, deserters or not.

5. The protection which the law affords to parties executing it, does not depend upon the legal guilt of the persons charged as deserters.

6. If a person assault parties charged with this service when they are not engaged therein, he is not amenable to the federal laws, however malicious the deed may be, and even though it result in death.

[Cited in U. S. v. Yellow Sun, Case No. 16,780; Tennessee v. Davis, 100 U. S. 279; Ex parte Yarbrough, 110 U. S. 660, 4 Sup. Ct. 156.]

7. In order to the guilt under this act of the person making the assault, he must be moved thereto by some motive having relation to the service in which the party assaulted was engaged.

8. It is not enough that the offence was committed in a casual rencounter, which would have occurred if the person assaulted had not been engaged in that service.

9. It is not necessary that the accused should have personally made the assault. It is enough if, with the spirit above mentioned, he brought it about, or aided in bringing it about.

10. The character of the dying statements of a person who has been killed, their consistency with established facts, and all the circumstances of the dying man, are to be considered by the jury in determining the weight to which his account of the transaction is entitled.

11. If a person, knowing himself to be suspected of a crime, makes contradictory statements with reference to it, the fact has not the effect, as in the case of an ordinary witness, of neutralizing his testimony.

12. It is reasonable to assume that if such person withholds the truth, he does so because it is unfavorable to his innocence.

13. The effect of statements made by a party against his interest, cannot be avoided by contradictory statements.

14. Before finding a defendant guilty of murder, the jury should be satisfied of his guilt beyond a reasonable doubt.

15. Such doubt is not every possible doubt, however slight, or however unfounded, such as beset some minds on all occasions.

16. It should be founded on something connected with the case, as disclosed by the testimony, which leaves in the mind a rational uncertainty as to guilt not removed by any other matter in the testimony.

This was the trial before the court and jury of the defendant upon an indictment for murder. The provost marshal of the United States army, for the district of Iowa, with headquarters at Grinnell, in that state, employed J. L. Bashore and J. M. Woodruff to arrest Samuel Bryant, Joseph Robertson, and Thomes C. M'Intire, as deserters from the service. While proceeding on this service, these officers were met by the defendant, who expressed a willingness to aid them in their employment. He went at once to the place where the alleged deserters were. On the way, he declared to all persons whom he met his hostility to the law, and to the execution of it by the officers, whom he declared his readiness to kill. A large and excited crowd collected, and the officers, being unable to secure the deserters, started on their return to headquarters to procure the force necessary to execute the law. They were followed by the accused and two other persons, were overtaken, and killed. [See Case No. 15,215.]

Mr. Browning, Dist. Atty., for the Government.

Mr. Severe, for defendant.

MILLER, Circuit Justice (charging jury). After several days of patient and careful investigation in this case, and after the able arguments of counsel for the government and for the prisoner, it becomes the duty of the court to give you a statement of the law which should govern you in deciding concerning the guilt or innocence of the accused. Section 12 of the act of congress of February 24, 1864, under which the defendant is indicted, was passed for the purpose of protecting the lives and persons of the officers and agents of the government, when engaged in the discharge of the duties by that act imposed. Experience had proved this to be a dangerous service, on account of a disposition on the part of evil-disposed persons in various parts of the country to resist the due enforcement of the law for calling out the military force of the nation. That section, so far as applicable to the case before us, enacts, that if any person shall assault, obstruct, hinder, or impede any officer or other person employed in arresting or aiding to arrest any spy or deserter from the military service of the United States, if such assaulting, obstructing, hindering, or impeding shall produce the death of such officer or other person, the offender shall be guilty of murder, and upon conviction thereof, shall be punished with death. The defendant, Michael Gleason, is charged, in various forms, in this indictment, with assaulting J. L. Bashore and J. M. Woodruff, with intent to hinder and obstruct them while they were engaged in the business of arresting Samuel Bryant, Joseph Robertson, and Thomas C. M'Intire, who were deserters from the military service of the United States; and that said assault occasioned the death of the said Woodruff and Bashore.

Upon the question whether Bashore and Woodruff were killed by a violent assault made upon them at the time and place alleged in the indictment, you can experience no difficulty.

You are next to determine whether they, or either of them, were employed in arresting, or aiding to arrest, Samuel Bryant, Joseph Robertson, and Thomas C. M'Intire, or either of them, as deserters from the military service of the United States, when this assault was made. Upon the subject of their employment, you have the records of the provost marshal's office of the district in which the transaction occurred, and their statements of the business in which they were engaged, as declared by themselves to the prisoner, and as detailed by the prisoner to various persons.

It is claimed by the counsel for the defendant, that if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault, had abandoned the intention of making the arrests at that time, and were returning to headquarters at Grinnell, with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law. But this is not a sound construction of the statute. The court instructs you, upon that point, that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the further prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still employed in arresting deserters within the meaning of the statute. It is not necessary that the party killed should be engaged in the immediate act of arrest; but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment.

The counsel for the defendant also asks in this connection, that the court shall instruct you that the persons whom Bashore and Woodruff were employed to arrest, must be proved clearly to have been deserters, before you can find the defendant guilty. This instruction we must refuse. If those officers were ordered by their superiors to arrest persons specifically named as deserters, they were bound to use their best efforts to execute their orders. They had no right to make their obedience dependent upon any inquiry which they could make as to whether the persons to be arrested were deserters or not. The protection which the statute intended to throw around those officers does not depend upon the legal guilt of the parties charged with desertion. If it were so, the jury would be required to try two issues of guilt or innocence, depending upon totally different transactions, and involving parties not before the court. Such a construction would defeat the manifest intention of the law. We have only to suppose that congress intended that if persons who were engaged in arresting parties as deserters were killed as in the act set forth, the one committing the offence should be guilty of murder. This makes the language of the act consistent with its manifest purpose. In giving it this construction we do no violence to the language of the statute, and are fully supported by the necessity of giving effect to its spirit and meaning. It is therefore not essential to conviction to prove that, in point of law or fact, Bryant, Robertson, and M'Intire were deserters.

If you find, in investigating this branch of the subject, that Woodruff and Bashore, when they were assaulted, were not employed in arresting or aiding to arrest deserters, then, according to the principle already stated, however wicked and malicious may have been the act of homicide, the defendant must be acquitted; the laws of the federal government do not reach his case, and he is amenable only to the laws of the state of Iowa. But if you are of opinion that the parties killed were employed in arresting deserters, as charged in the indictment, according to the rules which we have stated to enable you to determine that fact, you will then inquire into the connection of the defendant with the transaction. On this subject you are instructed that, in order to find this person guilty, it is not enough that you should find that the assault was a mere casual rencounter, which would have taken place all the same, if the persons killed had not been employed in a business relating to the enrolment, or to the arrest of deserters. You must find that the assault was prompted by some motive which had relation to the service in which the deceased was engaged, and grew out of hostile feelings engendered thereby. You must also find that the accused contributed to the assault with this motive or sentiment. You must find that he, with such feelings, or with the object of obstructing or hindering persons engaged in the discharge of the duty of arresting deserters, actually and personally assaulted them, or one of them; or by some active means efficiently aided in bringing about the assault which resulted in the homicide. It is not necessary to the defendant's guilt that he should have made the assault personally. If, with the motive above mentioned, he intentionally brought about, or assisted in bringing about, the assault in which the deceased were killed, it is the same as if he had made it himself. If, on the other hand, he had no design or intention to hinder or obstruct these officers in the discharge of their duties, or if he was present by mere accident when the assault was made, and took only such part in the affair as he might reasonably do for self-defence, then he is not guilty.

The testimony which tends to develop the prisoner's connection with and relation to the transaction which resulted in the death of these officers, is largely composed of the dying declarations of Bashore, and of statements alleged to have been made by the prisoner himself. In both cases, these statements come to the jury through witnesses who profess to have heard them. With regard to them both, you are to consider the imperfection of human memory, and the lapse of time since the conversations occurred which are detailed; and you are also, in reference to any discrepancies in the detail of these conversations by the witnesses who heard them, to remember how seldom it is that every person present hears or remembers all that is said, or receives precisely the same impres-

sion from hearing the same conversation. Bashore seems to have been fully aware of his approaching dissolution, and to have made his statements with a full sense of the awful responsibility of his situation. It is true that the absence of cross-examination leaves out an important agent in ascertaining all the truth, but it is equally true that in his situation there seems to be nothing to detract from the probability that he desired to tell nothing but the truth. The clearness or obscurity of his statements, their consistency with each other, and with other facts proved in the case; the condition of his mind for accurate observation and for correct recital of the things observed; and as well, also, the fact that he is the only person, except the defendant, whose story of the immediate occurrences at the time of the homicide is known to us,—are all to be considered by you in determining the degree of credit to which his testimony is entitled. Of the importance of these statements there can be no doubt. The weight to be given them, in your estimation of the whole case, is for you, and not for the court, to determine. The accounts of these transactions, given by the prisoner at various times, differ from each other, and are, in some important particulars, contradictory; and the statements of what he did say are not always identical when detailed by different witnesses who profess to have heard them. Considering the lapse of time, and the exciting nature of the occasion, it is not remarkable that the witnesses should vary somewhat in their recollection of what was said. The defendant, however, was aware that he was suspected of the murder, and was under no obligation to make any statement about the matter. The fact that he voluntarily made contradictory statements, cannot, as in the case of an ordinary witness, have the effect merely of neutralizing his testimony, as is contended by his counsel. On the contrary, the jury must be left to draw such inference from it as, in view of all the circumstances, may seem just. It is reasonable to assume that if he withheld the truth, he did so because it might not be favorable to his innocence. It is also to be considered that when a party has voluntarily made statements against his own interest, which are always entitled to great weight, he cannot, by subsequently contradicting them, or by varying his account of the transaction, destroy the effect of such admissions. Nevertheless, the general looseness, inaccuracy, or contradictory character of the defendant's accounts of the transaction, may be taken by the jury for what they may be worth, as affecting the credence to be given to any part of his story.

Before you find the defendant guilty, you should be convinced of his guilt beyond a reasonable doubt. But it is not every possible doubt, however slight or however founded, which should prevent a verdict of guilty. The doubt, to have that effect, must be a reasonable one; that is, it must be founded on something growing out of the state of the testimony, which leaves a rational uncertainty as to his guilt, and which nothing else in the case removes. The degree of conviction in the minds of the jury of the guilt of the prisoner, should be something more than a bare preponderance of belief; something more than the probability of guilt merely outweighing the probability of innocence. The mind should be able to rest reasonably satisfied of the guilt of the accused before a verdict of that character is given. On the other hand, mere possibilities of innocence, the doubts, however unreasonable, which beset some minds on all occasions, should not prevent such a verdict. If the whole testimony in the case produces in your minds this degree of conviction of the guilt of the prisoner, it is your duty to say so by your verdict. If it does not, it is your duty to say "Not guilty."

The jury retired, and after an absence of about one hour, returned with a verdict of "Guilty." At the request of the defendant's counsel, the jury were then polled, and each juror answered the usual question affirmatively. The convict was remanded to prison. Thereafter, being called to receive his sentence, he spoke for some minutes, professing to detail his connection with the death of Bashore and Woodruff, and declaring his innocence in the premises. Judge MILLER then pronounced sentence, as follows:

"Michael Gleason, you are charged at this bar, and before the country, with the crime of murder. A jury of honest and faithful men, after a full and fair investigation of your case, have said that you are guilty. You have had three years to prepare for this trial, and to secure, at the expense of the government, all the testimony which you could find in your behalf. You have had the aid of able, experienced, faithful, energetic counsel, who have done all that could be done in your defence. You have had a fair, an impartial, and conscientious trial. I have myself no doubt of your moral and legal guilt; and I feel authorized to say that the judgment of my associate, who has been with me through the trial of the case, concurs with mine. You met these two men, who confided to you their purpose to arrest deserters. You went immediately to a place in the neighborhood, where these deserters were, with a large crowd of other persons, many of whom were doubtless known to you as sympathizing with them. On your way you published to every person you saw, the presence of these officers in the neighborhood, and the object of their visit. You declared on each occasion your hostility to their purpose, and your readiness to join in resisting, even to death, although you had professed to them that you would assist them. When you reached the crowd, you proclaimed aloud in the hearing of all, the presence of these men, and the object of their visit; and declared that you would be one of three men to take or kill them.

Very shortly after this, you and two men of desperate character left the crowd, going in the same direction, and about the same time. You were next seen lying beside one of your victims, with your gun broken over his head; your pistol on the ground freshly discharged; and your other victim dead a few rods off. You were one of the three who killed those men, as you said you would be; and you killed them without any cause of offence against them personally. Your only motive was hostility to the law which they were charged to enforce. You are not a native of this country, but, as your counsel have stated, you had taken an oath that you were favorable to its government. You came from a country where men in your station in life complain, perhaps justly, that they are oppressed by laws which they have no voice in making. You have come to a country where your vote at the ballot-box is as potential in making or modifying the laws, as that of the judge who now addresses you. Not content with this peaceable mode of changing a law which you did not like, you permitted your hostility to it to incite you to murder the persons charged with its enforcement. Your present condition is a striking admonition that this cannot be permitted in a free country any more than in a despotism. The penalty which the law attaches to your offence is one which my private judgment does not approve; for I do not believe that capital punishment is the best means to enforce the observance of the laws, or that, in the present state of society, it is necessary for its protection. But I have no more right, for that reason, to refuse to obey the law, than you had to resist it. I therefore do pronounce upon you its sentence: That you be committed to the custody of the marshal of this district, by whom you shall be held in close imprisonment until the 27th day of December next; and that on that day you be hanged by the neck until you are dead; and may God, the wise Governor of the universe, who is equally the Father of the judge who pronounces this sentence, and the criminal to whom it is addressed, have mercy on you.

As to statements of person in extremis, see [Travelers' Ins. Co. v. Mosley] 8 Wall. [75 U. S.] 397.

Case No. 15,217.

UNITED STATES v. GLENN et al.

[1 Woods, 400.] [1]

Circuit Court, E. D. Texas. May Term, 1872.

COLLECTOR OF CUSTOMS—ACTION ON BOND—FAILURE TO COLLECT.

In an action on the official bond of a collector of internal revenue, where the breach alleged was his failure to account for or pay over the sum of $64,000, it was *held* that dereliction of duty in not collecting said sum could not be shown in order to establish the breach.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

At chambers.

This cause was heard upon a motion for new trial, the ground for which sufficiently appears in the opinion of the court.

Geo. Flournoy, T. N. Waul, and J. Z. H. Scott, for the motion.

D. J. Baldwin, U. S. Atty., contra.

BRADLEY, Circuit Justice. This is an action of debt on the official bond of Frank W. Glenn, as collector of internal revenue for this district. The breaches assigned are, that Glenn did not faithfully perform his duties as collector, but received as such the sum of $64,000, which he never accounted for or paid to the United States. To the declaration was attached a copy of the bond, and a particular statement of Glenn's accounts at the treasury department, showing the balance claimed against him. But it was not pretended, on the trial, that he had actually collected all the items contained on the debit side of the account, but that, under the 34th section of the act of 1864 (13 Stat. 223), he had been charged with the whole amount of the assessor's list of taxes returned to him, together with the amount of unpaid taxes turned over to him by his predecessor, and it was contended that if he had not collected them, it was dereliction of duty on his part unless he showed a sufficient excuse.

We are of opinion that, under the breach set forth in the declaration, dereliction of duty in not making collections cannot be set up at the trial. It is not the same thing as collecting and failing to pay over. At common law, it is true, any failure of duty, to any amount, involved the forfeiture of the bond and the payment of the penalty. And considerable sums were shown to have been collected by Glenn. This evidence was competent, and would have been sufficient, under the rules of the common law which once prevailed, to make him liable for the whole amount. But the courts have long since adopted a more just rule, and give judgment only for the amount actually due. And, as a very large amount was embraced in the verdict which did not consist of moneys collected and unpaid, we think that the verdict must be set aside, but with leave to the district attorney to amend the declaration. Ordered accordingly.

UNITED STATES (GLENN v.). See Case No. 5,481.

Case No. 15,218.

UNITED STATES v. GLOVER.

[4 Cranch, C. C. 190.] [1]

Circuit Court, District of Columbia. Dec. Term, 1831.

PERJURY—PROMISSORY OATH.

A promissory oath cannot be the subject of an indictment for perjury.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Indictment for perjury, upon the insolvent's oath that he would "deliver up, convey, and transfer all his property," &c., but he did not deliver up a promissory note which he had obtained after having made oath to his schedule, and before his oath made before the judge.

THE COURT (MORSELL, Circuit Judge, absent), at the request of Mr. Wallach and Mr. Dandridge, for the defendant, instructed the jury that a promissory oath could not be the subject of a prosecution for perjury.

Case No. 15,219.

UNITED STATES v. GODBOLD et al.

[3 Woods, 550; 5 Reporter, 168; 10 Chi. Leg. News, 140.] [1]

Circuit Court, S. D. Alabama. June Term, 1877.

LIMITATION OF ACTIONS—MARSHAL'S BOND.

The statute of limitations of six years (Rev. St. § 786) does not apply to suits brought on marshals' bonds by the United States.

This was a suit upon the official bond of Cade M. Godbold, late marshal of the United States, and William F. Cleveland, one of his sureties. The bond was executed June 3, 1854. The defendants interposed the plea of the statute of limitations of six years (Rev. St. § 786) to which plea the plaintiff demurred.

E. S. Daryan and Wm. Boyles, for defendants, cited Green v. U. S., 9 Wall. [76 U. S.] 655; U. S. v. Herron, 20 Wall. [87 U. S.] 251; Story, Const. bk. 3, p. 593; U. S. v. Union Pac. R. Co., 91 U. S. 72.

George M. Duskin, U. S. Atty., cited Dox v. P. M. General, 1 Pet. [26 U. S.] 318; Smith v. U. S., 5 Pet. [30 U. S.] 292; U. S. v. Knight, 14 Pet. [39 U. S.] 301; Savings Bank v. U. S., 19 Wall. [86 U. S.] 227; U. S. v. Herron, 20 Wall. [87 U. S.] 251; [U. S. v. Rand, (Case No. 16,116)].[2]

BRUCE, District Judge. This is an action brought upon the official bond of a United States marshal. A breach of the bond is alleged to have taken place. Among other pleas is the statute of limitations of six years, which is found in section 786 of the Revised Statutes, and in these words: "No suit on a marshal's bond shall be maintained, unless it is commenced within six years after the right of action accrues, saving, nevertheless, the rights of infants, married women and insane persons, so that they sue within three years after their disabilities are removed."

The question is, do suits instituted by the United States come within the influence of this section. The language is broad, and does not in terms except suits brought by the United States, and we must give the words their meaning, unless there is some principle upon which we can exclude the United States from the operation of the words, and from which we can justly conclude that congress, in enacting this section, did not intend to include suits by the United States, and did not include them in the broad language of the section. The district attorney invokes the maxim, "Nullum tempus occurrit regi," which is that time does not run against the sovereign power.

In the case of U. S. v. Herron, 20 Wall. [87 U. S.] 251, the principle is thus stated: "That the sovereign authority of the country is not bound by the words of a statute, unless named therein, if the statute tends to restrain or diminish the power, rights or interests of the sovereign." Now, the United States is not named in this statute, and under the rule of construction just stated, we must conclude that the United States is not bound by it, and that the congress, acting in view of this rule of construction, did not intend, in the use of the language, to include the government of the United States. But it is contended that the congress, in the enactment of the statute, had exceptions in view, and named the exceptions, to wit: infants, married women and insane persons, who might sue in three years after their disabilities were removed, and that, therefore, if congress had intended to except the government of the United States, it would have named it among the exceptions. It is true that enumeration is exclusion, because, when exceptions to a general rule are enumerated, it is a fair inference that no other exceptions are intended. It is to be observed, however, that the section of the Revised Statutes in question, together with the sections preceding it, are taken almost verbatim from an act relating to marshals' bonds, of April 10, 1806 (2 Stat. 374). It will be seen by an examination of this act, that its purpose was to afford persons who might be injured by a breach of the condition of a marshal's bond, a remedy by suit upon the bond. The second section of the act, which is carried into the Revised Statutes as section 784, gives the right to any person injured to institute and maintain a suit in his own name, and for his sole use, upon the bond; and section three, which is section 785 of the Revised Statutes, provides for repeated actions until the whole penalty is recovered; and then follows section four, which is section 786 of the Revised Statutes, now under consideration.

This review of the act of 1806, the provisions of which we find in the Revised Statutes as stated, shows the purpose of the act to have been to give a remedy in their own names to persons who might sustain injury by reason of the breach by the marshal of the conditions of his bond, and to limit the time within which the remedies might be

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 5 Reporter, 168, contains only a partial report.]

[2] [From 10 Chi. Leg. News, 140.]

pursued. The statute nowhere refers to suits by the United States, and section four must be held to refer to the same subject matter to which the other sections refer, to wit, the remedies by suit of injured persons upon the marshal's bond, and could not, therefore, have been intended by congress to impose any limitation upon the rights or remedies of the United States. The demurrer is sustained.

Case No. 15,220.

UNITED STATES v. GODDARD.

[4 Cranch, C. C. 444.] [1]

Circuit Court, District of Columbia. March Term, 1834.

CRIMINAL PRACTICE—MULTIPLYING INDICTMENTS.

Nine cows, belonging to divers persons, were stolen by the defendant from the commons, in or about the city of Washington, and the grand jury found nine separate indictments. Six were averred to be on the same day. The court refused to quash any of them.

The grand jury found nine indictments against the defendant [Joseph Goddard] for stealing nine cows belonging to nine different persons. Six of them were charged to have been stolen on the same day, the 14th of October, 1833.

Mr. Z. C. Lee, for defendant, moved the court to quash the six indictments in which the thefts were charged to have been committed on the same day, insisting that the six indictments were all for one and the same offence; and cited 1 Chit. Cr. Law, 254. The defendant may be punished six times as much as if the whole were included in one indictment, and the United States will be charged $90 for attorney's fees in nine cases, when, in truth, there was but one theft, and one attorney's fee of $10 only should be charged.

Mr. Key, Dist. Atty., contra. It does not appear that it was only one theft because charged on the same day. If all had been charged in one indictment, the defendant might have objected; but he cannot object to their being separately charged.

Mr. Hall, for defendant, in reply. It is an application to the discretion of the court. If the attorney might have joined them in one indictment, they ought to be so joined.

THE COURT (THRUSTON, Circuit Judge, contra) refused to quash any of the indictments, because it did not appear to them that the cows were all stolen at the same time and place. It is true that they were all averred to have been stolen in this county, and six of them on the 14th of October, 1833; but as the day was immaterial, and perhaps could not be exactly ascertained in evidence, and it was competent for the United States to prove that they were stolen on different days, and, if so, were separate acts of stealing, and separate offences, the court could not say they were not, and would do wrong to quash them, especially as the cows belonged to divers persons. If they had all been contained in one indictment, the defendant might have objected to it, and perhaps have obliged the attorney of the United States to make his election as to which theft he would prosecute; and, if they had been charged in separate counts, as they should if they were separate offences, the punishment might be exactly the same as if they had been charged in separate indictments; for each offence must have its separate punishment, and the only difference would be in the costs. If one only of the six should be retained for trial, who should say which it should be? and perhaps the one selected might be the only one which the United States could not support. See U. S. v. Beerman [Case No. 14,560], March term, 1838.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 15,221.

UNITED STATES v. GODLEY.

[2 Cranch, C. C. 153.] [1]

Circuit Court, District of Columbia. Nov. Term, 1818.

LARCENY OF SLAVE — INDICTMENT — AVERMENTS.

An indictment will not lie, at common law, for stealing "a mulatto boy, called William Foote, of the price of 500 dollars, of the property, goods, and chattels of one F. T.," if he is not averred to be a slave.

Indictment at common law [against James Godley] for stealing a "mulatto boy, named William Foote, of the price of 500 dollars, of the goods and chattels of one Fanny Thomas."

Mr. Swann and Mr. Taylor, for the prisoner, moved the court to quash the indictment, and contended that it was no offence at common law to steal a slave, because slavery was not known at common law. It is made an offence, by the Virginia statute, in one case only, namely: when stolen from the possession of the owner or his overseer; and the courts of that state have decided that the possession of a person to whom the slave was hired, is not the possession of the owner or overseer. Com. v. Williams (in 1792) 1 Va. Cas. 15; Com. v. Hays (in 1798) 1 Va. Cas. 122. Those courts have also decided that an indictment at common law for stealing a slave cannot be supported.

N. Herbert and Mr. Mason, contra. Slaves in Virginia are goods and chattels, and it is felony at common law to steal goods and chattels, therefore in Virginia, it is felony at common law to steal a slave. Judge Lyon's opinion, 2 Wash. [Va.] 7. The Virginia statute is cumulative. The decision of the courts of that state are not conclusive

[1] [Reported by Hon. William Cranch, Chief Judge.]

upon this court. State v. Hall, 2 Hayw. N. C. 105.

THE COURT (nem. con.) quashed the indictment, because it did not aver the boy to be a slave.

Mr. Herbert, then moved that the prisoner should be recognized to appear at the next term to answer to a new indictment.

But THE COURT (nem. con.) refused; being of opinion that the decisions of the courts of Virginia, that an indictment at common law, for stealing a slave, cannot be supported, are conclusive upon this court.

Case No. 15,222.

UNITED STATES v. GOLDBACK.

[1 Hughes, 529;[1] 23 Int. Rev. Rec. 129; 9 Chi. Leg. News, 256.]

Circuit Court, E. D. Virginia. April 6, 1877.

INTERNAL REVENUE—INFORMATION FOR VIOLATION OF SECTION 3430, REV. ST. U. S.

A parcel or package (in the sense of the clause of section 3437 of the Revised Statutes of the United States relating to lucifer matches) is a bundle put up in form and condition for handling or transportation, or delivery on sale from hand to hand; and, therefore, a match-box of capacity to hold less than one hundred matches, which contains two sliding drawers which are open on the top when drawn out, is but one package or parcel, inasmuch as each drawer is not of itself a parcel or package in the mercantile sense.

The defendant [Abraham Goldback] is a manufacturer of lucifer matches. As a novelty in his line of business, instead of putting up his matches in a box of one compartment, he provides two sliding drawers in each box, the drawers being open on top when drawn out, each holding about forty-two matches, and not large enough to hold by possibility as much as, or more than, fifty; the package holding from eighty to ninety matches. It is not pretended that there is any design on the part of the manufacturer to defraud the revenue. The information is in the nature of a friendly proceeding filed at the instance of the defendant, who wants the question of law tested and decided. Issues of fact as well as law are submitted to the court. Plea of not guilty.

L. L. Lewis, for the United States.

H. H. Marshall, for defendant.

HUGHES, District Judge. Section 3437 provides that friction matches, "in parcels or packages containing one hundred matches or less," shall be stamped with a one cent stamp on "each parcel or package." The device of this manufacturer is a package but little if any greater in size than the ordinary match-box; and it is so contrived that one-half of its contents may be used without disturbance to the other half. That, and its novelty, and not any design to defraud the revenue, are all that distinguish it from the ordinary match-box.

It is contended by the United States attorney that the two open drawers in each box are to be regarded as each a parcel or package, and that therefore the box itself should be stamped with two one cent stamps. A package, in the sense of section 3437, means a bundle put up for transportation, or commercial handling. It is a thing in form to become, as such, an article of merchandize, or transportation or delivery from hand to hand. A parcel is a small package; the word "parcel" being the diminutive of the word "package." Each word as used in section 3437 denotes a thing in form suitable for transportation or handling as an article of sale. Now the drawers in this match-box are not in that form. Taken separately, they are not in condition for mercantile shipment, or handling, or sale from hand to hand. These drawers therefore are not, each, parcels or packages in the meaning of section 3437. There has, therefore, been no violation of section 3430 of the Revised Statutes of the United States upon which this information is drawn, and there must be judgment of acquittal.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

Case No. 15,223.

UNITED STATES v. GOLDBERG et al.

[7 Biss. 175.][1]

Circuit Court, E. D. Wisconsin. May, 1876.

CONSPIRACY — PROOF — TIME — TESTIMONY OF ACCOMPLICES—ACTS OF CO-CONSPIRATORS.

1. A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense of conspiracy.

2. To establish the guilt of a party accused of this crime it must be proved: That the conspiracy was formed to commit the offense described in the indictment. That the accused were parties to the conspiracy. That to effect the object of the conspiracy, one or more of the parties thereto did one or more of the acts alleged.

3. An act done by only one of the parties to effect the object, binds each and all the parties to the conspiracy and completes the offense as to all; for in that case the act of one becomes the act of all.

4. It is not essential that the conspiracy be shown to have been formed at the precise time or times alleged in the indictment.

5. Circumstantial evidence may be sufficient to prove a conspiracy.

6. Testimony of accomplices, though competent, should be received and scrutinized with great caution.

7. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, does not constitute the offense.

8. When the existence of the conspiracy and the connection of the defendant therewith is established by independent evidence, he is bound by the acts and declarations of his co-conspirators.

9. The law of conspiracy fully discussed.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Indictment for conspiracy.

J. C. McKinney and L. S. Dixon, for the United States.

N. S. Murphey and G. B. Goodwin, for defendants.

DYER, District Judge (charging jury). Gentlemen:—It is charged in the first count of the indictment, that on the 24th day of July, 1875, the defendants, Philip Goldberg, Julius Jonas and A. M. Crosby, conspired together to wilfully take and carry away, with intent to steal and destroy, certain papers, documents and records known as "Returns of Gaugers of Spirits," form 59, and as "Rectifier's Notice of Intention to Rectify," form 122, and other papers and documents then filed and deposited with John M. Hedrick, a supervisor of internal revenue of the United States.

As acts to effect the object of this alleged conspiracy it is charged in this count, that on the 25th of July, 1875, the defendants Philip Goldberg and Julius Jonas, at Milwaukee, asked and demanded from Leopold Wirth, Henry Schanfield, Louis Rindskopf, William Bergenthal, Samuel Rindskopf, and Robert Kiewert, $50,000 with which to hire and induce certain persons to steal, take and carry away the said papers, documents and records; and that on the 26th of July, 1875, the defendants Philip Goldberg and Julius Jonas, at Milwaukee, did meet, consult and confer together, and with Leopold Wirth, Louis Rindskopf, William Bergenthal, and other persons, to devise plans and means to steal, take and destroy said papers, documents and records, and traveled from Milwaukee to Chicago, and on the 29th of July, 1875, returned from Chicago to Milwaukee, and on that day at Milwaukee consulted and conferred with Samuel Rindskopf as to the means to be adopted to take and carry away from the possession of John M. Hedrick said papers, documents and records.

The second count charges a conspiracy formed July 28, 1875, to wilfully take and carry away, with intent to steal and destroy, certain papers, documents and records in form required by regulations prescribed by the commissioner of internal revenue, and filed and deposited in the office of the collector of internal revenue for this district, which papers and documents were known as "Rectifier's Notice of Intention to Rectify," designated as form 122, a large number of which were given and made to the collector by Aaron Schœnfeld, as a rectifier, and a large number of which were given and made by Samuel, Elias, Jacob and Max Rindskopf, as rectifiers of distilled spirits to the collector.

As overt acts to effect the object of the alleged conspiracy it is charged in this count, that on the 28th of July, 1875, at Milwaukee, the defendants met, conferred and consulted with Samuel Rindskopf, Leopold Wirth, Henry Schanfield, William Bergenthal, and Louis Rindskopf, as to the mode and manner in which the papers, documents and records could be taken and carried away; and asked and demanded from those parties $50,000 as a reward for taking and carrying away the papers, documents and records, and proceeded to Chicago for the purpose of meeting and consulting with Louis Rindskopf, Leopold Wirth and Robert Kiewert, as to the means to be adopted; and at Chicago did meet and confer with those parties, and there devised opportunities and means to take and carry away the papers, documents and records, and on the 29th of July, 1875, proceeded from Chicago to Milwaukee for the purpose of taking and carrying the same away.

The third count charges a similar conspiracy, as formed July 28, 1875, to take and carry away with intent to steal and destroy, papers, documents and records, which were deposited with John M. Hedrick, supervisor of internal revenue, and which purported to be returns of spirits gauged by William H. Roddis in April, 1875, and in form required by regulation prescribed by the commissioner of internal revenue, and designated as form 59; also other papers, documents and records deposited with John M. Hedrick, supervisor, relating to the business of Simon Meyer, Aaron Schœnfeld, and of Samuel, Elias, Jacob and Max Rindskopf, as rectifiers, and to the business of other persons who were rectifiers in this collection district; also other papers, documents and records filed and deposited in the office of the collector of internal revenue, purporting to be returns of gaugers of spirits, designated as form 59, and filed and deposited in said office by John E. Fitzgerald, John S. Taft and William H. Roddis, as internal revenue gaugers, and other papers, documents and records deposited in the collector's office, and all of which were required by law and regulation to be there filed and deposited, and related to the business of certain persons who carried on the business of rectifiers of distilled spirits in the first collection district, in the months of March and April, 1875.

As acts to effect the object of the conspiracy, it is alleged in this count that on the 29th of July, 1875, at Milwaukee, the defendants asked and demanded from Leopold Wirth, Henry Schanfield, Louis Rindskopf, William Bergenthal, Samuel Rindskopf, and Robert Kiewert, the sum of $50,000, with which to hire and induce certain persons to steal, take and carry away said papers, documents and records.

It is also charged that on the 30th of July, 1875, the defendants at Milwaukee met, consulted and conferred together, and with Leopold Wirth, Louis Rindskopf, William Bergenthal and other persons, to devise plans and means to accomplish the object of the alleged conspiracy, and traveled from Milwaukee to Chicago and returned from Chicago to Milwaukee, and there consulted and conferred with Samuel Rindskopf, as to the means to be

adopted to take and carry away the said papers, documents and records.

This is the substance of the several counts of this indictment, and I have thus particularly called your attention to the allegations of each count, because it is important that they be borne in mind by you in considering the evidence.

By section 5403 of the statutes of the United States, it is made an offense for any person to wilfully destroy, or attempt to destroy, or, with intent to steal or destroy, to wilfully take and carry away any paper, document or record filed or deposited in any public office, or with any public officer.

Section 5440 of the statutes provides that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to certain punishment.

The charge in this indictment then is the formation of such a conspiracy as is made punishable by section 5440, namely: a conspiracy to commit an offense against the United States, which offense is that named in section 5403. The question, therefore, to be determined in this case is, was the alleged conspiracy formed by any two of the defendants to wilfully take and carry away, with intent to steal or destroy, the papers, documents and records mentioned in the indictment, or any of them; and if such conspiracy was formed, did any or either of the parties thereto, to effect the object of the conspiracy, do either or any of such of the acts charged in the indictment as constitute acts to carry into effect such object?

This indictment is against three defendants. The present trial, however, does not, and your verdict will not, include the defendant Crosby. The defendants Philip Goldberg and Julius Jonas only are now upon trial. As I have stated, the charge is one of conspiracy; that the defendants conspired to commit a certain offense against the United States. The questions, therefore, requiring your attention, to state them more explicitly, and in proper order, are these:

1. Was there such a conspiracy as is alleged in any or either of these three counts, and if there was, were the defendants Goldberg and Jonas, or either of them connected with the conspiracy?

2. If such a conspiracy was formed and existed, were any or either of such of the acts charged in the indictment as constitute acts to carry into effect the object of the conspiracy, committed as alleged?

I direct your attention, first, to what is essential to constitute a conspiracy. A conspiracy is formed when two or more persons agree together to do an unlawful act—in other words, when they combine to accomplish, by their united action, a criminal or unlawful purpose; and the statutory offense is consummated when such agreement is made, or such combination is entered into, and one or more of the parties does any act to effect the object of such conspiracy. If two or more persons agree together that they will commit a certain offense against the United States, as that they will enter a public office of the United States, and take and carry away papers and records there deposited, with intent to steal or destroy them, and one or more of the persons so agreeing does any act to effect the object of such agreement, they are guilty of the offense of conspiracy.

It is not necessary, to constitute a conspiracy, that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. U. S. v. Babcock [Case No. 14,487].

Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme or some proposed scheme is in fact assented to—concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act.

As I shall have occasion hereafter more fully to state to you, a mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense. There must be both the corrupt agreement or combination, and an act or acts done by one or more of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way, and from any motive, or upon any consideration, work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy.

To establish the guilt of the defendants on trial you must be convinced upon the testimony, that a conspiracy was formed, as alleged, to commit the offense against the United States, which is particularly described in the indictment; that these defendants, Goldberg and Jonas, were parties to that conspiracy, if any; and that to effect the object of such conspiracy, one or more of the parties thereto did one or more of such of the acts alleged in the indictment as constitute an act or acts to effect the object.

It is not essential that the alleged con-

spiracy be shown to have been formed at the precise time or times stated in the several counts of this indictment. It is sufficient, so far as time is concerned, if it be shown that at about the time or times charged, there was a conspiracy between any two or more of the persons who are alleged to have conspired together to wilfully take and carry away, with intent to steal or destroy, any of the papers, documents or records mentioned in the indictment.

To establish a conspiracy, it is not, as I have already said, necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct proof be made of an express agreement to do the act forbidden by the law. It is as competent to prove an alleged conspiracy by circumstances as by direct evidence.

In prosecutions for criminal conspiracies, the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction, which forms the subject of the accusation. Whart. Cr. Law, § 235.

The understanding, combination or agreement between the parties in the given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding, there is no conspiracy, but, as I have just said, circumstantial evidence may be resorted to, to show the agreement or conspiracy. The acts of parties in the particular case, the nature of those acts, their declarations and statements, whether verbal or in writing, and the character of the transactions or series of transactions with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered, as sources from which evidence may be derived of the existence or non-existence of an agreement which may be express or implied to do the alleged unlawful act. The government here affirms the formation and existence of a conspiracy to commit a particular offense against the United States, and that these defendants were parties to such conspiracy. The burden is therefore upon the government to prove what it thus affirms by legal and competent evidence, in order to ask a verdict in its favor.

Now I have said to you, that to constitute the offense which is made punishable by the statute, there must be not only the conspiring together by the parties, but the formation of the conspiracy must be followed by an act done by one or more of the parties to the conspiracy to effect its object. At common law it was an offense for two or more persons to merely confederate and combine together by concerted means to do that which is unlawful or criminal. But in settling the criminal liability of these parties, we have to be governed by the statute; and as, in order to convict, the statutory offense must be proved, it is not sufficient to show merely that a conspiracy was formed. Persons may conspire together to commit an offense against the United States; the conspiring together may be complete, yet if the proceeding stops with the mere agreement, and no act is done to carry into effect the object of the agreement or conspiracy, no criminal offense has been committed. Acts and deeds are the subject of human laws, not mere thoughts and intents unless accompanied by acts, and the theory of the law is, that when persons merely form a conspiracy and there pause in their proceeding, and do no act to effect its object, they are to be regarded as having repented of the act of conspiring, and are not to be punished for that alone. But the moment any act is done to effect the object of a conspiracy, that moment criminal liability is fixed; and this act to effect the object, though it be done by only one of the parties, binds each and all the parties to the conspiracy and completes the offense as to all, for in that case the act of one becomes the act of both or all. So, gentlemen, if you should find that the defendants conspired together as charged in the indictment, to wilfully take and carry away these papers, records and documents with intent to steal or destroy the same, you will then inquire whether the defendants or either of them, did any or either of such of the acts charged in the indictment as constitute acts to effect the object of the conspiracy.

The act must be one, you will observe, to effect the object of the conspiracy. That must be the character of the act. It must not be an act which is part of the conspiracy —it must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following a completed conspiracy, and done to carry into effect the object of the original combination. To illustrate, two persons conspire to take the life of another. It is agreed that it shall be done. The conspiracy is complete, but there is yet wanting the act to effect the object of the conspiracy. One of the parties purchases or procures the weapon with which to do the deed; there you have an act to effect the object, and the punishable offense is fully committed. So if the parties subsequent to the formation of a complete conspiracy, following it up and as independent acts, hold consultations between themselves and others as to the means to be employed to carry the conspiracy into effect, or go from place to place and confer about and arrange as to the particular means or instrumentalities that shall be used or employed to effect the object of the conspiracy, these constitute acts to effect such object.

Now, if there was this alleged conspiracy, there must be proved such acts to effect its object as are alleged. Some one or more of the overt acts charged in the indictment must be proven, in order to sustain a

conviction, and the acts as proven, if any, must be acts to effect the object of the conspiracy. There are three general classes of overt acts charged:

1. Demands of money with which to hire and induce certain persons to take, carry away and steal the papers and records in question, and as a reward for taking and carrying the same away

2. Journeys from Chicago to Milwaukee and from Milwaukee to Chicago for the purpose of holding conferences and consultations with parties named in the indictment, to devise means and opportunities to take and carry away the papers, records, etc.; and in the second count, there is an allegation of a journey from Chicago to Milwaukee for the purpose of taking and carrying away the papers.

3. Consultations and conferences with the persons named in the indictment as to the mode and manner in which and to devise means and opportunities by which the papers, documents and records could be taken and carried away.

The simple question upon this branch of the case is, were any or either of these acts done, by any or either of the defendants, and if so, were they acts independent of and to carry into effect a completed conspiracy formed by the defendants to take and carry away with intent to steal or destroy the papers, documents and records in question? Upon all the evidence and upon all the circumstances as disclosed to you, you are to determine the question.

I have stated to you, gentlemen, the general rules and principles upon the subject of conspiracy and overt acts, applicable to this case. There are some more particular considerations, to which I now direct your attention.

The offense charged, is a conspiracy to take and carry away with intent to steal or destroy the papers, records and documents mentioned. It is this conspiracy, therefore, that it is incumbent upon the prosecution to prove. Proof of a combination for any other purpose is not sufficient. Proof of a scheme to obtain by consent of a public officer having them in his custody, access to and inspection of the papers, documents and records, would not meet the requirements of this indictment, unless there was the purpose to take and carry away with intent to steal or destroy such papers and records.

It is claimed by the prosecution that the alleged conspiracy was formed by and between the three defendants Goldberg, Jonas and Crosby; that it was not a conspiracy between those defendants and the Milwaukee parties, but that first the conspiracy was formed between those defendants, and then, that what transpired between them or any of them and the Milwaukee parties, were acts to effect the object of a previously formed conspiracy.

It is claimed on the part of the defense that there was no such previously formed and completed conspiracy, and that what took place between the defendants and the Milwaukee parties were not acts to carry into effect any such conspiracy; that whatever was said or transpired between the defendants and the Milwaukee parties was but part and parcel of an incomplete, unperfected transaction between the defendants and persons in Milwaukee, and before completed was wholly abandoned. On this subject I charge you that if you find from the evidence that the alleged demands of money, conferences, consultations and journeys, if made and had, were part and parcel of an uncompleted transaction, combination or arrangement between the defendants and the Milwaukee parties, and were not preceded by such a perfected conspiracy between the defendants as is alleged, then such demands, conferences, consultations and journeys, if any, did not, nor did either of them have the necessary character of overt acts, and the offense charged is in that event not established. Further, if you find from the evidence that up to the time of the alleged meeting of one or more of the defendants with the Milwaukee parties, no conspiracy had been formed as alleged between the defendants, and you find that the defendants had one or more consultations with some, or any of the Milwaukee parties, wherein the project of stealing or destroying the papers and documents described in the indictment was talked over with a view to forming such conspiracy, but that the scheme was for any cause then abandoned, and no agreement, combination or understanding was made or concluded by and between the defendants or any two of them, to take and carry away said papers and documents with intent to steal or destroy the same, then and in that case no conspiracy is proven, and your verdict should be for defendants. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, when as yet no conspiracy has been formed, does not meet the requirements of the law.

But if the defendants, or any two of them, formed a conspiracy to take and carry away these papers, documents and records, with intent to steal or destroy the same, and if upon the complete formation of such a conspiracy by and between themselves, either of the defendants made the journeys or demands of money, or held the consultations and conferences alleged, as acts to effect the object of a previously formed conspiracy, then the offense as charged was committed.

As the defendants on trial are indicted for conspiracy with another person named in the indictment to take and carry away the papers and records in question, with intent to steal and destroy the same, it is clear that the charge implies that they knew there

was such a conspiracy, and with such knowledge became parties to the unlawful scheme, and the alleged guilty participation must be proved by the government. Guilty connection with a conspiracy may be established by showing association by the person accused, with others, in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design; but each may perform separate acts or hold distinct relations in forwarding that design.

If two persons pursue by their acts the same object, one performing one act or part of an act, and the other another act or another part of the same act, so as to complete it with a view to the attainment of the object they are pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object. 3 Archb. Cr. Prac. 622.

Co-operation in some form must be shown. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and "actuated by the common purpose of accomplishing the unlawful end," they are conspirators. If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator. Upon this subject I charge you in substance as asked by the defendants' counsel as to the defendant Jonas, that if you find from the evidence that a conspiracy was formed, as alleged, between the other defendants, but that the prosecution has failed to prove that the defendant Jonas intentionally participated in the transaction, knowing it to be such conspiracy, and with a view to the advancement of the common design, then your verdict as to him should be not guilty. As to both defendants on trial, it must be shown by the evidence (beyond reasonable doubt) that they knowingly and designedly assented to and united in the unlawful combination charged, if any such existed, in order to make them parties thereto; and the fact upon this branch of the case you must determine upon all the evidence before you.

Now I have said that in determining the question of the formation or existence of a conspiracy, the acts and declarations of the persons accused may, among other circumstances, be looked to and considered by the jury. Statements of one and in some instances of two of the defendants in the absence of the other defendant, and conversations with some of the witnesses, on the part of one or more of the defendants in the absence of the other, have been given in evidence. The individual letters and telegrams of the different defendants have also been introduced. It is proper that I should say to you that this evidence was admitted as bearing upon the question of the existence of a conspiracy and its nature, if any there was, and as shedding light upon the relation of the person so speaking to the transaction. These declarations, statements and communications were and are admissible as bearing upon the question of the existence of the alleged conspiracy, and as touching the alleged connection of the persons making the same therewith. If a conspiracy be shown to exist, the question then follows, were the defendants on trial, or either of them, connected with that conspiracy as parties thereto. To establish the connection of either of the defendants therewith, such connection must be shown, by facts or circumstances, independent of the declarations of others, or by his own acts, conduct or declarations. And until this fact is thus established, he is not to be bound by the declarations or statements of others. The principle of law and rule of evidence is that when once a conspiracy or combination is established, and a defendant's connection therewith is shown by independent evidence, then he is bound by the acts, declarations and statements of his co-conspirators, because in that event each is deemed to assent to or command what is done by any other in furtherance of the common object. 1 Whart. 702.

So in considering the testimony given as to the acts, declarations and statements of either one of the defendants when the other defendant or defendants was or were not present, you are to understand that that testimony was submitted to you for the purpose of showing in the first instance that there was a conspiracy formed and existing, and that the person or persons making the declarations, statements and communications were parties to it; that the alleged connection of any one of the defendants with the alleged conspiracy, if any existed, must be shown by facts or circumstances independent of statements of other defendants in his absence, and that when once that connection be thus shown, then he becomes affected and bound by the declarations and acts of other parties to the conspiracy, if any, made and done in the course of the prosecution of or pending the enterprise and during his connection therewith.

If you should believe from the evidence that any project was discussed or even a combination was formed by the defendants or any two of them to take and carry away with intent to steal or destroy the papers and records described in the indictment, and that such project or combination was wholly abandoned by the defendants before any act done to effect its object, then you should disregard and should not consider any statement, declaration or act of any one of the defendants as affecting either of the others made or done after such abandonment.

So, too, if you should find as a fact such abandonment under the circumstances just stated, and that thereafter Samuel Rinds-

kopf individually employed the defendant Crosby to procure abstracts of evidence, or releases of property seized, or to do other acts as an employé for said Rindskopf or for Rindskopf Bros., and if you should find that any portion of the correspondence in evidence, between Crosby and Rindskopf, was subsequent to such abandonment, and that it related to such employment and business pertaining thereto, and that the defendants Goldberg and Jonas were not parties to and had no connection with such employment or arrangement between Crosby and Rindskopf; then that portion of such correspondence should not be considered by you as evidence against the defendants on trial.

Further, if you should find that there never was a conspiracy between the defendants to take and carry away with intent to steal or destroy the papers and records in question, but that the defendants Goldberg and Jonas understood that the acts to be accomplished by them and Crosby, were to procure abstracts of evidence in the supervisor's and collector's offices in a lawful way, and to furnish an attorney to defend the Milwaukee parties and to procure a release of goods seized by the government, or to procure a settlement or compromise with the government, and that Crosby, without the knowledge, direction or procurement of Goldberg or Jonas, said to the Milwaukee parties that he would or could get some one else to steal or destroy the papers or records, then, and in such case, the defendants Goldberg and Jonas should not be bound by such declarations of Crosby, in that regard.

If, however, the alleged conspiracy be shown and the defendants' connection therewith be established, then each party is bound by the declarations of the other made while the conspiracy is pending or is being prosecuted.

I have said that to establish a conspiracy, or the connection of a party therewith, direct proof is not indispensable, and that it may be shown by circumstances. Where the prosecution in a criminal case rely upon circumstantial evidence, that is, upon proof of the facts or circumstances which are to be used as a means of arriving at the principal fact in question, it is a rule that these facts or circumstances must be proved in order to lay the basis for the presumption which is sought to be established. Each circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance. When the facts and circumstances depended upon to establish the principal fact are thus proved, the circumstantial evidence thus produced may generally be relied upon with safety in arriving at a conclusion as to the guilt or innocence of the person accused. The burden of proof throughout is upon the prosecution to prove the guilt of the defendants. To what I have thus far stated it is proper to add, that in a case depending upon circumstantial evidence, the rule is that first "the hypothesis of delinquency or guilt of the offense charged in the indictment should flow naturally from the facts proved and be consistent with them all, and second, the evidence must be such as to exclude every reasonable hypothesis but that of his guilt of the offense imputed to him; or in other words, the facts proved must all be consistent with and point to guilt only, and must be inconsistent with innocence." People v. Bennett, 49 N. Y. 137.

Witnesses have been called in the course of the trial who testify to their own participation in fraudulent and criminal practices, and some of whom are under indictment for such practices in this court, and have pleaded guilty to the charges presented against them. There has been much criticism of their testimony, and considerable discussion of the question as to the weight to which their testimony is entitled. The court instructs you upon this subject, that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it.

The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care by the jury, who should not rely upon it unsupported, unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in material respects. But this is not absolutely essential, provided the testimony of such witness produces in the minds of the jury full and complete conviction of its truth.

You must be convinced beyond reasonable doubt that the defendants on trial have committed the offense or offenses charged, in order to convict them. Each and every fact necessary to constitute the offense, must be so proved—that is, beyond reasonable doubt. Until guilt is proven there is an absolute presumption of innocence. The law does not permit the defendants to testify, and this presumption of innocence stands in their favor, until by competent testimony it is overthrown and guilt established beyond reasonable doubt. It is the settled rule in criminal cases, that a conviction cannot be secured upon strong suspicion or probabilities of guilt, nor, as in civil cases, upon a mere preponderance of evidence, though the weight and character of the evidence are to be passed upon by you in determining whether the charge or charges are proven beyond reasonable doubt. By reasonable doubt is meant an actual, substantial doubt that arises and

rests in the mind as testimony is weighed and considered—that results after the exercise of judgment and reason when fairly and candidly applied to an investigation of the evidence.

If the evidence convinces you beyond reasonable doubt that the defendants on trial are, or that either of them is guilty as charged in the counts of this indictment, or either of them, then you should so find. If all the facts essential to constitute the offense or offenses charged are not established, and guilt is not proven beyond reasonable doubt, then the government cannot rightfully ask a conviction, and it would be your duty to acquit.

The indictment charges that the three defendants, Goldberg, Jonas and Crosby, conspired together to commit the offense named. If you find that a conspiracy was formed by any two of the defendants named in the indictment, but that one only of the defendants on trial was a party to that conspiracy, and that the other was not, you should acquit the defendant so found not to be a party to it, and should convict the other, if found guilty

Verdict, not guilty.

See U. S. v. Nunnemacher [Case No. 15,902].

Case No. 15,224.

UNITED STATES v. GOLDING.

[2 Cranch, C. C. 212.] [1]

Circuit Court, District of Columbia. June Term, 1820.

POST-OFFICE — EMBEZZLEMENT FROM MAIL — INDICTMENT.

1. In an indictment under the 18th section of the act of the 30th of April, 1810 [2 Stat. 597], "regulating the post-office establishment," against a person employed in a department of the general post-office, charging him with embezzling letters, with which he was intrusted, and stealing therefrom sundry bank-notes, it is not necessary to aver that the letters were intended to be conveyed by post, nor to describe particularly the letters, or the bank-notes, it being averred that the particular description of the letters and of the bank-notes, was unknown to the grand jurors.

2. It is not a valid objection to the indictment, that the embezzlement of the letters, and stealing therefrom the bank-notes, are charged in the same count of the indictment.

This was an indictment under the 18th section of the act of the 30th of April, 1810 (2 Stat. 597), "regulating the post-office establishment." It consisted of a single count, and charged that Richard Golding on the 10th of July, 1819, "was employed in one of the departments of the general post-office, to wit, at the post-office established at Washington City in the county of Washington, as a messenger and sorter of letters, and in virtue of his said employment, was intrusted by the postmaster of the said post-office, with sundry and great numbers of letters and packets, sent by mail to said post-office, addressed to the postmaster-general of the United States, and containing sundry and great numbers of bank-notes," &c., "belonging to the postmaster-general, and to him remitted, and by him to have been then and there received for the use of the United States; and that the said Golding, after the 30th day of April, 1810, viz., on the 10th day of July, in the year first aforesaid, with force and arms at" &c., "so being employed as such messenger and sorter of letters as aforesaid, and so being intrusted with, and having received in virtue of his said employment, at and from the said post-office at Washington, the said letters and packets so containing the said bank-notes," &c., "to be by him sorted, and duly filed, and placed in the said office, unlawfully, wilfully, injuriously, and fraudulently did secrete, embezzle, and destroy sundry and great numbers of the said letters and packets, so being addressed and directed to the postmaster-general as aforesaid, (the particular number, dates, purport, and description of the said letters and packets to the jurors aforesaid being yet unknown,) from sundry postmasters of sundry post-offices, (to the jurors aforesaid yet unknown,) and out of the said letters, unlawfully, injuriously, wilfully, and fraudulently, then and there did steal and take sundry and great numbers of bank-notes of great value, to wit, of the value of $405, lawful money of the United States, (the particular and respective numbers, denominations, marks, and descriptions whereof, are to the jurors aforesaid, yet unknown,) belonging to the said postmaster-general, and to him remitted, and by him to have been then and there received for the use of the United States aforesaid, to the great fraud and damage of the said postmaster-general, and of the United States, to the manifest fraud, breach, and violation of the trust so reposed in him, Richard Golding, by virtue of his said employment at the said post-office, as aforesaid, to the evil example of all others in the like case offending, against the form of the statute, and act of congress, in such case provided, and against the peace and government of the United States."

Mr. Key and Mr. Redin, for defendant, moved in arrest of judgment: (1) That the offence, by the statute, is embezzling letters "intended to be sent by post," but the indictment does not charge that the embezzled letters were intended to be sent by post. (2) That two offences, viz., embezzlement of the letters, and stealing the bank-notes are charged in one count. (3) That the charge of embezzling "sundry and great numbers of the said letters and packets, and of stealing sundry and great numbers of bank-notes," is too vague and uncertain.

Mr. Jones, for the United States, contra. (1) The indictment states that the letters and packets were actually sent by mail; they

[1] [Reported by Hon. William Cranch, Chief Judge.]

must therefore have been intended to be sent by post. It is not necessary that they should not have arrived at the place of their destination. But the charge of embezzlement is only inducement. The charge is, that having embezzled the letters and packets, he therefrom stole the bank-notes. The gist of the indictment is the stealing, not the embezzling; and the clause of the statute respecting the stealing bank-notes from letters, does not require that the letters should be sent, or intended to be sent by post; it is only necessary that they have "come to his possession." (2) It is no objection that both offences are charged in one count; one of them being charged as inducement of the other. It is the common and approved form to charge the defendant with all the offences which the statute enumerates alternatively in the same clause, and to convert "or" into "and"; as in forgery the form is, that he forged, and caused to be forged, &c. (3) "Sundry letters and packets," and "sundry bank-notes," is a sufficient description, when the grand jurors say that the number and particular description thereof is yet unknown to them. It is the best description they can give; and the number and particular description, are not of the essence of the offence.

THE COURT overruled the motion in arrest of judgment, and sentenced the prisoner to six months' imprisonment; and by the 22d section of the act, it is enacted that every person who shall be imprisoned by a judgment of court, under and by virtue of the 18th, 19th, 20th, or 21st sections of the act, shall be kept at hard labor during the period of such imprisonment.

Case No. 15,225.

UNITED STATES v. GOLDMAN et al.

[3 Woods, 187.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1878.

CONSPIRACY—INDICTMENT—CONGRESSIONAL ELECTIONS—FEDERAL JURISDICTION.

1. An indictment based on section 5520, Rev. St. U. S., for conspiracy to prevent by force, etc., a citizen lawfully authorized to vote from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of congress, need not set out the acts of advocacy and support which the conspiracy was formed to prevent.

[Cited in U. S. v. Milner, 36 Fed. 891.]

2. The jurisdiction of a court of the United States to try persons accused of conspiracy under said section, is not ousted by the fact that the indictment charges that in carrying out their design the conspirators were guilty of a crime of which the state courts had exclusive jurisdiction, even though such crime were of higher grade than the conspiracy charged.

3. Section 2 of article 1 of the constitution of the United States, confers upon the electors in each state, who have the qualifications requisite for electors of the most numerous branch of the state legislature, the right to vote for representatives in congress, and congress has the constitutional power to protect that right.

4. Power is conferred on congress, by section 4 of article 1 of the constitution, to regulate the time, place and manner of holding elections for representatives in congress. This includes the power to protect the electors in a free interchange of views, in making a free choice, and in expressing that choice freely at the ballot-box.

5. Congress had constitutional power to enact section 5520 of the Revised Statutes.

Heard on demurrer to indictment. The indictment was based on section 5520, Rev. St., which declares: "If two or more persons in any state or territory conspire to prevent by force, intimidation or threat any citizen who is lawfully entitled to vote from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for president or vice-president of the United States, or as a member of the congress of the United States, or to injure any citizen in person or property on account of such support or advocacy, each of such persons shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment with or without hard labor not less than six months nor more than six years, or by both such fine and imprisonment." The indictment consisted of three counts. The first charged that [J. Carneal] Goldman and the other defendants, on October 12, 1878, at the parish of Tensas, "did conspire together, and with others, to the grand jurors unknown, to prevent by force, intimidation and threats Fleming Branch, Daniel Canada, Willie Singleton and others, whose names are to the grand jurors unknown, from then and there giving their support and advocacy in a legal manner towards the election of one J. W. Fairfax, a lawfully qualified person, as a member of the congress of the United States from the Fifth congressional district of the state of Louisiana, they the said Fleming Branch, Daniel Canada, Willie Singleton and others aforesaid, each and every one of them then and there being citizens of the United States and of the said state of Louisiana, duly and properly registered under the laws of Louisiana and lawfully entitled to vote. That for the purpose of effecting the object of the said conspiracy by force, intimidation and threats, as aforesaid," the said Goldman and others therein named, "did on the said 12th day of October, A. D. 1878, at and in the said parish of Tensas and state of Louisiana, assault and shoot and inflict great bodily injury upon the said Fleming Branch, Daniel Canada, Willie Singleton and others, as aforesaid, and upon each and every one of them, contrary to the form of the statute," etc. The second count charged that the defendants and others did feloniously conspire, at the same time and place stated in the first count, "to prevent by force, intimidation and

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

threats certain citizens of the United States, and of the said state of Louisiana, residing in the parish of Tensas, in said state, and in the Fifth congressional district thereof, to wit, Fleming Branch, Daniel Canada, Willie Singleton and others, whose names are to the grand jurors unknown, from giving their support and advocacy in a legal manner, to wit, by convoking and holding public meetings; by the delivery of public addresses; by the organization of political clubs and societies, and by other similar and lawful means towards and in favor of the election at a general election thereafter, to wit, on the first Tuesday after the first Monday in the month of November then ensuing, to be held under the laws of the state of Louisiana, in the said parish of Tensas, and at which said election a member of the congress of the United States for the said Fifth congressional district of the state of Louisiana was to be voted for and elected, of one J. W. Fairfax, a person then and there lawfully qualified, as a member of the congress of the United States for the said Fifth congressional district of Louisiana, they, the said Fleming Branch, Daniel Canada, Willie Singleton and others aforesaid, and each and every one of them then and there being lawfully entitled to vote at the general election so then about to be held as aforesaid." The second count avers the overt acts of the defendants in carrying out said alleged conspiracy in the same words substantially as the first, and concludes "contrary to the form of the statute," etc. The third count charged that the defendants did feloniously conspire among themselves, and each with the other, to injure Fleming Branch, Daniel Canada, Willie Singleton and others, to the grand jurors unknown, citizens of the United States, and of said parish of Tensas and state of Louisiana, and legally qualified voters, in their person and property, on account of the support and advocacy by them, the said Branch, Canada, Singleton and others aforesaid, then and there given in a legal manner, to wit, by convoking and holding public meetings; by the delivery of public addresses, and by the organization of political clubs and by other similar and lawful means towards and in favor of the election of a lawfully qualified person, to wit, one J. W. Fairfax, as a member of the congress of the United States for the Fifth congressional district of the state of Louisiana, at a general election to be held, to wit, on the first Tuesday after the first Monday in November, A. D. 1878, according to the laws of the state of Louisiana, etc. This count then alleged the overt acts committed by the defendants in carrying out said conspiracy, in substantially the same terms as the first and second counts, and concluded "contrary to the form of the statutes," etc.

The defendants filed demurrers to each of the three counts on substantially the same grounds. The grounds pressed upon the attention of the court were: (1) That the counts were defective in not specifying the time, place and circumstances of the acts of advocacy and support of the election of said Fairfax as a member of congress by said Branch and others. (2) It was objected that in the execution of the conspiracy it was alleged that the conspirators shot the parties against whom the conspiracy was formed, and therefore the allegations as to the overt acts showed a merger of the lesser crime in the greater, and thus the indictment on its face showed a want of jurisdiction in this court. (3) It was objected that the act of congress on which the indictment is based was unconstitutional.

A. H. Leonard, U. S. Atty., for the United States.

T. J. Semmes, W. F. Mellen, and Julius Aroni, for defendants.

Before WOODS, Circuit Judge, and BILLINGS, District Judge.

WOODS, Circuit Judge. We shall notice the objections to the indictment in the order above stated.

1. With respect to the statements of the charge in an indictment for conspiracy, it may be observed that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiracy alone. And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Reg. v. Best, 2 Ld. Raym. 1167; 3 Chit. Cr. Law, 1143. This is the rule at common law when the conspiracy is to commit some offense known to the law. It is only when the conspiracy is to commit some act not an offense that the indictment must show some illegal act done in pursuance of the conspiracy. Rex v. Seward, 1 Adol. & El. 706. Thus, where an indictment charged that the defendants conspired together, by indirect means, to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose, Lord Mansfield, C. J., said: "The conspiracy is stated and its object; it is not necessary that any means should be stated." And Buller, J., said: "If there be any objection, it is that the indictment states too much; it would have been good, certainly, if it had not added, 'by indirect means,' and that will not make it bad." Note to Rex v. Turner, 13 East, 231. When the indictment charged that the defendant conspired by divers false pretenses and subtle means and devices to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held that, the gist of the offense being the conspiracy, it was quite sufficient to state the fact and its object, and not necessary to set out the specific pretenses. Bailey, J.,

said: "When the parties had once agreed to cheat a particular person of his moneys, although they might not then have fixed on any means for that purpose, the offense of conspiracy was complete." Rex v. Gill, 2 Barn. & Ald. 204; State v. Bartlett, 30 Me. 132. But when the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements. Com. v. Hunt, 4 Metc. [Mass.] 111. These rules of pleading throw light upon the first objection made to the indictment.

The first and second counts of the indictment charge a conspiracy to prevent certain qualified voters from giving their support and advocacy in a lawful manner towards the election of a certain qualified person as a member of congress, and allege certain acts done in furtherance of the conspiracy. The law makes such a conspiracy an offense. Now, as the support and advocacy which the alleged conspirators sought to prevent were, as stated in the first and second counts, to be given in the future, it is clearly not necessary to allege what shape that support and advocacy were to take. The defendants could conspire to prevent the advocacy and support, in a lawful manner, by the voters, of the election to congress of the person named, without knowing by what means that advocacy and support were to be carried on, and even before the means were agreed upon by the persons by whom the support and advocacy were to be given. Might not the offense of conspiracy, as was said by Justice Bayley, be complete before it was possible to know or aver what was the manner in which the support and advocacy were to be given? As an indictment for conspiracy to do an unlawful act need not show what were the means to be used, the offense of conspiracy being complete before the means to carry out the conspiracy are agreed on; so we say that a conspiracy to prevent by force, intimidation and threats any citizen entitled to vote from giving his advocacy or support in a lawful manner to the candidate of his choice, need not set out the acts of advocacy and support, for the crime of conspiracy may be complete before the form in which the advocacy and support is to be given is known to the conspirators, or even to the persons against whom the conspiracy is directed. Suppose, for instance, three persons meet together and enter into a conspiracy, by which they agree, in order to prevent an influential person of the opposite political party from giving his support and advocacy to a particular candidate, to arrest him and restrain him of his liberty until after the election, and actually carry their purposes into execution. It is clear that the conspiracy forbidden by section 5520 would be complete, and yet it would be impossible to aver and prove what acts of support and advocacy by the person so restrained were contemplated by him, or were prevented by the conspiracy.

We are of opinion therefore, that the first count, which does not state the acts of advocacy and support which the defendants are charged with conspiring to prevent, is not defective in that particular; and as the second and third counts do set out the acts which the conspiracy was directed to prevent, without, it is true, giving details of time and place, that a fortiori they are not open to the objection under consideration.

2. In support of the second objection to the indictment it is said that, under the law of conspiracies, should an overt act result in murder, the conspiracy is lost in the greater crime. The indictment, it is said, alleges that in the execution of the conspiracy the conspirators shot the parties against whom the conspiracy was formed, and it is claimed that these allegations show a merger of the lesser crime in the greater, and so, on the face of the indictment, show a want of jurisdiction in this court. It is sufficient to say, in answer to this objection, that, in the first place, the indictment does not disclose any crime committed by the defendants of a higher degree than the conspiracy charged, and if it did, it would not follow that this court would be ousted of jurisdiction to try the accused for conspiracy. Even if it were shown that the defendants had been guilty of murder—that being an offense against the law of another sovereignty, and not against the laws of the United States, and therefore not triable in the federal courts—this court would not be ousted of jurisdiction merely because it was disclosed that an offense of a higher grade had been committed against the laws of the state

3. The third objection to the indictment, which was the one most earnestly pressed, is that the act upon which it is founded is unconstitutional—or, rather, to state the objection more precisely, that congress was without constitutional authority to pass the act. In the case of Fletcher v. Peck, 6 Cranch [10 U. S.] 187, Chief Justice Marshall said: "The question whether a law be void for its repugnancy to the constitution is at all times a question of delicacy which ought seldom if ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." And in the case of Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 625, the same eminent judge said, speaking in reference to the constitutionality of a legislative act: "On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of

such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution."

Guided by these words of caution, we shall consider the question now to be passed upon. The clauses of the constitution of the United States which it is claimed empower congress to pass the act in question are section 2 of article 1, which declares that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature," and section 4 of the same article, which provides that "the times, places and manner of holding elections for the senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators," and the last clause of section eight, article one, which declares that "congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." The question whether this legislation is supported by section 2 of article 1, above quoted, depends on whether that section confers the right to vote for members of congress on such electors in the state as are qualified by its laws, as electors of the most numerous branch of the state legislature. If such a right is conferred, then it is a right which congress has power to protect by law. Rights and immunities created by, or dependent upon, the constitution of the United States, can be protected by congress. U. S. v. Reese, 92 U. S. 217; U. S. v. Cruikshank, Id. 542. It is true, and has been so said by the supreme court of the United States, that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. Minor v. Happersett, 21 Wall. [88 U. S.] 178. But this language refers solely to voters at an election for state officers, and so far as such elections are concerned, the United States has no voters of its own. In the case of U. S. v. Reese, 92 U S. 217, the supreme court expressly reserves any opinion on the effect of article 1, § 4, of the constitution in respect to elections for senators and representatives. The constitution does not describe a class who, independent of state laws, are entitled to vote for members of congress. But section 2 of article 1 declares in the most unmistakable terms that members of congress shall be chosen by the people of the several states, who shall have the qualifications requisite by the state laws for electors of the most numerous branch of the state legislature.

Now, the question is, has an elector who is qualified by state law to vote for the most numerous branch of the state legislature, a right conferred upon him by this clause of the constitution to vote for members of congress? To us it seems clear that he has. Suppose a state should attempt by law, though without distinction as to race, color or previous condition, to exclude a certain part of those having the qualifications requisite for electors of the most numerous branch of the state legislature from the right to vote for members of congress. Would such an act be constitutional? Clearly not. And it is clear also that it would deprive the excluded citizen of a right derived from the constitution of the United States, which says to him if you are qualified to vote for the most numerous branch of the state legislature you are qualified to vote for members of congress, and the house of representatives shall be composed of members chosen by electors such as you. It seems to be clear that the language of the section under consideration could not have been intended merely to give a basis of representation; that was provided for by other clauses of the constitution. If this be so, it must follow that it was intended as a declaration as to who of the people of the states should have the right to vote for representatives in congress. As, therefore, the elector qualified by state laws derives his right to vote for members of congress from the constitution of the United States, congress has the power to protect him in that right. Section 4 of article 1, in effect, declares that the congress may at any time, by law, make regulations prescribing the time, place and manner of holding elections for senators and representatives, except as to the places of choosing senators. The purpose of conferring this power upon congress was that the country might not be in danger of having no congress through the indifference of the states or their hostility to the general government. It was to place it out of the power of the states to prevent the election of a congress by obstructive laws or in any other way. The ultimate right of regulating the time, place and manner of choosing representatives, and the time and manner of choosing senators, was therefore given to congress, so that it might always be within the power of congress to secure the election of a senate and house of representatives. Story, Const. § 817.

The clause of the constitution under consideration does not confer rights or privileges upon the individual citizen. It is a clause framed to secure the existence of the government itself, and was made in the interest of all the people of all the states. Such being the object and scope, what is the power granted by it? It authorizes congress to regulate the time, place and manner of choosing representatives in congress. The terms "time and place" need no commentary. What is meant by the words "manner of holding elections?" An election is not simply the depositing of a ballot in a box. If the elector is forced to

vote a certain ballot against his will it is not an election so far as he is concerned, and equally so if he is prevented by violence from voting at all. An election is the expression of the free and untrammeled choice of the electors. There must be a choice and the expression of it to constitute an election. Under our American constitution an election implies a free interchange and comparison of views on the part of the people who are voters, and finally an independent expression of choice. Any interference with the right of the elector to make up his mind how he shall vote is as much an interference with his right to vote as if he were prevented from depositing his ballot in the ballot-box after he had made up his mind. It is conceded that congress may declare that the elections for representatives shall be by ballot. Congress has so declared without objection or challenge from any quarter. Rev. St. § 27. What was the purpose of that enactment? Clearly that the elector might be free to vote according to his choice. If it is within the power of congress for such a purpose to regulate his method of voting, congress could adopt any other measures leading to the same result. It could say that armed men should not infest the vicinity of the polls; it could say that the voters should have the right of free interchange of views on the day of voting. All this would as clearly be regulating the manner of holding the elections as prescribing that the election should be by ballot. If congress could make such regulations for election day it could make them for any previous day. In short, in prescribing the manner of holding elections, it could protect the voter in making his choice, and afterwards expressing that choice at the polls, for both these things are included in an election. Suppose our method of elections were like that used in England, where the candidates appear upon the hustings and address the voters, and the vote is taken, as it often is, by a show of hands; would not an act of parliament making any violence offered to the candidates, while addressing the voters, a penal offense be a regulation of the manner of holding the election? With us the canvass sometimes lasts for weeks, but that does not change the principle. Any law the purpose of which is to enable the voter to make a free and intelligent choice, and to express that choice freely at the ballot-box, is a regulation of the manner of holding the election.

The act of congress under consideration was framed for that purpose in respect to elections for representatives in congress, and it seems to us is plainly warranted by section 4, art. 1, of the constitution. The first and fourth sections of article 1, taken together, it seems to us leave no doubt upon the question. The first declares that representatives shall be elected by the people of the states, and adopts the qualification of electors prescribed by the states for electors of the most numerous branch of the legislature. The second authorizes congress to regulate the manner of holding such elections. The two sections are intended to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives, first by preventing obstructive legislation by the states, and, second, securing to the voter the protection of the general government.

We both concur in the opinion that the legislation under consideration is clearly within the constitutional power of congress, and our judgment is that the demurrer to the indictment should be overruled.

UNITED STATES (GOLDSBOROUGH v.). See Case No. 5,519.

Case No. 15,226.

UNITED STATES v. GOLDSTEIN'S SURETIES.

[1 Dill. 413.] [1]

Circuit Court, D. Kansas. 1871.

RECOGNIZANCE—REQUISITES OF VALIDITY.

Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer; and where, in distinct offences, two bonds, in different sums, were required, one bond for the aggregate amount was adjudged to impose no liability upon the sureties.

[Cited in U. S. v. Horton, Case No. 15,393; U. S. v. Hudson, 65 Fed. 73.]

[Cited in Roberts v. State, 34 Kan. 151, 8 Pac. 246.]

A United States commissioner, on proper complaint and proceedings before him, required a person charged with receiving stolen property of the United States, knowing it to be stolen, to give bail in the sum of $500 to appear at the next term, and the commissioner at the same time, on another charge of like nature, required the same person to give bail in the sum of $200 to appear at the next term, &c.; and one bond for $700 was taken; and the principal cognizor having failed to appear, it was declared forfeited. This proceeding is a scire facias against the sureties.

Mr. Horton, U. S. Dist. Atty.

Stillings & Fenlon, for defendants.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

DILLON, Circuit Judge. Bonds or recognizances of this character are binding only when taken in pursuance of law and the order of a competent court or officer. No order was made authorizing a single bond for $700, and the bond taken was a substantial departure from the bonds required by the commissioner, and was not therefore obligatory on the sure-

[1] [Reported by Hon John F. Dillon, Circuit Judge, and here reprinted by permission.]

ties. State v. Buffum, 2 Fost. (N. H.) 267. Judgment accordingly.

Recognizance to secure appearance on criminal charge binding only when in pursuance of order of proper officer. Cited U. S. v. Horton [Case No. 15,393].

Case No. 15,227.

UNITED STATES v. The GOOD FRIENDS.

[4 Hall. Law J. 488.]

District Court, D. Delaware. May 5, 1812.

VIOLATION OF NONIMPORTATION LAWS—LIBEL OF FORFEITURE—ACQUISITION OF SPANISH TERRITORY BY UNITED STATES—UNAUTHORIZED ACTS OF PUBLIC AGENT.

[1. Where an American vessel was laden in England in 1811 with a cargo of dry goods of British manufacture, and cleared thence for Amelia Island, Rio Janeiro, and Philadelphia, and proceeded to Amelia Island, and lay there for about two months, without breaking bulk, after which she sailed direct to Philadelphia, *held* that, in view of these movements, and of certain letters found on board from the owner to the supercargo, which indicated an expectation that the cargo would be brought to Philadelphia, the same must be found to have been "put on board" the ship with the intent to import the same into the United States, within the meaning of the 6th section of the nonimportation act of March 1, 1809 (2 Stat. 528), and was consequently subject to forfeiture thereunder.]

[2. The nonimportation act of March 1, 1809, must be construed to prohibit the introduction into the United States of every article of British merchandise or manufacture for any use whatever, without any exception which would permit a shipowner to import any articles (such, for instance, as anchors, sheathing copper, charts, etc.) intended for his own use.]

[3. Act Cong. Jan. 15, 1811 (3 Stat. 471), authorizing the president to take possession of all or any part of the Spanish territory lying east of the river Perdido and south of the state of Georgia, etc., "in case an arrangement has been or shall be made with the local authority of said territory for delivering up the possession of the same, or any part thereof, to the United States, or in the event of an attempt to occupy the said territory, or any part thereof, by a foreign government," gave authority to acquire the territory only in a friendly manner, and by compact or negotiation without hostility, or the exhibition of military force, except in case of an attempt by a foreign force to occupy the same; and hence, in the absence of any such attempt, the action of the American agent in accepting a cession of Amelia Island from a party of armed people calling themselves "Patriots," who, by an exhibition of force, had, a short time before, compelled the Spanish authorities to capitulate to them, was without authority of law.]

[4. The term "local authority," as used in the foregoing act of congress, meant such authority as had the immediate government or superintendence of the territory to be surrendered, namely, the Spanish colonial authority, and no other.]

[5. The act of the agent of the United States, after thus acquiring possession of Amelia Island, in granting to American vessels then lying there clearances to ports of the United States upon giving bond for payment of duties on their cargoes, was wholly void in respect to a vessel laden with goods of British manufacture, and could not in any way operate to prevent a forfeiture thereof under the nonimportation act of March 1, 1809.]

[6. A bond given with a condition that obliges a person to bring goods of British manufacture into a port of the United States in violation of the nonimportation laws is void.]

[This was a libel of forfeiture filed against the ship Good Friends and cargo, charging a violation of the nonimportation act of March 1, 1809.]

FISHER, District Judge. The ship Good Friends, Robert Thompson, master, owned and claimed by Stephen Girard, merchant, of Philadelphia, registered on the 9th of March, 1804, laden with flour and carrying a sea letter dated 27th of July, 1811, sailed from the Capes of Delaware on the first of August, 1811, was bound for the port of Lisbon, in the kingdom of Portugal, and a market. She arrived on the 30th of August at Lisbon, and discharged and sold her flour agreeably to instructions. She left Lisbon after the sale of her outward cargo about the last of September. The supercargo landed in England on the 10th of October. Ten days afterwards the Good Friends arrived at London. At the time of the vessel's arrival at London, Mr. Charles Banker, on account of the claimant (who had already sailed for and had arrived in England), had purchased about 10,000 pounds sterling worth of her inward cargo. The purchases of the inward cargo were made from funds of the claimant already in England, in the hands of Baring Brothers & Co. These purchases closed about the middle of December in the same year. The ship left England on the 4th of January, 1812, laden with dry goods of best quality of British manufacture. Her clearance, dated 14th December, 1811, from the custom-house of London, is for Amelia Island, a Spanish port, Rio Janeiro, in the Brazils, a Portuguese port, and Philadelphia. On the 9th or 10th of February, 1812, the ship arrived at Amelia Island, after a direct voyage from London to that place. She lay there, without breaking bulk, until the 10th of April, when she sailed for the port of Philadelphia; and on the 12th of the same month, arriving in the waters of the Delaware, she was seized by an officer of the revenue for this district, for the violation of a law of the United States passed on the first of March, 1809, commonly called the "Nonimportation Act." The Good Friends, for this offence, was libelled by the proper officer on the part of the United States in this district, on the 5th day of May last, as forfeited. This cause was heard at great length at the November term last of this court, sitting at Newcastle.

The fourth section of the act of congress above mentioned prohibits the importation into the United States or the territories thereof, after the 20th of May following, of any goods, wares, and merchandizes whatsoever from any port situated in Great Britain or Ireland, or any of the colonies or dependencies of Great Britain, or from any port or place in her actual possession. The same prohibi-

tion is by the same law enacted against France, but has been since dispensed with. All goods, wares, and merchandize being of the growth, product, or manufacture of Great Britain or Ireland, or of the colonies or dependencies of Great Britain, are by the same section prohibited from being imported from any port or place whatever; certain clearances for ports beyond the Cape of Good Hope, &c., only excepted. By the fifth section, the prohibited articles are, if imported into the United States or their territories, forfeited. The sixth section is the only one by which it is alleged the forfeiture accrues, in the present case, of the ship Good Friends to the United States The words are: "That if any article or articles the importation of which is prohibited by this act, shall after the twentieth of May be put on board of any ship or vessel, boat, raft or carriage, with intention to import the same into the United States or the territories thereof, contrary to the true intent and meaning of this act, and with the knowledge of the owner or master of such ship or vessel, boat, raft or carriage such ship or vessel, boat, raft or carriage shall be forfeited, and the owner and master thereof shall moreover each forfeit and pay treble the value of such articles."

It has been truly alleged in the argument, by one of the advocates of the claimants, that the fact of importation is, independent of the act of congress, no offence. It has, however, been made an offence by the legislative authority of the country, and it cannot be dissembled that the ship Good Friends has done the very act prohibited by the fourth section of the act aforesaid, and that she is forfeited, unless there exist such facts and circumstances in her case as will exempt her from the operation of the act. The duty prescribed to this court now is to determine whether this ship has had put on board of her British manufactures, and brought them into the United States, under such circumstances as will protect her from forfeiture. It has been contended by the advocates for the claimants, that there is no evidence in the present case of any intention on the part of the claimant or his agents to put on board the goods to import the same into the United States or the territories thereof, and that it is incumbent on the part of the United States to prove such intention.

It is in evidence in this cause that the claimant had vast funds on the continent of Europe, being the proceeds of several cargoes exported and sold there; that he had endeavored, and very successfully, too, to concentrate these funds in the hands of Baring Brothers & Co., a house in London; that, viewing the uncertain state of the relations between this country and Great Britain, he was very uneasy, lest he might fail in accomplishing the great purpose he held in view. His desire to be in possession of his funds, at such a juncture, was very laudable; especially as it would redound to his own security, as well as be adding to the resources of his country. The simple question on this part of the case is whether the claimant intended a commercial profit on the back of the funds which he thus wished to be in his own possession, by lading the Good Friends with British manufactures for the American market. The letter of instructions to the supercargo, Mr. Adgate, is dated at Philadelphia, on the 27th of July, 1811, four days anterior to the ship's putting to sea. In this letter it is remarkable that nothing is said in respect to the ulterior destination of the bulk of the inward cargo which was to be taken on board at London. From this letter it would seem as if a part, at any rate, of the inward cargo was intended to be imported into Philadelphia. This is to be inferred from sundry expressions contained in it, such as the following: "As it respects letters, I have no objection to take in my ships those from American supercargoes, masters, officers, and crew to their families or owners or their vessels." Speaking of the purchase of anchors for his new ship, I suppose on the stocks of this country, the claimant says, "And if they cannot be obtained in Portugal or Spain, you are to purchase them in England, &c." Again, "No matter if the anchors are forged in England, so they are well made, of good iron bars, &c." And, further, "Should I want any other articles from England, I will write you in time, care of Messrs. Baring Brothers and Co., at London." There is, however, a clause in this letter of instructions, which strongly intended that the whole of the inward cargo was expected to be brought into Philadelphia. Speaking of the terms on which he engaged Mr. Adgate, he says: "3d. Five hundred dollars additional will be paid to you if the ship Good Friends proceeds from a port in Portugal or Spain to London, and there takes in a cargo on my account, as before mentioned, and arrives safe in this port." What port is meant to be arrived at? Why certainly, the one at which the letter is dated. Where is she to take in her cargo? Plainly and undoubtedly, at London. He further is desirous of purchasing on his own account a complete set of separate maps of that part of this continent from the south boundaries of the United States, including Mexico, all the way round Cape Horn, as far as it is navigable, &c. From these clauses of the letter of the 27th July it would seem as if the inward cargo, or at any rate a part of it, was destined at that time for the port of Philadelphia, the residence of the claimant.

It is now to be considered how far the effect of the above letter is done away by those which follow, of the 14th of October and the 29th of December, 1811. The letter of the 14th of October, was received by the supercargo on the 5th of December ensuing, at London, nine days only before the completion of lading and the date of the clearance. From the evidence of Mr. Adgate it seems that the purchases of the inward cargo closed about

the middle of December. Must not, therefore, an inference arise, that before receiving the letter of the 14th of October a considerable part of the cargo was shipped under the letter of the 27th of July? But the letter of the 14th of October most clearly and unequivocally proves to my mind the destination to both Amelia Island and Rio Janeiro to be colourable, and not real. It is the first paper in this cause, in point of date, which mentions Amelia Island as the place of destination, and orders the ship to proceed "near enough to our capes to put letters on board to point out the destination" of the claimants. It appears, then, that his intention was thereafter "to be pointed out," although he in the same letter orders the clearance for Amelia Island. Could Amelia Island or Rio Janeiro be the place at which he wished his cargo to be unladen and sold? If either of them were, why speak in the letter of pointing out his intention, the continuance of the nonimportation acts, and of the orders in council? Neither of these governmental acts could affect the ship or cargo at either Amelia Island or the Brazils. Why wish her to come so near the Capes of Delaware, if her destination was bona fide for either the Spanish or Portuguese ports? The letter of the 29th of December is an after-act, and cannot have much weight in the decision of the present case. It was not received until after the arrival of the ship at Amelia Island, or until the day after. It was written in Philadelphia, after the shipment of the cargo at London, and but a short time before the ship left the British waters. Even this document proves only in his favour that the claimant did not wish to bring his ship into Philadelphia, and subject her and her cargo to forfeiture directly in the face of the nonimportation act. It is ascertained by this letter that she was not to unlade or break bulk at Amelia Island, but was to be kept in such manner as at any time to proceed with her cargo to such port as the claimant should point out. By the way, all this time there is no mention made of the voyage to Rio Janeiro; but there is to be gathered an evident avidity in the claimant, apparent on the face of this letter, on the first intimation that the restrictive act is repealed that the ship should come direct for the port of Philadelphia; and this, too, without advice from himself of such being the fact. It follows that this court is of opinion that the evidence of the intention of lading in London to import into the United States is manifest from the documentary evidence to which we have alluded; and we are further of opinion that this evidence is strongly corroborated, nay, concluded, by the London clearance. This document is the voluntary act of the captain, and presents, together with the act of since bringing them in, indisputable evidence of the goods being put on board with a view to the American market. In this paper Amelia Island, Rio Janeiro, and Philadelphia are named, and most probably named with a full intention and understanding among the parties of being filled up in the handwriting of the custom-house officers at London,—not in print, but in manuscript. To this paper it has been replied by the claimant's advocates that the ship might not have arrived with her cargo until the repeal of the restrictive acts, and for that event, and with that view, was the clearance filled up with the word "Philadelphia." I would ask if this be the course of transactions of this kind, and if there is any evidence in the cause to support such a supposition? Is the lying at Amelia Island upward of two months, waiting the result of the memorial to congress, presented by the claimant and others, in favour of special importations, evidence of such a position? There is, however, still further evidence of a part of the cargo being put on board in London with an intention to bring it into a prohibited port. I mean the memorial presented by the claimant to congress dated on the 9th of March, 1812. By this paper it appears that property in British manufactures amounting to 1,863 pounds 18s. sterling was shipped on board the Good Friends for the express purpose of being brought to and used in the port of Philadelphia, consisting of "three anchors, a quantity of sheathing copper, copper nails, a small bale of bunting, four night glasses, and several charts,"—thereby fulfilling, in respect of these articles, the wishes of the claimant expressed in his letter of the 27th of July. These articles, by the explanatory statement annexed to the memorial, are excepted from the general wish which the claimant had of being permitted by congress to order the ship round to Philadelphia as a place of safety, and of there entering her cargo for exportation. The captain, he says, has given bonds in England to land the copper and anchors in a port of the United States. From this document, then, as well as the letter last mentioned, it appears that these articles were intended for the use of the claimant himself; but it has been very ingeniously replied that if these anchors and the other articles composing this part of the shipment were intended for the use of the claimant, and not as articles of merchandize, their importation cannot influence a decision of the present case against him, if even put on board with intention of being brought here. In support of this principle a case has been cited from 3 Dall. 297, as being fully in point. This case has been attentively considered, and this court is of opinion that it does not go the length contended for by the claimant's advocates. It is true that an act of congress passed on the 22d of May, 1794 [1 Stat. 369], prohibiting for one year ensuing the exportation of arms and ammunition.

The La Vengeance was alleged to have exported these articles from the United States against the form of the act, but it appeared that the powder constituted a part of the equipment of the French frigate the Semilante, and did never belong to the United

States, nor was it of their manufacture; and that the muskets mentioned in the information were the private property of French passengers on board La Vengeance, "carried out for their own use, and not by way of merchandize." It must be evident that the nonimportation act was made to prohibit the introduction into the United States of British merchandize for any use whatever, and thereby to strike at the interests of a nation whose government was heaping upon us vexations and injustice without number and without end. We are of opinion that congress intended to prohibit importations of every article with a view to the consumption of the country, otherwise the nonimportation system would be a laborious nullity and a dead letter; and surely, if congress had intended to let in British manufactures for any purpose or use whatever, the law would have contained an exception. We, however, find none; and as a matter of construction we can never sanction such a one of any law as would inevitably defeat the ends for which it was enacted. Such a construction is indubitably the wrong one. The whole mercantile class of the community might, under such a construction, enter into importations with the avowed object of being for their own use; and by such means the United States in the face of the legislative prohibition might become inundated with British manufactures. This court cannot adopt such a construction, as would, if sanctioned by the judiciary of the country, violate the plain intention of the act, and frustrate all the benefits intended from it. The act of May, 1794, was passed to prevent the United States being drained of those materials, by their exportation abroad, without which the country could not be defended; and the construction was perhaps a reasonable one, that twenty muskets, bought by individuals for personal defence, and not with views of mercantile profit or for other foreign markets, could not be considered a violation of the law. Very different, in the opinion of this court, is the importation of upwards of 1,500 pounds sterling worth of British manufactures, when our prohibitory act without exception forbids the introduction altogether of British merchandise, in terms the most broad and unequivocal.

Independently of the documentary, there is abundant other testimony in this cause of the cargo "being put on board" the Good Friends for importation into the United States. The claimant certainly never could intend to lay out nearly 67,000 pounds sterling in any goods for the purpose of being carried to an uncertain or a glutted market. His funds in England were in able, responsible hands, and his goods were purchased with monies taken up from Messrs. Baring Brothers & Co. in pursuance of his own orders. Importation to Amelia Island of British dry goods, to so great an amount, is inconsistent with the mercantile eminence and known acuteness of the claimant. He would have preferred bringing his money home in bills, or in any other manner, to bringing a cargo of such an amount to such a market. His supercargo swears that the whole of the inhabitants of Fernandina of all ages, sexes and colours, do not amount to 300, and that the land of Amelia Island is very poor and thinly populated. The whole of the wealth of this island was not sufficient for the purchase of this cargo. Besides, from the good understanding which has existed between the British and Spanish governments for some years past, it is reasonable to conclude that British manufactures were to be obtained in great abundance anterior to the arrival thither of the Good Friends. The British are sufficiently eager to supply, indeed to glut, every market open to their manufactures. The Good Friends arrived there on the 19th of February, and lay in the Spanish waters until the 10th of April, without breaking bulk, or exposing any part of the cargo to sale. Nor have we any testimony of its being consigned to any person to superintend its sale, and to account for and remit its proceeds. So far from any of these measures being taken, we have it from under the hand of the claimant that the vessel was "to be kept in such manner as at any time to proceed with her cargo to such port as he should point out." The conclusion from these facts is, that Amelia Island could not have been the real port of destination. But Rio Janeiro is another port of destination. It is, I believe, not mentioned in the claimant's letter of the 14th of October, nor in the original manifest, or the consular certificate, and must have been inserted on the suggestion of the master of the ship, or of some agent of the claimant. The manifest and consular certificate mention Amelia Island, &c. The clearance itself mentions Rio Janeiro. There does not appear to have been any obstacle to the ship's proceeding to that market, had such been her intention. That, perhaps, was not an empty market. The British trade there themselves, and it was but reasonable to conclude that an ample supply of their manufactures was on hand. No attempt was made to enjoy the Brazilian market, though an ample opportunity was afforded during the delay at Amelia Island. Indeed, according to my recollection, the claimant nowhere mentions this port as the one which in any event is to be the receptacle of his cargo. One of his advocates has urged as an excuse for not going to Rio Janeiro that the property would there have been seized as an indemnity for the seizure of Florida. It is hardly to be supposed that the Portuguese would proceed to such a length for any injury committed against the Spanish government. I am compelled to decide from these facts, united with the paper testimony heretofore considered, that the cargo of the Good Friends was put on board at London, not with a real destination for Amelia Island or Rio Janeiro, but for

the port of Philadelphia in the United States. The last place presented every invitation which mercantile cupidity could hope for, because of the interrupted state of commerce which for some years had existed.

I might here close, and order the decree which would result from the foregoing convictions, but that several other questions of great magnitude have arisen and been discussed in this cause, which it may be thought incumbent on me to decide.

It is urged on the part of the claimant in this case that the ship is protected from forfeiture by the conduct of the government of the United States and their agents in receiving the cession of Amelia Island, and by the conduct of those agents subsequent to the cession. By a secret act of congress, passed on the 15th January, 1811, the president of the United States was authorized "to take possession of all or any part of the territory lying east of the river Perdido, and south of the state of Georgia and the Mississippi territory, in case an arrangement has been, or shall be, made with the local authority of the said territory for delivering up the possession of the same, or any part thereof, to the United States, or in the event of an attempt to occupy the said territory, or any part thereof by any foreign government." On the 26th of January, same year, General George Matthews and Colonel John M'Kee, were appointed by the president joint and several commissioners for carrying into effect the provisions of the foregoing act. It appears from the testimony that on the 16th of March last, the town of Fernandina, in Amelia Island, was summoned to surrender by a number of armed people, calling themselves "Patriots"; that on the 17th it capitulated, by striking the Spanish flag to that of the patriots; that on the 11th it was ceded by the patriots to General Matthews, as United States commissioner, who hoisted the flag of the United States in place of that of the patriots; that General Matthews took possession, at the head of fifty armed men, being a detachment of United States' troops. There were lying in the adjacent waters from five to eight United States gunboats, under the command of Commodore Campbell; that at the time of the cession these gunboats lay opposite the town, side to, with springs on their cables: that after the cession General Matthews appointed a judge, a collector, a harbour master, and a notary publick. On the 2d of April following, the ship Good Friends, theretofore lying in the waters of Amelia river, was cleared out for the port of Philadelphia from Fernandina, by the collector there, whom General Matthews had appointed, after giving bond for securing the duties on the ship and cargo. The clearance was accompanied by a letter from General Matthews to John Steele, Esquire, collector of the port of Philadelphia, stating the capitulation, surrender, cession, &c. of Fernandina and Amelia Island. On the 4th of April the government of the United States disavowed the conduct of General Matthews, revoked his powers, and committed them to another person.

These facts have given rise to several very important questions which were debated at the bar with great science and ability by the advocates of counsel for both sides. The first question raised is whether Matthews did or did not exceed the powers delegated to him by receiving the cession of Amelia Island in the manner he did receive it. The words of the act of congress from whence the whole authority to occupy East Florida originated are: "In case an arrangement has been or shall be made with the local authority of the said territory for delivering up the possession of the same or any part thereof to the United States." These words define the first casus in which the commissioners were to act, and to occupy the territory for the United States. The language of the letter of instructions to the commissioners is: "Should you find Governor Folk, or the local authority existing there, inclined to surrender in 'an amicable manner' the possession of the remaining portion or portions of West Florida now held by him in the name of the Spanish monarchy, you are to accept in behalf of the United States the abdication of his or of the other existing authority, and the jurisdiction of the country over which it extends. And, should a stipulation be insisted on for the redelivery of the country at a future period, you may engage for such redelivery to the lawful sovereign." In the fifth paragraph of the letter are the following words: "These directions are adapted to one of the contingencies specified in the act of congress, namely, 'the amicable surrender of the territory by the local ruling authority.'" From the plain meaning of all this language it would seem as if Matthews, in relation to the first contingency, was to act as a peaceful negotiator and in an amicable manner. In support of this idea the act speaks of an "arrangement" which has been or is to be made in relation to the surrender of the territory. The word "arrangement" here means something depending on and preparatory to a compact, and a compact, too, to be made in a friendly manner; that is, without any pre-existing hostility. The word "arrangement" and those which follow it must mean something voluntary on the part of the authorities ceding the territory, for no compulsion could be contemplated, as no force in this case was to be resorted to. We must therefore infer that the clear meaning of this casus was a voluntary or amicable surrender of the territory without the aid of force or the show of military authority. This idea is abundantly supported by the letter of instructions under which General Matthews acted. This paper was penned by the secretary of state, about ten days after the act passed, and, though there is a slight variance from the language, yet it follows the meaning of the act.

The letter uses these words: "inclined to surrender in an amicable manner the possession, &c." The obvious meaning of this language is, that the territory was to be acquired in a friendly manner, and by compact or negotiation without hostility or the exhibition of a military force.

2dly, as to the authority which was to make the surrender. With regard to colonies there are generally authorities of two kinds—the authority of the mother country by which the colony has been discovered, planted and settled, or acquired by conquest or treaty, and which retains and exercises many of the more important attributes of sovereignty; and the "local authority" of the colony, which is exercised for its immediate government, and in the colony itself. The latter is called from usage and propriety of language the "local authority," by way of contradistinguishing it from the former. The meaning of the words "local authority," as used in the act of congress, I am of opinion must be such authority alone as had the immediate, or, if you please, the "local," government or superintendence of the territory about to be surrendered, namely, the colonial authority, and no other. In this sense congress must have used the term. The authority of the mother country could not, in the nature of things, and never was intended to, be applied to for the cession. Governor Folk's name being mentioned in the instructions was a sufficient guide to Matthews as to the authority intended by the act and by the executive who issued instructions under it. The act uses the words "local authority"; the instructions vary in a small degree from these words; and probably, to meet the possible case of Folk's removal from office, uses the words in one place "local authority existing there," and in another "the local ruling authority." In both cases the instructions correspond with the true intent and meaning of the act. They both meant the local provincial or colonial authority. Did that authority make the surrender to Matthews? Was it made by Governor Folk, or even Don Lopez? Or was it made by the existing provincial or colonial authority? Was it made by that authority which existed when the law passed, or which had held the territory of the crown of Spain? Certainly by none of them, but by such an authority as had stepped in between the one congress had contemplated and General Matthews. Nor does the cession bear that voluntary and peaceful character which was desired and described by the legislative and executive department of our government. But in this case there is a summons by the patriot forces of the town of Fernandina, on the 16th of March to surrender on the next day. It capitulates and surrenders; both of which are measures of war, and the consequences of hostile movements.

Under this view of the subject, I am clearly of opinion that the first casus or contingency mentioned in the law did not arise; and that Governor Matthews in receiving the cession as he did, exceeded, and of course violated, both the letter and spirit of his powers; that he obtained the territory by usurpation, and not by compact, unless the second casus arose, in which force was to be used, and this brings us to examine whether the second casus did arise, in which possession was to be taken by force. On this part of the subject I shall attempt brevity, as not much contest has arisen at the bar upon it. It is not pretended that the force to which Fernandina capitulated was a foreign one; that force, therefore, is laid out of the case. Matthews, in regard to the second contingency, was to keep on the alert, "on suspicion of a foreign force being about to occupy the territory"; and he was to preoccupy it by force, only on the first undoubted manifestation of the approach of a force for that purpose. It is not in proof that such a force did approach for such a purpose. It follows that the possession which was obtained was unauthorized and illegal. The agent acted beyond the limits of his authority, and what he did of course was void.

But a second question on this part of the case is whether the bonding at and clearance from Amelia Island to Philadelphia was a forced or a voluntary act on the part of the agents of the claimant. Mr. Adgate, the supercargo, states that after the cession he felt very uneasy for the safety of the property, and waited on General Matthews, to know how he was to consider himself and the property under his charge. Matthews told him he might consider himself in the United States. The supercargo considered the property in imminent danger. Matthews agreed with him. He told the supercargo finally, he would give a clearance from the custom-house of Fernandina, on securing the duties. Matthews required a bond for this purpose in the sum of forty-six thousand and odd dollars, that the vessel and cargo should be delivered in charge to the collector of Philadelphia, until, as Matthews' letter expressed it, "the determination of the government of the United States be known, as relates to her case." Neither the testimony of the supercargo nor the letter of Matthews enforces conviction that there was any force used to give the bond or accept the clearance. The supercargo indeed implies, and very strongly, that he made the first overture to Matthews, in consequence of his own uneasiness in respect to the property. Matthews views the clearance in two lights: as a measure of justice, for which he gives no reasons; and as one of policy, lest the vessel and cargo "might invite the attack of piratical marauders." He seems a little suspicious lest she might bring trouble on his hands. George Turner deposes that the vessels were not compelled by the government of Amelia Island to depart, but were required to give bonds before they were allowed to

depart; that the bonds required that they should proceed to their destined ports in the United States, and that the power de facto did not take possession of the ships and vessels in the harbour further than the general possession given them by the cession of the island. The only testimony that supports the idea of any compulsion to secure duties is that of James Girdon. He says "that all American vessels were compelled to secure the duties on their cargoes for the use and benefit of the United States at Amelia Island, by giving bond to the collector there." This, however, shows what he means by the word "compelled." We shall, however, presently see whether such bonds are compulsory. It further appears that the captains and supercargoes of several ships, and among them of the Good Friends, preferred a petition to Matthews, after the cession, on the subject of the ships and cargoes; that Matthews, in his answer, wished them to vary the form of the application. The first petition to him does not appear in the proceedings, but that pursuant to the form he advises does, and bears a contemporary date with his reply to the first petition. So it would seem that, so far from any compulsion being used, the arrival into the waters of the United States was, on the part of the agents of the claimant, voluntary and solicited. By the way, they state that they had been waiting at Amelia Island until they could be legally admitted to come hither, and state, in the same paper, Philadelphia as their port of destination. We do not discover any exercise of the vis major in this case. Had such been the fact, our opinion might and probably would have been different; for the coming into the waters of the United States would have been imputable to the compelling force, and not to the claimant or to his agents. But so far from the vis major, we find no exclusive possession taken of the ships which had been riding in the Spanish waters by the military occupants of the island or by the gunboats which were in its waters. The ships are as unmolested as before the surrender. The whole uneasiness in the case is with Mr. Adgate. He it is that applies to Matthews to know what to do. Matthews, fearing the Colibri, I suppose, which had been seen some time before in the offing, but which had gone further to the south, takes his bond, and clears him out for a port in the United States. There certainly then was no external force, or even the offer of it.

The next question which offers for our consideration is, can the bond be deemed compulsion in the case? The bond, we are told, was given with condition to come to the port of Philadelphia, and with a cargo of dry goods of British manufacture. We have before seen that such articles are forbidden to be brought here, and by the law of the land. It is clearly unlawful to bring in such a cargo. We are informed by our law that a bond given with a condition which obliges a person to do an act or to the performance of a thing which is unlawful, is void. 3 Bac. Abr. 703; Co. Litt. 206b; Cro. Eliz. 705. The inevitable conclusion is, the bringing in goods of British manufacture being unlawful, a bond with a condition to do that thing is void and of no effect. Such an instrument could never form the ground of a recovery in any court of justice in the United States. It could have no compulsory effect belonging to it, and in this view of the subject there was no compulsion to bring in the cargo, even according to the deposition of Girdon.

These are all the questions which I have thought it material to consider in this cause. I will now beg leave to remark that in a republican government like ours, which exists only by the force and obligation of its laws, it is of primary importance that those laws should be obeyed; that they should operate equally; that the obedience yielded to them may be cheerful and willing; that if one member of the community shall be exempted from their operation, every other is injured, and has a right to complain; and that in proportion as the laws become disregarded and ineffectual the government from which they emanate becomes enfeebled, and eventually is incapable of providing for its own security and the happiness of the people. It therefore certainly behooves every functionary of such a government, by whom the laws are to be expounded, to be cautious how he admits facts on principles virtually to do away the force and effect of a law. By admissions of this kind a judicial magistrate may usurp all the powers which belong to a free government. He may virtually, though he cannot formally, repeal a law. He may excuse, though he cannot pardon, an offence against the law; forgetting the wise maxim of the common law, "Sed est tutissima cassis sub clypeo legis nemo decipitur." On the other hand, it must be confessed that there are cases of violation of the laws where the offender ought not to suffer their penalties; but the great question in cases of this kind, in a well-regulated government, is whether he ought not rather to look up for indemnity to the executive authority than to the judicial magistrate. The one can listen to the suggestions of clemency in a hard case, while the other is the lex loquens,—the law speaking,—or the medium through which its penalties are pronounced against its violators. I do not mean by what I have said that a judge should be unmerciful; but merely that he confine himself to those functions which his government have conferred upon him.

I may do wrong to the claimant by the decision which I now make, but the wrong is unintentional on my part. If, however, I have erred, the error will hereafter be corrected by the great and learned appellate authorities before whom this cause will go when it shall have left this court; and a great

consolation to me is that in cases of magnitude the final decision is not here. Were my judgment of this case to be formed according to my prepossessions which I have received of the claimants, very different indeed would it be from what it is. But I am bound by a tie which admits no personal partialities or animosities to mingle themselves in my decision. They can never form the grounds of my decrees. Let a decree of forfeiture be entered.

Case No. 15,228.

UNITED STATES v. GOODRICH TRANSP. CO.

[8 Biss. 224.] [1]

Circuit Court, E. D. Wisconsin. June, 1878.

INTERNAL REVENUE—TRANSPORTING BARRELS WITH UNCANCELED STAMPS.

In an action to recover a penalty under section 3324 of the Revised Statutes, for transporting empty barrels upon which were uneffaced internal revenue stamps, *held*, that the defendant was bound to know whether or not there were stamps upon the barrels, which had not been effaced or obliterated.

Action to recover penalty under section 3324 of the Revised Statutes, for transporting empty barrels which had theretofore contained distilled spirits, and upon which, it was claimed, were internal revenue stamps not effaced or obliterated as required by law.

G. W. Hazelton, for the United States.

Murphey & Goodwin, for defendant.

DYER, District Judge (charging jury). Testimony has been given tending to show that the defendant received on board one of its boats at Green Bay, for transportation to Milwaukee, and that it transported empty barrels having thereon, uneffaced and unobliterated, certain stamps required by law to be placed on any cask or package containing distilled spirits. Testimony has also been given on the part of defendant tending to show that these barrels had been stored for a considerable time before such transportation, that they were old barrels, and that the heads of the same were covered with dust and dirt and water stains, so that the stamps were to some extent obscured and not readily discernible upon ordinary observation, and that they were received by defendant for transportation and were transported from Green Bay to Milwaukee, in connection with and as part of a large number of other barrels upon which the stamps had been effaced or obliterated.

Upon the state of facts presented by the entire testimony, I am asked by defendant's counsel to instruct you that if the defendant by its agents and employés exercised reasonable care and watchfulness in observing the condition of said barrels when they were received for transportation, and if in the exercise of such care, they failed to ascertain that the stamps upon the same were uneffaced and unobliterated, for the reason that such stamps were obscured from ordinary view by the presence of dirt, dust and stains upon the heads of the barrels where the stamps were placed, the defendant is not liable in this action. I must, in the view I take of the statute, decline to so instruct you.

The statute (section 3324, Rev. St.) provides, that every transportation company which receives or transports or has in possession with intent to transport, any empty cask or package having thereon any brand, mark or stamp required by law to be placed on any cask or package containing distilled spirits, shall forfeit three hundred dollars for each such cask or package so received or transported or had in possession with intent to transport. This is one of the most important provisions of the internal revenue law, and I am of the opinion that under a proper construction of its requirements the defendant was bound to know whether or not there were stamps upon these barrels that had not been effaced or obliterated. The statute is positive in its terms, and the question is, did these barrels have upon them stamps, uneffaced, as claimed; not, did the defendant discover them or could it discover them by the exercise of reasonable care and ordinary observation. It was the defendant's duty, before receiving them for transportation, to ascertain whether there were or were not uncancelled stamps upon these barrels, if it would escape liability under this statute, and as I have before said, it was bound to know what was the fact; and although the stamps may have been obscured as claimed, if they were upon the barrels uneffaced and unobliterated, and if the defendant received the barrels with the stamps upon them for transportation, and transported them as alleged, then it is liable in the present action to the extent of three hundred dollars for each such barrel so transported.

Verdict for United States for twelve hundred dollars.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Case No. 15,229.

UNITED STATES v. GOODWIN.

[4 Mason, 128.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

CUSTOMS DUTIES—PALMETTA HATS.

Hats made of palmetta leaf are not hats made of straw, chip, or grass, within the act of 22d May, 1824, c. 136 [4 Stat. 25], and therefore pay only a duty of 15 per cent. ad valorem.

[Cited in An Ullage Box of Sugar, Case No. 14,324.]

[This was an action by the United States against F. H. Goodwin.] The case was re-

[1] [Reported by William P. Mason, Esq.]

ferred to the decision of the court upon the following statement of facts, which was agreed upon by the parties: "It is agreed, that the goods in question, before they were imported into the port of Passamaquoddy, had been imported into St. Andrews, in the province of New Brunswick, and were lying in St. Andrews, and intended to be imported, or not imported into the United States, according as the duties should be found, on inquiry, to be an ad valorem duty of fifteen per cent. as on unenumerated articles, or an ad valorem duty of fifty per cent. as on hats under the denomination of hats of straw, chip, or grass; that for the purpose of getting this information he, the defendant, went to the port of Passamaquoddy, and made the inquiry of the collector through the deputy collector; that said collector took time for the examination and to give the answer; that his deliberate answer, after mature examination and reflection, was, that an ad valorem duty of fifteen per cent. was to be paid, as on unenumerated articles; that upon this information, and in consequence thereof, he, the defendant, imported said goods into the port of Passamaquoddy, which he should not have done, had he been informed that a duty of fifty per cent. would have been to be paid; that said goods were duly entered, and the duties demanded, viz. fifteen per cent. as on unenumerated articles, were duly paid by the defendant, amounting to the sum of $40.49, and that a certificate was given by the deputy collector, under the seal of the custom-house, certifying that said goods had been imported into said port, and the duties thereon paid; that said hats are a species of hats fabricated of palmetta leaf."

The first question is, is not said certificate a discharge and release to the defendant from all liability for duties on said importation, whatever the duties may be?

If it be not such a discharge and release, the second question is, what duty does the law require in the importation of that species of hats? The law, on which the plaintiffs rely, is the statute passed the 22d of May, 1824, entitled "An act to amend the several acts imposing duties on imports." The section of the said act, on which the plaintiffs rely, is the 4th, and is in these words: "On all Leghorn hats or bonnets, and all hats or bonnets of straw, chip, or grass, and all flats, braids, or plats for the making of hats or bonnets, a duty of fifty per centum ad valorem: Provided, that all Leghorn hats and bonnets, and all hats or bonnets of straw, chip, or grass, which, at the place whence imported with the addition of ten per centum, shall have cost less than one dollar each, shall be taken and deemed to have cost one dollar each, and shall be charged with duty accordingly." "It is agreed, that these hats were imported into St. Andrews, and thence into the port of Passamaquoddy from Campeachy in the province Ytica, a province of Mexico. The question arising is, whether hats, which are fabricated of palmetta leaf, come under the denomination of 'hats of straw, of chip, or of grass.' If they do not, it is agreed that these palmetta leaf made hats pay only an ad valorem duty of fifteen per cent.; and that the ad valorem duties due thereon, have been duly paid. If hats fabricated of palmetta leaf come under the denomination of hats of straw, or chip, or grass, then it is agreed, that said hats are to pay an ad valorem duty of fifty per cent."

The case was shorty argued by Pearse, Dist. Atty., for the United States, and A. Robbins, for defendant; and by consent, an affidavit of a person acquainted with the palmetta tree was read.

STORY, Circuit Justice. Upon the first question the court is of opinion, that if by a mistake of the collector the full duty is not paid to the United States, they may maintain a suit against the owner for the deficiency. By law the duty on goods imported is a debt due to the United States.

As to the second point, we think it really admits of no doubt. The palmetta is a tree of a large trunk, and the hats are made of the leaves of that tree. Some of the trunks are at the bottom three feet in circumference, and grow to eight feet high. But it is decisive with us, that the hats are made of the leaf, and of no other part of the tree. The act of 22d May, 1824 (chapter 136), puts an ad valorem duty of fifty per cent. on hats of straw, chip, or grass. A hat made of a leaf is not made of straw, chip or grass, in any common or technical sense. A chip hat is made of the ligneous strips of a tree. Straw and grass are too well known to require any description. Judgment must therefore be for the defendant. Judgment accordingly.

UNITED STATES (GOODWIN v.). See Case No. 5,554.

Case No. 15,230.

UNITED STATES v. GOOSELY.

[1 Burr's Trial, 222.]

Circuit Court. D. Virginia.[1]

WITNESS—REFUSAL TO ANSWER—POSSIBILITY OF CRIMINATION.

[Cited in argument in U. S. v. Burr, Case No. 14,692e, to the point that a witness is not bound to answer a question which might possibly criminate him.]

Goosely was indicted for felony, under the 16th and 17th sections of the act of congress establishing the post-office and post-roads within the United States, for robbing the mail of some bank-notes.

On his trial, the attorney for the United States called Reynolds, an accomplice with the person, against whom an indictment for the offence had been preferred, but which had been found "not a true bill" by the grand jury.

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[1] [Date not given.]

Randolph & Wickham, counsel for the prisoner, objected to his testimony, on the principle that the witness was not bound to give any evidence which might implicate himself.

The attorney admitted the general principle, but denied its application, and insisted that he might give evidence.

THE COURT determined, "that he was a competent witness;" but IREDELL, Circuit Justice, observed (and GRIFFIN, District Judge, concurred) that "he could not be compelled to answer a question leading to an implication of himself; and that it was very probable that the jury would pay but little attention to a fact, which they were satisfied was but partially related. He was asked, whether he knew of any bank-notes being taken out of the mail by the prisoner. He answered, none, but what he was jointly concerned in. The court said he was not bound to tell anything that might "tend to criminate himself."

The jury returned a verdict for the prisoner of not guilty, and he was discharged.

Case No. 15,231.

UNITED STATES v. GORDON.

[5 Blatchf. 18.] [1]

Circuit Court, S. D. New York. Nov. 8, 1861; Nov. 30, 1861.

CITIZENSHIP—SHIPPING—AMERICAN VESSEL—SLAVE TRADE—INDICTMENT—SENTENCE.

1. A person born abroad, on board of an American vessel, of parents who are citizens of the United States, and who are, at the time, in the foreign country, not with the design of removing thither, but only having touched there in the course of a voyage which the father has made, as captain of the vessel, is to be regarded as a citizen of the United States.

2. Where it appears that a vessel was built in the United States and belonged to American citizens, it is not enough, in order to show that she ceased to be an American vessel, to prove that she was taken abroad, and there sold and transferred by those American citizens, but it must also be shown that she was sold and transferred to a foreigner.

3. Where a vessel is shown to have been fitted out for the purpose of engaging in the slave trade, her master, if he had control and charge of the vessel, in procuring the cargo, in stowing it and in shipping the seamen, is to be held chargeable, as matter of law, with a knowledge of the intended service of the vessel.

4. If such master conducts the vessel to Africa, remains in her, and starts to come back with her, she having there taken on board a cargo of slaves, such previous knowledge on the part of the master, is, on the trial of an indictment against him for engaging in the slave trade, to be taken into consideration by the jury, on the question as to the purpose for which he was found on the vessel, in Africa, when the slaves were put on board.

5. To sustain an indictment, under the 5th section of the act of May 15, 1820 (3 Stat. 601), for forcibly confining and detaining negroes on board of a vessel, with intent to make them slaves, it is not necessary to show that physical or manual force was exercised on board of the vessel, but it is enough if the negroes were under moral restraint and fear there, their wills being controlled by superior power exercised over their minds and bodies, it appearing that they were under restraint at the time by the persons who furnished them at the vessel's side and transferred them to the vessel, and that they came upon the deck of the vessel in that condition; and any person who participated in such sort of detention is to be regarded as a principal in the offence.

6. In such an indictment, it is sufficient to aver, that the defendant forcibly confined and detained the negroes, "they not having been held to service by the laws of either of the states or territories of the United States," without otherwise averring that they were not so held to service at the time of the commission of the offence.

7. An offence commenced to be committed on board of an American vessel lying at the time in a river which is an arm of the sea, on the coast of Africa, and continued uninterruptedly to a point in the Atlantic Ocean several miles from land, is within the jurisdiction of the United States and of a circuit court thereof.

8. Although a trial and conviction have been had for a capital offence before a circuit court when held by both of the judges thereof, it is competent for the same court, when held by only one of the judges, to pass the sentence.

This was an indictment against the defendant [Nathaniel Gordon], under the 5th section of the act of May 15, 1820 (3 Stat. 601), for forcibly confining and detaining, on the 8th of August, 1860, on waters within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, and out of the limits of any state or district, on board of the ship Erie, owned wholly or in part, or navigated for, or in behalf of, a citizen or citizens of the United States, certain negroes, not having been held to service by the laws of either of the states or territories of the United States, with intent to make such negroes slaves, he being, at the time of the commission of the crime, one of the ship's company of the ship, and a citizen of the United States, and the Southern district of New York being the district in which he was apprehended and into which he was first brought. The trial took place before NELSON, Circuit Justice, and SHIPMAN, District Judge, and a jury.

E. Delafield Smith, Dist. Atty., for the United States.

Gilbert Dean, for defendant.

NELSON, Circuit Justice (charging jury). The 5th section of the act of May 15, 1820, under which the prisoner is indicted, provides, "that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel, any negro or mulatto not held to service by the laws

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

of either of the states or territories of the United States," with intent to make him a slave, such person shall be adjudged a pirate, and, on conviction, shall suffer death. There are two counts in the indictment, to which we shall call your attention, and to which the observations that we shall make on the law of the case will be confined. The first count is, in substance, that the prisoner, one of the ship's company of the ship Erie, owned in whole or in part by American citizens, in the river Congo, did piratically, feloniously, and forcibly confine and detain eight hundred negroes on board, with intent to make them slaves. The third count is, that the prisoner, a citizen of the United States, one of the ship's company of the ship Erie, a foreign vessel, engaged in the slave trade, in the river Congo, did piratically and forcibly confine and detain eight hundred negroes on board such vessel, with intent to make them slaves. Under the statute which we have read to you, in order to make out the offence against the prisoner, it is necessary, on the part of the government, to prove, either that he is a citizen of the United States, or that the vessel on which he served, with which he was engaged in the slave trade, belonged, in whole or in part, to citizens of the United States. If the prisoner is a citizen of the United States, then the crime charged against him, of forcibly detaining these negroes, may be made out, if he was on board of a foreign vessel. But, if he was not a citizen of the United States, but a foreigner, then, in order to charge him with the crime, it must appear that it was committed upon an American vessel, or at least a vessel owned, in whole or in part, by citizens of the United States. Two questions, therefore, become material: First—Was the prisoner at the bar a citizen? Now, proof is given by two witnesses, that they knew both his father and his mother in Portland, Maine, before their marriage. They were both residents of that place. The witnesses also knew them after their marriage, in the same place, and knew the prisoner, the fruit of that marriage, when two or three years old. The question is, upon this testimony—Was the prisoner a native-born citizen, born in Portland or in the United States? It has been argued, by the counsel for the prisoner, that there is some evidence that the mother, after the marriage, was in the habit of going with her husband, who was a sea captain, upon foreign voyages; and it is insisted that, upon this state of facts, the prisoner may have been born abroad. Perhaps, the presumption being, upon the evidence, that he was born in Portland, a prima facie case being made out that he was born there, the burden would rest upon him, to show that he was born abroad. But we take it to be settled law, that, although he was born in a foreign country, yet if his father and mother were American citizens, and did not have the design of removing to the foreign country, but touched there in the course of a voyage which the father made as a sea captain, the child would still be regarded as an American citizen.

Next, gentlemen, as to the character of the vessel. Was she an American vessel, or owned, in whole or in part, by American citizens? It appears that she was built in the United States, and belonged to American citizens, and made a voyage from England to Havana; and, it is insisted that, after her arrival at Havana, she was sold and transferred by those American citizens. We have the account from Mr. Post, who owned three-fourths of her at the time of the sale. He states, that though he was not present at the time of the sale, yet one of the other part owners, Mr. Knudsen, was with the vessel as its master, and that he received from Havana, in March, 1860, the proceeds of the sale, and had no doubt that she had been sold and transferred. Perhaps, on this evidence, it would be difficult to deny that a sale and transfer was made of this vessel out of those American owners, so far at least as Mr. Post is concerned; and he says, also, that he accounted with the other part owners for their share of the price. The difficulty, in this part of the case, is, that it is not enough to show that the title to this vessel was conveyed by these American owners in March, 1860. That is not sufficient, because, before any change can be made in the character of a vessel, after it has been proved that she belonged to American owners, it must appear that the transfer was made to a foreigner. To whom this vessel was transferred, we have no evidence in the case. But, as I before said to you, gentlemen, it is not necessary, upon this branch of the case, that the prisoner should be a citizen, and, also, that the vessel should be an American vessel. It is sufficient, if either of these facts exists, for the commission of the crime charged in the indictment.

This brings us, gentlemen, to the merits of the case, and the question is, is the prisoner guilty or not, of forcibly confining or detaining the negroes on board of this vessel, in the Congo river, with the intent of making them slaves? This is the issue in the case, so far as the real merits are involved. Now, you have the evidence, on the part of the government, of Martin, Green, Alexander, and Hetelberg, four seamen on board of the Erie, who shipped in Havana, in April, 1860, a short time after this alleged sale and transfer. They have detailed to you the circumstances of their employment as seamen, the cargo with which the vessel was laden at that port—some 150 or more hogsheads of liquor, a number of barrels of pork and beef, bags of beans, barrels of bread and rice, and some 250 bundles of shooks, with a corresponding number of hoops, for the purpose of being subsequently manufactured into barrels or casks. Now, it may be material for you to inquire, in entering upon the consideration of this issue, whether this was a bona fide cargo, for lawful trade and commerce, or whether it was a cargo fitted out and in-

tended to be used in the slave trade. The vessel was of some 500 tons. If this was a fitting out for the purpose of engaging in the slave trade, and the prisoner at the bar had a knowledge of this intended service of the vessel, then that fact would accompany him to the Congo river, and will have its weight and its influence upon your minds, as to the connection that he had with the transaction that occurred there, in receiving these negroes on board and detaining them. It may undoubtedly be assumed, without any injustice, as a matter of law, the prisoner being the master of the vessel at the port of Havana, and for her voyage to the Congo river, that if this cargo was fitted out for that purpose, if it was a cargo not only proper for that purpose, but intended for that purpose, he, as master, who had the control and charge of the vessel in procuring the cargo, in stowing it, and in shipping the seamen, is chargeable with a knowledge of these facts. Now, these four witnesses, whom you have seen on the stand, have detailed the progress of the voyage from Havana to the Congo river, and the taking of these negroes on board, and the starting from the river on the return voyage to Havana. Their testimony has been so frequently referred to by counsel, and commented upon by them, that I shall not take up your time in going over it. The four concur in the account which they have given of the voyage. They state that, after they had been out some thirty days, and had discovered the provisions and freight on board, a suspicion arose, in the minds of the sailors, that the vessel might be intended for the slave trade, and that they disclosed this suspicion to the captain, assigning to him the reason and grounds of it. The captain, however, disclaimed any such purpose, rebuked the suspicion, and ordered them forward. They all concur in stating that, after the vessel arrived in the Congo river, and while the persons connected with her, and those who furnished the cargo of negroes, were engaged in putting the negroes on board, the captain continued in command of her, so far as they saw, and exercised the same control over the vessel, and her management, and the putting on board of these negroes, as he had previously exercised in the course of the voyage. They also state that, after the negroes were put on board, they were called aft, and were applied to for the purpose of ascertaining whether they would continue to serve as seamen on the return voyage, and were told that, if they would, they should be paid a dollar a head for every negro landed at Cuba. They also state, especially some of them, that the prisoner gave a direction for hoisting the anchor, and directed the course of the vessel when she came out of the river. These are the material facts which have been testified to by the witnesses for the prosecution. On the part of the prisoner, you have the testimony of the first and second mates, who, in all these respects, with, perhaps, one exception, contradict these four witnesses. They state that, after the arrival of the vessel and the discharge of the cargo, the prisoner no longer exercised any control over the management of the vessel, and the control of the vessel and her navigation were passed over to the hands of another person, first, to Mr. Hill, who died, and afterwards to Mr. Manuel, whom they regarded as the captain of the vessel; and that subsequently the prisoner had no management or control of her. One of them, the mate, I think, states that he was present when the seamen were applied to, with the view of ascertaining whether they would serve on the return voyage, and his statement differs from the account given by the seamen in this: He says, that the prisoner applied to the seamen, on behalf of the owners of the vessel, and that, as agent, or on behalf of the owners, holding a letter in his hand at the time, which purported to be an authority, he made this offer to them, for the purpose of engaging them. This is the only discrepancy, so far as regards that fact testified to by the seamen.

Now, as I before stated to you, if the prisoner at the bar, as master of this vessel, at Havana, had a knowledge that she was fitted out, equipped, and provisioned for a voyage to the Congo river, on the coast of Africa, for the purpose of engaging in the slave trade, then, in view of the fact of his entering upon that voyage, conducting the vessel to a foreign coast, remaining in her, and coming back with her, or starting to come back with her, before she was captured, this previous knowledge of the prisoner, and his engagement to navigate the vessel for that purpose, will have its influence as to the purpose for which he was found upon the vessel in the Congo river, at the time the negroes were put on board; and it is entitled to whatever weight you may think it deserves, in aiding or supporting the testimony of the four seamen, and will raise the question, for your consideration and decision, whether or not the transfer was a part of the original plan of carrying out this engagement of the vessel in the slave trade, and, if such, colorable and not bona fide. This, however, is a question for your consideration and determination.

Now, we have said that, in order to sustain the charge against the prisoner, it must appear that these negroes were "forcibly" confined and detained on board of that vessel, for the purpose of making them slaves—for the purpose of bringing them to Cuba, or elsewhere, to make them slaves. This word "forcibly," which is a material element in the crime charged, does not mean physical or manual force. Even the crime of robbery, in which force is a peculiar element of the crime, it being the taking violently the property of another from his person, need not be accompanied with or consist of actual force. Any conduct, on the part of the robber, putting the person deprived of his goods in bodily fear and terror, is equivalent to ac-

tual force. And so in this case. These negroes were collected at the place where they were put on board, in barracoons, and were there under restraint by the persons who furnished them at the ship's side. They were in bondage at the time, and under the control of those persons, who transferred them to the vessel. They came upon the deck of the vessel in that condition, and it would be strange, indeed, if it was made necessary by the law, that it should be shown that they made personal, physical resistance at the time, against being put on board and detained on board, under all these circumstances. It is sufficient that they were under moral restraint and fear—their wills controlled by this superior power exercised over their minds and bodies; and any person participating in that forcible detention, that sort of detention, is a principal, participating in the guilt of the offence.

Then, as to the intent of making them slaves. This, undoubtedly, is a question of fact for the jury. You must find it, but you can find it as an inference from the surrounding circumstances attending their being put on board and forcibly detained on board. If any other purpose, any lawful purpose, had been shown to you by the evidence in the case, undoubtedly it would have been pertinent and satisfactory for the purpose of rebutting such a presumption of intent. But, in the absence of any such evidence, it is for you to say whether the inference is warranted by the testimony.

These are all the observations that we deem it advisable to submit to you, but we will call back your minds to the material question, so that you may look into the case with intelligence and comprehend the real issue involved in the case, which is—Were these negroes, that were put on board of the Erie, in the Congo river, in August, 1860, forcibly detained or confined, with the intention of making them slaves, and did the prisoner, on board of that vessel, at the time, participate in that confinement and detention? If he did, he is guilty of this offence, under the statute. If he did not, he is innocent.

The jury found the defendant guilty. He subsequently made, before NELSON, Circuit Justice, and SHIPMAN, District Judge, a motion for an arrest of judgment and a motion for a new trial.

SHIPMAN, District Judge. We have carefully considered the point submitted to us, on the motions for an arrest of judgment and for a new trial, and the arguments of counsel thereon. In disposing of these motions, we do not deem it important to discuss any exceptions taken to the form of the indictment, except such as apply to the first and third counts, inasmuch as it was upon those two counts that we put the case to the jury. If either one of those counts is good, the indictment is sufficient to support the verdict.

The only objection taken to the form of the first and third counts is, that they do not aver, in the precise words of the statute, the condition of the negroes, as "not held to service by the laws of either of the states or territories of the United States," at the time of the commission of the offence, the language of the indictment being, "not having been held to service, &c." It is argued that, if the defendant had been able to prove that they had been once held to service, at some time prior to the commission of the offence, this averment would have been negatived, and he would have been entitled to an acquittal. But this, we think, only proves that the language of the indictment, in this particular, is more comprehensive than was necessary. The indictment charges him with having forcibly confined and detained the negroes, they not having been held to service, &c., that is, not having been held to service at the time he so confined and detained them, or at any time previous. The fact that the terms of the averment are somewhat broader than those of the statute is not material, so long as they cover the offence described in the latter.

To the objection that there was no such proof that the vessel upon which the offence was committed, was "owned wholly, or in part, or navigated for, or in behalf of, any citizen or citizens of the United States," as would warrant a conviction on the first count, we cannot accede. The government proved that she was built in, and owned by citizens of, the United States. This fixed the national character of the vessel, and this character and ownership would be presumed to continue until they were shown to have been changed. To show such a change, the burden of proof was on the defendant. The evidence offered only tended to show that a sale was made of the vessel at Havana, but without showing to whom such sale was made. It is urged, by the defendant's counsel, that, inasmuch as the sale claimed to have been proved was made in a foreign country, the law will presume, until the contrary is shown, that it was made to foreigners. We think there is no foundation, in law or reason, upon which such a presumption can rest.

In support of that part of the indictment which charges that the defendant was an American citizen at the time of committing the offence, the government proved that his father and mother were residents of Portland, in the state of Maine, for many years, both before and after their marriage, and before the birth of the defendant, and while he was a small child. It also appeared, from the testimony of the same witnesses, that his father was a sea captain, and that sometimes his wife, the defendant's mother, accompanied him on his foreign voyages. The defendant's counsel claimed, that it appeared, from this evidence, that he might have been born abroad, and that, if he was, he was not a citizen of the United States, and, therefore,

not amenable to those criminal laws of the United States which are limited in terms to its citizens. The court instructed the jury, however, that, even if the defendant was born during one of those voyages which the father made as a sea captain, without any intention of removing to, but merely touching at, foreign countries, he would still be regarded in law as an American citizen, although thus born abroad, provided his parents were American citizens. The defendant's counsel excepted to this part of the charge, on the ground that it did not lay down the correct rule of law applicable to children of American parents, born in foreign countries. Without here discussing the general principles of law applicable to that subject, it is a sufficient answer to the exception taken in this case, that the charge on this point, taken in connection with the facts in evidence to which it was to be applied, clearly referred to a possible birth of the defendant on board of his father's American vessel, while the latter was in a foreign country, in the course of the voyage. We are clearly of opinion, that there was no error in this part of the charge.

The only remaining objection that we deem it necessary to notice, is, that, if the Erie was a foreign vessel, even admitting the citizenship of Gordon, this court has not the jurisdiction to try him for an act committed on the river Congo, in the Portuguese dominions, and not on tide waters. There are two answers to this objection: First. There is no proof that the Erie was a foreign vessel, but the proof is clear and uncontradicted that she was an American vessel, owned by American citizens. Second. The allegation, in the indictment, that the offence was committed "in the river Congo, on the coast of Africa, on waters within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court," is, we think, fully sustained by the proof. The proof is, that the negroes were taken on board in the Congo river, some distance from its mouth, but where it is several miles broad, and really an arm of the sea. The proof is clear and uncontradicted, that the offence of confining and detaining the negroes on board was continuous and uninterrupted, until her capture in the Atlantic Ocean, several miles from land. Of course, it was committed in the very mouth of the river, where its broad expanse is lost in the Atlantic, and where the jurisdiction of every nation, over its citizens or its ships, clearly extends. The other exceptions to these two counts and to the charge, are overruled

Upon all these points, we are clearly of opinion, that there is no error in the indictment, and that none intervened on the trial, and that the jurisdiction of the court is beyond dispute. We are, therefore, constrained to deny the application for a certificate of division, which is asked for by the defendant, to enable him to carry the case to the supreme court. It is hardly necessary for me to add that these views are the result of consultation and are fully concurred in by Mr. Justice NELSON.

Sentence of death being about to be passed on the defendant by Judge SHIPMAN, holding the court alone, in the absence of Mr. Justice NELSON, it was objected by the counsel for the defendant, that this could not be done, because the trial had taken place before both of the judges. Judge SHIPMAN stated, that he and Mr. Justice NELSON had agreed, on consultation, that it was competent for the court, when held by only one of the judges, to pass the sentence.

Case No. 15,232.

UNITED STATES v. GORDON et al.

[1 Brock. 190.] [1]

Circuit Court, D. Virginia. Nov. Term, 1811.

BOND—PENALTY—EMBARGO ACTS.

1. A statutory bond taken in a penalty greater than that prescribed by law, is void, whether the statute prescribes a specific sum as a penalty, or a standard by which that penalty is to be measured, so as to give a precise sum.

2. If, in the latter case, from the nature of things, the exact penalty could not be ascertained with absolute mathematical precision, and the variance should be so inconsiderable as to be entirely compatible with an honest difference of opinion, it would be a question for the jury to decide, whether, under such circumstances, the signature of the bond, without objection, by the obligor, would not import his assent to the estimate as the true value. But where the statute prescribed twice the value as the penalty, and the defendant pleaded that the bond was taken in more than thrice the value, and that it was obtained by constraint, and the plaintiffs demurred to the plea, thus admitting the allegations of the plea: the demurrer was properly overruled.

3. The plea was good, and the bond a nullity. This position, entirely sustainable as it is on general principles, must be especially true, in a case in which the person taking the bond would, in the event of forfeiture, be entitled, under the law, to half the penalty.

This was an action of debt, brought in the district court of the United States at Richmond, upon an embargo bond, executed by Salem Woodward, William Gordon, and John M. Shepherd, which bond was in the words and figures following, to wit: "Know all men by these presents, that we, Salem Woodward, master of the brigantine Essex of Newburyport, and owner, William Gordon, and John M. Shepherd, are held and firmly bound unto the United States of America, in the sum of $21,000, to be paid unto the said United States, for which payment well and truly to be made, we bind ourselves, &c. Sealed with our seals, and dated this 2d day of November 1808." "Whereas, the following goods, wares, and merchandise; that is to say, 800 barrels of flour, and 57 barrels

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

of naval stores, as per manifest, now delivered to the collector of the customs of the district of Tappahannock, and intended to be transferred in the said vessel called the Essex, of Newburyport, burthen 108.13-95 tons, to the port of Newburyport, in the state of Massachusetts: Now, the condition of the above obligation is such, that if the abovementioned merchandise shall be relanded in the United States, at the port aforesaid, or at some other port of the United States, the dangers of the seas only excepted, the above obligation to be void, else to remain in full force and virtue." This suit was brought to recover the penalty of the above bond, which the plaintiffs claimed by reason of an alleged violation of the condition thereof. Process was issued on Gordon & Shepherd only, and the suit abated as to Woodward. The counsel for the defendants, craved oyer of the bond and condition, and pleaded several special pleas, to all of which the attorney for the United States demurred. The matter of defence contained in the plea, on which the judgment was rendered in the district court, was, that the bond was in a penalty "more than double the value of the vessel and cargo, mentioned in the recital and condition of the bond, to wit (embargo act of December 22, 1807, § 2 [2 Stat. 451], and supplementary embargo act of January 9, 1808, § 1. See 2 Story's Laws, 1071 [2 Stat. 453]), in the sum of $8,000 more than double the value thereof, and that the obligors were constrained to execute the said bond, by the refusal of the collector of the port of Tappahannock to clear, and permit the vessel and her cargo to depart from the port and district of Tappahannock, until the said bond was executed as aforesaid." To this plea the attorney for the United States demurred, and the defendants joined in demurrer. The district court overruled the demurrer, and gave judgment for the defendants, and the plaintiffs obtained a writ of error to this court.

MARSHALL, Circuit Justice. This cause comes on to be heard on several pleas, to which demurrers have been filed. One of these demurrers was overruled in the district court, and the first inquiry will be, whether this court concurs with that in the judgment on this demurrer. The plea states that the bond was given by constraint, in more than three times the value of the vessel and cargo, instead of double their value, the latter being the penalty prescribed by law, and the truth of this allegation is confessed by the demurrer. If the law had prescribed a penalty in $20,000, and the bond had been taken in a penalty of $30,000, all would admit that such bond could not be supported under the statute. I perceive no principle on which it can be maintained, that where the statute, instead of prescribing a precise sum as a penalty, prescribes a standard by which that penalty is to be measured, so as to give a precise sum, the officer can discard that standard, and substitute, in the place of it, his own will. Precedents for such a position may be searched for in vain, and such a proposition appears to me to be peculiarly unsustainable in a case, where the person, whose will is to be substituted in the place of the law, is to have half of the penalty. The attorney for the United States rests his argument, on this part of the case, on the difficulty of ascertaining precisely the value of a vessel and cargo, and on the honest difference of opinion which might prevail between different individuals on such a point. That there may be some difference of opinion on the question of value, will be readily conceded; and if the attorney ought to prove by this argument, that a bond ought not to be avoided in consequence of this variance, its weight would be acknowledged. This argument would be urged with irresistible force to a jury in a case where the penalty was objected to on grounds which admit its application. If, in the opinion of a witness, or a juryman, the estimate of the collector exceeded the real value so far only as was compatible with an honest difference of opinion, it would be for the jury to decide, whether in such a case, under all its circumstances, the signature of the bond without objection, might not be considered as an assent to the estimate or if this be inadmissible, as the real value. But by the demurrer, every thing of this kind is waived, and the fact is admitted that the penalty is not in the sum prescribed by law.

The estimate of the collector, it is said, must be conclusive. Had the law said so, the court could only have obeyed the law. But this is not its language. Instead of expressing its will in such a manner as to indicate an intention that the estimate of the collector shall be conclusive, the legislature has referred to a standard entirely distinct, and has, consequently, subjected his will to the control of the standard.

It is also contended, that the act is to be construed in like manner as if the words "at least" had been introduced; the effect of which would be, that the collector would have been at liberty to make a penalty, in which he was to participate, what he might please, provided it was not too small. But, certainly, this is a conjecture which neither the letter, nor the spirit of the law, would warrant. However determined the legislature might be on punishing offenders against the embargo laws, they never intended to surrender the right of regulating the extent of that punishment to their collectors. But it is said that a remedy for every oppression that might be practised by the collector is to be found in the power given to the secretary of the treasury to mitigate or remit penalties; and the court is reminded of its duty to give effect to the intention of the leg-

islature, and not to employ itself on the policy of the law.

Nothing is more correct than this admonition. But how is the court to effect the intention of the legislature? Certainly not by inflicting a penalty of $30,000 in a case where the legislature has declared its intention to be, that the penalty should not exceed $20,000, nor by referring it to the secretary of the treasury to correct the judgment of the court, in a case in which it has transcended the law, because he has the power to remit a part where it has not exceeded the law. The discretion of the secretary may be exercised, in particular cases, where the court has rendered a judgment conformable to law, but this can never authorize the court to transcend the law, in order to give him an opportunity to display his clemency.

The judgment of the court is affirmed.

NOTE. It is apprehended, that this decision is not in conflict with that of the supreme court of the United States, in the case of Speake v. U. S., 9 Cranch [13 U. S.] 28; 3 Con. Rep. Sup. Ct. U. S. 244. That was an action of debt for $8,787, upon an embargo bond, dated April 14, 1808, taken by the collector of the port of Georgetown, conditioned to be void, if the brig Active should not proceed to any foreign port or place, and the cargo should be relanded in some port of the United States. The bond was executed by Speake, the master, and by Beverly and Ober, the owners of the cargo, in compliance with the provision of the first section of the act of January 9, 1808, cited above. The defendants pleaded various pleas, severally and jointly; to some of which there was a general demurrer and joinder. The circuit court for the District of Columbia, in which the action was brought, decided all the demurrers in favour of the United States, and the case was carried by writ of error to the supreme court. The second joint plea was as follows: "That the defendants ought not to be charged, &c., because they say, that the said writing obligatory was required and taken by one John Barnes," collector, &c., "by colour of his said office, and by pretence of an act of congress, &c., (the act of January 9, 1808), which said writing obligatory and the condition thereof were not taken by the said John Barnes, collector, &c., pursuant to the said act of congress, but contrary thereto in this, to wit: that the said writing obligatory was taken in a sum more than double the value of the vessel and cargo, in the condition of the said writing obligatory mentioned, by reason whereof the said writing obligatory became void and of no effect in law, and this the said defendants are ready to verify; wherefore, &c."

To this plea there was a general demurrer and joinder. Judge Story, in delivering the opinion of the court, said: "The second joint plea of the defendants alleges, that the bond was not taken pursuant to the act of congress, but contrary thereto, in this, that the bond was taken in a sum more than double the value of the vessel and cargo, whereby the bond became void. On demurrer to this plea and joinder in demurrer, the court below gave judgment for the United States; and we are of opinion, that the judgment so given ought to be affirmed. There is no allegation or pretence, that the bond was unduly obtained by the collector, colore officii, by fraud, oppression, or circumvention. It must, therefore, be taken to have been a voluntary bona fide bond. The value was a matter of uncertainty, and the ascertaining of that value was the joint act and duty of both parties. When once that value was ascertained and agreed to by the parties, and a bond executed in conformity to such agreement, the parties were estopped to deny that it was not the true value. If an issue had been taken upon the fact, the evidence on the face of the bond would have been conclusive to the jury; and, if so, it is not less conclusive upon demurrer. It would be dangerous in the extreme to admit the parties to avoid a sealed instrument by averring that there was an error in the value by an innocent mistake, or by accident, or by circumstances against which no human foresight could guard. A mistake of one dollar would be as fatal as of $10,000. Suppose the double value were underrated, could the United States avoid the bond, and thereby subject the parties to the penalties of the third section? Where the law provides that the penal sum of a bond shall be equal to the double value, and the parties voluntarily and without fraud assent to the insertion of a given sum, it is as much an estoppel as if the bond had specially recited that such sum was the double value."

The majority of the court affirmed the judgment of the court below. Marshall, Circuit Justice, said he was rather inclined to think that the plea was good, which stated that the bond was given for more than double the value of the vessel and cargo. If the bond was given for more than double that value, he thought it was void in law. He should not, however, have intimated his opinion on this point, if a dissenting opinion had not been given on another point in the cause, and his silence might have been construed into an assent to the entire opinion of the court, as it had been delivered.

In the above extract from the opinion of the court, Judge Story relies strongly upon the fact that the plea contained no allegation that the bond was obtained by the collector, by colour of his office, by fraud, circumvention, or oppression; from which it may be inferred that, had the plea contained such allegation, it would have been held good, and the demurrer overruled. But, in U. S. v. Gordon, above reported, the plea expressly charged, that the obligors were constrained to execute the bond, by the refusal of the collector, &c., to clear, and permit the vessel and her cargo to depart, &c., until the said bond was executed, &c. The United States carried the above reported case of U. S. v. Gordon to the supreme court of the United States, by another writ of error, but that court dismissed it for want of jurisdiction. 7 Cranch [11 U. S.] 287.

Case No. 15,233.

UNITED STATES v. GORDON.

[1 Cranch, C. C. 58.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

SELLING LIQUOR WITHOUT LICENSE—INFORMATION.

1. In an information for selling spirituous liquors without license, it is not necessary to specify the kind of liquor, nor the person to whom sold.

2. All the acts of selling constitute one offence.

Information [against Robert Gordon] for selling spirituous liquors. Motion in arrest of judgment. 1st. Because the particular kind of liquor is not specified in the information. 2d. Because the person is not named to whom sold.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Mr. E. J. Lee, for defendant. The clause of the act of assembly upon which this prosecution is founded, is in the following words. Rev. Code, p. 212, § 4. "If any person, without such license, shall open a tavern, or sell by retail, wine, beer, cider, rum, or brandy, or other spirituous liquors, or a mixture thereof, to be drank in or at the place where it shall be sold, or in any booth, arbor, or stall, such offences shall be deemed a breach of good behavior, and he or she so offending, shall moreover forfeit and pay the sum of thirty dollars, to be applied towards lessening the county levy." By the fifth section, the offender, upon a second conviction, is to be imprisoned six months without bail or mainprise. Every selling is a distinct offence. If this was not the case, a conviction for the last selling would bar a prosecution for all the former offences. Rex v Robe, 2 Strange, 999; Davy v. Baker, 4 Burrows, 2471; Rex v. Mason, 2 Term R. 581; Style, 186.

Mr. Simms, on the same side. The information is not sufficiently certain to enable the defendant to meet the charge by counter evidence, or to plead it in bar of a subsequent prosecution. By the fifth section of the act, a higher penalty is annexed to a second offence, and in such case the indictment must state the prior conviction. A declaration, in trover as uncertain as this, would be bad (5 Bac. Abr. 272); a fortiori, an information, or an indictment. The court is bound, ex officio, to see that the information states sufficient to warrant a judgment. Rex v. Wheatly, 2 Burrows, 1127; 2 Ld. Raym. 1410; 2 Hawk. P. C. 332. The offence is alleged to have been committed on the 10th of August, 1798; and the information was not filed until April, 1800, more than twelve months after the offence committed, contrary to the act of assembly (Rev. Code, p. 113).

Mr. Mason, contra. The limitation of one year applies to the prosecution, not to the filing of a particular process. The presentment upon which the information was filed was within the year. The first step was the presentment, and that is the commencement of the prosecution. Rev. Code, p. 106, § 2. Circumstances which constitute the offence, must be set out. But where they are not of the essence of the offence, there, if set forth, they are only surplusage. Rex v. Horne, Cowp. 682. The words of the act are "spirituous liquors or a mixture thereof." It may be impossible for a man to say what kind of liquors constitute the mixture; and yet he may be certain that he is drinking spirituous liquors. Rex v. Gibbs, 1 Strange, 497. All the acts of selling spirituous liquors before conviction constitute but one offence Crepps v. Durden, Cowp. 640.

Motion overruled and judgment entered.

[For subsequent proceedings, see Case No. 15,234.]

Case No. 15,234.

UNITED STATES v. GORDON.

[1 Cranch, C. C. 81.] [1]

Circuit Court, District of Columbia. April Term, 1802.

SELLING LIQUOR WITHOUT LICENSE.

Under the act of Virginia prohibiting the sale of spirituous liquors without license, all the acts of selling before conviction constitute but one offence.

Indictment [against Robert Gordon] for retailing spirituous liquors. [For prior proceedings, see Case No. 15,233.] The judgment was arrested; because the indictment charged it as a second offence, before the defendant was convicted of a first; the court being of opinion that all selling before conviction constituted but one offence.

Case No. 15,234a.

UNITED STATES v. The GORDON.

[N. Y. Times.]

District Court, S. D. New York. Dec. 14, 1862.

PRIZE—CAPTURE BY ARMY AND NAVY—THE BLOCKADE.

This vessel was captured in Beaufort at the same time as the Alliance. She was also of American build, owned by the same owners in this country, and transferred at the same time to the same English claimants, and entered the port of Beaufort seven days after the Alliance, having knowledge of the blockade, and was loaded there prior to Sept. 14, 1861, and documented for departure in substantially the same manner. She brought there from Liverpool 4,300 sacks of salt, and 112 tons of iron. The master, Jennings, knew the port was blockaded, but says the first blockading vessel he saw there was on Sept. 6 or 7. Most of her cargo was taken on board after that date. This master was put in command at Beaufort, after her former master, Gooding, left her. The steamer Nashville, coming in there, left a few days after the change, and Jennings says it was rumored that Gooding took command of the Nashville and went to sea in her, and he had not seen him since. One objection taken by the claimants was that at the time of the capture Beaufort was in the custody of the army of the United States, and a neutral vessel there was not subject to capture.

Mr. Upson and Mr. Andrews, for the United States and captors.

Mr. Edwards, for claimants.

HELD BY THE COURT: That the presumption from the fact is exceedingly cogent that the voyage was set on foot and prosecuted to its termination with full knowledge of the blockade and intent to invade it. No proof is found in the ship's papers or in the

[1] [Reported by Hon. William Cranch, Chief Judge.]

preparatory examinations repelling or displacing such presumption. That it is not shown that there was any co-operation between the land and naval forces in the arrest of this vessel on this occasion, nor any concert even in the proceedings leading to that end; nor does the army make claim to any interest in the capture. If the vessel and cargo were in delicto, and subject to condemnation for her acts, the claimants have no power to contest in the prize court the competency of the libelants alone to control the proceeds of the forfeiture. That Beaufort was an enemy port to the United States, and the acts of the vessel in going there and whilst in it were hostile to the United States, and impressed upon them the character of enemy property. That it is a legal cause of forfeiture for a neutral vessel to clothe herself in time of war with protective documents obtained from the enemy. That there is in these various particulars ample cause for condemnation of vessel and cargo. Decree accordingly.

Case No. 15,235.

UNITED STATES v. GORHAM.

[6 Blatchf. 530.] [1]

Circuit Court, N. D. New York. Aug. 11, 1869.

CLERK OF COURT—EXPENSES OF OFFICE.

Under the act of February 26, 1853 (10 Stat. 166), moneys paid by the clerk of a district court, during his clerkship, for expenses incurred by him, as clerk, for board and lodging at hotels, while attending, as clerk, at terms of the court held away from the place where he is required to keep his office, are not allowable to him as "necessary expenses of his office."

This suit was commenced in the district court [case unreported], and was removed into this court under the provisions of the act of March 3, 1821 (3 Stat. 643), on the ground that the judge of that court was so related to or connected with the defendant, as to make it improper for him to sit on the trial of the suit. The defendant [George Gorham] was the clerk of the district court, from June, 1861, to January, 1867. He was required to reside at Buffalo and keep his office there. The terms of the court were held at Albany, Utica, Auburn, Rochester, and Buffalo, and the clerk was required to attend at those terms. During his clerkship, the defendant paid out $577.25, for expenses incurred by him as such clerk, for board and lodging at hotels, while attending at terms of the court held away from Buffalo. In accounting to the government for the moneys received by him, as clerk, in excess of his maximum allowance, he withheld the $577.25. The government, in adjusting his account for services, as clerk, withheld $265.61 due to him for such services, and claimed that the defendant, as clerk, still owed to it $311.64. Under the act of January 25, 1828 (4 Stat. 246), the government withheld from the defendant the sum of $311.64, due to him for services rendered to the government as a United States commissioner. This suit was brought at the request of the defendant, made before he knew of the withholding by the government of the $311.64. The object of the suit was to recover the $311.64 claimed by the government to be due from the defendant, as clerk, and to determine the question, whether the defendant, as clerk, was entitled to be allowed that amount, so paid by him for board and lodging, as being "necessary expenses of his office," within the meaning of the act of February 26, 1853 (10 Stat. 166). The case was tried before the court, without a jury.

William Dorshemer, U. S. Dist. Atty.
George Gorham, in pro. per.

THE COURT (NELSON, Circuit Justice) held, that the expenses in question were not allowable, and directed a judgment to be entered for the plaintiffs.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Case No. 15,236.

UNITED STATES v. GORMAN.

[4 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. March Term, 1835.

UNITED STATES DEBTORS—PRISON BOUNDS.

Debtors of the United States are not entitled to the benefit of the prison bounds in the District of Columbia.

Debt on a prison-bounds bond given to the United States in the penalty of $450, dated the 14th of June, 1830, and executed by Jacob Dixon, and the defendant [John B. Gorman], and another surety, with the following condition: "Whereas the above bound Jacob Dixon is confined in the prison of Washington county, and in the custody of the marshal of the District of Columbia, by virtue of a writ of capias ad satisfaciendum, issued out of the circuit court of the District of Columbia, for the county aforesaid, on a judgment rendered by the said court, for the sum of $200 fine, and $23.01 costs, at the suit of the United States aforesaid; and having prayed for liberty to walk out of prison and within the bounds thereof as fixed by law, which is granted to the said Jacob Dixon, he complying with the provisions of the statute in that case made and provided. Now, therefore, if the above bound Jacob Dixon shall continually keep, remain, and stay within the prison bounds aforesaid, that is, for the said county of Washington, as now marked or laid out, or as hereafter may be, from time to time, marked and laid out by order of the circuit court of the District of Columbia, in and for said county of Washington, and not depart therefrom

[1] [Reported by Hon. William Cranch, Chief Judge.]

until he the said Jacob Dixon shall, by due course of law, be finally discharged from the said prison and bounds, then the above obligation shall be void; otherwise to remain in full force and virtue in law." The declaration, after setting forth the bond and its condition, averred, as a breach thereof, that the said Jacob Dixon did not continually keep, &c., but departed therefrom, without being discharged in due course of law, whereby action hath accrued to the said United States, to demand and have of the said John B. Gorman, the said sum of $450, &c. To this declaration the defendant demurred generally.

Mr. Dandridge, for defendant, contended that every bond, given for ease and favor of a person in execution, is void, unless expressly authorized by law; and cited 1 Saund. 35, note; Thompson v. Bristow, Barnes, Notes Cas. 205; Vigers v. Aldrich, 4 Burrows, 2482; Da Costa v. Davis, 1 Bos. & P. 242; Blackburn v. Stupart, 2 East, 243; and Yates v. Van Rensselaer, 5 Johns. 363. By the 16th section of the insolvent act of March 3, 1803 (2 Stat. 237), (all the preceding sections having been occupied by provisions respecting insolvent debtors,) it is enacted: "That the said court may cause to be marked and laid out reasonable bounds of the prisons in the said district, to be recorded in the same court; and from time to time may renew, enlarge, or diminish the same; and every prisoner not committed for treason or felony, giving such security to keep within the said bounds as any judge of the said court shall approve, shall have liberty to walk therein, out of the prison, for the preservation of his health; and keeping continually within the said bounds, shall be adjudged in law a true prisoner." And by the seventeenth section it is enacted: "That the provisions of this act shall not be construed to extend to any debtor who is or shall be imprisoned at the suit of the United States." The defendant was a debtor who was imprisoned at the suit of the United States, and, therefore, was not entitled to any of the benefits of the act.

Mr. Key, contra, for the United States, contended that this bond is good as a voluntary bond, of which the defendant has had the benefit. U. S. v. Howell [Case No. 15,405]. But it is good, also, as a statutory bond, under the sixteenth section of the insolvent act. The seventeenth section refers only to the provisions respecting the surrender of the effects of insolvent debtors and the discharge of their persons from arrest and imprisonment on account of any debt contracted before their application for relief. And the reason why those provisions should not extend to debtors of the United States was, that congress, by the act of June 6, 1798 (1 Stat. 561), had made special provisions on the same subject; and it cannot be supposed that congress meant, by the seventeenth section of the insolvent act to deprive the debtors of the United States in this District of the benefit of the prison bounds, which they had expressly granted to all other debtors of the United States in civil actions by the act of January 6, 1800 (2 Stat. 4), and which, by the sixteenth section of the insolvent act, they had expressly given to all prisoners, except those committed for treason or felony. The words of the seventeenth section may be satisfied by applying them to the provisions of the act respecting the surrender of the property and the discharge of the person of debtors upon such surrender. And by that construction the incongruity will be avoided which would grant the privilege to all debtors of the United States excepting those residing in this District. And this is the construction which has been given to the insolvent act, in this respect, from the time of its enactment to the present moment. The consequence of a different construction would be, that prisoners committed for any crime, except treason and felony, would be entitled to the bounds, while simple debtors of the United States, instead of being committed for safe-keeping only, would be committed to the same close custody with condemned traitors and felons. The court had power to limit the bounds to the high brick walls surrounding the gaol. They have extended it further, but that cannot alter the construction of the act.

At November term, 1833. THE COURT (CRANCH, Chief Judge, contra,) ordered judgment to be entered for the defendant, upon the demurrer in this cause, and in twenty-four other suits on like prison-bounds bonds, given by persons who had been arrested on ca. sas. for fines for keeping public gaming-tables.

Case No. 15,237.

UNITED STATES v. GORMAN.

[4 Cranch, C. C. 574.] [1]

Circuit Court, District of Columbia. March Term, 1835.

LOTTERIES—SELLING TICKETS—STATUTES—REPEAL.

The power, given to the corporation of Washington city, by its charter of 1820, "to provide for licensing, taxing, and regulating" "vendors of lottery tickets;" and the power, given by the same section of the same charter "to restrain or prohibit" "lotteries," and the by-laws of January 4, 1827, and July 12, 1831, seem to have repealed the 2d section of the act of Maryland of 1792, c. 58 [2 Laws Md. 189], so far as it was in force in the city of Washington.

This was an indictment [against J. B. Gorman] under the 2d section of the Maryland law of 1792, c. 58, for offering to sell and actually selling a ticket in a lottery "not authorized by the legislature of the state of Maryland, nor by the congress of the United States, called the Delaware and South Carolina Consolidated Lottery," against the form of the statute, &c.

Mr. Jones, for defendant, contended that the charter of the city of Washington repealed the second section of the Maryland

[1] [Reported by Hon. William Cranch, Chief Judge.]

law of 1792, c. 58, adopted by the act of congress of the 27th February, 1801 (2 Stat. 103), concerning the District of Columbia, so far as it was applicable to the city of Washington.

By that section of the Maryland law, it is enacted, that if any person shall sell, or offer for sale, within that state, any ticket in any lottery not authorized by the legislature of that state, or by the congress of the United States, he shall forfeit for every such ticket sold, or offered for sale, £10 current money, to be recovered by bill of indictment.

By the seventh section of the charter of the city of Washington, power is given to the corporation "to provide for licensing, taxing, and regulating," "vendors of lottery tickets," and "to restrain or prohibit lotteries."

On the 4th of January, 1827, the corporation passed a by-law "to restrain and prohibit certain lotteries." The first section forbids private lotteries; the second prohibits the drawing of any lottery not authorized by act of congress, or of the corporation. The third section provides that no licensed vendor of lottery tickets, or other person, shall sell any ticket in any lottery not specially permitted and authorized by some law of some state or territory of the United States, or law of congress of the United States, or act of the corporation, under the penalty of the $50 for every offence, &c. The by-law of July 12, 1831, prohibits the exercise of the business of lottery-ticket vendor without license, for which $100 must be paid.

Mr. Jones cited Hawkins v. Cox [Case No. 6,243], in this court in June, 1819, and Thompson v. Milligan [Id. 13,969], in June term, 1820.

Mr. Key, contra. The charter of 1820 (section 7) has no negative words; it is all affirmative, and not inconsistent with the then existing law: both may stand together; both may prohibit the same thing under different penalties. The corporation has power to license and regulate vendors of lottery tickets; but only to restrain and prohibit, not license, lotteries. In the great lottery case of Clark v. Corporation of Washington [12 Wheat. (25 U. S.) 40], in the supreme court, it was admitted on all hands that the power given to the city did not repeal the law of Maryland. Congress might have repealed the law of Maryland, and might have given that power to the city; but the question is, have they given it, and whether the corporation has exercised it. Has congress given the city the power to license all sorts of lottery tickets? They could not mean to give the city the right to license the sale of illegal tickets, but only tickets vendible by law. There were tickets the sale of which was lawful. The same power is given over gaming, which this court has decided did not repeal the general law of the land against gaming, and that the power was cumulative, so that the party may be liable to the Maryland penalty and the city penalty both. If the corporation had the power to repeal the Maryland law, they have not yet exercised it. They have not said what tickets it should be lawful to sell. The corporation had only power to license and tax the business of a vendor of lottery tickets, not to authorize the sales of tickets the sale of which was prohibited by law. It is not like the case of tavern licenses, for in that case there was nothing left for the Maryland law to operate upon.

Mr. Jones, in reply. It is not necessary to contend that this charter repeals the Maryland law; the only question is whether the corporation has not the power to license the sales of such tickets in the city.

THE COURT (CRANCH, Chief Judge, not giving any opinion, as he wished to consider the several charters and by-laws, and the cases already decided by this court) stopped Mr. Jones, saying they were satisfied that the license of the corporation authorized the sale.

Case No. 15,238.

UNITED STATES v. GOUGHNOUR.

[2 Pittsb. Rep. 369; 4 West. Law Month. 561; 10 Pittsb. Leg. J. 130.]

District Court, W. D. Pennsylvania. 1862.

COUNTERFEITING—UTTERING—SCIENTER—POSSESSION OF COUNTERFEIT COIN AND NOTES.

1. In an indictment for passing counterfeit coin evidence of the possession of counterfeit bank notes is not admissible to prove the scienter.

2. But the possession of quantities of counterfeit coin of a different denomination from that laid in the indictment is admissible for such purposes.

This was a motion for a new trial, and was argued by Mr. Carnahan, U. S. Dist. Atty., for the government; and by Kopelin, Noon, Hampton & Swartzwelder, for the defendant.

McCANDLESS, District Judge. Satisfied with the verdict in this case, I do not feel disposed to disturb it, except upon substantial grounds. There is one point to which I have given much reflection, because it will be a precedent, and, if wrong, "many errors, by the same example, will creep" into this court. It is the admission in evidence of the fact that counterfeit bank notes were found in possession of the prisoner to prove the scienter; that is, that he knew the dimes he passed were counterfeit. The evidence was admitted, upon the authority of the text in Greenleaf, but the cases cited by the learned author do not sustain the position contended for by the government. As Lord Campbell says in 4 Eng. Law & Eq. 572: "It was evidence which went to show that the prisoner was a very bad man, and a likely person to commit such offences as that charged in the indictment; but, with regard to the scienter, it did not afford ground for a legitimate inference in respect of it." The possession of

counterfeit bank bills does not necessarily show guilty knowledge of counterfeit coin. If the indictment was in the state court, and under the state laws, for passing counterfeit bank bills, the possession of other bank bills of a similar character would tend to prove the scienter. And so of coin. On an indictment in this court for passing counterfeit coin, the possession of other counterfeit coin, although of a different denomination, would go far to show guilty knowledge. Coin is money. Bank bills are the mere representatives of money, and a knowledge of the false character of one, does not imply a knowledge of the false character of the other. Holding the latter in common with the former may be suggestive of the occupation and purpose of the party; but counterfeiting the coin being a usurpation of one of the highest acts of sovereignty, and the "passing" being highly penal, no qualified evidence should be given to prove the guilty knowledge.

Although the court charged the jury that the proof upon this point was of little value, yet they may have been influenced by it, and the prisoner is entitled to the benefit of the reason assigned.

As to the other reasons, in the language of Chief Justice Gibson in the case of Rogers v. Walker, 6 Barr [6 Pa. St.] 375, "they form a reticulated web to catch the crumbs of the cause, and, as they contain no point or principle of particular importance which has not already been ruled by this court, they are dismissed without further remark." New trial granted.

See U. S. v. Roudenbush [Case No. 16,198]; U. S. v. Doebler [Id. 14,977].

Case No. 15,239.

UNITED STATES v. GOULD.

[8 Am. Law Reg. 525.]

District Court, S. D. Alabama. Spring Term, 1860.

SLAVE TRADE—POWER TO PROHIBIT—STATE SOVEREIGNTY—IMPORTATION OF NEGROES—INDICTMENT.

1. Congress has the constitutional power to prohibit the foreign slave trade.

2. That power is part of the power to regulate foreign commerce. It is commercial in its character, and has the same extent and application, and the same limits, as the power to regulate foreign commerce.

3. The several states have the general sovereign right to determine who may or who may not live within their limits, to fix the political and social status of each inhabitant, and to prescribe his rights and punish their violation within its limits

4. This portion of state sovereignty has not been wholly surrendered to the general government. It is surrendered only to the extent and for the purposes specified by the constitution. As respects negroes, imported as slaves, it is surrendered only so far as to allow the prohibition of such importation, and as a means to this, the removal of negroes unlawfully imported. The power to prescribe and to protect the rights of such negroes after the importation is entirely complete and ended, and they have become mingled with the mass of the population of a state, is exclusively in the state government.

5. It is settled, by repeated decisions of the supreme court, that the commercial power of the general government extends to and covers (exclusively of the interference of state laws,) the importation of either goods or persons, until the commercial transaction of importation is complete and ended, and no further. When the goods or persons imported pass out of the possession or control of the importer, his agents and employees, and become mingled with the mass of property or population of a state, they then become subject to the state jurisdiction and laws.

6. The laws of the United States prohibiting the foreign slave trade, are to be construed in reference to the mischief intended to be remedied, and to the nature, extent and limits of the constitutional power of congress over this subject.

7. The sole mischief intended to be remedied was the importation of negroes as slaves. It was not and is not, the manner in which either free negroes or slaves are regarded or treated in any state.

8. These laws extend to all persons who in any manner, directly or indirectly, participate, aid or abet, in the prohibited importation. They do not extend to offences committed in a state against the rights of a negro who had been previously unlawfully imported by some other person, after he has passed out of the possession or control of the importer and become mingled with the mass of the population of a state.

9. An indictment which only charges that the accused, within this state, did hold, sell, or otherwise dispose of, a negro or a slave, who had previously been unlawfully imported by some other persons, without alleging that the accused did participate, aid or abet, in the unlawful importation, is fatally defective.

10. The mode of procedure prescribed by the 7th section of the act of April 20, 1818, for enforcing the penalty for violating its provisions, is a qui tam action, and no other. Therefore an indictment does not lie under that section.

A. J. Requier, U. S. Dist. Atty.

George N. Stewart, Wm. Boyles, and Robert B. Armstead, for defendants.

JONES, District Judge. Mr. Gould is indicted under the 7th section of the act of congress of April 20, 1818 [3 Stat. 450], prohibiting the foreign slave trade. There are three counts in the indictment. The first count charges, "that Horatio N. Gould, late of said district, heretofore, to wit, on the first day of March, A. D eighteen hundred and fifty-nine, at Mobile county, to wit, in the district aforesaid, and within the jurisdiction of this court, a certain number, to wit, one female negro, whose name is to these jurors unknown, and who had, then and there, been lately unlawfully brought into the jurisdiction of the said United States, to wit, on the twentieth day of February, A. D. eighteen hundred and fifty-nine, at the county and district and within the jurisdiction aforesaid, in a manner and from a foreign place to these jurors unknown, by a certain number, to wit, one person, whose name is to these jurors unknown, did, then and there, to wit, at the time and place aforesaid, with force and

arms, unlawfully and knowingly hold the said negro, so then and there unlawfully brought in as aforesaid, as a slave, for a certain time, to wit, for three days, contrary to the power of the statute in such cases made and provided," &c. The second and third counts are substantially like the first, except that the second count charges, that Gould did "sell" (instead of "hold";) and the third count charges that he did "dispose, otherwise than by selling her, of said negro," &c. The accused has demurred to each count in the indictment. This presents for decision the question whether this indictment charges in a legal and sufficient manner, an indictable offence against the laws of the United States. The objections urged against the indictment are: 1st. That it is too vague and uncertain, in this, that it does not state the name of the negro, or any description of her, except that it is a female, nor the names or description of a foreign place from which, or persons by whom, she is alleged to have been unlawfully brought in. 2d. That it does not show that Gould had any participation whatever in the importation of the negro; and that the law applies only to the importers, their agents or employees. 3d. That if the law was intended to apply to other persons than the importers, their agents or employees, it is to that extent unconstitutional.

Passing over the supposed want of sufficient certainty, in the description of the offence charged, I shall proceed at once to the more important question raised by the demurrer. It is conceded by the district attorney of the United States, that the indictment is under the 7th and not the 6th section of the act of 20th April, 1818, and that he does not charge, and does not expect to prove, that Mr. Gould in any manner participated in, or had any knowledge of the illegal importation. The charge then, when stripped of the legal phraseology of the indictment, is simply this, that Mr. Gould, without any participation in the illegal importation, did, within this district, hold, sell, or otherwise dispose of, as a slave, a negro who had been previously unlawfully imported by some other person. The material question is, whether this is, or is not, an indictable offence against the laws of the United States.

No case has been referred to in the argument, nor have I been able to find any case, in which this question has been decided by any court. It is a novel question, and recent events have rendered it one of much interest and importance. It has been the settled policy of our country, for more than fifty years, to prohibit, under severe penalties, the importation of slaves. The laws enacted to carry out this policy had the support and approval of the statesmen and people of all sections of our country. Within the last three or four years a few persons in the South have questioned the constitutional power of congress to pass these laws. Some others, admitting the power, have denied the policy of these laws, and earnestly urged their repeal. There have no doubt been some recent violations of these laws. The whole subject has been much discussed, and most men must have formed some opinion upon it. For my own part I have examined the subject very carefully. The result of that examination is a thorough and clear conviction that congress has the constitutional power to prohibit the importation of slaves; that it is wise, just and politic to prohibit it, and that the laws prohibiting it ought not to be repealed, but ought to be maintained, respected, and strictly enforced. As there are several similar cases pending in this court for the Middle district of Alabama, and this is the first which has been brought before me for decision, I think it due to the importance of the question, and to the parties interested in it, that the reason and extent of my decision should be stated as clearly as possible. This is the more proper, because (much to my regret) there is no appeal in such cases to any higher tribunal. Knowing that if I commit an error in deciding this question, it cannot be corrected. I have examined it carefully, and reflected on it maturely. If my opinion is erroneous, it is an error of judgment alone.

The proper determination of this question necessarily requires an examination of the nature and extent of the constitutional power of congress over this subject, and a construction of the acts of congress upon it. In construing both the constitution and statutes, the great object is to ascertain what was the true meaning and intention of those who framed them. The words of a statute are the principal, but not the only means of determining the meaning and intention of the legislature. There are many well settled rules and principles of construction of statutes resorted to by the courts to aid in arriving at the true intention. Two of the rules of construction I shall state and use in this case. The first is to consider the mischief intended to be remedied. The second is, never to give a statute such a construction as would render it unconstitutional, if it will possibly admit of any other construction which would make it consistent with the constitution. We will first inquire: What was the mischief intended to be remedied by the convention which framed the constitution, and by congress in passing this law? It is well known from the debates of the convention, and the contemporaneous history of the times, that the framers of the constitution considered the foreign slave trade as a great evil, which ought to be suppressed. That was the mischief which had been the subject of complaint, and which they designed to remedy. Nobody had complained of the manner in which free negroes were regard-

ed and treated, in any of the states. That was never thought of by the convention. The same remark is equally applicable to congress, which passed these laws. The mischief which both the convention and congress intended to remedy, was, unquestionably, the foreign slave trade, and nothing else. This proposition I think too clear to admit of dispute, but as I considered it very important, I will refer to two instances, to show, not only that it has been recognized, but how it has been practically applied by the executive branch of our government, in the construction and execution of these laws. I refer to two official opinions given by Mr. Wirt, as attorney-general. They are not indeed binding authorities on the courts, but from his known ability as a lawyer, his official opinions, adopted and acted on by the government, are certainly entitled to much respect. The first section of the act of 20th April, 1818, provides that "it shall not be lawful to import or bring, in any manner whatever, into the United States from any foreign place, &c., any negro, &c. with intent to hold, &c., any such negro, &c., as a slave, or to be held to service or labor; and any ship, &c., employed in any importation as aforesaid, shall be liable to seizure, &c." In 1821 a Mr. McFarlane, brought into New York, from the Island of Tobago, (a foreign place,) on the schooner Sally, a negro boy, who was free in Tobago. The negro boy came voluntarily, and with the consent of his mother, as the servant of Mr. McFarlane. This was done with the knowledge of the captain of the schooner. The collector of the port of New York considered this a violation of the law, and seized the schooner. The case was reported to the secretary of the treasury, who referred it to Mr. Wirt, as attorney-general, for his opinion. It is manifest that the case came within the letter of the law. A negro was brought into the United States from a foreign place with intent to hold him to service or labor. It is equally clear that the case did not come within the mischief which the law was made to remedy. Mr. Wirt gave it as his opinion that this was not a violation of the law. 5 Op. Atty. Gen. 736. Soon afterwards a somewhat similar case was referred by the president to the attorney-general. The wife and children of Mr. Fayoll, of Charleston, embarked for France in 1820, taking with them as a servant a negro girl slave, belonging to Mr. Fayoll, intending to return in 1822. Mr. Fayoll wished the negro to return to the United States with his family. The question submitted was, whether this would be a violation of the law. It was a case where a negro would be brought into the United States from a foreign country, with intent to hold the negro as a slave. It was clearly within the letter of the law, and Mr. Wirt seems to have been conscious of this. He says, however: "I am of opinion that the case is not within the meaning of the law; that the legislature were not looking to the case of persons going abroad on a visit, or to sojourn for a short time, and taking a servant with them from the United States, which they were desirous of bringing back with them; that this was not at all the mischief which congress had in view; that they meant not to prohibit the return of a body servant with his master or mistress, but an original importation or bringing in to increase the stock of slaves in the United States." And he accordingly gave it as his opinion that the negro might be brought back without the violation of any law of the United States. 1 Op. Atty. Gen. 503. This opinion of Mr. Wirt was afterwards fully sustained by the decision of the supreme court of the United States in the case of U. S. v. Skiddy, 11 Pet. [36 U. S.] 73, in which the precise point was presented, and decided in accordance with Mr. Wirt's opinion. See also to the same point U. S. v. The Ohio [Case No. 15,914]. In construing the constitution and statutes on this subject we will be greatly aided by constantly bearing in mind that the foreign slave trade was the sole mischief which was intended to be remedied.

There are other principles of construction applicable to the constitution, which are now so well settled that they may properly be called political and legal maxims. The general government is a special and limited government. It has no other sovereign powers than those conferred upon it by the constitution. On the contrary, the several states are original sovereignties. Each state has all the rights and powers, usually appertaining to a sovereign state, except such as it has, by the constitution, conferred upon the general government. Among the rights and powers usually appertaining to every sovereign state, are, the power to determine who may or may not come into its territories from other countries, to fix and determine the social and political relations, in which all its inhabitants shall stand to each other, or in other words, the social and political status of every inhabitant; to determine the personal rights of every one within its borders, and to protect those rights and punish their violation. These principles are asserted and established by the supreme court in the case of City of New York v. Miln, 11 Pet. [36 U. S.] 102. That the states have entirely surrendered all these sovereign powers to the general government has never been contended by the most latitudinarian construers of the constitution. Let us inquire to what extent these powers have been surrendered to the general government, so far as they apply to the slave trade.

It is well known that the regulation of foreign commerce was one of the principal inducements for the formation and adoption of the constitution. The African slave trade was then, and had long been, an extensive

and lawful branch of the foreign commerce of our country. Some of the states at that time permitted and some had prohibited the importation of slaves. The question, whether the power to control or prohibit that trade should be given to the general government or not, was one of much difficulty, and was maturely considered by the convention. The result was, that by the constitution the power "to regulate commerce with foreign nations," was given to congress in general and comprehensive terms. But in respect to the foreign slave trade, a special and particular provision was inserted in these words: "Sec. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person." It is very plain, that the object and effect of this special clause are to define and limit the previous general grant of power over foreign commerce. The definition is, that congress, as to this particular branch of foreign commerce, shall have power to prohibit it; and the limitations are, that this prohibitory power shall not be exercised prior to the year 1808, and the duty imposed shall not exceed ten dollars for each person. The language of the constitution seems to me too clear to admit of a reasonable doubt, or to require reasoning or authorities to show its meaning. If such authorities were needed, the whole contemporaneous history of the country, the reported proceedings and debates of the convention and of the state conventions which adopted the constitution, and of the subsequent action of every department of the government from that time to this, all concur in showing that such was the true intent and meaning of that part of the constitution. I have no doubt or hesitation, therefore, in holding that congress has the constitutional power to prohibit the foreign slave trade, and to pass all laws necessary and proper to carry into execution that power. I think it equally clear, from the nature of the subject, and the manner in which it is introduced and expressed in the constitution, that this power is part of the power conferred upon congress over foreign commerce. It was so considered in the debates of congress on the act of 1807 [2 Stat. 426], and by the supreme court in the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, and in The Passenger Cases, 7 How. [48 U. S.] 283. See, also, 2 Story, Const. § 1337. In its nature, then, this power is commercial in its character. Having now ascertained what was the mischief intended to be remedied—that is, the foreign slave trade—and the nature of the power conferred upon congress on this subject—that is, that it is part of the commercial power—we will next proceed to enquire into the extent and limit of this power. In doing so I shall endeavor to follow what seem to me the clearest and safest precedents, afforded by our political and judicial records.

The first precedent to which I shall refer is, the old alien law passed in 1798 [1 Stat. 570], during the federal administration of the elder Adams. That law authorized the president, under certain circumstances, to remove aliens out of the country. It was strongly denounced by Mr. Jefferson, Mr. Madison, and all the statesmen of the state rights school of that day, as unconstitutional—a palpable usurpation of power by the general government—and a dangerous encroachment on the rights of the states. Why was it considered unconstitutional? Obviously, because it was an original inherent sovereign right of each state to determine who might or who might not live within its limits, and that power had not been surrendered to the general government. An alien in a state was under the jurisdiction, control and protection of that state. It was for the state to determine whether he might or might not remain within its limits, to prescribe his rights, and punish any violation of them. The alien law was an infringement on these rights of the states, and therefore unconstitutional. It is true, that the unconstitutionality of that law was never passed upon judicially by any court, so far as I can find; but it was most effectually passed upon by the people in the presidential election of 1800. They passed upon its authors a most righteous judgment of condemnation. Nearly sixty years have elapsed since the rendition of that judgment, and it never has been, and I trust never will be, reversed. What principle did it involve and settle? It was this, that the power to determine whether an alien might or might not live in the state, and to prescribe and protect the rights and fix the status of an alien, resident in a state, belonged to the state, and not to the general government; and the power to punish any violation of his rights, as a necessary consequence, belongs also to the state. This principle seems to me clearly applicable to the case now under consideration. When a negro is unlawfully imported, though the importer may intend him as a slave, the law considers and makes him a free man, by expressly providing that no person can ever acquire a legal title to him as property. The law also properly provides for his removal out of the country as one of the means necessary and proper to carry out the execution of the power to prohibit importation. So long as he remains in the possession, or under the control of the importer, or his agents or employees, he is under the power of the general government and its laws. But when the commercial act of importation is entirely complete and ended, and he has passed out of the possession or control of the importer or his agents or employees, and has been mingled with the mass of the population in a state, he is a free negro alien, resident in the state, and like any other free negro in the state, his status, his rights, and his remedies for injuries, are subjects of state jurisdiction and regulation; except (as has been stated)

that the general government may remove him out of the country. While he remains here, however, he is subject to the state laws, and his rights are regulated and protected by them. Alabama has not neglected her duty in this respect. Her laws most amply provide for the protection of his freedom. If any person, knowing him to be free, should buy or sell him as a slave, such person would be subject to ten years imprisonment in the penitentiary, under section 3102 of the Code of Alabama.

The next precedent to which I shall refer is the case of Brown v. Maryland, 12 Wheat. [25 U. S.] 419, decided by the supreme court of the United States in 1827, after great consideration. This case, like the one before me, depended upon the extent and limit of the power over foreign commerce, granted by the constitution to the general government. Congress had passed laws laying duties on goods imported. The legislature of Maryland passed an act requiring every importer of goods into Maryland to pay a license tax of fifty dollars to the state, before he could sell the goods, though he had paid the duties upon them. The constitutionality of this Maryland act was questioned, on the ground that congress had exclusive power over foreign commerce, and the state could not, directly or indirectly, lay any tax on the importation. It was held by the supreme court, that while the imported article remained the property of the importer, in his warehouse in the form or package in which it was imported, it was not subject to state taxation; but when it has passed out of the possession of the importer, and become incorporated and mixed up with the mass of property in the country, it loses its distinctive character of an import, and becomes subject to the taxing power of the state. The same principle was again laid down by the supreme court in The License Cases (1847) 5 How. [46 U. S.] 504. In these cases the laws of New Hampshire, Massachusetts and Rhode Island, imposing a state license tax on the sale of spirituous liquors, under certain quantities, by the importer, were held to be constitutional. These two cases define, with much clearness, the extent and limits of the power of congress as to goods imported. Does not the same principle apply to persons brought into the United States from foreign countries? It was so held by the supreme court, in The Passenger Cases, 7 How. [48 U. S.] 283–573. The legislatures of New York and Massachusetts each passed acts laying a tax on passengers brought into any port of these states from a foreign country. The constitutionality of these acts was questioned, on the ground that the bringing in of emigrants is a branch of foreign commerce, exclusively under the control of the federal government. Several cases, arising under these acts, were taken up to the supreme court. The cases were ably and elaborately argued and re-argued at four different terms of the court, by some of the ablest lawyers in America. The judges of the supreme court were divided in opinion upon the question. Five of them, McLean, Wayne, Catron, Grier and McKinley, held the state laws to be unconstitutional; and four of them, Taney, Woodbury, Daniel and Nelson, held them to be constitutional. Chief Justice Taney, in delivering his opinion, after a course of very able reasoning, says: "I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several states have a right to remove from among their people, and to prevent from entering, any person or class or description of persons whom it may deem dangerous or injurious to the interests and the welfare of its citizens; and that the state has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government." [Passenger Cases] 7 How. [48 U. S.] 467.

Judge McLean, one of the majority, said: "When the merchandise is taken from the ship, and becomes mingled with the property of the people of the state, like other property it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the state, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the state, they become subject to its laws." [Passenger Cases] 7 How. [48 U. S.] 405. This case shows, then, that in this respect, the same principle applies to the importation of both goods and persons; that is, that until the commercial transaction of importation is complete and ended, they are subject to the commercial power and laws of the United States; but when the commercial transaction of importation is complete and ended, and the goods become mingled with the property, and the persons with the people of a state, they both then become subject to the state jurisdiction and state laws. It obviously makes no difference that the persons are negroes, and intended by the importer as slaves. Whether they are to be considered as slaves or free, as chattels or persons, the same principle applies to them. The cases referred to show the extent and limit of this power over foreign commerce. It covers and extends to the whole commercial transaction of importation; and, in respect to negroes unlawfully imported as slaves, to their removal out of the country. This is its extent and its limit. In my opinion, it never was the intention of the framers of the constitution, that the several states should surrender to the general government this power to fix the status, prescribe the rights and provide for the protection of free negroes, or any other inhabitants of a state. Suppose that a negro, unlawfully imported, is residing in Alabama, either as a free man, or wrongfully held as a slave, and that any person should beat, maim or murder such a negro in Alabama, what law would be violated, and under what law could the offender be tried and punished? Most unquestionably the state law. So, too, if he

is wrongfully deprived of his freedom, it is the state law which is violated, and the state law under which the offender is to be punished. Such an offence has no connection with, or relation to foreign commerce, and is entirely without and beyond the power given to congress over any branch of foreign commerce.

Looking, then, to the mischief intended to be remedied, and to the nature, extent and limits of the constitutional grant of power over this subject, I think the proper construction of the law is, that it embraces and provides for the punishment of every person who, in any manner, directly or indirectly, participates, aids or abets in the importation of negroes as slaves. The capitalist who furnishes the money—the agents who build, charter or fit out a slave ship—the officers and crew who navigate it—those who procure the cargo, or who receive the negroes when landed, or carry them into the interior, or hold, sell, or otherwise dispose of them there, for the importer—are all participants in the unlawful importation, and guilty of an offence against the constitutional laws of the United States, and punishable under those laws. But after such a negro has passed out of the possession or control of the importer and his agents and employees, and has become mingled with the inhabitants of Alabama, if any person beats, murders, or otherwise criminally violates his rights, in this state, the offender is liable to indictment under the state law, and before the state tribunals alone. Whilst, as judge of this court, I shall always be ready and willing to maintain and enforce this, and all other constitutional powers and laws of the general government, it is equally my duty not to go beyond the limits of the constitution, or to encroach, in the slightest degree, upon the rights and jurisdictions of the states.

Under the construction which I give to the law, the indictment in this case is not maintainable. It does not allege that the accused had any connection whatever with the unlawful importation; nor does it allege any facts from which this could be legally inferred. It simply alleges that the accused knowingly held, as a slave, in Alabama, a negro, who had previously been unlawfully imported, by some other unknown person. This, I think, is not an indictable offence under the laws of the United States.

It is contended for the prosecution, that the 6th section of the act of 20th April, 1818, provides for the punishment of the importer, his agents and employees; and that the 7th section (under which this indictment is found) creates a separate and distinct offence, and was intended to embrace the case of a person who, without any participation in the unlawful importation, afterwards holds the negro as a slave. I concur with the district attorney, in thinking that the 7th section intended to create a separate and distinct offence from that created by the 6th section. It would be very unreasonable, if not absurd, to suppose that congress, after creating an offence by the 6th section, and providing that it should be punished by a forfeiture, not exceeding $10,000 and not less than $1,000, and imprisonment for not less than three nor more than seven years, immediately added another section, providing that the same offence should be punishable by a forfeiture of only $1,000. No doubt a different offence was created by the 7th section, but I do not think the difference is that supposed by the district attorney. By comparing the act of 1818 with the previous act of 21st March, 1807, on the same subject, and bearing in mind the state of things existing when each of these acts was passed, I think the real difference is apparent enough, though from the mere omission of a comma, it is not so clearly expressed in the act of 1818 as in that of 1807. At both of these periods slavery existed in Florida and Mexico, then belonging to Spain, and immediately adjoining the United States. Slaves might be brought into the United States from Africa or from Florida or Mexico. Congress manifestly considered that the person who seized a negro in Africa, and brought him to the United States, was guilty of a much greater offence than one who, living in the United States, near the Florida or Mexican line, should buy a slave from his neighbor in Florida or Mexico, and bring him into the United States. The fifth section ot the act of 1807 plainly refers to the first class of offenders, and the 6th section of that act, I think, refers to the latter class of offenders, and provides a milder punishment. The 7th section of the act of 1818 is obviously taken, almost verbatim, from the 6th section of the act of 1807, and, I think, was intended to apply only to the same class of offences. I can see no other sensible meaning and effect that can be given to the qualifying words, "immediately adjoining to the United States," used in each of those sections, and which are not used in the 6th section of the act of 1818. A comma is placed before these qualifying words where they occur in the act of 1807. Thus, "from any foreign kingdom, place or country, or from the dominions of any foreign state, immediately adjoining to the United States," etc.—thus making the words "immediately adjoining to the United States," apply to and qualify the words "foreign kingdom, place or country," as well as the words, "dominion of any foreign state." The very same words are used in the 7th section of the act 1818, omitting the comma between the words "state" and "immediately." This omission of the comma was, I presume, from an inadvertence of the writer, or a mistake of the printer. I cannot believe it was done purposely to change the character and extent of the offence. My construction of these sections of the act of 1818 is, that the 6th section was intended to apply to those who bring in negroes, as slaves from Africa, or other foreign

countries, not immediately adjoining the United States. The 7th section was intended to apply to those who brought them in from Florida or Mexico. This, I think, is the difference between them as to the character of the offence. This construction brings the whole law within the constitutional limits of the power of congress. But even if this construction of the law is not correct, and that contended for by the district attorney is correct, still the indictment cannot be sustained under the 7th section. The offence created by it is not a common law offence. It is purely a statutory offence, created by that section of the act.

It is an established rule of criminal law, that if a statute creates an offence, and by the same clause prescribes a particular mode of proceeding, otherwise than by indictment, to enforce the penalty, the mode of procedure prescribed by the statute must be followed and an indictment cannot be maintained. Whart. Am. Cr. Law, § 10; 2 Burrows, 805; 1 Archb. Cr. Prac. & Pl. 2; 6 Humph. 17; 7 Spear, 305; 12 Ill. 235; 3 Ala. 375. The penalty prescribed by the seventh section for a violation of its provisions, is a forfeiture of one thousand dollars for each negro, "one moiety to the use of the United States, and the other to the use of the person or persons who may sue for such forfeiture, and prosecute the same to effect." The mode of procedure thus prescribed, for imposing the penalty, is not by indictment, or any other criminal procedure, but a civil suit, well known as a qui tam action. Upon this ground, also, the indictment cannot be supported.

It is unnecessary to examine the other more technical objections to the indictment. For the reasons stated, the demurrer to the indictment is sustained, and there must be a judgment for the defendant.

Case No. 15,240.

UNITED STATES v. GOURE.

[4 Cranch, C. C. 488.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

RESISTING OFFICER — ARREST WITHOUT WARRANT — OFFICIAL DUTY.

A constable is not in the discharge of his official duty when searching for a man, (who is represented to him as, and whom he believes to be, a loose and disorderly person without visible means of livelihood, a night-walker and frequenter of bawdy-houses, and a keeper of false keys,) with intent to arrest him without a warrant, and carry him before a justice of the peace to be dealt with according to law; and it is not an indictable offence to threaten to kill the constable if he should attempt to arrest him.

[1] [Reported by Hon. William Cranch, Chief Judge.]

The defendant [John Goure] was convicted upon the following indictment: "District of Columbia, Washington County, to wit: The jurors of the United States for the county aforesaid upon their oath present: That Richard R. Burr and Lambert S. Beck, being constables of the county aforesaid duly appointed and qualified, and acting in their said office as conservators of the peace of said county, upon information duly and lawfully to them made and given, that a certain John Goure, late of Washington county, yeoman, was a loose and disorderly person without any visible means of livelihood, a night-walker and frequenter of bawdy-houses, and a keeper of false keys, and knowing and believing the said information to be true, did thereupon, in the discharge of the duties of their said office, on the 13th of December, 1834, at the county aforesaid, proceed to search for the said John Goure, in order to arrest him by virtue of their said office and take him before a justice of the peace of said county to be dealt with according to law. And the said John Goure, well knowing the premises, and being such loose and disorderly person without any visible means of livelihood, and a night-walker, and frequenter of bawdy-houses, and a keeper of false keys, as aforesaid, and as such well knowing that he was liable to arrest as aforesaid, to be dealt with according to law; and intending to intimidate the said Burr and Beck, and to prevent them from the discharge of their duty as aforesaid, and to hinder and obstruct them in the discharge of their said duty in searching for and arresting said Goure, on the day and year aforesaid, with force and arms at the county aforesaid, did threaten to kill the said Burr and the said Beck if they should attempt to discharge their said duty in searching for and arresting the said Goure; to the disturbance of the peace, and the obstruction of public justice, and against the peace and government of the United States."

Mr. Bryce and Mr. Brent, moved in arrest of judgment, and contended that the constables were not in the discharge of their official duty in searching for a supposed offender without a warrant; and cited 2 Hawk. P. C. c. 12, § 18; Id. c. 13, § 7; 4 Bl. Comm. c. 10, § 3; 1 Burn. J. P. 103; 1 Chit. Cr. Law, 14, 20–22, 24.

Mr. Bradley, for the United States, cited the Maryland law of 1715, c. 15, § 1 [1 Dorsey's Laws Md. p. 8], for the oath of a constable; and the by-law of the corporation of Washington (Rothwell, 64).

THE COURT (THRUSTON, Circuit Judge, contra, and CRANCH, Chief Judge, doubting,) arrested the judgment, the officers not appearing to be in the discharge of their official duty in searching for the man to arrest him without a warrant.

Case No. 15,241.

UNITED STATES v. GOURLAY.

[2 Wheeler, Cr. Cas. 102.]

Circuit Court, S. D. New York. Sept., 1823.

FEDERAL COURTS—CRIMINAL JURISDICTION—MURDER ON AMERICAN SHIP IN BAY OF CADIZ.

Quære, whether a United States court has jurisdiction to try a person who committed murder on board an American merchant ship in the Bay of Cadiz.

Dist. Atty. Tillotson and Mr Haines, for the United States.

Van Wyck, Baldwin, Scott & Blunt, for prisoner.

On Friday, the 10th of September, at 9 o'clock in the morning, commenced the trial upon an indictment found at the present term of the court against William Gourlay, for murder. The following jurors were examined and sworn, viz.: Calvin W. Howe, William Finch, Daniel Oakley, John S. Bradford, Nathaniel Rathbone, Smith Lane, Daniel Barnard, Samuel Maverick, Samuel Dixon, Dennison Wood, Lyman Fitch, and John Reid. The indictment was read, consisting of three counts, of which the first charged the offence to have been committed in a bay, the second in a haven, and the third on the high seas, near Cadiz, in the kingdom of Spain.

Mr. Tillotson opened the case for the United States, and observed that he deemed it proper to state explicitly, not only the facts and circumstances attending the offence which was charged, but also the law by which those facts were to be governed. In civil cases, questions of law were referred to the court; but in criminal trials the jury were made the judges as well of the law as of the facts. In this case, the grand jury had charged the prisoner with wilful murder; and if the fact of the killing be proved by the United States upon the prisoner, the law would presume it to have been done with malice. It would then rest upon the accused to produce such circumstances of mitigation as would reduce the crime from the highest grade of homicide. He should expect, in order to substantiate the charge, to show: 1st. The killing; 2nd. That it was done by the prisoner; and 3rdly. The facts, as he understood, were briefly these:

That on the 14th of June last, the ship Canton was lying in the Bay of Cadiz, in an open roadstead, where the sea was flowing in, on board of which the offence charged was perpetrated by the prisoner upon William Jones. The Canton was an American ship, of which the master was then on shore; the prisoner the first, and the deceased the second mate. In the afternoon of that day a quarrel had been sought, authority oppressively exercised, and a blow given by the prisoner. At the close of the evening, Jones went into the berth assigned him by the captain, which was in a single stateroom, the berths being placed the one over the other. Gourlay came down, and ordered Jones out of his berth. The latter refused, when Gourlay pulled off the clothes, and left him naked. Jones then jumped out, a struggle ensued which continued until they got out of the stateroom into the main cabin. Gourlay then cried "Murder!" and an indentation appeared from Jones' teeth. Jones, it would be proved, was about 21 years of age, a humble, tranquil, feeble young man; whilst the prisoner, as the jury would observe, was stout and athletic. After they had been disengaged from the struggle, Gourlay looked steadfastly for some time at the deceased, and then said, "By God! I'll shoot you," stepped back into his room, took his pistol, levelled it, and shot him dead on the spot. These were the facts, as Mr. Tillotson was advised, and he presumed no effort would be made to reduce the grade of the crime below that of manslaughter. Mr. Tillotson then cited various authorities to show from the cases found in the books that the present was not a case of manslaughter, but of murder. Among them were 1 East, 233; Notes to Chit. Cr. Law, and 3 Chit. Cr. Law, 730. The prisoner was indicted under the 8th section of the act of congress entitled "An act for the punishment of certain crimes against the United States," passed April 30, 1790 [1 Stat. 112]. That section declares: "That if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death * * * being thereof convicted, shall suffer death." Should the jury, on the question of jurisdiction, entertain doubts whether the United States intended to punish murder in cases like the present, he presumed the jury would find the facts specially, so that the question might be revised and finally determined by the supreme court of the United States. Such a course would be decorous and correct, and it would be peculiarly proper, inasmuch as a general verdict (the jury being judges both of the law and the fact) would be conclusive, and could never be revised.

Captain Charles M'Cauley was sworn on the part of the prosecution. He commanded the ship Canton on the 14th of June, but was absent on shore at the time the affray happened. The ship lay about a mile from the molehead in Cadiz, and about two and a half miles from Fort Catalina, on the opposite side, which is fortified and now occupied by the French. It was far in from the chops of the harbour. It is about seven and a half miles from Rota to Cadiz, and about three miles from Fort Catalina to the Fort Escaronada (towards Rota), opposite Cadiz. The water is about five or six fathom. All within the point of Rota and the Fort St. Sebastian is called and occupied as the Bay of

Cadiz. The Canton did not approach nearer Cadiz on account of the shallowness of the water. She came to anchor, unloaded, and loaded in that place. In the winter such ships go farther in. It is the usual place for mooring such ships. Had just discharged the ship the day of the affair. The king of Spain entered Cadiz the next day after. The Canton was an American ship. Her owners were Americans.

Thomas M'Cready identified and proved the register of the ship Canton, and its American character.

Jacob Smith was a carpenter on board the ship Canton on the 14th of June, in the port of Cadiz. About sunset he put away his tools. A lighter was alongside the ship, with salt; and as the ship was short of hands, and wished to discharge the lighter, witness laid to and assisted in taking out the salt. A little past 9 o'clock witness missed the prisoner, by whom he was soon after called down into the cabin. Knew not what Gourlay wanted, but went down. Gourlay addressed him, and said, "Carpenter, I have brought you and Vesey and the steward down to witness that I order Mr. Jones out of the berth." Does not recollect he said this or that berth. Deceased was then lying in his own berth. Gourlay repeated the order to Jones to get out. Jones replied he would not go out alive; that, he said, was the place appointed by the captain for him to sleep, and there he would sleep. Prisoner turned round and said, "Carpenter, haul that man out of his berth." Witness refused, stating that he was willing to obey his orders, but unwilling to drag the man out of his berth, for he didn't know the consequence. Prisoner then pulled the bedclothes from Jones, seized and dragged him into the dining room, where they had a clinch together, and in passing the mahogany table they nearly capsized it in the scuffle. Witness put his hand on the table, and held it till they passed it. He went on deck, leaving them scuffling, and asked the men to go down and part the two mates, or they would kill each other. A man named Jones (not the deceased) said, "Let them fight; it's none of our business." Whilst receiving this answer, "Murder!" was cried in the cabin, in about a minute after witness left it. Witness went down, and prisoner held up his hand, and said, "This man has bit me." It was on the left hand; a slight wound, which bled a little; also a small wound on the cheek. Gourlay and deceased were then clinched, Jones being partly down on his knees, and Gourlay above him, and had the command of him. There was a little place on the side of Gourlay's cheek, and the blood running from his hand. Witness, with his right, laid hold of Gourlay by his left arm, and Jones with his other by the shoulder, and thus separated them. Jones was a small man, five feet three inches high. Knows his height, for he made his coffin. Begged Jones to go on deck. Deceased said: "Where shall I go? Am I to be murdered?" Witness told Jones to go on deck, and sleep in Black's berth, in the forecastle. Black was then on shore. "You say you are going to leave the ship to-morrow. Gourlay (the prisoner) says he is going to leave the ship tomorrow. Go, and stay in the forecastle to-night. Gourlay is in a passion now, and in the morning, when the captain returns, all will be well." Jones was then standing with his back near the companion way, and the prisoner with his back to the stateroom door. They were about four feet apart, and the witness about four feet from them. Gourlay then said, "By God! I'll shoot you," stepped back a foot, reached back his arm, took down a brass pistol, cocked it, and shot him dead. Prisoner had two pistols, usually loaded, suspended over the berth where he slept. Witness took the candle, then standing on the table, looked upon Jones, and perceived he was dead; he did not stir; turned, and said, "Mr. Gourlay, you have killed the man." Gourlay replied: "I can't help it. He ought to have obeyed my orders." Witness, Wm. Vesey and George Brown were the only persons present at the time Jones was killed. The men on deck, hearing the report of a pistol, came below. They insisted upon prisoner's being immediately put in irons, and kept in that way until the captain returned in the morning. It was done, and he remained so until the morning, when, as soon as witness thought he could get into the city, he took a boat, went ashore, and found Capt. M'Cauley, to whom he related the facts. Captain M'Cauley, Captain O'Sullivan, the American deputy consul, and four Spanish soldiers came on board, took Gourlay ashore, took off his irons, and put him in prison in Cadiz, where he remained until the vessel was ready to sail. Witness supposes he was taken ashore by order of the deputy consul. In answer to questions by Mr. Tillotson, witness said he thought it was about two minutes from the time the struggle ended to the time that the pistol was fired and the deceased shot. In this time witness gave the advice above stated, and prisoner moved along in the meantime to near the stateroom, where the pistol was. The wounds of the prisoner were one on his knuckles, and one on his cheek. Does not know whether either was a bite or not. The deceased had no weapon of any kind in his hand.

Mr. Blunt, for prisoner, requested that the other witnesses be removed while the witness was under examination. The court granted the request.

Witness continued. In the afternoon previous to the alleged murder, at four o'clock, the deceased had three or four men in the hold, trimming or stowing salt. Deceased could not please the prisoner, who quarreled with him in the hold, and called him a "damned worthless scoundrel." Deceased came on deck, said he would have nothing more to do with the ship, and would quit when the captain came on board. A few words passed, when prisoner struck the de-

ceased on the head. A scuffle ensued, and the parties were directly separated, and prisoner told witness to go below and get the irons, and put Jones in them. Witness went and got them, and came on deck, and found deceased with the cook's tormentors, or flesh fork, in his hands, and swore he would not be put in irons alive. Prisoner seized the deceased, to take away the instrument, but could not do it. Witness, by order, took hold of one end of it, but soon let go; thought he would let Gourlay get them away himself.

Gourlay then ordered Vesey to get the cutlass. Vesey got it. Gourlay received it, but soon afterwards put it away, saying: "I will not use such a thing against you." Prisoner then ordered a pair of pistols to be brought up. Vesey brought the pistols, and laid them down under the dripstone, aft of the companion. Did not know whether Gourlay knew the pistols were there. Prisoner succeeded in getting away the tormentors from deceased, and threw them overboard. From that time nothing further than words occurred until sundown. Had words after that. Jones was not put in irons. Deceased was shot under the left eye, near the nose. Died immediately. Did not move. Thinks the ball did not pass through the head.

Cross-examined by Messrs. Blunt and Scott: Witness had a little dispute with prisoner, but more with deceased. About three weeks previous he was about putting on the forehatch bar, and prisoner told him (witness) to go to hell, and struck him. Witness took up the handspike, but laid it down, and did not strike, an explanation having taken place.

Witness had always treated prisoner as a brother. Prisoner once took witness forward in a state of intoxication from the cabin. Witness was asleep, and didn't know whether he refused to go. It was some time before this affair,—three or four weeks,—while in Cadiz No illwill was entertained by witness against prisoner. He did not see the whole transaction. Went on deck and heard prisoner's voice cry "Murder!" and went down as before stated. Deceased did not strike prisoner in the eye previous to taking the pistol. Didn't notice that prisoner had a black eye. There was a black spot on his cheek. Does not know how it came. Saw the parties both looking at each other. The deceased was not in the attitude of fighting Deceased had nothing on but his shirt when dragged from his berth. Prisoner is an Englishman. Jones retired to his berth, refusing to do any more duty, while others were busy at work. Prisoner did not say, when he commanded Jones to leave his berth. "Come out, and do your duty;" but "Go out of this place; I am afraid of you." Prisoner expressed fear of his life if deceased remained there. Prisoner was quarrelsome, and deceased more so. The crew were busy at work three hours after deceased had quit labour. When the captain left the vessel his direction to prisoner was to get the salt aboard, that we might not be compelled to work on Sunday. It was then Saturday. It was not exactly an order, but he expressed it as his wish and expectation, and directed prisoner to give an extra glass of grog to get it finished. When prisoner said, "By God! I'll shoot you," deceased replied, "I can't help it." Witness was examined by the deputy consul, who is a Spaniard, and speaks broken English, and heard the examination read once or twice since his arrival here. He now speaks from recollection, and his testimony would be the same if he had not heard that examination read. He was examined on board the ship. No Spanish officer was present. He remembers the transaction perfectly well. Witness does recollect that prisoner ordered deceased to leave the cabin. After the cry of "Murder!" went down A little before he shot, he said "Get out of my sight."

William Vesey, a young man, apparently about 17 or 18 years of age, was next called. He was a mariner on board the Canton. Saw Gourlay, the prisoner, go into the cabin with a candle in his hand. It was about nine o'clock. Witness was in the cabin. Gourlay says: "Jones, come out of that cabin. You shall not sleep there to-night." Jones was then undressed, in his berth, where he had been, probably, about an hour. Gourlay added: "My life is not safe if you sleep there. Come out, and you shall have as good a bed as I have. But you shall not sleep under me, for my life is not safe." Deceased replied, "No, I'll not come out." Prisoner rejoined, "I'll make you." Prisoner then went on deck, called down the carpenter (Jacob Smith), the steward, and himself (Vesey), for witnesses, and said to us, "I call you down to be witnesses that I order Jones out of that berth." The prisoner then ordered him out again. Deceased replied he would not come out alive. Prisoner then directed the carpenter to lend a hand, who said, "No, he did not like to do that." Prisoner replied, "Then I must do it myself," and began pulling off the clothes, continuing to order deceased out. When prisoner had stripped the bed, deceased got up, and sat in the bed. Prisoner took him by the arm, and eased him out of berth. No violence was offered, and no resistance attempted. Both went into the cabin together. As they approached the cabin door, prisoner shoved deceased, but not so as to hurt him; and here they closed, and had a good deal of struggle. Prisoner cried "Murder!" and sung out: "O my God! he is biting me." The carpenter then rushed between, and parted them, begging deceased to go forward, and sleep in the forecastle. Deceased replied, "No;" he would not go forward, but would sleep in the place appointed by the captain. Jones then said: "What shall I do? Am I to be murdered?" This was just as they let go. Prisoner im-

mediately upon that said, "By God! I'll shoot him" (not "you," as Smith stated), addressing himself, as witness supposed, to the carpenter, and, in the act of saying so, made a rush to the door, squeezing himself through it sidewise into the stateroom, took the pistol from his berth, and shot the deceased through the half door; for the cabin door, being open, half shut the stateroom door. Deceased died immediately. Thinks the pistols were previously cocked, for witness often made up prisoner's bed, and found them cocked, and half-cocked them himself. Gourlay had a pair of pistols. Did not see the other pistol,—whether it was cocked or not. Witness was of the opinion that not more than fourteen seconds elapsed from the time the prisoner uttered the words, "By God! I'll shoot him," before he executed the deed. It was not more than a minute from the parting in the scuffle to the time of the shooting. Gourlay was standing still, and looking at Jones, whilst Jones said, "What am I to do? Am I to be murdered?" Prisoner appeared to be in a great rage. In the course of the afternoon, Jones said he would do no more duty until he had seen Captain M'Cauley. Gourlay said Jones did not do his work properly. Gourlay struck him in the face, but left no mark, nor did it stagger him. Deceased doubled his fist, and said to prisoner, "Look out!" Gourlay said to Jones, "Go on shore." Jones said he would if Gourlay would let him have a boat. Gourlay said he wouldn't give him a boat. Gourlay then said, "I will put you in irons," and ordered the carpenter to bring the irons up. Deceased declared he would not be put in irons alive. Prisoner replied, "Well, see if I don't," and ordered witness to bring him a cutlass, which he brought, and Gourlay laid it on the hatch, but did not use it. Jones made a rush, and got a pair of tormentors. Gourlay, seeing it, came up, and, after considerable struggle got them out of Jones' hands, and threw them overboard. This was about 5 or 6 o'clock in the evening. They then parted. Witness brought up two pistols to prisoner, shook out the priming on his way, and placed them under the dripping stone. Did not hear Gourlay order Jones to leave the cabin after the scuffle; he had not time. It was over like a flash of lightning. Jones was small, but pretty strong. Gourlay was then sick of the liver complaint. Has seen Jones clinch a larger man than himself. Captain did not assign any berth, but Jones usually slept in that he lay down in.

Cross-examined by Mr. Baldwin: Gourlay quarrelled with the cook because cook let Jones have the tormentors, and ordered witness to get pistols to intimidate the cook. Witness brought the pistols, but shook the priming out, for which Gourlay afterwards thanked witness, and said he had lived thus long without murdering any one, and should be sorry to have that crime attached to his name. In the afternoon Gourlay said to the men, "Will you obey me?" They said, "Yes." He replied, "Then I order you not to obey that man," meaning Jones. The priming was knocked out before sundown. Gourlay took the pistols in the cabin with him, and probably primed them for the use of the ship again. Gourlay was mostly upon deck that afternoon and evening. He went down once to put on a shirt, his own being nearly torn off in one of the frays. The act of shooting was almost instantaneous after the separation. Gourlay's shirt collar was torn off.

George Brown, a black boy, who was steward on board the Canton, testified that Gourlay ordered Jones out of the berth. Jones refused. Gourlay then called for help, and the carpenter came, but refused to assist. Gourlay then took him out. They then struggled, and Jones bit Gourlay, and Gourlay called out "Murder!" and Jones let Gourlay go. Jones was biting Gourlay. Gourlay then stepped back, and said, "By God! I'll shoot you." Did not see the carpenter part them. They were struggling a couple of minutes. About a minute after separation. Gourlay shot Jones.

John Ray. The wound was on the left side of Jones' face, under the eye. Did not see the affray.

Here the prosecution rested. A recess of half an hour was given, when the prisoner's defence commenced.

Mr. Scott commenced the defence on the part of the prisoner, and occupied the floor nearly two hours. He adverted to the doctrine of homicide se defendendo; and although he did not place this case distinctly on that ground, yet he explained and enforced to the jury the authorities on that question, submitting to them whether a mutinous disobedience to the lawful authority of the prisoner, acting, in absence of the captain, as commander of the ship, would not justify his act, on the ground that he was authorized to use as much force as was requisite to carry into effect his lawful commands. 4 Bl. Comm. 183. Mr. Scott also insisted that the crime of which the prisoner was guilty at most was manslaughter, and not murder; and for this he cited the following authorities: 4 Bl. Comm. 193; 1 East, P. C. 224, 232; and Rowley's Case, and the case of the Scotch Soldier, 1 East, P. C. 252. He further contended that the court had no jurisdiction of the case. It was a crime, he said, committed in the harbor of Cadiz, within the jurisdiction and sovereignty of Spain; that sovereignty must, in its nature, be exclusive and absolute, and cannot be concurrent. He referred to and commented upon the following authorities: 1 Azuni, Mar. Law, 223, 233–235, art. 3; Hubner, p. 244; Vatt. Law Nat. 187, § 287, p. 236; U. S. v. Rice, 4 Wheat. [17 U. S.] 246; [Ex parte Bollman] 4 Cranch [8 U. S.] 136; s. p. Id. 144, 145; U. S. v. Palmer, 4 Wheat. [17 U. S.] 633; U. S. v. Ross [Case

No. 16,196]; U. S. v. Wiltberger, 3 Wheat. [16 U. S.] 94, 95.

Don Thomas Stoughton, the Spanish consul, was then called and sworn. He defined what he considered to be the Bay of Cadiz, and gave it as his opinion that the Spanish authorities had always exercised jurisdiction over the waters, not only where the Canton lay, but all that extent within a line drawn from Rota to the castle of St. Sebastians, the extreme point of the peninsula of Cadiz. Had never heard it doubted.

Hugh Roberts was born in Cadiz, and resided there many years. Considered the Bay of Cadiz less extensive than last witness. Supposed it to be included within a line from Fort Catalina direct to Cadiz. The position of the Canton would still be in it. The outer part of the bay from the line referred to, he considered as open road.

Captain M'Cauley was called again, and stated the instructions he had given prisoner to have the salt taken in that afternoon. Considered all the waters within a line from Rota to St. Sebastians as forming the harbor of Cadiz. Gourlay was taken on shore by the American deputy consul, assisted by the Spanish authorities. Knew of no refusal on the part of the Spanish authorities to take cognizance of the offence. Jones had served on board the ship but two or three days. Gourlay had been employed but a few days. Had perceived neither of them to be quarrelsome.

The testimony here closed on both sides, and Mr. Haines, associate counsel with the district attorney, stated the authorities to be adduced in support of the points of law which the prosecution would assume.

Mr. Van Wyck, in summing up for the prisoner, expressed a confidence that he would receive at the hands of the jury the same measure of justice as if he were one of our own citizens And the melancholy case before them he observed, exemplified the feeble hold we have on life. Neither the prisoner nor the deceased were aware that in so short a period the latter would be precipitated into eternity. Whether the agency of the prisoner in causing that event was the result of premeditated malice and a hardened heart, or whether it was produced by the impulse of sudden passion, was the momentous inquiry which the jury were called upon to try Had he been tried by the Spanish authorities, no jury would have interposed; and whether the circumstance of falling into the hands of the American consul may have been favorable to him or not, yet, if this court has not jurisdiction of the offence, the jury were bound on their oaths to acquit. If the Spanish government had cognizance of this case, this court has not. It would not do to say that, because the Spanish authorities did not try him, therefore we will. The jury were acting as agents of the government, and were bound to administer justice according to law. The several states of the Union made a constitution, by which they delegated part of their sovereignty to congress. Whatever they did not impart, they retained By the eighth section of the constitution authority was given to congress "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." To felonies committed on the high seas, and to none other, is this authority derived from the constitution to be applied. But the act of 1790, in conformity to which this indictment is drawn, would seem to have reference, not merely to the United States, but to all the rivers, havens, basins, and bays in the whole world. But congress can legislate only for those persons who owe allegiance to the United States. The construction contended for would make it assume a jurisdiction over the bays, rivers, and harbors of all Europe. Such cannot be the true construction of the act. If it were to be allowed, our jurisdiction would extend up the Thames, the Rhone, and the Danube. Our government could not have the hardihood to claim it. Our system of jurisprudence was derived from England, and by the law of that realm offences were to be punished in the place where they were committed. It is competent for congress to give construction to the term "high seas" in our own, but not in a foreign, country. If they have not power to pass laws to punish crimes committed in the territories of Spain, they have not power to invest a court with that authority. This was not a crime against the peace and dignity of the United States, but of Spain. The act of the consul does not confer jurisdiction on this court. There was no power in Spain, unless that specially of the king, which could surrender and transfer the prisoner from the jurisdiction of that country. And what a precedent would such a decision create! Suppose a felony be committed on board an American ship lying in the Thames The accused is entitled to the benefit of testimony; and what shall be done? The witnesses, many of them perhaps Englishmen, are to be taken on board and brought to New York to attend the trial! Thus the ships of the United States are to be freighted back with felons and witnesses. Suppose a British ship is at anchor in the harbor of New York, on board of which a homicide is committed upon a custom-house officer, would we not claim jurisdiction, and try the offence? Or suppose the reverse, that a custom-house officer had killed a British seaman would we endure it that the offender, and all the witnesses to the act, should be transported to Great Britain for the trial of the accused? Or suppose, in the very case of the Canton, that the prisoner, on board that ship, in the Bay of Cadiz, had killed, instead of William Jones, a Spanish grandee, or a custom-house officer of Spain, would the authorities of that country have suffered him to be taken to America for trial? The vice consul, it is true, assumed

the power of judge, jury, and police officer; but this assumption can give no jurisdiction to the court.

Mr. Van Wyck then commented ably and at large upon the facts as proved, which he contended did not make out the charge as set forth in the indictment.

Mr. Baldwin, on the same side, observed that there was certainly some difficulty in determining whether this case came under the jurisdiction of the court. It took place in the Bay of Cadiz, within the acknowledged jurisdiction of Spain; and to decide that it is subject to the authority of this court would necessarily involve the principle that a man may be tried twice for the one offence. This was abhorrent to our own laws and the laws of England. Piracy presents a different question. There, a first would be a bar to a second trial; for, it being a crime against all nations, each has the right to make its own laws to punish it. It will be objected that Great Britain assumes jurisdiction of offences committed on board her ships all over the world. But the parliament of Great Britain is said to be omnipotent. The constitution of the United States is limited and we cannot follow their example. Mr. Baldwin adverted to the differences in the definition of the "high seas," as construed by the common law and admiralty courts, and contended that, however the construction might be in relation to them, yet the true intent and meaning of congress in the act referred to was that the high seas were those waters over which all nations had the right of passing, but neither had the exclusive jurisdiction; and that the words "havens, bays," &c., were meant to provide for cases wherein—like the river La Plata—the mouth is so wide that jurisdiction cannot be exercised from the shore, or bays, like those of Bengal, Biscay, or Honduras. Mr. Baldwin commented, at considerable length, upon the construction of the law as applied to the case, and adverted to U. S. v. Ross [Case No. 16,196]; Ross' Case, 5 Wheat. [18 U. S.] 200; and section 43 of Graydon's Digest, and concluded his remarks by an address to the jury upon the matters of fact in evidence.

Mr. Haines, on the part of the prosecution, contended for the positions which follow. Our limits preclude the illustrations and arguments by which they were enforced. He argued

(1) That the murder was committed on the high seas.

(2) That the 8th section of the statute of congress passed in 1790 clearly included the crime, even admitting that it was committed on the high seas

(3) That congress has the constitutional power to pass the law alluded to; and

(4) That the crime committed by the prisoner was murder, and not manslaughter.

Mr. Tillotson, Dist. Atty., concluded the argument in support of the prosecution, and confined his remarks principally to an exposition of the facts, and the grade of crime to which they necessarily pointed. His observations were perspicuous and liberal, and occupied the court until 11 o'clock in the evening.

Before THOMPSON, Circuit Justice, and VAN NESS, District Judge.

THOMPSON, Circuit Justice, then addressed the jury, and presented to them the law and the facts, in a very able and clear point of view. At half past 11 the jury were sent out, and returned at 1 o'clock on Saturday morning, with a special verdict: "Guilty of murder in the Bay of Cadiz." This verdict leaves the question of jurisdiction, which was an important point in the trial, open for revision. The judge stated that he was not clear upon the point, and suggested to the jury the verdict they gave, should they be satisfied that the crime in its nature amounted to murder. The cause will be carried up to the supreme court of the United States.

Case No. 15,242.

UNITED STATES v. The GOVERNOR CUSHMAN.

[See Case No. 5,646.]

Case No. 15,243.

UNITED STATES v. The GRACE MEADE.

[2 Hughes, 83;[1] 22 Int. Rev. Rec. 91.]

District Court, E. D. Virginia. March 13, 1876.

SHIPPING REGULATIONS — CHANGE OF NAME — IDENTITY OF VESSEL—REBUILDING.

1. It is the policy of the admiralty law to discourage changes in the names of vessels.

2. Admiralty courts, therefore, will go very far in ruling that rebuilt vessels are in law identical with those from the material of which they are built, and in requiring them to be registered in the same names.

3. Where any substantial portion of the frame or skeleton of an old vessel is built upon and preserved intact, in constructing the new, the courts lean towards holding the vessel to be the same in law.

4. But where no such part of the frame or skeleton is left intact, but each timber of the old vessel is first dislocated before being used in the new, in such case the vessel is a new one, and may bear a new name, though having the model of the old vessel.

[Cited in Hartupee v. Coal Bluff No. 2, Case No. 6,172.]

In admiralty. Libel for forfeiture.

HUGHES, District Judge. The United States brings this libel, demanding forfeiture of the steam tug Grace Meade, for an alleged change of name, under the act of congress ap-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

proved May 5, 1864, passed "for the prevention and punishment of frauds in relation to the names of vessels." 13 Stat. 63, 64, Rev. St. § 4179, p. 811. A vessel of the same model, and partly of the same material, called the Agnes, had been blown up on the James river, a few miles above City Point, on September 10th, 1872; and the Grace Meade was completed and registered in August, 1874. The officers of the government erroneously supposed that the Agnes had been towed from the James river to Baltimore, and there rebuilt.

The facts were substantially as follows: The steam tug Agnes was built at Bordentown, New Jersey, in 1870 and 1871. She was brought to Richmond late in 1871, and was there sold to Mrs. Grace G. Lawrence, as her separate property. Captain Milton S. Lawrence, husband of the purchaser, became her master. While in charge of a tow, in September, 1872, a few miles above City Point, in James river, her boiler exploded, killing five men and sinking the vessel, which was considerably blown to pieces. Her sides were blown away; large openings were blown into both sides of her hull; the boiler was ruined; the engine much damaged; the hull broken into halves; the deck blown off, from the engine-room to the bow; most of the timbers of the vessel much shattered; all the ribs destroyed except three or four; the stern-post too much injured for reuse, and the wreck generally a very bad one. The vessel was first raised about October 1st, 1872, between two canal-boats, and was then drifted to the flats above City Point. The object at the time was, to take out of her such material as could be reused, and such machinery as could be removed. All of the machinery was got out except the shaft, the engine-frame, and the wheel, which could not be removed. The vessel was then left lying on the flats until May, 1873. Then a railway was made and sunk, and the wreck was lightened and lifted upon the railway by means of chains suspended between two barges. The model of the Agnes having been a very fine one, and that vessel very swift, it was the desire of Captain Lawrence to build a new vessel on the same model. For this purpose all the old timbers which could be found were gathered up, and these, as well as those already in the vessel, were tacked and battened together, so as to obtain in outline the model of the Agnes as nearly as practicable. The new vessel was built to the outline thus secured, moulds being taken from the old timbers for new ones, and once in a while the old timber used in the new vessel where it was sound and unshattered. During the construction of the new vessel, the old shaft, wheel, and engine-frame, which the wreckers had, in the fall before, been unable to remove, were left as they had been in the Agnes, and the new boat was built to them in their old relative position. In short, the model and general plan of the Agnes were studiously adopted and followed in building the Grace Meade, and the bulky machinery left, as just stated, in its old positions. Other parts of the old vessel were used as follows: The old stem was used, but was changed by deepening the rabbet for thicker planking. A new scarf was cut in it, and its upper part cut off and a new arch scarfed on it. A new keel was put in, and scarfed to the stem, and the stern-post was set into a piece of the old keel six or eight feet long, and the new keel scarfed to that Three new kelsons were put in—the Agnes had but one. The frame of the Agnes had been one-half of chestnut and one-half of white oak; of these timbers only such few of the white oak ones as had not been shattered by the explosion were used. The planking was all new, except a third of the garboard streak on the starboard side. Of the eight old beams only two were used in the Grace Meade. Of the deck, only a small part of the floor of the after cabin was made of the old timber. Of the sixty old stanchions only three were reused. The old waist was not used. Of the logging around the stem only half of the old was reused. The old transom was first used and then discarded. The old Samson post, forward, was used, and the old bits. All the old timbers that were put into the new vessel made up an aggregate of some 1,200 feet; the whole number of feet of timber used in the new vessel being upward of 30,000.

The new vessel was completed at City Point, in the summer of 1874; and Captain Lawrence brought her to Norfolk and applied to the collector of customs here for registration as the Grace Meade, in August. It seems that while the Agnes was in the James river trade, Mr. Currie had been her agent in Richmond down to the time of her sinking by the explosion of September, 1872. It seems also that while the new vessel was in process of construction at City Point, Mr. Currie applied to the collector of customs at Richmond for the registration of the new vessel in the name of the Grace Meade. The collector had written for instructions to the secretary of the treasury, stating in his letters that the Agnes had been towed to Baltimore and there rebuilt. Upon this statement, the secretary had declined to allow the registration in the new name, as without authority of law. The motive of Captain Lawrence in desiring the name Grace Meade to be given the vessel was, that that had been the maiden name of his wife, who, greatly shocked by the disaster that had befallen the Agnes, had soon after died. There was no claim against the Agnes of any sort, and it is not pretended that there was any motive inducing Captain Lawrence to desire the name Grace Meade to be given his vessel except the one which has been mentioned. There is no charge or suspicion of fraud. When Captain Lawrence applied, in August, 1874, at Norfolk, for the registration of the vessel, the special agent of the treasury here, Mr. Ira Ayer, Jr., instituted an inquiry into the facts of the explosion of the Agnes, the building of the Grace Meade, and

the attempt which had been made a year before at Richmond for registering the vessel in the new name. The result of the inquiry was to convince the officers here that the vessel could lawfully be registered as the Grace Meade, and papers were accordingly given her, dated August 4th, 1874. This libel was brought February 20th, 1875; and I am to decide, upon the case as presented, whether the vessel is forfeitable under the act of congress of May 5th, 1864.

1. In point of fact it cannot be pretended that the Grace Meade is the same vessel as the Agnes. True, the model is the same; but one egg may fit in the mould of another without being the same egg. True, one-twentieth or one-thirtieth of the timber of the Agnes was used in constructing the Grace Meade; but it would be idle to pretend that in point of fact, the use of so small a portion of the material of one vessel made the new one the same as the old. The fact of the machinery being in great part the same in the two vessels, has no bearing upon the question of identity; it having never been pretended that the successive use of machinery by two vessels identified the vessels themselves as the same.

2. The real inquiry is, whether in point of law the Grace Meade is a new vessel, or the old vessel Agnes rebuilt. The policy of the maritime law, for reasons so obvious that they need not be stated, is very strongly to discourage a change of the names of vessels. Accordingly, it is held that a vessel, which in the course of time has undergone repairs to such an extent that her old material may have entirely disappeared and been replaced by other material, is still in law the same vessel. And generally, it may be held as a principle, that, where the keel, stem, and stern-posts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel. But where no piece of the timber of an old vessel is used without being first dislocated and then replaced, where no set of timbers are left together intact in their original positions, but all the timbers are severally taken out, refitted, and then reset, there we have a very different case. That is a case of a vessel rebuilt. There it is of little consequence how much of the old timber is reused. If none of the old timber is left undisturbed, if all of the timber used, whether old or new, is taken up, refitted, and reset, as was the case in rebuilding the Grace Meade, then I think the case is presented of a vessel built anew, and not of an old vessel rebuilt.

I think it is clear from the evidence that not one piece of the Agnes was used in the construction of the Grace Meade, without having been first taken up, and handled, before being placed in its present position. No part of the frame of the Agnes, not even the smallest, was used as a frame in the Grace Meade. I am clear, therefore, in the opinion that the Grace Meade was a new vessel, and not identical with the Agnes in the legal sense of the identity of vessels.

3. I think, moreover, that where the proper officers of the United States, after a full investigation of the facts of the building of a vessel, and where there is no fraud or concealment on the part of the owner, conclude that a vessel may be registered in a given name, a court of admiralty ought not to look with favor upon a libel for the confiscation of that vessel for bearing the name in which the government itself registered her.

I will sign a decree dismissing the libel at the costs of the United States.

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